ASAP ASYLUM SUPPORT APPEALS PROJECT

DEFENDING ASYLUM SEEKERS
LEGAL RIGHTS TO FOOD AND SHELTER

Asylum Support Appeals Project response to

"Transforming Legal Aid: delivering a more credible and efficient system"

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About the Asylum Support Appeals Project (ASAP)

1. ASAP is a legal advice charity specialising in asylum support law. It was set up in 2003 with the aim of reducing the destitution of asylum seekers by protecting their legal rights to food and shelter. ASAP runs a *pro bono* representation scheme, called the Duty Scheme, at the First-tier Tribunal (Asylum Support) (the Tribunal). The Duty Scheme operates daily and appellants are assisted by ASAP staff and around 30 volunteer solicitors and barristers. ASAP also provides training on asylum support law to voluntary sector agencies and runs a telephone advice line. We seek to influence asylum support policy through research, lobbying and strategic litigation.

2. There is no legal aid for representation at appeals; solicitors, barristers and advice workers do not generally attend. We are the only representation scheme. In 2012 our Duty Scheme advisers helped in 455 cases, just over half the number of appellants with oral hearings[1]. We went on to represent 380 people in their hearing. In 2009 the Citizens Advice Bureau published research showing that having legal representation before a hearing at the Asylum Support Tribunal increases the chances of success from 39% to 61 – 71% [2].

3. Whilst we as an organization do not use legal aid, as we set out below, our area of law is totally dependent on it. References below are to the paragraph numbers in the consultation paper unless otherwise specified.

Q4 Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

No, for two main reasons; the proposal is contrary to the rule of law and is unworkable. We will look at those issues first and then deal with specific aspects. The purpose of the tables of judgments we set out below is to show that, under the proposal, these cases would not have taken place. We seek to demonstrate that it is in the interests of the relevant public bodies, not just migrants, that the law is clarified through case law.

Rule of law

4. We believe that in a democratic society the rule of law should be upheld. The government is concerned that migrants access the welfare state (in its broadest sense) when they are not entitled to. However, it is essential that benefits obtained unlawfully are not confused

[1] We do not have complete statistics from the Tribunal for 2012 so this figure is based on six months of 2012.
[2] CAB Evidence Briefing: Supporting Justice, The case for publicly funded legal representation before the Asylum Support Tribunal, Citizens Advice Bureau, June 2009

with the right to access what limited entitlements do exist. Legal aid is concerned with the latter. It cannot be categorized with other aspects of the welfare state. Since the late 1980s when entitlement to mainstream benefits first began to be removed from some migrants a complex body of law, involving immigration, asylum, housing, welfare benefits and social services statutes and case law (both domestic and EU/ECHR) has developed. Mistakes are inevitably made by decision-makers. The proposals remove the right to check whether decisions are correct and, if necessary, to enforce access to lawful entitlements.

5. Most of our clients will fail the proposed residence test. Asylum seekers, as recognized in the consultation paper, are vulnerable (3.56) and they do not suddenly become less vulnerable once they are refused asylum. It is not in the interests of society as a whole that, simply by virtue of who they are, that they are unable to access the law. The government should be very clear that, in bringing in these proposals, they will be creating a class of rights that exist on paper, but cannot and will not be enforced and protected, resulting in an increase in street homelessness amongst families with children and sick and disabled people.

6. It is also in the interests of the state and potential claimants that the law in this area can continue to develop. As will be seen from our tables below, many judgments from the higher courts are helpful to the central or local government, in defining and limiting their duties. Removing the ability to challenge decision-making will inevitably lower its quality.

7. The consultation paper refers to migrants receiving legal aid as 'this anomalous situation' (3.43) and against common sense and unfair to the UK taxpayer. We strongly believe that the UK taxpayer would find it more of an anomaly that rights exist on paper that cannot be enforced, and that this anomaly has been specifically targeted at a vulnerable group.

<u>The proposal is unworkable</u>

8. The question of lawful residence is a complex matter. This point is well developed by the Immigration Law Practitioners Association (ILPA) in their response to this consultation and we adopt their concerns. They point out that the Home Office guidance for employers on preventing illegal working runs to 89 pages, and employers rely on lawyers to interpret it. As practitioners will be obliged to operate the test very conservatively (or risk not being paid) some migrants will inevitably be wrongly denied legal aid. The Legal Aid Agency will also make mistakes on this issue.

9. In some cases it will very difficult to obtain quickly the paperwork to prove an applicant's immigration status, thus making it impossible to act in urgent cases. In many cases it can take months to clarify a person's status with the Home Office.

10. The one year lawful residence test will make it impossible for new refugees to challenge negative homelessness decisions, or any decisions at all, and yet this group are particularly in need of advice as the UK grants them protection and they begin to interact with mainstream benefits and housing for the first time. EU nationals will be unable to seek advice on the Right to Reside and Habitual Residence tests, their gateway to benefits and housing, which are known to be complex and the subject of frequent mistakes by officials.

11. The immigration status query we regularly deal with is whether someone is a current asylum seeker, as it is determinative of their entitlement to the main type of asylum support. This is relatively simple compared to other examples set out by ILPA and yet this issue has generated two important Court of Appeal and House of Lords precedents which are frequently relied on by the Home Office, *Erdogan* and *Anufrijeva* (see third table below).

12. The following case studies illustrate the difficulties people have in showing that they are asylum seekers demonstrating that whether they are or not should not be the determinant of legal aid eligibility.

13. ***Case study:*** *Mr A was assisted by a legal aid solicitor in making his application for support as well as his asylum claim. The Home Office had refused his application for support on the basis that they did not believe he had ever claimed asylum in the UK. His case was complicated because he had initially come to the UK through a third country to which he had been removed in 2006. But he had returned to the UK at some point and claimed asylum. Although the Home Office disputed this, he was able to show he had been interviewed by the Home Office and had yet to receive a decision on his claim. The Tribunal judge found that he was an asylum seeker and he was granted support.*

14. ***Case study:*** *Mr H had submitted further submissions to the Home Office following the refusal of his asylum claim. The Home Office rejected these saying they did not amount to a fresh claim for asylum. His solicitors then issued a Judicial Review which was settled by Consent Order. The Order made it clear that the Home Office had agreed to reconsider his fresh claim as an asylum claim. However, when he applied for support his application was refused on the basis that he was not an asylum seeker as his further submissions were still pending. It emerged in his support appeal that the Home Office caseworker had interpreted the Consent Order to mean that they were merely going to reconsider the further submissions, not that they had agreed they amounted to a new asylum claim. He won his appeal for support.*

15. ***Case study****: Mr B's application had been refused on the grounds that it was not believed he had an outstanding case. However, he had recently obtained permission to have his case considered by the Court of Appeal following the Home Office's refusal of his fresh claim. He had been released from immigration detention but shortly after was admitted to a*

psychiatric ward as he suffered from serious mental health problems. He was thought to be at risk of suicide and suffered from Post Traumatic Stress Disorder. He was sleeping in parks at the time of his support appeal. He won his appeal and was given support.

People with little or no connection to the UK (3.42)

16. Our clients have almost always been in the UK for several years, and thus cannot be categorized as having 'no connection' with it. Research we carried out in 2010[3] revealed that out of 54 cases all but one person had been in the UK more than a year by the time we assisted them. 67% had been in the UK for over 5 years and in 10 cases for over 10 years. In that time they had forged ties to this country. Most had close family here and 23 children were included as dependents in their applications.

17. A small percentage will have paid taxes, on the basis that they had student or work visas in the past. However they will still not be eligible, as they will not have *current* lawful residence. Under EU law (the Reception Directive) the government is obliged to permit asylum seekers who have not had an initial decision on their cases to apply to work. Whether or not this rule applied to further claims for asylum was the issue for the Supreme Court in *ZO(Somalia)* (see third table below).

18. These case studies demonstrate how persons who have a clear connection to the UK would be denied legal aid.

19. ***Case study:*** *Ms B arrived in the UK 14 years ago and claimed asylum. In 2009 she submitted a fresh claim to the Home Office which was still outstanding when we met her. Given the delay in considering her fresh claim, she had been granted permission to work and had taken up a job as a care worker, paying taxes in the UK. In June 2012 following a change in policy the Home Office restricted the work she could do to the shortage occupation list. She lost her job. As she was not qualified to carry out any of the jobs on the occupation list she has not been able to work since then and is now in receipt of asylum support.*

20. ***Case study:*** *Mr M has been in the UK for 12 years. He now has two young children who are settled in the UK, one of whom is British. Although he does not live with his children he has regular contact with them and takes an active role in their upbringing. When we met him he was in the process of preparing a further application to the Home Office on the basis of this established family life.*

Areas of legal advice and/or challenge to which our clients will no longer have access

[3] ASAP, *No Credibility: UKBA Decision making and Section 4 support* (April 2011) available on our website at http://www.asaproject.org/wp-content/uploads/2013/03/no-credibility.pdf

21. In our experience, enforcing a legal right against a public body (which has already made a negative decision) invariably necessitates the threat of legal action. Often the threat, set out in a factually and legally detailed pre-action protocol letter is sufficient for the public body to concede, and thus start to act lawfully. If we are unable to refer our clients on to solicitors, they will become or remain destitute. It is unrealistic to expect them to bring a judicial review as litigants in person. Nor, we believe, is this what the Home Office or the High Court would want.

22. By way of example, the proposal will prevent advice, pre-litigation correspondence and litigation in the following:-
    - Fresh claims/further submissions
    - Failed asylum seekers who cannot leave the UK (usually due to lack of documentation) and have had their support appeals dismissed
    - Failed asylum seekers who cannot leave the UK due to medical reasons
    - Failed asylum seeking families wrongly refused support under the Children Act
    - Failed asylum seekers in need of care and attention under the National Assistance Act 1948
    - Newly recognised refugees accessing mainstream benefits and housing

<u>LASPO concession regarding asylum support</u>

23. The changes to legal aid brought in by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on 1st April 2013 deliberately left asylum support law within scope, for claims that concern homelessness. Initially, all of asylum support law was to be taken out of scope. This amendment was made as a result of lobbying from specialist lawyers, as it was conceded that these cases have more in common with homelessness (which remains in scope under LASPO) than welfare benefits (which does not).

24. The proposal contradicts the amendment, as the majority of those who receive a negative decision from the Home Office on an application for asylum support, and thus require advice, are failed asylum seekers. In 2012, 91% of the appeals we dealt with concerned applications for support from failed asylum seekers. We believe this reflects the overall picture of appeals at the Tribunal[4]. Nearly all of the cases we refer for judicial review concerned support for failed asylum seekers (see section below on our 2012 referrals).

25. We would also point out that all the areas of immigration non-asylum law left in scope under LASPO (e.g. judicial review, detention, trafficking, domestic violence) will now be

[4] We are unable to provide figures from the Tribunal as they do not publish this information.

taken out of scope by virtue of the applicant's immigration status. We question the lawfulness of bringing in such important changes, under LASPO, and via regulations, which themselves contradict LASPO.

Fresh claims

26. It is settled law that, under the Refugee Convention, failed asylum seekers must be allowed to make fresh claims. The proposal will deny them legal aid to do so, however meritorious their case. Paragraph 353 of the Immigration Rules defines what constitutes a fresh claim for asylum and in our experience it is often misunderstood by individuals and needs to be explained by a qualified adviser. Given the complexity of asylum law, clearly submissions prepared by a specialist are more likely to be correctly dealt with by the Home Office than lay representations. The legal aid system already operates as a quality control filter; unmeritorious fresh claims are not granted legal aid. Given that it is an offence to give immigration advice without being regulated, it is perverse also to cut this group off from the possibility of receiving regulated advice through legal aid.

27. Those who make fresh claims are brought back into scope (3.58). It is not entirely clear what is intended here. Given that para 353 of the Immigration Rules is footnoted, we assume the proposal means that until the Home Office accepts it as a fresh claim there is no entitlement to legal aid. Further submissions by failed asylum seekers are not, of course, automatically recognized by the Home Office as a fresh claim for asylum. The Home Office first makes a preliminary assessment under para 353 as to whether the material constitutes a fresh claim. Should they incorrectly decide that it does not, the only remedy available is judicial review. Both the making of the fresh claim and the assessment of whether the Home Office's decision to refuse to accept it as a fresh claim is lawful, require access to legal advice.

28. Again, this is an example of cutting migrants off from the rule of law. It also removes entitlement to asylum support for large numbers, as their support is dependent on the making of a fresh claim. The Home Office maintain that only a small percentage of further submissions made amount to fresh claims for asylum. Figures given by the Home Office in the 2012 case of *MK/AH* (see third table below) show that 14% of further submissions were accepted as asylum claims or granted leave to remain. As this figure related to 7,705 claims, it is still a significant number. It is doubtful that any of these successes would have been achieved without legal advice. The Home Office is concerned about multiple claims but legal aid is already not available for unmeritorious claims.

29. The Home Office does not publish statistics showing why people are on s4 support, but the majority are due to having made further submissions. The Home Office's witness statement (para 59) in *MK/AH* stated that in July 2010, 74% of s4 recipients had outstanding fresh

claims, representing 4,512 people. This figure then dropped to 45% by April 2012, which is also in line with our own statistics that 54% of our allowed appeals in 2012 concerned people in this category.

Cases we referred for litigation in 2012

30. There is no right of appeal from the Tribunal, and therefore potentially unlawful decisions can only be challenged by way of judicial review. We referred 19 cases to solicitors for consideration for judicial review and the details are set out in the table below. The majority were cases in which the individual had lost their Tribunal appeal against a decision by the Home Office to either refuse or discontinue their support. The remainder concerned challenges to the UKBA policy or practice, such as automatic dispersal from London, regardless of the fact of the case. All but 2 of the claimants would not be entitled to legal aid under the proposal.

31. Out of the 19 cases referred to solicitors, 5 were considered too weak to pursue. In the remaining 14, proceedings were issued in 12 and the Home Office backed down after pre-action protocol letters in 2. Regarding the 12, 7 were settled on the basis of the claimants receiving support. In 3 permission and/or interim relief was refused, and 2 remain outstanding.

32. In 6 cases, the claimants had been refused support on the grounds that they were not considered to be taking enough steps to leave the UK voluntarily and return to their countries of origins. In all but one of these, the claimants were successful in overturning the UKBA decision and thus obtained support.

33. ***Case study:*** *The particular difficulties these individuals will experience when trying to leave the UK is highlighted by the case of Mr A, who is a Bidoon from Kuwait. In common with many Kuwaiti Bidoons, Mr A and his family had lived Kuwait for many years but never acquired Kuwaiti citizenship. Whilst in UK he had approached the Kuwaiti embassy several times to try and obtain documents to return but these were refused on the basis that he was not a national of Kuwait. Following a decision by the Tribunal to refuse him support on the basis that he was not taking enough steps to return, we referred his case to a solicitor. During the process of the judicial review, the Treasury Solicitor settled and agreed to grant him support and to backdate this to the day of his appeal hearing.*

34. ***Case Study:*** *This is illustrated by the case of Mr B who, following a successful appeal, was offered accommodation in Wales. However, his partner and two young children were housed in London which would have severely limited the contact he could have with them. The solicitors issued a letter before claim, pointing out Home Office's duties to promote the welfare of children and also their obligations to preserve family life as far as possible.*

Following the letter, UKBA agreed to house Mr B close to his family in London thus ensuring he had sufficient contact with his partner and children.

Table showing ASAP referrals to solicitors

Date	Issue	Result	Migrant eligible post Autumn 2013?
Jan 2012	Claimant refused Section 4 support on appeal on the grounds that he was not considered as taking enough steps to return to Kuwait. Claimant is a Bidoon and although he lived in Kuwait for most of his life he never acquired Kuwaiti nationality.	Settled by consent order. UKBA agreed to provide Section 4 support	No
Feb 2012	Claimant made an Article 8 application for leave to remain in the UK. UKBA refused to accept the application by post, in accordance with their policy that those who claimed asylum in the UK prior to March 07, need to make such applications in person in Liverpool.	Permission refused	No
Feb 2012	Claimant was refused Section 4 support on appeal as they were not considered as taking enough steps to return. The claimant's nationality was disputed.	Settled by Consent Order with UKBA agreeing to provide support to the claimant	No
April 2012	Claimant had appointment to submit a fresh claim at UKBA in Liverpool but refused on appeal as they had no evidence of the appointment	Interim relief refused and case not pursued	No
May 2012	Claimant refused Section 4 support on appeal as not considered as taking enough steps to return to their country of origin. Claimant only became aware of the steps he was required to take at his appeal hearing.	Permission refused but reheard by the First Tier Tribunal Asylum Support and support was awarded	No
June 2012	Claimant was refused Section 95 support on appeal as she was considered as having	Settled by consent order as Treasury Solicitors	Yes

	'intentionally deprived' herself of capital. Client had previously paid off outstanding credit card bill and council tax bill.	department (TSOLs)excepted error of law had occurred	
June 2012	Claimant refused Section 4 support on appeal as not seen as taking enough reasonable steps to return.	Issued proceedings Currently awaiting decision on permission to renew application for JR.	No
June 2012	Claimant refused Section 4 support on appeal as not considered as taking enough reasonable steps to return. Client only became aware of the actions he was required to take at his appeal hearing.	Settled after pre-action protocol letter	No
July 2012	Claimant was refused Section 4 on appeal as not considered as meeting the criteria of support. Claimant had attempted to submit a fresh claim but UKBA refused to accept this claim.	No JR taken as facts not considered strong enough.	No
Aug 2012	Claimant had the decision to discontinue her Section 4 support upheld by the Tribunal on the grounds that she has breached a condition of her support	Settled by consent order TSOL accepted error had taken place	No, although ambiguity here
Aug 2012	Following a successful appeal at the Tribunal, the claimant was offered accommodation by the UKBA in Wales. Claimant's partner and two children live in London.	Following the pre-action protocol letter, the UKBA agreed to provide support in London	Yes
Sept 2012	Claimant was refused Section 4 at appeal on the grounds that having an appointment to submit a fresh claim was not enough to bring them within the eligibility criteria for support.	Advised not to JR as merits considered weak. S4 eventually award on other grounds	No
Sept 2012	Claimant refused Section 4 support on appeal as not considered as taking enough steps to return to their country of origin. Claimant is Iranian and due to the closure of the Iranian Embassy was experiencing difficulties acquiring travel documents to return.	Settled by consent order and the UKBA agreed to provide support	No

2012 Sept	Claimant was refused Section 4 on appeal as not considered as meeting the criteria of support. Claimant had an appointment to submit a fresh claim the day after his appeal hearing.	Client did not wish to pursue JR	No
Oct 2012	Claimant refused Section 4 support at appeal on the grounds she was considered as 'fit enough' to travel. Client had medical evidence stating she was at risk of suicide.	Permission to proceed granted.	No
Nov 2012	Claimant was refused Section 4 on appeal as not considered as meeting the criteria of support. Claimant had an appointment to submit a fresh claim.	JR not pursued as merits considered weak	No
Nov 2012	Claimant was refused Section 4 on appeal as not considered as meeting the criteria of support. Claimant had a fresh claim but did not have money to travel to Liverpool to submit his claim	JR issued and interim relief granted	No
Dec 2012	Claimant had submitted a claim to remain on Article 8 grounds but was refused Section 4 support on appeal as not considered as meeting the criteria.	Interim relief granted and JR still outstanding	No
Dec 2012	Claimant refused Section 4 on appeal as not considered as meeting the criteria for support.	Permission refused for JR and not pursued as merits considered weak	No

Judicial reviews judgments regarding Tribunal decisions

35. The First-tier Tribunal (Asylum Support) was previously known as the Asylum Support Adjudicators and the Asylum Support Tribunal.

36. Unlike the table above, the following cases went to full hearings and were not ASAP clients.

37. It is crucial that that the High Court oversees Tribunal decisions. Tribunal decisions are not binding. There has never been legal aid for appellants to be represented, and, under

Tribunal regulations, decisions have to be made quickly. It is acknowledged by the Tribunal judges that they cannot always consider all relevant law or have the benefit of argument. The High Court JR judgments thus clarify the law in this developing area, and this is welcomed by the Tribunal judges. Given that judicial review is the only possible 'appeal', it is unfair (and arguably a breach of Article 6) that only one side has the opportunity to challenge the lawfulness of the decision.

38. Currently there are very approximately 2000 appeals heard per year by 25 judges (of whom all but 4 are part-time). Since the Tribunal began in 2000 there have been 10 such judicial reviews, which went to a full hearing. The unsuccessful party at the Tribunal becomes the claimant in the JR and the defendant is the Tribunal. If the asylum-seeker succeeded at the Tribunal, they are potentially an interested party in the JR, if they can find representation and obtain public funding. If the Secretary of State for the Home Department (SSHD) succeeded at the Tribunal, they become the 2nd Defendant in the JR. It is ASAP's opinion that the current position should continue; whether asylum-seekers can challenge Tribunal decisions or be involved as an interested party is (and should be) dependent on the merits of the case.

39. It can be seen from the table that the more recent cases involved failed asylum seekers. This reflects the pattern of cases going through the Tribunal since 2000. In the early years issues arose regarding s95 support, which have now become settled law. The focus has switched to s4 support. By definition those on s4 support will not be entitled to legal aid under the proposals; if an applicant is accepted as an asylum seeker due to a fresh claim, they should receive s95 support instead. In all the cases, regardless of whether the JR succeeded or failed, useful guidance was given. The Home Office (SSHD) was the claimant in half the cases. It is noteworthy that the Home Office was successful in 7 of the cases.

Table showing judicial review judgments regarding Tribunal decisions

Name	Issue and result	Migrant eligible post Autumn 2013?
R (Husain) v ASA and SSHD [2001] EWHC Admin 852	Asylum-seeker arguing that the ASA was not an independent tribunal so as to comply with ECHR Art 6. Found that asylum support was a 'civil right' within the meaning of Art 6 but that the Tribunal was sufficiently independent. Also found that the withdrawal of support could interfere with Art 3 rights. JR partially successful	yes

R (SSHD) v ASA (Berkadle, Perera not represented) [2001] EWHC 811	SSHD challenging 2 ASA decisions, which had found in favour of the applicants on levels of support, and comparing them to income support levels. JR successful	Yes
R (SSHD) v Chief ASA (Dogan, interested party) [2002] EWHC 2218	SSHD challenging decision that termination of support for refusal to take up accommodation in the dispersal area was within their jurisdiction. JR successful, and confirmed by the Court of Appeal	Yes
R (SSHD) v Chief ASA (Manzana not represented) [2003] EWHC 269	SSHD challenging ASA decision on significant, but technical, procedural issue. JR successful	Yes
R (Rasul) v ASA and SSHD [2006] EWHC 435	Failed asylum-seeker had been receiving s4 support on basis of no safe route of return to his home town of Kirkuk, Iraq. SSHD then decided there was a safe route, so he no longer qualified under (c) and instead needed to show he was taking all reasonable steps (a). Issue was whether the Tribunal could consider for itself issue of whether safe route of return, or, alternatively, allow appeal if SSHD's opinion (that is safe) is unlawful on Wednesbury grounds. ASA and SSHD both took view that the ASA did not have the jurisdiction to look behind the SSHD's opinion, and were found to be right. Para 26 as to the 'availability of judicial review in which the correctness in public law terms of the holding by the S of S of a particular opinion may be tested' precludes the ASA having to do this. But clarified that ASA can substitute its view regarding (a). Secondary issue as to whether a route of return is safe can be considered under (a), this was left open, but otherwise the JR failed.	No
R (SSHD) v ASA (Osman and 3 others as interested parties) [2006] EWHC 1248	SSHD challenging 4 decisions on test under Reg3(2)(b) – whether failed asylum seeker 'unable to travel'- which it viewed as overly generous, and regs misconstrued. JR successful, but test set out not totally unfavourable to asylum seekers	No
R (SSHD) v ASA (Malaj as interested party not represented)	SSHD challenging ASA's jurisdiction on procedural point, JR failed	No

[2006] EWHC 3059		
R (Ahmed) v ASA and SSHD [2008] EWHC 2282	Iraqi safe route of return, can s4 support continue under (a) or (e). JR failed	No
R (NS) v FTT and SSHD [2009] EWHC 3819	On interpretation of (e) – will depend on the facts of each case - 'variety of factual circumstances in which the regulation may fall to be applied'. JR successful	No
R (Chen) v FTT and SSHD [2012] EWHC 2531	Split family, Art 8 and 14 considered, JR failed	No

<u>Significant other judicial reviews relevant to asylum support</u>

40. This is not a complete list and other cases could have been chosen. The summaries are inevitably oversimplified.

41. The cases fall broadly into 3 categories:-
    1) Whether local authorities or the UKBA should support disabled/vulnerable asylum seekers or failed asylum seekers
    2) Whether local authorities or the UKBA should support families who may be asylum-seekers, failed asylum-seekers or Article 8 applicants
    3) Test cases on other issues eg *Limbuela, Nigatu*

43. This is a legally complex area (note the judges' comments in *A,W A,Y* and *VC/K* below) and it is impossible that individuals will be able to enforce their rights without assistance.

44. For the purposes of asylum support under Immigration and Asylum Act (IAA) 1999 s95 a person continues to be defined as an asylum-seeker (and thus eligible for support) if they have children under 18 and they remain in the UK (s94). It is assumed that this definition will not be used for entitlement to legal aid (para 3.56). It should be noted that this 'generous' definition ensures that children are not sleeping on the streets. This will without doubt change if these proposals go through, and persons entitled to support are unable to access it as they have no legal aid; it will become a not uncommon sight to see families bedding down for the night.

45. It is understandable that local authorities need to protect their budgets and hence the 'unseemly turf war' (see *SL v Westminster*, below) between local and central government. Through litigation, not only are children and the disabled prevented from sleeping on the streets, but also judges are able to make orders, or comment helpfully, on the impasse between the two branches of government (see *Clue* below). These issues are very much alive, evidenced by the fact that there have already been four Children Act 1989 s17 judgments in 2013 (see table below). Given that a tiny fraction of cases result in a full judgment, this indicates that many more families are being kept off the streets due to legal aid. In the majority of cases either the local authority retracts its unlawful decision on threat of legal action or the solicitor advises the client that there is insufficient merit in their case.

Table showing judicial review cases relevant to asylum support

Date and Name	The issue and result	Migrant eligible post Autumn 2013?
R(Westminster CC) v NASS [2002] 5 CCLR 511	As to whether asylum seekers in need of 'care and attention' should be supported by the local authority (s21) or NASS (s95). Answer is the latter	N/A as both sides public bodies, but clearly a considerable amount of public money spent on lawyers for both sides
R (Anufrijeva) v SSHD [2003] UKHL 36	For the purposes of support, an asylum claim is not determined until the individual has been notified by the Home Office	No – subject matter of proceedings

R (Nigatu) v SSHD [2004] EWHC 1806	Issue of what counts as fresh claim so as to trigger entitlement to support (so crucial to the proposals as the same 'threshold' is being used to decide entitlement to legal aid, 3.58). By time of full hearing of JR took place, the SSHD had accepted it as a fresh claim but Mr Justice Collins decided issue of importance so should proceed. N had attempted to apply for support, but NASS refused it although they acknowledged that the HO had received his fresh claim (applications for s4 support prior to 2005 did not lead to an appeal and so JR was the only remedy here). Judgment quotes Bingham in CA in *Onibiyo* 1996 on why the Refugee Convention must allow for fresh claims, and what test should be to qualify as one (new material etc) and that if it is a fresh claim, then there must be a right of appeal. And that JR is the correct remedy to use to compel the SSHD, if he errs, to accept it as a fresh claim. But therefore making a fresh claim and it being accepted as one are 2 separate stages, and only the latter triggers entitlement to s95 support	No Case contains essential guidance to both sides on when a 'fresh claim' is made, and therefore when asylum support (s95 or s4) becomes available. Under the new proposals, the guidance will be affected in the following ways:- 1) No LA to make fresh claim 2) No LA to JR SSHD if SSHD incorrectly refuses to accept it as a fresh claim (or simply delays) – Bingham 3) Applicant will remain destitute because the right to asylum support will not be triggered
R (Erdogan) v SSHD [2004] EWCA Civ 1087	On issue of when an asylum-seeker fails to appeal an asylum refusal in time, and instead submits an out of time appeal, and whether remains entitled to s95 support. The CA allowed the SSHD's appeal. Useful guidance on purpose of the asylum support system, and mechanisms to prevent it being abused (para 19), and also on the importance of the 'supervisory role of the court in judicial review to give protection where necessary' (para 20)	No

R (Limbuela, Tesema and Adam) v SSHD Shelter as intervener [2006] UKHL 66	IAA 1999 s55 preventing asylum support from those who did not claim on arrival. All 5 law lords dismissed the SSHD's appeal, and confirmed that this was a breach or Art 3. The SSHD had also lost at the High Court stage	Yes **BUT** the implication of 3.57 is that they will lose legal aid if they are refused asylum, even for an ongoing case. Therefore this test case would never have reached the lords. (Limbuela became a failed asylum seeker, Tesema and Adam became refugees so query whether legal aid would have continued for those two, as a test case)
R (AW,A,Y) v Croydon, Hackney SSHD as interested party [2007] EWCA Civ 266	Same issue as NASS v Westminster but here it concerned failed asylum seekers so was between s21 and s4. SSHD intervened on the side of the asylum seekers to argue it should be s21. Lengthy technical judgment on the statutes and regulations which refers to the 'elaborate paper chase through these interlocking provisions' and 'important area of law….in a difficult and sensitive field'	No
R (M) v Slough BC [2008] UKHL 52	Being HIV positive, and needing medication, did not mean M was in need of 'care and attention' under NAA s21.	Not clear. Judgment refers to proceedings related to his article 3 claim as 'still continuing'
Birmingham v Clue SSHD as interested party Shelter as intervener [2010] EWCA Civ 460	Jamaican overstayer, by time of CA hearing she had been given ILR but case continued. Established that if family has an outstanding Art 8 claim which is not 'hopeless and abusive' and they are destitute, local authority should support under the Children Act s17 pending determination of claim. Issue for Birmingham was whether withholding assistance would cause ECHR breach (on facts of this case would). Birmingham's appeal dismissed. Case concludes	No Client had strong outstanding immigration case (fitted within DP 5/96 policy) Important guidelines set out for local authorities and SSHD in these type

	with LJ Dyson 'it is right that I should record the steps that the Sec of State has agreed to take to mitigate the problems that have been exposed by cases such as the present'.	of cases (ie non-asylum seeking families) and how to liaise better so as to resolve them more quickly. Attention of the Court of Appeal on issues clearly benefited the UKBA and local authorities, as UKBA decided to prioritise these cases, as they are not entitled to asylum support
R (ZO Somalia) SSHD [2010] UKSC 36	On whether a failed asylum seeker who has been waiting more than a year for the Home Office to consider their further submissions is entitled to work, under the EU Reception Directive	No
R (SO) v LB Barking and Dagenham SSHD interested party The Children's Society [2010] EWCA Civ 1101	On whether local authorities or the Home Office should support asylum seeking care leavers after they turn 18. SSHD arguing on the same side as the asylum seeker and the Children's Society against the local authority. It was held that local authorities are responsible	No
R (VC and K) v Newcastle CC SSHD as interested party (and arguing against Newcastle) (2 judge court, very fully considered) [2011] EWHC 2673	On who is responsible to support failed asylum-seeking families (who are not entitled to s95 because they became failed asylum-seekers *prior* to the birth of a child) with outstanding applications – local authorities under CA s17 or the UKBA under IAA s4? Established that it is s17. CA s122(5) prevents local authorities providing assistance to children if they would be entitled to s95 support. There is no similar provision regarding s4. Case proceeded regarding K only. Although the SSHD supported K at this hearing (ie that she should be supported under the CA), K had previously applied for s4 support, been	No Remarks made by both judges as to the 'monstrous labyrinth' and 'tortuous' relevant statutory provisions Note the position of the SSHD in this case

	refused and lost her appeal to the FTT(AS). So she and her 2 children under 3 would have been totally without support had she not been able to JR Newcastle's unlawful decision	
R (MK, AH) v SSHD Refugee Action as intervener [2012] EWHC 1896	On issue of the Home Office delaying in considering s4 applications until the applicant's further reps had been considered or 15 working days had elapsed. Held unlawful, as Art 3 rights at risk. Very lengthy judgment and led to changes in Home Office policy and practice. Case will have effected a very large number of people	No
R (KA) v Essex CC [2013] EWHC 43	On the issue of whether the local authority under s17 has to support family (failed Art 8 app) pending removal directions, which would trigger a right of appeal, the family not yet having had a right of appeal. Found that there was a duty but Essex are appealing to the CA	No
R (EAT) v LB Newham [2013] EWHC 344	On the issue of whether SSHD or the local authority under s17 responsible for supporting mother and baby with complex medical needs. Mother had outstanding Art 8 application, not Art 3, and held that it was the local authority	No
R (ES) LB Barking and Dagenham [2013] EWHC 691	On the issue of duty to assess under s17, failed asylum-seeker and very young child, and whether should be s17 or s4	No
R (MN, KN) v LB Hackney [2013] EWHC 1205	On same issue as KA above. *Obiter* comments from Mr Justice Leggatt that he did not agree with decision in KA. Future CA decision and guidance in KA clearly very keenly awaited by LAs	No
SL v Westminster CC Mind and Freedom from Torture as interveners	On the meaning of the NAA s21 'care and attention' and when a vulnerable asylum-seeker becomes the responsibility of a local authority as opposed to the UKBA (either under s95 or s4). Existing authorities reviewed and the CA's judgment overturned, and held that the care and	No When the case started SL was a failed asylum-seeker and by time it reached the SC he had

[2013] UKSC 27	attention needs to be 'accommodation-related'. Very useful guidance given by the Supreme Court (SC) on this 'unseemly turf war' between local authorities and central govt (para 2)	ILR

Q5 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 disbursement should be payable in any event)? Please give reasons.

No. This proposal will also drastically interfere with the rule of law. Thus, with regard to our clients, even those migrants who remain eligible for legal aid will have difficulty in accessing their rights, as legally aided public law cases will become uneconomic for the legal profession.

46. The proposal appears to rest on the 500 legally aided cases (3.68) in which the legal aid providers did not record that there had been a 'substantive benefit to the client'. This is in fact a very small number compared to the number who will have benefitted from being in receipt of legal aid for a potential judicial review (4,074 is given as an overall figure – para 3.65). It is a tiny fraction of the number of unlawful decisions which are made by public bodies. It benefits no-one for decision-making to go unchecked.

47. The Legal Aid Agency could thoroughly investigate these 500 cases so as to ascertain why there was no benefit to the client, and therefore consider whether the case should have been funded in the first place. The results could be analysed according to type of case and provider. Instead, the approach the Agency is to respond disproportionately.

48. Judicial reviews require considerable work prior to issuing. In some cases, and against efficient and sensible opponents, this work leads to the matter settling, favourably to the claimant. If this happens in response to the pre-action protocol letter (thus pre-issue) there will be no basis for the claimant's solicitors to pursue their costs as set out in 3.75 and 3.76. The better quality the letter (and hence more time spent on it) the more likely it is that the solicitor will not be paid.

49. The statement that a similar system exists regarding applications for permission to appeal to the Upper Tribunal in immigration and asylum cases (3.69) is incorrect. Our

understanding is that far less work is needed at that stage in those cases than in preparing a judicial review.

50. Pre-action protocol letters will carry far less weight, when potential defendants know that the likelihood of proceedings being issued is far less.

51. There is too much uncertainty involved at the early stage for a clear judgment to be made that permission will definitely be obtained. Most of this uncertainty is totally outside the control of the claimant's solicitor. The defendant will be in possession of undisclosed material which may strengthen or weaken the case. The Public Law Project has carried out research on the wide discrepancies of judges as to whether permission is granted.

52. In cases where defendants concede post-issuing but pre-permission determination they invariably do so on the basis that there is no order for costs. Under the current system, solicitors accept such offers, as of course in the interests of the client. 3.76 is too simplistic in implying that in future in such cases the defendant will either agree costs as part of the settlement or, if not, the claimant can seek an order for costs. The former is very likely. And many cases, at this stage, are not sufficiently clear-cut for judges to be able to make an order for costs, especially given that defendants will be arguing strenuously as to why one should not be made.

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as 'borderline' prospects of success? Please give reasons.

No

53. The importance to the client of the case should still remain a relevant factor as to whether cases are funded, and therefore, in some situations, borderline cases should be funded.

54. Public interest cases and cases which hold 'the State to account' (3.87) are likely often to appear borderline at the initial stages but for obvious reasons should still be funded. The argument set out in 3.87 for removing legal aid from borderline cases appears to be as follows:- domestic violence cases with poor prospects of success are not funded, and therefore there is already a principle of not funding cases which 'concern issues of great importance'. In a desire to 'level down' this ignores the public interest principle. It also ignores the fact that 'poor' is not the same as 'borderline'. Clearly certain cases can be categorized as 'sufficiently meritorious' (final sentence of 3.87) whilst also having borderline prospects.

Q34 Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.

Q35 Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

Q36 Are there forms of mitigation in relation to impacts that we have not considered?

It is difficult to comment very substantively as the impact assessment itself is so thin.

55. We will focus on the impact on 'users' rather than 'providers' of legally aided services as we are not a provider. Paragraph references will be to Annex K.

56. Our clients, by definition, share the protected characteristic of race. Paragraph 4.1 refers to the duty to give due regard to the need to eliminate unlawful conduct. As we have argued above, unlawful conduct by public bodies will inevitably increase, as it will be unchecked. No details are given as to how the proposals 'constitute a proportionate means of achieving a legitimate aim' (4.4). There is no weighing up of factors, and thus no evidence of a proportionality exercise having been carried out.

57. With regard specifically to the residence test, the consultation paper accepts there will be an adverse impact on those who fail it (5.3.1). However no explicit justification at all is given, even under the section headed 'justification' (5.3.3). It is implied that limiting 'civil legal aid [to] those who have a strong connection to the UK' will improve the 'credibility of the scheme' (5.3.3). We note the reference in ILPA's response to Chris Grayling's assertion (page 53, footnote 120) that he receives lots of letters and emails from people concerned about legal aid entitlement. We believe that there is a strong likelihood that this concern relates to well-publicised terrorist cases (eg Abu Qatada) or other foreign nationals who have committed serious offences and are using legal aid to resist deportation. These are clearly completely different scenarios from the circumstances of the overwhelming majority of other migrants who access legal aid. We very much doubt that the public is concerned about legal aid being used to enforce rights to keep families and other vulnerable migrants off the streets, whilst they are in the UK.

58. The 'justification' for the residence test simply refers back to the legitimate aims set out in section 4. The only clear discernible aim is to save costs. We do not understand how the other aims referred to in 4.2 (to 'drive greater efficiency in the provider market' and to 'transform the justice system') can be applied to the residence test.

59. With regard to costs, no consideration at all is given to other costs on the state which will be incurred if migrants are left destitute, such as additional strain on emergency health services, homelessness and social services and a potential increase of children in care.