THE LEGALITY OF THE PROPOSED RESIDENCE TEST

FOR CIVIL LEGAL AID

JOINT OPINION

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

2. In our opinion, such a measure would be unlawful. In short, that is because (a) it would attract a justification test and (b) it would not survive scrutiny under such a test. It would not survive scrutiny given its nature and impact, as well as the paucity of the reasoning put forward, and the absence of anything approaching a proper assessment of its implications. The absence of any proper assessment of impacts is likely itself to be fatal for the purposes of the Equality Act 2010, were the decision to adopt such an exclusion challenged on that basis. Ultimately, the exclusion would itself fail a justification test because it denies practical and effective access to justice to what are essentially a group of 'foreigners', each of whom have (by definition) a

meritorious case and who do not have the means to litigate without the benefit of legal aid.

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

4. There are at least three routes by which this prohibition would attract scrutiny under a principle of justification. They are: (1) the Human Rights Act 1998 (giving effect to the European Convention on Human Rights); (2) EU law; and (3) common law. As regards the HRA:ECHR, the issue arises because it can cogently be argued that the general exclusion of funding for non-residents unjustifiably discriminates against a class of persons. As such, the proposed measure would need to be justified in light of the combined effect of article 6 ECHR and article 14 ECHR. A key component of article 6 is effective access to the court (eg. *Steel and Morris v UK* (2005) 41 EHRR 22

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

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

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

7. The problems with justification have been identified above. Government would be unable to take refuge in the provision for "*exceptional*" funding under section 10 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*. This provision applies in two circumstances, the first of which is that an individual failure to provide legal aid would itself be an infringement of a person's rights under the ECHR or under EU

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

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

9. The Government in the consultation document devotes some 3 pages to the residence test. There is a paucity of reasoning. There is no analysis, and no impact assessment. There is no discussion of the sorts of claims which would be excluded from funding, nor the equivalent claims which will remain fundable because they are made by a resident. There is no mention, for example, of extra-territorial abuses of human rights at all. The idea of 'need' or 'justification' for access to justice being a function of non-resident status is one which is unknown to the rule of law. The law would pose a

question of justification, and we cannot see how the Government could convincingly answer it. The measure would be contrary to law.

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