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Legal aid in England and Wales for civil claims against UK armed forces

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Inside:

Contents

Summary

This Commons Library briefing describes the availability of legal aid for civil claims in England and Wales, as it may relate to claims brought against members of UK armed forces.

It examines

- current eligibility criteria for legal aid, in particular the merits test
- the development of the Ministry of Justice's (MoJ) plans to introduce a residence test for civil legal aid
- the commentary on that proposed test from the Joint Committee on Human Rights, the Justice Committee and others and
- challenges in the courts to the legality of the test.

The availability of legal aid for people outside the UK to bring claims in England and Wales against UK armed forces for actions overseas has long been controversial. For some, the availability of legal aid in these circumstances is (in their view) essential to ensuring that human rights are respected, standards upheld and members of the armed forces can be held accountable through the courts for their actions. For others, this represents (in their view) an abuse of process and a waste of taxpayers' money.

Several well-publicised cases in recent years have brought these concerns to the fore.

The debate was reignited on 22 January 2016 when, on Facebook, the Prime Minister, David Cameron, said that, to clamp down on the "industry" of firms making "spurious" claims against members of UK armed forces, the National Security Council would oversee a number of measures, including speeding up the introduction of a residence test for civil legal aid.

It is not yet clear which cases the Prime Minister has in mind when he describes them as "spurious". Such cases (if they exist) may not be funded by legal aid. As the Prime Minister's comments recognise, they may be funded by "no win, no fee" agreements.

Reacting to the Prime Minister's remarks, Leigh Day (a law firm which has represented several clients in cases against the UK government) argued that bringing cases before the courts was necessary to identify instances of abuse, damage and loss and nobody could be above the law.

Broadly speaking, the eligibility criteria for civil legal aid in England and Wales are intended, through the merits test, to weed out those cases with poor prospects of success.

The MoJ intends to introduce by regulations a residence test for civil legal aid which would require that (with certain exceptions) people applying for legal aid must have been in the UK for at least 12 months.

The MOJ's plans for the residence test were challenged in the courts. In November 2015, the Court of Appeal overturned the High Court ruling of July 2014 that the regulations were beyond the scope of the powers in the *Legal Aid Sentencing and Punishment of Offenders Act 2012* and that the test was discriminatory and unlawful.

Other briefings on issues related to those in this briefing are available from Parliament's topic pages for legal aid, international law and Iraq.

1. Legal aid for civil claims against UK armed forces

1.1 Background and context

The availability of legal aid for people outside the UK to bring claims in England and Wales against UK armed forces for actions overseas has long been controversial. For some, the availability of legal aid in these circumstances is (in their view) essential to ensuring that human rights are respected and standards upheld and members of the armed forces can be held accountable through the courts for their actions. For others, this represents (in their view) an abuse of process and a waste of taxpayers' money.

Several well-publicised cases in recent years have brought these concerns to the fore.

Further discussion of the obligations of UK armed forces deployed overseas and the Government's obligations to members of the armed forces is available in the Lords Library briefing *The Armed Forces and Legal Challenge (November 2013)*

1.2 Alleged unlawful detention at Camp Bastion, Afghanistan

One such case concerned the alleged unlawful detention and internment of Afghan nationals at Camp Bastion.[1]

The case was brought by Public Interest Lawyers. Phil Shiner and Tessa Gregory of Public Interest Lawyers wrote about the case for the *Guardian*.[2] The Defence Secretary at the time, Philip Hammond, was quoted as saying that Public Interest Lawyers were bringing the case funded by legal aid.[3]

1.3 Claims that British soldiers abused Iraqi citizens

One of the cases cited by some commentators as indicating that legal aid ought to remain available for civil claims brought from outside the UK was that of Baha Mousa.[4] Concerns were voiced in some quarters that, had a residence test been in place, cases such as his could not have been brought.[5]

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1 Dominic Casciani and Clive Coleman "Afghans 'unlawfully held' by UK forces at Camp Bastion" *BBC News* online, 29 May 2013

2 Phil Shiner and Tessa Gregory, "Camp Bastion detainees challenge the notion of British justice in Afghanistan", *Guardian Comment Is Free* online, 30 May 2013

3 "UK 'ready to hand over Afghan detainees'", BBC News online, 29 May 2013

4 See, for example, Rachel Stevenson and Matthew Weaver, "Timeline: Baha Mousa case", *Guardian* online, 8 September 2011

5 See, for example, the Legal Aid Changes blog and the briefing there from Nick Matthews of Matrix Chambers (*Briefing: civil legal aid and access to justice*, 15 September 2015) and Liberty's response to the Ministry of Justice consultation (June 2013)

Iraq Historic Allegations Team

The Iraq Historic Allegations Team (IHAT) was set up in 2010 to investigate the large number of claims that British military personnel unlawfully killed and abused Iraqis during the period from 2003 to 2009.

A Commons Library briefing paper on IHAT is available on Parliament's topic page for international law.

Its mandate now includes:

- allegations of criminality relating to the death or ill-treatment of Iraqis, whether in custody or not
- deciding whether British soldiers should be referred to the Service Prosecuting Authority and
- reporting on wider issues.

The number of cases on its books has grown enormously.

Information on the work of IHAT is available in its latest quarterly report. This breaks the allegations down into 10 separate caseloads depending on the circumstances of the claim. A total of 1514 allegations have been reported to IHAT, of which 43 have been closed with the remainder ongoing at various stage of the investigative process. Details of investigations completed are in a separate IHAT publication.

1.4 Are "spurious" claims being brought?

There have recently been renewed calls to find ways to restrict claims against British military personnel. The Solicitors Regulation Authority has been investigating two firms of solicitors involved in such cases.

The Prime Minister, David Cameron's official Facebook page today carries a statement saying that, to clamp down on the "industry" of firms making "spurious" claims against members of UK armed forces, the National Security Council will oversee a number of measures, including speeding up the introduction of the residence test for civil legal aid (discussed at more length below):

> The National Security Council will produce a comprehensive plan to stamp out this industry, including proposals to clamp down on no win, no fee schemes used by law firms, speeding up the planned legal aid residence test, and strengthening investigative powers and penalties against firms found to be abusing the system. We will also take firm action against any firms found to have abused the system in the past to pursue fabricated claims.

Reacting to the Prime Minister's remarks, Leigh Day (a law firm which has represented several clients in cases against the UK government) argued that bringing cases before the courts was necessary to identify instances of abuse, damage and loss and nobody could be above the law:

> A Leigh Day spokesperson told the Independent: "Over the last 12 years many cases of abuse made against the MoD during the course of the occupation of Iraq have come to light and been accepted by the Government. They include the appalling torture and murder of Baha Mousa in 2003. In addition, the Government has paid compensation for over 300 other cases relating to abuse and unlawful detention of Iraqis...the vast majority of serving

> army soldiers do a first class job in protecting this country but the evidence shows that this is by no means the case for all.
>
> "We have a system in this country that enables people to obtain justice if they have suffered abuse, damage or loss at the hands of anyone. No-one is above the law, not us, not the British Army and not the Government. We cannot imagine that the Prime Minister is proposing that this should change."[6]

It is not yet clear which cases the Prime Minister has in mind when he describes them as "spurious". Such cases (if they exist) may not be funded by legal aid; as the Prime Minister's comments recognise, they may be funded by "no win, no fee" agreements.

As this briefing will describe at more length, the eligibility criteria for civil legal aid in England and Wales are intended, through the merits test, to weed out those cases with poor prospects of success. The MoJ intends to introduce a residence test which would further restrict the availability of civil legal aid, requiring (with certain exceptions) that people applying for legal aid must have been in the UK for at least 12 months.

A brief overview of sources of help with legal problems such as "no win, no fee" agreements is in the Commons Library briefing *Legal help: where to go and how to pay* (CBP03207, 27 May 2015)

6 Ashley Cowburn, "David Cameron launches assault on lawyers filing 'spurious' allegations against Iraq war veterans", *Independent* online, 22 January 2016

2. Legal aid in the UK: the basics

2.1 Civil legal aid since 1 April 2013: the basics

The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (the 2012 Act) made significant changes to civil legal aid, not only by amending some of the financial eligibility criteria but also (and even more controversially) by taking many areas of civil and family law out of scope.

The legal aid provisions of the 2012 Act came into effect from 1 April 2013, making significant changes to the scope of legal aid in civil and family matters and amending the merits test.

To be eligible for legal aid in a civil case, an applicant must pass three tests:

- the case must be within scope for legal aid
- the applicant must have a 50:50 (or thereabouts) prospect of winning the case (this is the merits test) and
- the applicant must fulfil the financial eligibility criteria.

2.2 Claims against UK armed forces

Under current rules, there is no requirement that a person receiving legal aid should be a British citizen or resident or present in the UK.

Civil claims against UK armed forces from people outside the UK are therefore subject to the same eligibility criteria for legal aid as claims from UK residents.

At the time of the Camp Bastion case mentioned earlier, the Legal Aid Agency provided the Commons Library with a statement confirming that limited legal aid had been made available and setting out the background:

> UK lawyers have been granted a limited amount of legal aid to represent a handful of detainees at Camp Bastion.
>
> Further background:
>
> - These cases are eligible for civil legal aid because the challenge against the MoD is being brought before UK courts.
> - This case is being brought in the UK courts because it is against the MoD, which is based in UK.
> - Habeas corpus and JR cases are eligible for legal aid – subject to the individual passing the means and merits test conducted by the Legal Aid Agency.
> - Anyone seeking legal aid is only granted funding if their case passes standard financial means and legal merits tests.
> - Funding for this case is managed by a specialist unit at the Legal Aid Agency, to ensure the costs are carefully controlled.
>
> The Legal Aid Agency has also provided funding so that families of service personnel could have legal representation for a number of inquest and damages cases; for example, the death of Gordon Gentle, the use of Snatch Land Rovers in Iraq, military policemen (Red Caps) killed in Majar al-Kabir and Private Jason Smith who

died of a heart attack brought on by heatstroke while serving in Iraq.[7]

2.3 Weeding out weak cases: the merits test

The *Civil Legal Aid (Merits Criteria) Regulations 2013* provided for the merits criteria which the Director of Legal Aid Casework at the Legal Aid Agency (LAA) must apply when determining whether an applicant qualifies for civil legal aid.[8]

Further analysis of the 2012 Act is in the Commons Library briefing *Civil legal aid changes since 2013: the impact on people seeking help with legal problems*

The case's prospects of success will be graded according to six categories:

- **Very good:** an 80% or more chance of obtaining a successful outcome
- **Good:** a 60% or more chance, but less than an 80% chance, of obtaining a successful outcome
- **Moderate:** a 50% or more chance, but less than a 60% chance, of obtaining a successful outcome
- **Borderline:** the case is not "unclear" but it is not possible to decide that the chance of obtaining a successful outcome is 50% or more or to classify the prospects as poor
- **Poor:** unlikely to obtain a successful outcome
- **Unclear:** the Director cannot put the case into any of the categories above because investigations could be carried out, which would enable the Director to make a reliable estimate of the prospects of success.[9]

The MoJ, though, wanted to see further change and in its consultation paper *Transforming legal aid: delivering a more credible and efficient system* argued that the merits test was not stringent enough. The issue in contention was the "borderline" category, where the MoJ argued that funding should no longer be available.[10]

The *Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2014* removed borderline cases from scope.[11] The regulations were amended again in July 2015, following a successful legal challenge, which means that legal aid may now be provided in some cases with a "poor" or "borderline" prospect of success, if providing legal aid would prevent a breach of the applicant's rights under the ECHR or EU law.[12]

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7 personal communication, 26 June 2013
8 SI 2013/104. See in particular Regulations 4 and 5. The MoJ also published an Explanatory Memorandum.
9 MoJ, *Transforming legal aid: delivering a more credible and efficient system,* CP14/2013, 9 April 2013: page 34
10 MoJ, *Transforming legal aid: delivering a more credible and efficient system,* CP14/2013, 9 April 2013: page 34
11 SI 2014/131
12 *The Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015* (SI 2015/1571). See also LAA, *Civil news: civil legal aid merits regulations amended*, 31 July 2015

3. Proposals for a residence test

The residence test

In the Westminster Hall debate in January 2016 on access to legal aid for vulnerable people, junior justice minister Shailesh Vara confirmed that (with certain exceptions) the residence test would require that people applying for legal aid must have been in the UK for at least 12 months:

> The Government continue to believe that individuals should have a strong connection to the UK to benefit from our civil legal aid scheme, and intend to implement the residence test following recent success in the courts.
>
> (…)
>
> Clearly, we have said that someone has to be here for a minimum of 12 months. We will ensure that when an application is made that criterion is fulfilled. If the person is in one of the exceptional categories the criterion will not apply.[13]

Under the previous government, the Ministry of Justice (MoJ) announced its intention greatly to reduce the availability of legal aid to people living outside the UK by introducing a residence test.

3.1 MoJ consultation on transforming legal aid

In *Transforming legal aid: delivering a more credible and efficient system* the MoJ proposed more changes to civil and criminal legal aid. It argued that, to be fair to the UK taxpayer, those receiving legal aid in civil matters ought to have a strong connection to the UK:

> We are concerned that individuals with little or no connection to this country are currently able to claim legal aid to bring civil legal actions at UK taxpayers' expense. These may be people who have never set foot in England or Wales, or those who have never paid taxes in the UK, but who are yet able to benefit financially from the civil legal aid scheme.[14]

In its report on the impact of the changes to civil legal aid, the Justice Committee expressed concern about the potential impact of the residence test on highly vulnerable people:

> It seems to us that the residence test is likely to save very little from the civil legal aid budget and would potentially bar some highly vulnerable people from legal assistance in accessing the courts.[15]

Further briefing about the legal challenge to the residence test and other issues is available in the Lords Library briefing for the December 2015 debate on the future of legal aid.

13 HC Deb 19 January 2016 cc502-3WH
14 MoJ, *Transforming legal aid: delivering a more credible and efficient system*, CP 14/2013, April 2013: page 27
15 Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 12 March 2015, HC 311 2014-15: page 23

Responding to the Committee, the MoJ again asserted that the test was necessary and, with some exceptions and safeguards, would be fair.[16]

3.2 Joint Committee on Human Rights reports

Implications for access to justice

On 13 December 2013, the Joint Committee on Human Rights (JCHR) published a report examining the implications for access to justice of the MoJ's proposed legal aid reforms.[17]

One of the proposals on which the report focussed was the introduction of a residence test for civil legal aid.

The JCHR argued that there was a basic constitutional requirement that legal aid should be available to make access to court possible in relation to important and legally complex disputes. In relation to the proposed residence test, the Committee said that, given the serious implications for access to court, such a test should be subject to full parliamentary scrutiny and introduced through primary legislation.

The JCHR accepted that a residence test may not be incompatible per se with the right to effective access to court, but any restrictions needed to be carefully drawn to ensure that they were proportionate. The JCHR also expressed concern about the impact on vulnerable groups and recommended further exemptions, including for children and refugees.[18]

At the same time as the final proposals on further legal aid reform were published in February 2014, the MoJ published its response to the JCHR report. Here, it agreed to make some further exemptions to the residence test.[19]

Children and the residence test

As noted above, particular concerns have been raised about how the proposed residence test might affect children. It has been argued that, without legal aid, they might struggle to assert their rights.

In June 2014, the JCHR published a report on legal aid, children and the residence test in which it summarised the further changes to the exemptions to the test.[20]

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16 MoJ, *Government Response to Justice Committee's Eighth Report of Session 2014–15: Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Cm 9096, July 2015: page 8

17 Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform legal aid*, Seventh Report of Session 2013–14, HC 766, 13 December 2013

18 JCHR, *The implications for access to justice of the Government's proposals to reform legal aid*, Seventh Report of Session 2013–14, HC 766, 13 December 2013, pp16-45

19 MoJ, *Government response to the Joint Committee on Human Rights: The implications for access to justice of the Government's proposals to reform legal aid*, February 2014: pages 6 – 17 Cm 8821

20 JCHR, *Legal Aid: Children and the Residence Test* , HL Paper 14 HC 234 2014-15, 30 June 2014: page 4

The Committee again argued that the residence test for children could not be applied fairly and might breach their human rights.[21]

The Government continued to argue that the residence test was fully compatible with the UN Convention on the Rights of the Child.[22]

3.3 Legal challenge to the introduction of the residence test

On 15 July 2014, the secondary legislation to introduce the residence test was the subject of a judicial review in the High Court.[23] Lord Justice Moses and two other judges found that the regulations were beyond the scope of the powers in the *Legal Aid Sentencing and Punishment of Offenders Act 2012* and that the test was discriminatory and unlawful.[24]

There were some immediate reactions:

> John Halford, a solicitor from Bindmans law firm, represented the Public Law Project (PLP), the organisation that brought the judicial review challenge.
>
> He said: "What we need to see now is the response of the government. We would like to hope that the House of Lords will not endorse this unlawfully drafted legislation, especially when it's discriminatory.[25]

The Opposition indicated its opposition to the test:

> The Labour party have always maintained that David Cameron's residence test would unfairly penalise the vulnerable, which is why we voted against it last week. We welcome the court's judgment and hope that the government move quickly to drop these unlawful measures.[26]

Natasha Simonsen commented on the UK Constitutional Law blog on the implications of the judgment.[27]

A few days later, the MoJ issued a formal response to the judgment, saying the residence test would not be introduced as planned on 4 August 2014, but it intended to appeal.[28]

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21 JCHR, *Children's residence test breach their human rights says Joint Committee,* 30 June 2104

22 See, for example, Chris Grayling, "We must stop the legal aid abusers tarnishing Britain's justice system" *Daily Telegraph* online, 20 April 2014

23 The *Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014* was laid on 31 March 2014, requiring an affirmative vote in both Houses. The Commons agreed the Order on 9 July 2014 by a deferred division vote passed by 273 votes in favour to 203 against. The draft Order had been debated in the Delegated Legislation Committee on 1 July where Mr Vara defended the proposals (Fifth Delegated Legislation Committee, 1 July 2014). The draft Order had been due to be debated in the Lords before the recess on 21 July, where a motion of regret on the Order had been tabled. The Order was withdrawn on 16 July.

24 http://www.bailii.org/ew/cases/EWHC/Admin/2014/2365.html para 50

25 "Legal aid test 'discriminatory and unlawful' High Court rules", *Guardian* online, 15 July 2014

26 *Ibid*

27 *Natasha Simonsen "Government cannot use a statutory back door to implement major changes to legal aid changes, Divisional Court says*, UK Constitutional Law Association, 17 July 2014

28 "Update on civil legal aid residence test" 17 July 2014 Ministry of Justice

In November 2015, the Court of Appeal overturned the High Court ruling on the residence test.[29]

[29] Law Society, *Court of Appeal Overturns High Court Ruling on Civil Legal Aid Residence Test*, 26 November 2015

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