REDRESS

Ending Torture, Seeking Justice for Survivors

Austerity & Legal Aid: Impact on the vulnerable

10 October 2014

Conference Report

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Introduction

1) On Friday 10 October 2014, REDRESS hosted a meeting with a number of specialists in the area of immigration and asylum law, and front-line services and support provision. The purpose of the event was to consider the ways in which recent changes to legal aid, welfare benefits, and access to health care through the Immigration Act (2014) and other pieces of legislation impact vulnerable individuals, and explore the ways in which the non-profit organisations present could potentially better work together to support each other in a climate of increased demands for services and austerity as regards government-provided services.

2) REDRESS' mandate is to seek justice, reparation and accountability for torture survivors. We seek to provide holistic support, including, for those clients based in the United Kingdom, advice and support, as appropriate, on how to access health and social services. While we do not provide immigration advice, we try to refer people to specialists in respect of family reunion and immigration matters. Thirty percent of the individuals we work with directly are based in the UK. It is estimated that up to 30% of asylum seekers in the UK are torture survivors. Therefore, REDRESS has a clear interest in understanding the wider challenges facing refugees and asylum seekers in the UK. Often these are the most pressing concerns that a torture survivor has when they arrive in the UK. However, it has been increasingly difficult to refer individuals to solicitors for specialist legal advice.

3) Carla Ferstman (REDRESS, Director) thanked all those present for attending and gave an introduction to the organisation. She set out the ways in which REDRESS works holistically with its clients, seeking to ensure that any housing, health care, benefits or other needs are addressed while the organisation works with the individual on their torture claim or related advocacy. Increasingly, REDRESS has found that survivors' welfare and support needs have become more pressing as a result of the cuts to legal aid and related austerity measures. More and more individuals are unclear about what they are entitled to, and whether they can obtain legal assistance to address their needs.

4) Kevin Laue (REDRESS, UK Legal Advisor) said REDRESS hoped everyone would gain further insight into the challenges impacting vulnerable individuals. He expressed the hope that the organisations present might collaborate further to better address needs, at a grassroots level. An aspect of this would be to begin building stronger links and channels for information-sharing between the different welfare and legal services in the community.

5) Increasingly, the not-for-profit sector, working directly with vulnerable individuals, is being asked to undertake much of the initial work gathering information from an individual wishing to challenge decisions denying them access to adequate housing, benefits and healthcare, for example. Solicitors are being remunerated for shorter amounts of time, and this means that organisations may need to support them by collecting information prior to making a referral.

6) Harpreet K Paul (REDRESS, Casework coordinator) introduced the speakers, as follows:
    - *Session 1: Legal Aid for Immigration Cases, Frances Trevena (Barrister, Rights of Women)*
    - *Session 2: Accessing Welfare for Vulnerable Clients, Gerry Hickey, (Specialist Welfare Advisor, Strategic Legal Fund)*
    - *Session 3: Social Exclusion, Indira Kartallozi (Director, Chrysalis Family Future)*
    - *Session 4: Data Collection & Strategic Litigation, Hannah Chambers, (Migrants' Law Centre);*
    - *Session 5: Challenging Unlawful Immigration Detention, Fred Piggott (Solicitor, Wilsons LLP)*
    - *Session 6: Removals, Nigel Leskin (Partner, Birnberg Peirce and Partners)*
    - *Session 7: Accessing Healthcare, Louise Whitfield (Partner, Deighton Pierce Glynn Solicitors).*

7) The first session on “Legal Aid for Immigration Cases” set the stage and outlined the significant cuts to legal aid service provision. Frances Trevena (Barrister, Rights of Women) also outlined the possibility of using the “exceptional case funding” pot of the Legal Aid Agency when working with clients whose human rights or European Union rights may be breached due to their inability to have access to legal aid.

8) The second and third sessions were linked in a number of ways. In the second session on “Accessing Welfare for Vulnerable Clients” Gerry Hickey, (Specialist Welfare Advisor, Strategic Legal Fund) outlined the financial and accommodation support available to asylum seekers and – in limited circumstances – to refused asylum seekers. In the third session, “Social Exclusion”, Indira Kartallozi (Director, Chrysalis Family Future) shed light on the ways in which the support available to asylum seekers and refused asylum seekers is insufficient to meet their needs. Indira then went on to explain the difficulties that many asylum seekers who obtain refugee status, or humanitarian protection, experience when attempting to transition to mainstream benefits.

9) In the fourth session, “Data Collection & Strategic Litigation”, Hannah Chambers, (Migrants’ Law Centre) highlighted potential avenues for non-governmental organisations (NGOs) and front-line service providers to work together in order to exchange data and information, potentially with a view to bringing public law cases against local authorities who consistently fail to correctly apply policies relating to immigration or welfare support.

10) In the fifth session, “Challenging Unlawful Immigration Detention”, Fred Piggott (Public Law Solicitor, Wilsons LLP) outlined the difficulties that asylum seekers, refused asylum seekers, and other migrants experienced in being detained. He outlined the legislation, policies and caselaw that is relied upon to challenge the detention of individuals for unreasonable periods of time, when detention reviews are not undertaken substantively, or when a vulnerable individual (such as a torture survivor) has been detained – contrary to the Home Office’s own policy.

11) In the penultimate session, “Removals”, Nigel Leskin (Partner, Birnberg Peirce and Partners) explored the obstacles to challenging removals, and the changes brought into effect by the Immigration Act (2014). This was followed by a session on “Accessing Healthcare” where Louise Whitfield (Partner, Solicitor Advocate, Deighton Pierce Glynn Solicitors) highlighted the charging programmes for accessing secondary National Health Service services (e.g. hospitals) for individuals not ordinarily resident in the UK.

12) REDRESS is grateful to each of the speakers who volunteered their time to share their expertise with the many organisations present. Thank you also to all the participants, who came from law firms, front-line service providers, rehabilitation centres and academia. Thank you also to REDRESS Intern Rupert Robey who helped REDRESS Casework coordinator & Legal Officer, Harpreet K Paul, compile this Conference Paper, and to REDRESS Intern Louise Kinsella for her help in putting together the conference. Finally, thank you to the Esmée Fairbairn Foundation for allowing us to use their premises to host the meeting.

Session 1: Legal Aid for Immigration Cases

In April 2013, the changes to legal aid provision for England and Wales - brought into effect by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 - came into force.[1] Frances Trevena (Barrister, Rights of Women[2]) gave a presentation on:

a. the impact of LASPO 2012 and the Immigration Act 2014 on the provision of immigration advice;
b. the possibilities of obtaining "exceptional case funding" for matters that fall out of scope for legal aid;
c. recent caselaw in the field of legal aid funding for family reunion applications and obtaining expert reports; and
d. initiatives of the British Government since April 2013 to bring further changes to the provision of legal aid.

13) On 1 April 2013, major changes were made to the legal aid system in England and Wales by the LASPO 2012. As a result of these changes, it is now more difficult to obtain legal aid. There are a number of areas of law that are no longer eligible for legal aid. They are:

- asylum support (i.e. for weekly stipends, except where accommodation is claimed);
- Criminal Injuries Compensation Authority cases;
- debt, except where there is an immediate risk to the home;
- education, except for cases of special educational needs, discrimination, or where there is a potential judicial review;
- housing, except those where the home is at immediate risk, homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases;
- immigration cases that do not involve detention, domestic violence, human trafficking or the Special Immigration Appeals Commission;
- private family law cases that do not involve issues of domestic violence, child abuse, child protection or forced marriage or where a child is a party to the proceedings;
- welfare benefits cases except for appeals to the First-tier Tribunal where the tribunal reviews its own decision because there has been an error of law and appeals to the Upper Tribunal, Court of Appeal and Supreme Court on a point of law.

14) LASPO 2012 took all these areas of law out of scope for the provision of legal aid. In order to now qualify for legal aid, the area of law must fall within the scope of eligible categories, and the individual seeking legal aid must also meet the means and merits test. In keeping with the theme of the conference, Frances Trevena outlined the areas of immigration related legal advice service provision that do – and do not – remain in scope for the provision of legal aid.

Within Scope

15) The following categories of immigration law still fall within scope for immigration legal aid:

a) asylum cases. These are claims under the Refugee Convention (1951), and claims under Article 3, European Convention on Human Rights (ECHR) (1950), which for example, protects the right not to be subjected to torture, inhuman or degrading treatment or

[1] Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, available at: http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted.
[2] Rights of Women: http://rightsofwomen.org.uk/.

punishment. Legal aid is available for preparing an asylum claim, and for representing the asylum seeker;

b) proceedings before the Special Immigration Appeals Commission;

c) asylum support cases. Asylum support is the provision of housing and financial assistance for destitute asylum seekers and refused asylum seekers (asylum support is a parallel system of support, separate from mainstream benefits). Legal aid is *only* available in relation to claims or appeals which include a claim for housing, and not when they exclusively relate to a claim for the weekly monetary stipend. Further legal aid is *not* available for representing an individual, i.e. for an advisor to appear at an appeal hearing;

d) certain domestic violence-related cases (where the immigration status of a migrant victim of domestic violence is dependent on his or her partner, and that partner is either a British citizen, settled person (i.e. has indefinite leave to remain in the United Kingdom (UK)) or exercising European free movement rights[3]). Legal aid is available for advice and representation;

e) victims of human trafficking (where the person is recognised as a victim or potential victim of trafficking via the National Referral Mechanism[4]). Legal aid is available for advice and representation;

f) challenges to immigration detention (e.g. bail applications). Legal aid is available for advice and representation;

g) judicial review, but *not* if the same or substantially the same matter has been rejected on appeal or judicial review claim in the previous 12 months; and *not* for challenges to removal directions made following a decision to remove, or conclusion of an appeal against such a decision, in the previous 12 months.[5] Legal aid is available for advice and representation.

16) All other immigration law related matters will generally *not* be entitled to legal aid including:

a) applications for citizenship, including deprivation of citizenship;

b) people facing removal or deportation, where no asylum claim is made;

c) people who have made claims under article 8 ECHR (the right to family and private life) and post-conviction deportation even where article 8 ECHR is engaged;

d) decisions to cancel or curtail leave (permission) to remain in the UK;

e) applications for discretionary leave to remain in the UK by children in non-asylum immigration proceedings, including separated children applying to extend a grant of discretionary leave and abandoned children needing to regularise their stay in the UK;

f) managed migration applications on the Points Based System,[6] including students, family members or workers;

g) entry clearance applications or appeals from outside the UK;

h) applicants who have mental health/capacity issues unless they are applying under article 3 ECHR (prohibition of torture and ill-treatment).

17) In addition to falling into one of the eligible categories of substantive legal aid work, an applicant will *also* have to satisfy the means and merits test to qualify for legal aid.

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[3] Open Society Foundations, "What is "Freedom of Movement" in the European Union?", December 2013; available at: http://www.opensocietyfoundations.org/explainers/what-eu-freedom-movement.

[4] Stop the Traffic, "About the NRM", available at: https://www.stopthetraffik.org/spot/what-is-it.

[5] Immigration Act 2014, available at: http://www.legislation.gov.uk/ukpga/2014/22/pdfs/ukpga_20140022_en.pdf.

[6] Home Office, "Points-based calculator: Tool", allows individuals to calculate how many points they may get, and indicates whether they may be eligible to work or study in the UK under the points-based system, available at: https://www.points.homeoffice.gov.uk/gui-migrant-jsf/SelfAssessment/SelfAssessment.faces.

The Means Test

18) Those entitled to legal aid must have a very small amount of annual earnings, and have less than £8,000 in savings or capital, or £3,000 for asylum and immigration matters. The income levels for eligibility differ depending on whether the individual seeking legal aid is single or has dependents. The UK Government has an eligibility calculator that individuals can use to assess whether they meet the criteria.[7]

19) Those in receipt of income support, income based job seekers' allowance, income based employment and support allowance or guarantee credit are no longer automatically eligible for legal aid. They must meet the capital limit for savings and other capital (including equity in property). If asylum seekers or other migrants need legal advice in an area of law that still falls within the scope of legal aid, they will only be granted legal aid if they meet the merits test (below) and do not have more than £3,000 in capital (savings or equity, including property).

The Merits Test

20) The implementation of the merits test has been much criticised. The merits test is applied at both the initial assessment and appeals stages. To meet the merits test, a potential claim must be considered to have a greater than 50% chance of success in order to be considered eligible for legal aid.

21) Legal advisors (solicitors, caseworkers, immigration practitioners) who receive a referral must carry out an assessment as to the merits of the referral. If a legal advisor does not believe a case has more than 50% chance of success, they cannot make the application for legal aid. From 27 January 2014, borderline cases have been removed from the scope for eligibility for legal aid. Legal advisors are obligated to apply the merits test judiciously; a systemic failure to adequately apply the merits test appropriately may lead to a firm losing its legal aid contract, which thereafter would prevent them from taking any legal aid case.

22) Some organisations have found that legal advisors often wrongly apply the merits test, either by failing to judge the merits of an immigration detention bail case and the substantive asylum or immigration case separately, or by applying the wrong measure of success.[8] The Legal Aid Agency (LAA) does not provide clear, accessible guidance on what would satisfy the merits test; however it does undertake regular audits of the way in which legal advisors have made merits assessments. In some cases, and contrary to the views and findings of not-for-profit organisations working in the field, the Legal Aid Agency has urged legal advisors to exercise more restraint. The LAA has found that legal advisors wrongly assessed the merits of a case to have more than 50% chance of success, thus enabling them to apply for legal aid, even when the legal advisors ultimately won the case.

23) Others underscored that the purpose of legal aid is to allow a qualified representative to demonstrate or argue a point on behalf of a lay person who does not have the legal knowledge or understanding to do so themselves. There are significant numbers of difficult cases which require case documentation and evidence to be prepared and obtained before a legal advisor can decide whether it meets the merits test or not. Legal advisors will not be funded for this preparation. This leads to reluctance on the part of some legal aid firms to consider difficult cases with due seriousness. Just because at first glance a case may appear to have low merit, a person should not

[7] UK Government, Justice Department, "Legal Aid Checker", available at: www.legal-aid-checker.justice.gov.uk.
[8] Bail for Immigration Detainees, "A Nice Judge on a Good Day: Immigration Bail and the Right to Liberty", 1 July 2010, available at: http://www.biduk.org/420/bid-research-reports/a-nice-judge-on-a-good-day-immigration-bail-and-the-right-to-liberty.html, p. 23.

automatically be refused the opportunity and means to demonstrate otherwise. Many participants held the view that those cases which may (at first light) appear to fall below the 50% success rate are often the cases which require legal aid the most.[9]

Exceptional Case Funding

24) Where a case involving a particularly vulnerable client does not fall within scope for legal aid, it may be worth attempting to obtain exceptional case funding from the LAA. Exceptional case funding is only available where the denial of legal aid would breach the claimant's rights. The claimant must still meet the means and merits tests outlined above.

25) The areas of law which LASPO 2012 took out of scope for legal aid include: asylum support (except where accommodation is claimed); criminal injuries compensation authority cases; debt, except where there is an immediate risk to the home; education, except for cases of special educational needs, discrimination, or where there is a potential judicial review; housing, except those where the home is at immediate risk, homelessness assistance, housing disrepair cases that pose a serious risk to life or health and anti-social behaviour cases; immigration cases that do not involve detention, domestic violence, human trafficking or the Special Immigration Appeals Commission; private family law cases that do not involve issues of domestic violence, child abuse, child protection or forced marriage or where a child is a party to the proceedings; welfare benefits cases, except for appeals to the First-tier Tribunal where the tribunal reviews its own decision because there has been an error of law, and appeals to the Upper Tribunal, Court of Appeal and Supreme Court on a point of law.

26) If a client has a case falling within one of these 'excluded' areas, the only way that he or she will be able to get legal aid is if there is eligibility for exceptional funding. However, applications for exceptional funding will only be considered where failure to provide legal aid funding would:
    a) breach an individual's rights under the ECHR; or
    b) breach an individual's rights under the law of the European Union.

    The UK Government does not believe that immigration cases will meet the first threshold because the right to a fair trial does not apply in immigration cases.[10]

27) The application process for exceptional case funding from the LAA is difficult. It involves essentially compiling the entire case that will be put forward. It is particularly difficult to obtain exceptional case funding in immigration cases.[11] The Public Law Project – through their Exceptional Case Funding Project – may be able to offer assistance with making an application.[12] It was underscored that it is important to use the exceptional case funding "pot" of finances available. Failure to use exceptional case funding allowances may result in the provision disappearing altogether.

28) The Public Law Project has undertaken research on exceptional case funding. In the first three months of LASPO 2012 coming into force, 233 applications for exceptional case funding were received by the LAA. Nearly half of these applications were in family law. Only five requests were

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[9] Immigration Law Practitioners' Association, *ILPA briefing for the House of Lords debate on the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2013,* 20 January 2014, available at: http://www.ilpa.org.uk/resources.php/25688/ilpa-briefing-for-the-house-of-lords-debate-on-the-civil-legal-aid-merits-criteria-amendment-no.-2-r, pps. 3-4.

[10] Immigration Law Practitioners Association, "Update to cuts/changes to legal aid for immigration services", 17 May 2012, p.3, citing the Lord Chancellor's guidance, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332858/legal-aid-chancellors-guide-exceptional-funding-non-inquests.pdf, para.58.

[11] *Ibid*.

[12] Public Law Project's, Exceptional Case Funding Project, available at: http://www.publiclawproject.org.uk/exceptional-funding-project.

granted. The majority of cases granted were for inquests (4 grants). One grant for exceptional case funding in a family law case was made.[13] Only 1% of the non-inquest applications for exceptional case funding have succeeded since LASPO came into effect in April 2013.[14] So, in order to qualify for exceptional case funding, exceptional means "truly exceptional".

29) In January 2014, ILPA expressed concern that in the previous year (2013) only 746 applications for exceptional case funding applications were made. Of these, only 15 grants of exceptional case funding were granted by the LAA. During the passage of LASPO 2012, Government officials estimated that between 5,000 and 7,000 cases would receive case funding through the exceptional case funding mechanism.[15] In December 2013, the Joint Committee on Human Rights also expressed concern that the exceptional case funding mechanism was not working so as to secure effective access to court in human rights claims.[16]

30) No application for exceptional case funding has been granted where the application was made by the claimant themselves. This highlights the need to obtain professional assistance from those familiar with the exceptional case funding process when making an application.

Recent Developments

Family Reunion

31) LASPO 2012 took applications for family reunion out of scope for the purposes of legal aid funding. In *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor* (2014), the High Court (England and Wales) held that the refusal of the LAA to grant exceptional case funding for family reunion applications to each of the six claimants involved in the litigation was unlawful. It also held that the guidance being used by the LAA to make decisions on applications for exceptional case funding was unlawful. Lastly, the High Court held that refugee family reunion cases were in scope for legal aid under the 2012 Act.[17] It is unclear, yet, how this decision will be implemented in practice.

32) According to ILPA, the likely implication of this ruling is that:

> *[F]unding will now be available for [family reunion] cases (subject to the usual tests of financial means and merit). Although the Government is appealing the judgment, the Legal Aid Agency has clarified that any cases funded in the period after this judgment will not be at risk of having to repay the legal aid granted, in the event that the Government wins its appeal. The Court's ruling that the refusal of exceptional funding to all six cases before it was unlawful is likely to have the effect that more exceptional funding applications are granted in future (to date, only about 1% of exceptional funding applications in immigration cases have been granted). The Legal Aid Agency will also need to rewrite its internal guidance.*[18]

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[13] *Ibid*.

[14] *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840* (Admin) (13 June 2014) [2014] WLR(D) 266, [2014] EWHC 1840 (Admin), para. 10.

[15] Immigration Law Practitioners' Association, "ILPA briefing for the House of Lords debate on the Civil Legal Aid (Merits, Criteria) (Amendment) (No. 2) Regulations 2013", 20 January 2014, available at: http://www.biduk.org/162/bid-research-reports/bid-research-reports.html, p. 3

[16] Human Rights Joint Committee - Seventh Report, "The implications for access to justice of the Government's proposals to reform legal aid", 11 December 2013, available at: http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/100/10002.htm, paras. 132-144.

[17] *Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840* (Admin) (13 June 2014) [2014] WLR(D) 266, [2014] EWHC 1840 (Admin), paras. 107, 124, and 114.

[18] Immigration Law Practitioners Association, "Information Sheet: Legal Aid 19 – Litigation Update", 31 July 2014, available at: http://www.ilpa.org.uk/resources.php/29117/information-sheet-legal-aid-19-litigation-update, pp. 1-2.

The Residence Test

33) On 9 April 2013, just as the LASPO 2012 legal aid changes came into force, the Ministry of Justice issued a consultation paper entitled "*Transforming Legal Aid: Next Steps*". In this paper, the Government proposed a number of additional changes to the provision of legal aid. One change proposed was the creation of a residence test for civil legal aid, which would apply in addition to the means and merits tests currently in force.

34) The residence test would restrict eligibility for civil legal aid to those with at least 12 months' continuous "lawful residence" in the UK. This would include British nationals and European nationals with the right to reside in the UK who have lived here for a year. However, it would exclude people who may have been in the country for several years, possibly with British children, without leave to remain and who are waiting for an application for leave to remain to be decided by the Home Office. Under the Government proposals, there would be an exception for those seeking asylum, who would be eligible for legal aid in civil cases whilst their asylum claim was ongoing. However, once they are granted asylum they would then become ineligible for civil legal aid until they had resided "lawfully" for another 12 months. In the original proposals, there were no exceptions for domestic violence injunctions, child abduction cases, homelessness issues, victims of torture or human trafficking, or other important and emergency cases.[19] Subsequent Government amendments to the initial proposals would still exclude torture survivors from accessing legal aid, if they had not lawfully resided in the UK for 12 months.

35) Other changes proposed in the "*Transforming Legal Aid: Next Steps*" consultation paper included
- removing an uplift in available funds for immigration cases being appealed to the Upper Tribunal which would make it more difficult (financially) for barristers to devote a significant part of their practice to these types of cases;
- reducing the available fees for lawyers in cases (by 10%); and
- a number of amendments to criminal contracts and prison law (e.g. on fees for lawyers, representation in making complaints relating to conditions of detention, and prison law).

36) The draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order (2014) incorporates a number of proposals in the 2014 "*Transforming Legal Aid: Next Steps*" consultation paper, including the residence test for access to civil legal aid. Limited classes of people (e.g. serving British soldiers) are exempted from the test, as are those with certain family law disputes and those challenging detention. However, the test will apply to most areas of civil legal aid, including bringing a civil claim for compensation against British perpetrators of torture – where the torture occurred abroad and/or where the victims are residing abroad. If the torture victim has not been lawfully resident in the UK for a continual period of 12 months, they would not be eligible for civil legal aid. The residence test is therefore discriminatory and would have an impact on accountability and the rule of law.[20]

37) The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 passed through the House of Commons. On 14 July 2014, the High Court (England & Wales) ruled that the decision to introduce a residence test for civil legal aid, now formulated in the draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order

[19] REDRESS Submission to the UK government on Proposed Legal Aid Changes: Response to the Ministry of Justice's Further Consultation on Proposed Reforms to Legal Aid "Transforming Legal Aid: Next Steps"), 18 October 2013, available at: http://www.redress.org/downloads/publications/1310Legal%20aid%20consultation%20response%2018%20October%202013.pdf.

[20] *Ibid*.; see also, Joint NGO Submission, "10 Reasons to Vote Against the Legal Aid Residence Test", July 2014, available at: http://www.redress.org/downloads/country-reports/140711Residence%20Test%20Briefing%20Paper.pdf.

2014, is unlawful.[21] The Court described the Government's plans as "unauthorised, discriminatory and impossible to justify". It held that the Lord Chancellor had exceeded his powers, that is, that he had not been given the power by Parliament under the LASPO 2012 to impose such a test. It also held that the test would unlawfully discriminate against "foreigners" without justification. On 17 July, the Government responded, to confirm that the Ministry of Justice intends to appeal, and that the residence test would not be introduced as planned on 4 August 2014.[22] In July 2014, 32 non-governmental organisations (NGOs) issued a joint briefing calling on the House of Lords to reject the residence test entirely.[23]

Expert reports

38) Legal aid funding available for expert reports has significantly reduced over the years. The case of *Q v Q; Re B (A Child); Re C (A Child)*[24] raised the issue of difficulties in presenting a case without access to expert reports. The High Court (England & Wales) decided that the Government has a duty to fund the attendance of an expert for the purpose of giving evidence at a hearing, in accordance with the Family Procedure Rules 2010, and to ensure compliance with both articles 6 (fair trial) and 8 (family life) ECHR.[25]

Advocacy with Ministers of Parliament

39) It was suggested that contacting local MPs about individual cases can be very helpful as an advocacy tool to prevent further negative changes to the provision of legal aid. MPs often do not realise the human impact of the measures they vote for, and introduce. Individual MPs can be surprised to learn that a very vulnerable individual is not eligible for legal aid. It is rare that MPs are actually aware of the obstacles that people are coming up against, and it is important to highlight these issues as much as possible. Some clients may be willing to meet their MP and explain to them directly, the difficulties that they are facing. This can be a powerful advocacy tool.

Conclusion: Impact of Legal Aid Changes on Non-profit Organisations

40) By definition (i.e. because it is a service only available to the poorest individuals in society) the cuts to legal aid service provision are disproportionately affecting the poorest and most vulnerable segments of society, those from low socio-economic backgrounds, asylum seekers, other migrants, ethnic minorities, women and children. The cuts to legal aid are also having a significant impact on the non-profit organisations working on issues relating to immigration and asylum, which are also highly regulated areas of legal advice service provision.

41) For the areas that remain within scope for legal aid, legal aid firms do not receive sufficient funds from the LAA to cover the cost of working on a file. Legal advisors working under legal aid contracts are allocated reduced hours at reduced rates for work which takes far longer than what the LAA will remunerate for. As a result, many legal advisors are asking non-profit organisations – working directly with the most vulnerable segments of society – to undertake a lot of the initial work in

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[21] *Public Law Project v The Secretary of State for Justice the Office of the Children's Commissioner (2014)* [2014] EWHC 2365 (Admin), Case No: CO/17247/2013.

[22] Parliament, "Criminal legal aid contracting, residence test and other Ministry of Justice proposals for transforming legal aid - Commons Library Standard Note", 3 December 2014, available at: http://www.parliament.uk/business/publications/research/briefing-papers/SN06628/criminal-legal-aid-contracting-residence-test-and-other-ministry-of-justice-proposals-for-transforming-legal-aid.

[23] Joint NGO Submission, "10 Reasons to Vote Against the Legal Aid Residence Test", July 2014, available at: http://www.redress.org/downloads/country-reports/140711Residence%20Test%20Briefing%20Paper.pdf.

[24] Q v Q [2014] EWFC 31 (06 August 2014) [2014] WLR(D) 372, [2014] EWFC 31.

[25] *Ibid*., para. 57.

preparing a case, before the legal advisors take over to make filings and draft submissions. This has resulted in a number of legal aid firms providing trainings for the non-profit sector on the type of information gathering that needs to take place to locate and gather evidence.

42) Non-profit organisations are finding themselves overwhelmed and stretched beyond capacity due to an increased number of service-users seeking advice on welfare benefits, housing and immigration issues, who can no longer access assistance elsewhere. This increase in service-users seeking assistance puts further strain on organisations to ensure that they do not step beyond legal and regulatory limits with regards to offering legal advice and assistance whilst maintaining their role as sources of support and assistance in the asylum and refugee community.[26] ILPA asserts that:

> *At various times, the Government has suggested that generalist advice agencies, law centres and pro bono work will mitigate the loss of legal aid. It is wholly unclear how the Government envisages that these providers will be able to do so. The Government's suggestions have generally failed to acknowledge or understand the regulation of immigration advice and services, the wider financial pressure that law centres and others are under, the dependency upon legal aid of many law centres and others, or the relationship between pro bono work and securely funded basic advice and representation provision.*
> *One source of advice and representation in every community, which is not constrained by the regulation of immigration advice and services, is the constituency MP. Many MPs already have a substantial immigration caseload. It can be expected that such caseloads will increase.*[27]

43) There is also an obvious implication on the overall quality of assistance and advice. ILPA further highlights that:

> *[i]t is highly likely that the effect of legal aid cuts will not be wholly or immediately visible. It is not uncommon for migrants, their families or friends, to now seek to pay for immigration advice and representation in circumstances where legal aid ought to be available. The experience of those that do pay privately is mixed, and while there are several good quality immigration advisers, who only do charged work, the experience of many migrants is one of paying substantial sums of money, which they can ill-afford, for immigration advice or representation of little or no value, or which is damaging to their interests. The risk is that this continues or increases with the withdrawal of legal aid; and others may be lured or forced into dangerous or exploitative situations in seeking to secure money to pay for advice.*[28]

44) The non-profit sector may need to come up with innovative ways in which to fill the gap that legal aid cuts have left.

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[26] Immigration Law Practitioners Association, *Update to cuts/changes to legal aid for immigration services*, 17 May 2012, available at: www.ilpa.org.uk/data/.../12.17.05-Ealing-Advice-Forum-re-Legal-Aid.pdf, para. 13.
[27] *Ibid*., para. 14.
[28] Immigration Law Practitioners Association, *Update to cuts/changes to legal aid for immigration services*, 17 May 2012, available at: www.ilpa.org.uk/data/.../12.17.05-Ealing-Advice-Forum-re-Legal-Aid.pdf, para. 18.

Session 2: Accessing Welfare for Vulnerable Clients

Access to welfare has also been impacted by the climate of austerity. The level of cash support for asylum seekers remains very low, and legal aid does not cover the cost of a legal advisor challenging the provision of asylum support. Further, migrants are increasingly being permitted entry to the UK on the condition that they do not have recourse to public funds. Such measures come into force in a climate of anti-migrant sentiment, fuelled by an enduring economic crisis in the UK.

45) Gerry Hickey (Specialist in Welfare Law, Strategic Legal Fund[29]) led this session on accessing welfare for vulnerable clients. Clients accessing services provided by NGOs and not-for-profit service organisations may hold a variety of different immigration statuses. For example, they may be British citizens, refugees, asylum seekers, refused asylum seekers, or over-stayers. The starting point when identifying the types of benefits or services a client may be able to access is the client's immigration status. In some instances a client will have no right to access any form of support except those emergency provisions provided by charities and faith groups.

46) To help decipher what level or type of support – if anything – a client may be entitled to, it is important to find out the following:
- their immigration status;
- when they entered the UK;
- how they entered, for example on a visa (student, spouse, visitor);
- if they entered on a visa, has the visa expired;
- have they any outstanding applications with the Home Office;
- have they ever claimed asylum;
- if they have claimed asylum, what is happening with their claim;
- do they have children in the UK?

"No Recourse to Public Funds"

47) Many migrants in the UK, such as asylum seekers, students and visitors, will be barred from accessing public funds. In addition, since July 2012 some individuals and families (non European Economic Area[30] citizens), who are granted limited leave to remain on right to family and private life grounds,[31] will have a condition placed on their leave which prevents them from accessing public funds. This is commonly referred to as the "No Recourse to Public Funds" rule. Persons that are granted leave to remain in the UK without access to public funds can apply to have the "No Recourse to Public Funds" rule lifted if they are destitute, or if there would be a risk to their child.

48) Although citizens from the European Economic Area (EEA) are not subject to the "No Recourse to Public Funds" rule, they may not be eligible for welfare support benefits if they do not meet the right to reside test. EEA nationals meet the right to reside test if they have been in the UK for a period of five years as a job-seeker, a worker, self-employed, a former worker who has kept their worker status, or a student who is self-sufficient. Family members of a person in one of these groups would

[29] Strategic Legal Fund: For Vulnerable Young Migrants: http://www.strategiclegalfund.org.uk/.
[30] European Economic Area (EEA) countries include all those in the EU plus Norway, Iceland, Switzerland and Liechtenstein. To check which countries are members of the European Union, see the Europa website: www.europa.eu.
[31] Article 8 of European Convention on Human Rights.

also qualify.[32] European Union law is complicated and there may be a need to seek specialist advice as to whether an individual meets the criteria.

What are public funds?

49) Public funds include most non-contributory mainstream benefits such as job seekers allowance, income support, child benefit, tax credits, council tax, housing benefit, many disability benefits, local authority housing and services. Public funds do not include statutory maternity allowance, contribution based job seekers allowance, retirement pension, guardian allowance, widows and bereavement benefits.

50) The National Health Service (NHS) and the provision of primary and secondary education are not classed as public funds, but other restrictions for migrants may apply. Further information in relation to accessing the NHS were discussed in Session 7 of the Conference ("Accessing Healthcare") and information in relation to this session is available from page 46 below.

Who may have "No Recourse to Public Funds"

51) A large number of people may be in the UK with "No Recourse to Public Funds", including asylum seekers, refused asylum seekers, those on spouse visas or student visas, visa over-stayers and those not known to the Home Office (irregular migrants without status in the UK).

Restriction on employment

52) Many migrants will also have a restriction on their ability to find and engage in employment. Groups of migrants to whom restrictions apply include:
    - asylum seekers;
    - refused asylum seekers;
    - students (who have restrictions on the number of hours per week that they can work[33]).

53) Those who are waiting 12 months or more for a first instance decision on their asylum application are able to apply for permission to work. However, they will be restricted to taking up jobs where the Government accepts there are shortages. These are normally those which require particular specialisms such as in the field of engineering and medicine (medical practitioners).[34]

Support for Asylum Seekers

54) Since 2000, asylum seekers and refused asylum seekers have received a parallel system of support, separate from mainstream benefits.[35] These support schemes were set up by Part VI of the Immigration and Asylum Act (1999) and the subsequent amendments made to that Act. The Immigration and Asylum Act (1999) provides for two support packages:

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[32] Advice Guide, "Claiming benefits and Right to Reside", available at: http://www.adviceguide.org.uk/wales/benefits_w/benefits_coming_from_abroad_and_claiming_benefits_hrt/benefits_eea_nationals_and_the_habitual_residence_test/eea_nationals_other_ways_to_get_rights_hrt/eea_national_with_a_permanent_right_to_reside_in_the_uk_hrt.htm.

[33] Normally, students are allowed to work up to a maximum of 20 hours per week during term time and full-time during vacations or when their course has finished (for specified durations).

[34] Home Office, "Asylum Policy Instruction: Permission to Work", Version 6.0, 1 April 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299415/Permission_to_Work_Asy_v6_0.pdf.

[35] Home Office "Guidance: Allocating section 95 support", 25 February 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285360/allocating-section95.pdf.

a. support for those whose asylum claims are ongoing (*Section 95 support*); and
b. support for refused asylum seekers (*Section 4 support*).

55) Section 95 support is aimed at *asylum seekers* whose claims are ongoing, who are destitute or about to become destitute, and their dependents. In 2005 support for *refused asylum seekers*, who met a narrow set of criteria, was put on a legal footing with the introduction of additional regulations under the Immigration and Asylum Act (1999).[36] This support for refused asylum seekers is known as Section 4 support. Prior to this, Section 4 was provided on a discretionary basis and had a very low uptake.[37]

56) Currently both types of support are administered by UK Visas and Immigration (UKVI) which is a department of the Home Office. Originally support was administered by the National Asylum Support Service (NASS). Although NASS was dismantled several years ago, the term NASS is still widely used when describing the support given to asylum seekers and refused asylum seekers.

Asylum seekers

57) An asylum seeker is someone who has made a claim for asylum under the Refugee Convention (1951) or under article 3 ECHR. An asylum seeker is required to register their claim for asylum either at the port of entry (port claims) or, if they are already in the UK, at the Asylum Screening Unit in Croydon (in-country claims). Individuals will usually register a claim in Croydon when they entered the UK via another route, such as a student or visitor, but due to specific circumstances (such as changes in their country of origin), now wish to apply for asylum. Until a person has registered their claim in person they will not normally be able to access the support system.[38]

Cash and Housing

58) The support provided to asylum seekers over the age of 18 is called Section 95 support and consists of cash and housing. Support is available to asylum seekers who are destitute or likely to become destitute. Asylum seekers are also entitled to receive support for their dependents which includes children, spouses and civil partners. Other household members may also be classed as dependents, such as children over 18 who have a disability or an unmarried partner who has been living with the applicant for two out of the last three years. Those under 18 who claim asylum in their own right (not as part of a family) are supported by Social Services under the Children's Act (1989).

Housing

59) Asylum seekers are housed outside of London and the South East. This is known as dispersal. In certain circumstances an asylum seeker may be offered housing in London. This includes those in receipt of treatment from *Freedom from Torture's* London office or the *Helen Bamber Foundation.*

Cash

60) The level of support provided to asylum seekers is capped at just over £36.62 per week for single adults, but amounts are also provided for any dependent children of asylum seekers (£52.96 for those under the age of 16 and £39.80 for those between the ages of 16-18 years). The amounts

[36] Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations (2005), available at: www.opsi.gov.uk/si/si2005/20050930.htm.
[37] Home Office, "Asylum Support", available at: https://www.gov.uk/asylum-support.
[38] Right to Remain, "Entering the UK", available at: http://righttoremain.org.uk/toolkit/legalprocess/index.html. See also, Home Office, "Claim Asylum in the UK", available at: https://www.gov.uk/claim-asylum.

allocated for dependent children are similar to those for children on mainstream benefits. Lone parent asylum seekers also receive higher amounts (£43.94). However, asylum seekers do not receive child benefit. The Home Office was recently obliged to reassess the rates following a High Court decision.[39] Following a reassessment, the Home Office announced (in August 2014) that it had decided not to adjust the rates of support available.[40] The levels of support remain the same as what they were in 2011.

Subsistence only Support

61) Asylum seekers can opt to have the cash side of "Section 95" support only. Asylum seekers often choose this when they have accommodation that is provided by friends or family. In these circumstances they would not be subject to dispersal. Many of those on subsistence-only support live in the London area, or in the South-East of England.

Ending of Section 95

62) Support for asylum seekers will normally come to an end 21 days after they receive a final refusal of their asylum claim. This includes any appeals they make to the Asylum and Immigration Tribunal (AIT) following a negative decision on their claim from UKVI.

63) Once a person's claim for asylum has been refused, UKVI expect that person to leave the UK and will provide them details of where they can get assistance to return voluntarily to their country of origin. If they remain in the UK they will be subject to removal.[41] Families with dependent children under 18 that formed part of their household before they received a final refusal on their first asylum claim will not have their support withdrawn whilst they remain in the UK. However, this does not prevent UKVI from seeking to remove the family from the UK. Unless removed, they will continue to receive support whilst in the UK and until their youngest child turns 18.

64) If an asylum seeker is granted leave to remain, their support will normally come to an end 28 days after they receive notice of their leave from UKVI. They will then be entitled to work or to claim mainstream benefits.

Support for Failed or Refused Asylum Seekers

65) A refused asylum seeker is someone whose initial claim for asylum (including any appeals they made to the AIT) has been refused. Some groups of refused asylum seekers can access a restricted form of asylum support known as *Section 4.* This consists of housing and food vouchers. To qualify, a person needs to be destitute and meet a narrow set of criteria. The support provided to adults under Section 4 is capped to the value of just over £36.00 per person per week, including children.[42] The weekly cash allowance comes on an *Azure* card, which can only be used in participating supermarkets and stores. This means that refused asylum seekers cannot take advantage of cheaper local markets and culturally appropriate stores with their cash allowance.

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[39] *R (on the application of Refugee Action) v Secretary of State for the Home* Department [2014] All ER (D) 69 (Apr).

[40] Refugee Action, "Home Office announces asylum support rates will remain unchanged following review, despite legal challenge", 12 August 2014, available at: http://www.refugee-action.org.uk/about/media_centre/our_news/1248_home_office_review_of_asylum_support_rates_will_leave_vulnerable_people_living_in_poverty.

[41] Refugee Action, "Choices: Assisted Voluntary Return", available at: http://www.choices-avr.org.uk/.

[42] To qualify for section 4 support, a former asylum seeker has to meet certain conditions found in the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, available at: www.opsi.gov.uk/si/si2005/20050930.htm.

Criteria for Section 4 Support: Refused Asylum Seekers

66) Broadly, an individual applying for Section 4 support needs to show that they are destitute,[43] or will likely be destitute within the next 14 days and are:
- taking all reasonable steps to leave the UK or to place him/herself in a position in which s/he is able to leave the UK;
- s/he is unable to leave the UK because of a physical impediment to travel or for some other medical reason;
- there is no viable route of return;
- s/he has applied for judicial review of the decision on his/her asylum claim and s/he has been granted permission to proceed;
- the provision of accommodation is necessary to avoid breaching a person's human rights.[44]

67) The requirement that there be a physical impediment to travel or some other medical reason preventing the person from leaving the UK is interpreted strictly. It is not enough for a Section 4 application to show that the claimant is receiving treatment in the UK, or to have a doctor's opinion that it would be preferable if they did not travel. They must have a medical condition which makes them unable to travel. Evidence is required, so written documentation should be obtained from a medical practitioner specifically stating the individual is unable to travel, the reason and when they are likely to be able to travel. The medical advisor should complete the "Section 4 Medical Declaration."[45] The Home Office policy is that women in the late stages of pregnancy (around six weeks before their expected due date, or earlier if there have been complications), or those with a baby under six weeks old, are accepted as being unable to travel.

68) Many former asylum seekers qualify for Section 4 support because they have fresh claims for asylum outstanding. This is when a refused asylum seeker has new evidence or arguments they would like the Home Office to consider as part of a fresh claim for asylum or humanitarian protection (they may be at risk of detention upon making a fresh claim).

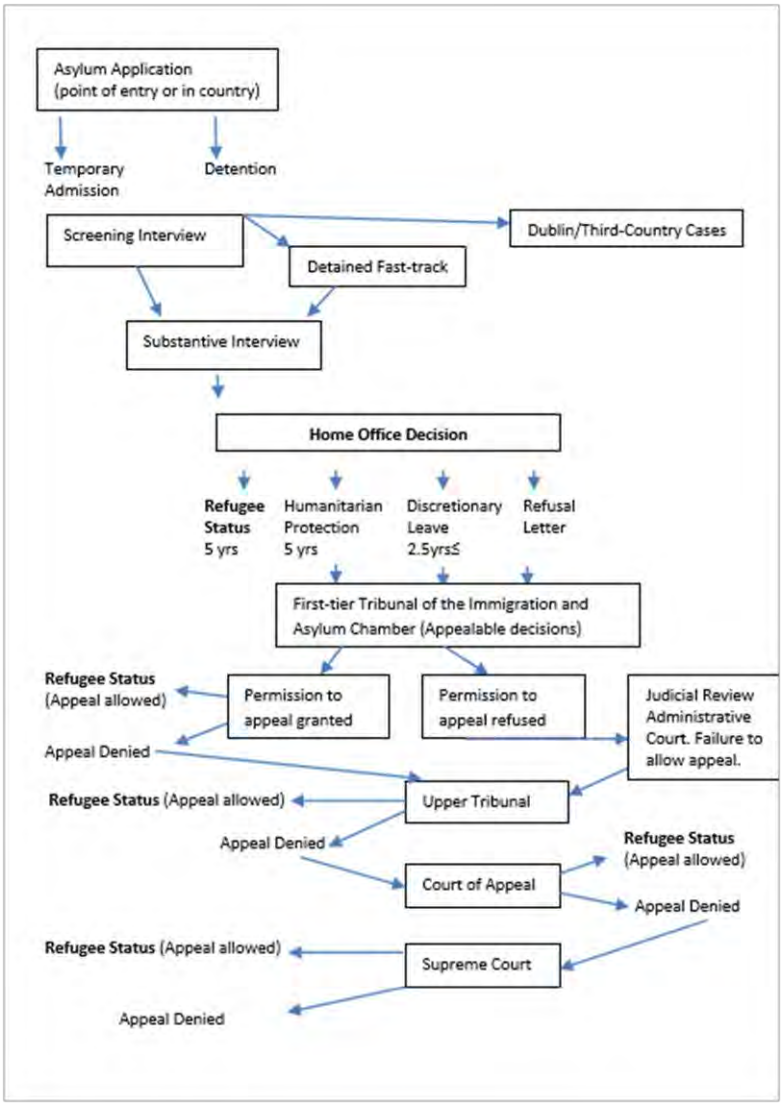
69) Once a fresh claim is submitted to the Home Office, they may be entitled to Section 4 support on human rights grounds. The courts in England and Wales have found that denying support to asylum seekers whose claims are outstanding, and who would face street homelessness, would constitute "inhuman and degrading treatment." This is prohibited under article 3 ECHR.[46] Similarly, separating a family by denying some members support could also breach article 8 ECHR, which protects private and family life.

70) Like asylum seekers, those in receipt of Section 4 support are also entitled to receive support for their dependents. Unlike Section 95, there is no form of subsistence-only support as Section 4 support is provided as a package (an *Azure* card for basic food stuffs, and housing). As they are entitled to housing, they will be dispersed unless they are in receipt of treatment from *Freedom from Torture's* London office or the *Helen Bamber Foundation*. This means that those wishing to

[43] A person is considered destitute if they do not have adequate accomodation or do not have enough money to meet their living expenses for themselves and any dependants.
[44] Asylum Support Appeals Project, "Section 4", available at: http://www.asaproject.org/wp-content/uploads/2013/03/fs2.pdf.
[45] UK Visas and Immigration, "Application for medical declaration: section 4", 21 July 2014, available at: https://www.gov.uk/government/publications/application-for-medical-declaration-section-4.
[46] House of Lords, *Regina v. Secretary of State for the Home Department (Appellant) ex parte Adam (FC) (Respondent) Regina v. Secretary of State for the Home Department (Appellant) ex parte Limbuela (FC) (Respondent) Regina v. Secretary of State for the Home Department (Appellant) ex parte Tesema (FC) (Respondent) (Conjoined Appeals)* [2006] HLR 10, [2006] AC 396, [2007] 1 All ER 951, [2006] HRLR 4, (2006) 9 CCL Rep 30, [2006] 1 AC 396, [2005] 3 WLR 1014, [2005] UKHL 66, paras. 63-4, 79 and 103.

apply for Section 4 support do not have the option of living with friends or family and will be subject to dispersal unless they are receiving treatment.

Diagram: Asylum process



Ending of Section 4

71) Support for refused asylum seekers will come to an end if UKVI consider that they no longer meet the criteria under which support was awarded. This may happen after fresh representations have been refused or where (if there is no fresh application for asylum) the UKVI consider that the person is not doing enough to return to their country of origin.

Asylum Support Appeals

72) Both asylum seekers and refused asylum seekers will have the right to appeal against a decision to either withdraw or refuse Section 95 or Section 4 support. These appeals are heard at the First Tier Tribunal Asylum Support. Legal aid is not available for representation at the Tribunal, unless the matter includes an accommodation issue.

Asylum Support Legislation

73) The main pieces of legislation governing asylum support are the Immigration and Asylum Act (1999) and the Asylum Support Regulations (2000). In addition, UKVI have produced a number of policy bulletins and asylum instructions which cover all aspects of the support system and which set out an interpretation of their duties under the relevant legislation.[47]

Relationship between Asylum Support Advisors and Immigration (Asylum Advisors)

74) It was also recommended that asylum support advisors should consult with asylum solicitors so that contradictory arguments are not made in applications for Section 95 or Section 4 asylum support (made by asylum support legal advisors), and in a claim for asylum (made by immigration law practitioners).

Asylum seekers with disabilities

75) Individuals deemed as being in need of "care and attention" can apply for support from their local authority under Section 21 of the National Assistance Act (1948). This also applies to asylum seekers.[48] An individual will normally be considered as meeting this definition if they require one-to-one help and support to carry out their daily activities, such as washing, cooking, shopping, and going out. The type and level of support they receive will depend on the extent of their physical or mental health challenges. Services provided can include the provision of accommodation, a home help to assist with daily tasks, or adaptations to their homes.

Refused asylum seekers

76) Many refused asylum seekers, who are in need of "care and attention" will be excluded from accessing community care support. This exclusion applies to those who are *failing* to co-operate with formal action taken by UKVI to remove a person from the UK. However, refused asylum seekers who are "in need of care and attention" will not be excluded from community care support if that support is required to avoid a breach of their human rights. This could include refused asylum seekers who have lodged fresh representations with UKVI, based on either an on-going need for protection in the UK or the establishment of family or private life under article 8 ECHR.

[47] UKVI, "Asylum support instructions: policy bulletins", First published: 29 September 2014 and last updated: 23 October 2014, available at: https://www.gov.uk/government/publications/asylum-support-instructions-policy-bulletins.

[48] UK Visas and Immigration, "Asylum seekers with care needs: This instruction provides guidance for asylum support caseworkers, the voluntary sector and local authorities on the handling of applications for support from asylum seekers who may have a need for additional support /care due to age, illness or disability", 18 September 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/356217/Asylum_Seekers_with_care_needs.pdf.

Accessing Support from Social Services

77) To apply for community care support an individual will need to request an assessment from their local authority. This is a complicated area of law so individuals wishing to apply should seek advice from a law firm or an organisation specialising in community care law.

Section 17 of the Children Act (1989)

78) Under Section 17 of the Children Act every local authority has a general duty to promote the welfare of children who may be in need. A child may be considered to be in need if they are homeless, disabled or facing other difficulties which impair their health or development. Services provided can include housing and support and can also be provided to members of the child's family. Asylum seekers are excluded from accessing support under Section 17 if they are entitled to support under Section 95 of the Asylum and Immigration Act (1999).[49]

79) A refused asylum seeker whose children were born after their initial claim for asylum was refused, may be able to access support under Section 17 if they are not entitled to support under Section 4. Support offered by the local authority may be confined to support and assistance whilst the parent prepares to leave the UK, but can be provided for longer if the family has lodged fresh representations that are being considered by the UKVI.[50] Again, this is a complicated area of law and individuals wishing to apply for Section 17 support should seek advice from organisations specialising in this area of law.

Individuals Granted Leave to Remain in the UK

80) There are various forms of leave to remain awarded by UKVI. Many of those granted leave will be entitled to work and can access public funds. However, under Immigration Rules introduced in July 2012, some groups granted Limited Leave to Remain will be barred from accessing public funds (see "No Recourse to Public Funds" rule above (paragraphs 47 and 48)).[51]

Refugee Leave

81) This is awarded following a positive decision from UKVI that the person is a refugee as defined by the Refugee Convention (1951). The person is given 5 years leave to remain and is eligible to apply for Indefinite Leave to Remain (ILR) at the end of 5 years. Changes to refugee law introduced in 2005 mean that the decision is now subject to review which could happen at the end of the five-year leave period or could be triggered by changes in circumstances in the person's home country.

82) Individuals granted refugee status are entitled to work and will have access to public funds (as defined above). They can also access support provided under Section 21 of the National Assistance Act (1948) or under Section 17 of the Children Act (1989), if they meet the eligibility criteria for both forms of support.

[49] Project Seventeen, "Section 17 Factsheet", May 2013, available at: http://www.project17.org.uk/media/7763/s17-Factshet-May-13.pdf.
[50] Coram, Children's Legal Centre, "Seeking Support: a guide to the rights and entitlements of separated children", available at: http://www.seekingsupport.co.uk/.
[51] UK Visas and Immigration, "Family and private life immigration rule changes 9 July 2012", 21 March 2014, available at: https://www.gov.uk/government/collections/family-and-private-life-rule-changes-9-july-2012.

Humanitarian Protection

83) This is normally granted to individuals who are considered as not meeting the definition of a refugee under the Refugee Convention, but where UKVI accept that they would be at risk of harm or persecution should they return to their country of origin (e.g. at risk of female genital mutilation). An individual who falls within this criterion can be awarded 5 years leave to remain. At the end of five years they can apply for ILR at which point UKVI will reassess their case.

84) Individuals granted Humanitarian Protection are entitled to work and will have access to public funds. They can also access support provided under Section 21 of the National Assistance Act (1948) or under Section 17 of the Children's Act (1989), if they meet the eligibility criteria for both forms of support.

Discretionary Leave

85) Individuals who do not meet the criteria for either Refugee Leave or Humanitarian Protection may be awarded Discretionary Leave. This includes individuals who are victims of trafficking, those with a serious medical condition and unaccompanied children (under 18) who cannot be returned to their country of origin due to a lack of adequate reception facilities.

86) The period of leave granted will vary depending on the individual's circumstances. However, changes introduced in 2012 mean that those awarded Discretionary Leave after this date will be granted leave for no more than 30 months (2.5 years) and individuals will be required to complete at least 10 years of Discretionary Leave before being entitled to make an make an application for indefinite leave to remain.

87) Individuals granted Discretionary Leave are entitled to work and will have access to public funds. They can also access support provided under Section 21 of the National Assistance Act (1948) or under Section 17 of the Children's Act (1989), if they meet the eligibility criteria for both forms of support.

Victims of Trafficking

88) Victims of trafficking whose cases are processed under the National Referrals Mechanism (NRM) can access public funds for a year or more if they are formally recognised as being victims of trafficking. To enter the NRM an individual would need to be referred by what are known as "First Responders." Certain chosen organisations are First Responders, including the police; UKVI; the Crown Prosecution Service; local authorities; the NHS and certain specialist groups such as the POPPY Project[52] and Kalayaan.[53]

Time Limited Visas

89) Various groups of migrants enter the UK on time-limited visas. These include visitors, students, workers, spouses and fiancées. Generally, those who enter the UK on a visa will not have a right to access public funds and, when applying for visas, will normally have to show that they are able to support themselves without recourse to public funds for the duration of their visa.

[52] The Poppy Project: http://www.eavesforwomen.org.uk/about-eaves/our-projects/the-poppy-project.
[53] Kalayaan, Justice for Migrant Workers: http://www.kalayaan.org.uk/.

Victims of Domestic Violence

90) Women who entered the UK on a spousal visa who experience domestic violence may be given access to public funds for three months under the Destitute Domestic Violence Concession.[54] During these three months they will need to apply for ILR under the domestic violence rule. Whilst the claim for ILR is being considered they will remain entitled to access public funds until UKVI makes a decision, even if this exceeds three months.

91) This is a specialist area of law and women needing advice should contact an organisation specialising in immigration law.

Over- Stayers

92) Those who remain in the UK after their visas have expired are classed as over-stayers and are subject to being removed. They are not entitled to access public funds but in certain circumstances may be able to apply for support provided under Section 21 of the National Assistance Act (1948) or under Section 17 of the Children's Act (1989).

93) Individuals in this situation should seek advice immediately from an organisation specialising in immigration law.

Impact of Legal Aid Cuts

94) Solicitors are relying more and more on community organisations in the non-profit sector to do much of the work in preparing a case file.

95) Non-governmental organisations (NGOs) are experiencing a significant increase in requests for assistance from service users seeking pre-legal support. In many cases, the requests for assistance outstrip capacity.

96) The non-profit sector may need to come up with innovative ways in which to fill the gap that legal aid cuts have left.

[54] UK Government, "Application for Destitution Domestic Violence (DDV) concession", 2 December 2013, available at: https://www.gov.uk/government/publications/application-for-benefits-for-visa-holder-domestic-violence.

Section 3: Social Exclusion

This session focused on the social impact of asylum support measures and, the issues of transitioning from asylum support benefits to mainstream benefits. The session was led by Indira Karallozi (Chrysallis Family Futures).

Introduction

97) As discussed in session 2, since 2000, asylum seekers have received a parallel system of support, separate from mainstream benefits. This is commonly referred to as "Section 95 support."[55] This support scheme was set up by Part VI of the Immigration and Asylum Act (1999). The Immigration and Asylum Act (1999) provides two support packages – support for those whose asylum claims are ongoing and support for refused asylum seekers.

98) Section 95 support is aimed at asylum seekers whose claims are ongoing, who are destitute or about to become destitute, and their dependents. In 2005, support for refused asylum seekers who met a narrow set of criteria, was put on a legal footing with the introduction of additional regulations under the Immigration and Asylum Act (1999). This support for refused asylum seekers is known as "Section 4 support". Prior to this, Section 4 support was provided on a discretionary basis and had a very low uptake.

99) The purpose of Section 4 support was to address the devastating effects of poverty on asylum seekers, failed asylum seekers and refugees. Asylum seekers in need of "care and attention" may also apply to their local authority for help pursuant to section 21 of the National Assistance Act (1948). Each of these provisions of support were discussed in the previous session (led by Gerry Hickey, and each form of support is subject to an eligibility criteria.

Asylum seekers and Refused asylum seekers

100) Proof of destitution is a prerequisite for support under Section 95 and Section 4. Additionally, Section 4 requires applicants to demonstrate that they are taking all reasonable steps to leave the UK or that it is unreasonable to do so in the circumstances. Local authority support for "care and attention" is only available to asylum seekers who are unable to carry out their day-to-day activities on their own. Each set of conditions is strictly enforced and many asylum seekers and other migrants with legitimate needs are excluded from government support because their circumstances are assessed as outside the scope of current rules. Those without Government support must turn to family members, friends and community groups for sustenance and accommodation.

101) A single adult on asylum support receives just over £36.00 a week in cash support,[56] which on current figures amounts to 52% of the equivalent income support rate for a person on mainstream benefits.[57] When the current system of asylum support was introduced in 1999, recipients were

[55] Home Office "Guidance: Allocating section 95 support", 25 February 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285360/allocating-section95.pdf.

[56] Asylum seekers under 16 receive a much higher rate, similar to that of children in receipt of mainstream benefits (see session 2).

[57] Still Human Still Here coalition, Submission to the Home Affairs Committee, ASY 16, 2013, available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71we-5.htm ("**SHSHc's submission to the Home Affairs Committee**"). The coalition includes the Red Cross, OXFAM, the Children's Society, Citizens Advice Bureau and a host of other civil society groups.

paid 70% of the income support rate.[58] The relative decline in asylum support over the years reflects the Government's failure to increase the cash rate in line with the consumer price index – as it has for mainstream benefits.

102) Civil society groups have argued that the current rates of payment are inadequate to provide for asylum seekers' basic sustenance and should be restored to at least 70% of income support rates.[59] The present cash allowance of £36.00 a week for a single adult equates to roughly £5 a day to spend on food, clothing, transport, toiletries and other essential needs. In 2013, the NGO *Freedom from Torture* undertook a survey relating to Section 95 asylum support. It found that many in receipt of asylum support were seldom or never able to buy nutritious food, hygiene products, cleaning products and adequate clothing.[60]

103) Respondents also mentioned the stress of paying for transport and communication costs associated with attending medical appointments and keeping informed of their asylum claims. With so many competing priorities, respondent had to allocate their funds according to the urgency of their needs, even where it meant forgoing essential items and – instead – paying for transport to be able to attend a medical appointment, or an appointment with a legal advisor on their asylum claim.[61]

104) Those on Section 4 support are no better off; the rate of payment under Section 4 support for a single adult is roughly equal to that available under Section 95 support. Refused asylum seekers in receipt of Section 4 support receive their allowance on an *Azure* card which can be used only at designated shops to purchase a limited range of items. The list of participating shops has been revised over the years, causing confusion for users and shop assistants as to which items may be purchased. There is a £5 carry over limit on the weekly allowance; the remainder must be spent at once. As such, it is very hard to save for expensive items of necessity like shoes and clothes. Refused asylum seekers who took part in the *Freedom from Torture* survey on Section 4 support identified numerous problems with using the *Azure* card, including delays in loading the weekly allowances, incorrect amounts being loaded, and the card not working at the checkout.[62] All of these situations can leave a person without food and other basic goods until the problem is resolved.

Accommodation

105) The Home Office has negotiated contracts with private companies such as G4S and Serco for the provision of accommodation to people entitled to support under Section 95 and Section 4 respectively. The accommodation is supposed to meet particular standards of habitability and safety. However, many tenants have expressed concerns about the living conditions. Complaints typically concern the poor standards of hygiene, broken and inadequate facilities, and lack of security. Persons in shared accommodation have cited overcrowding, as well as the difficulty of sharing close quarters with strangers who are experiencing trauma related to their asylum claim.[63] A combination of these factors makes it very hard for people to feel comfortable and secure in their accommodation.

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[58] Freedom from Torture, "The Poverty Barrier: The Right to Rehabilitation for Survivors of Torture in the UK", July 2013, available at: http://www.freedomfromtorture.org/sites/default/files/documents/Poverty%20report%20FINAL%20a4%20web.pdf, ("**Freedom from Torture Report**"), p. 25.

[59] See SHSHc's submission to the Home Affairs Committee.

[60] Freedom from Torture Report, pp. 27 – 29.

[61] *Ibid*, p. 30.

[62] Freedom from Torture Report, pp. 34 – 35.

[63] Ibid, pp. 42 – 46. See also: John Grayson, "Destitution, intimidation…How Britain shirks its obligations to asylum-seekers", *Open Democracy*, available at: https://www.opendemocracy.net/ourkingdom/john-grayson/destitution-intimidation-how-britain-shirks-its-obligations-to-asylumseekers.

106) Another issue for asylum seekers and refused asylum seekers pursuing public housing options is that they may be relocated at short notice depending on the availability of housing and changes in their asylum status. This would be disruptive for any person, but is especially disruptive for persons who may be reliant on support networks and service providers in a specific area.

107) Those who apply for Government accommodation have no choice where they live. The Government's policy for several years has been to disperse asylum seekers and refused asylum seekers to areas outside of London and the South East of England.[64] Some asylum seekers, including people receiving treatment from *Freedom from Torture*'s London office or the *Helen Bamber Foundation* may be permitted to remain in London or the South East.

108) Dispersed asylum seekers are often accommodated in economically-deprived locations with high unemployment and crime, and inadequate community services.[65] Asylum seekers are sent to areas where animosity towards "foreigners" may be high, and xenophobia on the increase. Further, participants at the conference spoke of asylum seekers and refused asylum seekers being sent to new communities without receiving information regarding the area, and without any referrals to public services. Attendees at the conference felt that the Government should provide a support package – which would include information about their new area of residence – to families dispersed outside of London and the South East, and ensure proper referrals to public services in their new area of residence.

Leave to remain

109) Migrants with permission to stay in the UK, including refugees and individuals granted humanitarian protection, are entitled to work and access mainstream benefits. Income from employment, or mainstream benefits are likely to be more generous than the level of support provided to migrants in the asylum system. This will be a relief to those living on Section 95 or Section 4 support, who have endured the stress and uncertainty of their asylum application. However, the challenges of obtaining a job or moving across to mainstream benefits should not be understated.

110) Despite the desire of many refugees to work, many refugee families are dependent on welfare. An estimated 64% of refugees are unemployed even though around 60% have formal qualifications of some type.[66] Refugees have cited inadequate English language skills, a lack of experience in the UK, delay in receiving their national insurance number, discrimination in the employment market and an unfavourable economic climate as barriers to obtaining work.[67] Many others have pre-existing mental health problems preventing them from looking for work; this can be the case with survivors of torture, for example.

111) Asylum support is cancelled 28 days after leave to remain in the UK is granted. This gives refugees, those with limited leave to enter or humanitarian protection, only a short period of time to transition onto mainstream benefits if they are to avoid gaps in their support. Documentary proof of

[64] See: Home Office, "Dispersal guidelines", policy bulletin (version 8), July 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326896/Policy_Bulletin_31.pdf.

[65] The Open Democracy article "Destitution, intimidation…How Britain shirks its obligations to asylum-seekers", available at: https://www.opendemocracy.net/ourkingdom/john-grayson/destitution-intimidation-how-britain-shirks-its-obligations-to-asylumseekers, quoting a 2005 Home Office report: "The government's policy of dispersing asylum seekers is creating long term 'ghettos' in deprived areas where they are more likely to suffer racial assaults and harassment…The procurement of housing in the poorest areas polarises entrenched views held by the host community against the incomers".

[66] Indira Karallozi, "21st Century London Outcasts: Welfare Reforms and their Impacts on Refugee Families living in London", Centre for Social Justice and Change, Working Paper Series No 1, February 2014 ("**Indira Karallozi's Working Paper**"), p. 8.

[67] Freedom from Torture Report, p. 68.

identity and legal status are required to make an application for benefits such as income support. In this regard, applicants must obtain documents confirming their immigration status and notice of the termination of asylum support from the UK Home Office, as well as proof of a National Insurance number. A failure to provide documents on time can cause delays in the provision of support, regardless of who is at fault. Furthermore, applying for mainstream benefits often involves a multi-stage process of filling out forms and attending interviews – bewildering for anyone new to the welfare system and with limited English language skills.

112) Housing is the other immediate concern for people granted leave to remain. A person who is homeless (they have no reasonable accommodation available to them) may apply for housing from their local authorities pursuant to Part VII of the Housing Act (1996). Besides being homeless, applicants must demonstrate a connection with the local area and a "priority need."[68]

113) Refugees and other persons granted leave to remain can usually rely on the fact that their last Section 95 accommodation was in the municipality to satisfy the "local connection" requirement. A "priority need" might be found to exist where an applicant is pregnant, with dependent children, or vulnerable. Refugee status, by itself, is not enough to establish vulnerability. A person would also need to show that they are a victim of torture or suffering from some other significant disadvantage. Migrants rejected from local housing sometimes complain that their mental health problems were not given sufficient weight in assessing their vulnerability.[69] The decision of the local authority can be judicially reviewed which usually requires the assistance of a legal advisor.

114) Where an unemployed person or low-income earner is able to organise private rental accommodation[70] he or she can apply for housing benefit to pay, or put towards, the rent.[71] However, accessing the private rental market is difficult for those on benefits because private landlords tend to prefer tenants in the workforce. Further, a deposit of one month's rent is usually payable in advance which is a struggle for anyone awaiting determination of their housing benefit application.[72] Alternatively, a person can apply for council housing, but the waiting lists tend to be very long.[73]

115) As has been shown above, the transition from asylum support to mainstream benefits presents a number of challenges. Participants at the meeting expressed concern that people were being left without financial support or accommodation during the transition, exposing them to severe hardships and emotional vulnerability. Participants agreed that when migrants are granted leave to remain, there should be a more efficient transition onto mainstream benefits, avoiding the risks of destitution and severe poverty.

Introduction of the benefits cap

116) In 2012, the UK Government made sweeping reforms to the welfare system as part of its austerity drive. One of the biggest changes was to introduce a benefit cap. This cap imposes a limit on the total amount of benefits that people of working age can claim. The imposition of the cap has

[68] Department of Communities and Local Government, "Homelessness prevention and relief", available at: https://www.gov.uk/government/publications/homelessness-prevention-and-relief-p1e-guidance-and-returns-form; Shelter, "Homelessness: Advice", available at: http://england.shelter.org.uk/get_advice/homelessness.
[69] Freedom from Torture Report, p. 71.
[70] Shelter, "Private Accomodation: Advice", available at: http://england.shelter.org.uk/get_advice/private_renting.
[71] Shelter, "Housing Benefit: Advice", available at: http://england.shelter.org.uk/get_advice/housing_benefit_and_local_housing_allowance.
[72] Shelter, "Tenancy Deposits: Advice", available at: http://england.shelter.org.uk/get_advice/tenancy_deposits.
[73] Shelter, "Council Housing: Advice", available at: http://england.shelter.org.uk/get_advice/social_housing.

caused a substantial decrease in the disposable income of those in receipt of benefits, including refugees and other persons granted leave to remain who receive benefits. In her working paper "*21st Century London Outcasts: Welfare Reforms and their Impacts on Refugee Families living in London*" Indira Karallozi illustrates the impact of these changes on different types of refugee families:

> *Context:* A household of five consisting of an unemployed father, mother and three children, aged 7, 15 and 18 who live in London and pay £345 per week in rent. Before the cap, the family received a total of £630 in weekly benefits. This left a sum of £285 for basic weekly expenses for the family of five (for example, in relation to utilities (energy, water, gas), food, clothes, toiletries, travel, school related expenses (school trips, uniform, lunches, materials)) once the rent was subtracted.
> *Impact of Benefits-Cap:* Their weekly benefits are now capped at £499, leaving only £154 per week for non-rent expenses for the five individuals in the family, or £30.80 each.[74]

According to the Department for Works and Pensions a family of five needs £323.82 per week to survive.[75] Many families are forced out of London, where rents for a three or four bedroom apartment or home regularly surpass this amount.

117) The introduction of the benefit cap coupled with the high cost of living in London has had a detrimental effect on refugee families living in the capital. Larger households in particular, are struggling to find adequate accommodation within the allowable local housing rates.[76] This is expected to cause an increase in homelessness and a movement of refugee families to other parts of the UK where housing is more affordable, but where community support and specialist treatment may be limited. Indeed, there is a risk that refugee families will be forced to move to areas already experiencing high levels of deprivation, where employment prospects are low. Refugee families are by no means solely affected by the benefit cap. Many other lower-socio- economic households have been forced to relocate to disadvantaged areas. Nonetheless, the situation for refugees is particularly concerning because many have psychological treatment needs and other care needs. There is a risk they will be forced to move to places lacking in services and adequate support networks.

Children living in poverty

118) A number of studies have explored the devastating impact of poverty on children's health, education and work prospects. Successive governments have vowed to end the cycle of poverty through a range of measures that promote the wellbeing of disadvantaged children. In this regard, Section 17 of the Children Act (1989) confers a duty on local authorities to safeguard and promote the welfare of children in need. This includes children who are homeless, disabled or suffering any other impairment to their health or development. Some local authorities provide financial support and accommodation to poverty-stricken refugee children and their families; however, participants at the conference felt that local authorities should be doing more, in accordance with their duty, to protect refugee children from harm caused by severe poverty and destitution.

[74] Indira Karallozi's Working Paper, p. 10.
[75] Ibid.
[76] Ibid, pp. 11-12.

Social exclusion

119) Quantitative measures of poverty do not fully convey the social dimensions of living in poverty, including the sense of social exclusion that many asylum seekers and refugees experience.[77] Simple activities like meeting with friends and participating in community events become a challenge if you do not have much money. Those living in poverty may have to decide between food and toiletries, or the cost of a train or bus ticket to visit friends, attend a doctor's appointment, or an appointment with a legal advisor. At the same time, asylum seekers and failed asylum seekers wishing to keep connected with family and friends overseas need funds to pay for telephone and internet charges. Further, where asylum seekers and failed asylum seekers are dispersed to locations outside major cities – where specialist service providers, community centres, temples, mosques and churches cannot easily be found – it compounds their sense of isolation.

120) When disbursed to already disadvantaged locations, asylum seekers and failed asylum seekers may face hostility. They may be seen by receiving communities to be aggravating existing problems such as unemployment, crime and creating pressure on the provision of (already inadequately funded) local services.[78] Another common experience asylum seekers and failed asylum seekers face is racism, fuelled by negative portrayals of migrants in the media. As a result, those with limited English skills and pre-existing mental health issues may also be reluctant to fully immerse themselves in their new surroundings.

Psychological impact of poverty on torture victims

121) Poverty can cause profound feelings of shame, anxiety and vulnerability. Those with pre-existing health problems, including many torture victims, may suffer these feelings to an even greater extent. Every person's experience of torture is different but it tends to produce lasting psychological health problems, the symptoms of which include recurring trauma, flashbacks, panic attacks and constant feelings of unease. This may translate into a loss of trust in other people and an inability to cope with situations in the present. When torture victims find themselves in a state of poverty there is a risk that the experience of poverty will exacerbate these problems. Research suggests that such people are left feeling incapacitated, frustrated and pessimistic about their chances of rehabilitation.[79]

Recommendations

122) In summary, the three recommendations to come out of the session were:
   a) the Government should provide a support package and information to refugee families dispersed outside of London and the South East, and to ensure proper referral to public services in their new areas of residence;
   b) when individuals and families are granted leave to remain, there should be a more efficient transition onto mainstream benefits, avoiding the risk of destitution and severe poverty during the transition; and
   c) social services should ensure that they adhere to their obligations under section 17 of the Children Act (1989) and protect refugee children from harm caused by severe poverty and destitution.

[77] See Freedom from Torture Report, pp. 56-57.
[78] See Open Democracy article above.
[79] See Freedom from Torture Report, pp. 56-57.

Session 4: Data Collection & Strategic Litigation

Hannah Chambers (Solicitor, Migrants' Law Project) led a discussion on the potential of sharing information for the purposes of building evidence for strategic litigation. Hannah pointed out that organisations working directly with individuals are in a good position to identify the recurring problems faced by their clients. It is possible for such organisations to gather evidence about how a client base is generally struggling with a public authority, rather than simply seeing specific cases as individual and isolated problems.

123) Clearly there are many reasons to collect data, such as campaigning and policy work. However, it is useful to think about judicial review, and have public law principles in mind as part of the consideration when collecting information, as this can open up the possibility of using litigation as an additional option to resolve ongoing problems.

124) When public authorities are failing individuals, it is possible to bring actions against them. Where a public body – such as the Home Office or Local authority – makes a decision that affects an individual, if that decision is made on a wrong understanding of the law or facts or is made through a process that is unfair or biased, the person affected by that decision can take action to challenge that decision in a variety of ways. Examples of how s/he can do so are by:
    a. appealing against that decision (if there is a right of appeal);
    b. pursuing a complaint; or
    c. making a claim for judicial review.[80]

125) Public law also regulates the conduct of Tribunals and lower courts such as the First Tier Tribunal (Immigration and Asylum Chamber), Social Entitlement Chamber – Asylum Support; and the Upper Tribunal (Immigration and Asylum). Traditionally courts in the UK have focussed on resolving difficulties with the way that public authorities are acting by looking into the circumstances of individual cases. However, with the dramatic cuts to legal aid, there are real difficulties in individuals getting their cases before the courts at all.

126) Organisations may in some cases be able to bring public interest legal challenges in their own right, instead of relying on individuals to bring their case before the courts. In such cases, organisations may be able to put forward their experience of the behaviour of a public authority to provide wider evidence which can be useful to an individual's case.

Public law considerations[81]

Acting within its powers

127) A public body must have the power to make the decision that it makes otherwise it will be acting unlawfully. For example a High Court judge held that the UK Home Office's policy to give little or no notice of removal to some classes of people was unlawful because it did not give those people

[80] Leigh Day, "Judicial Review: A Quick and Easy Guide", available at: http://www.leighday.co.uk/LeighDay/media/LeighDay/documents/JR-Quicky-and-Easy-Guide.pdf; Public Law Project, "A brief guide to the grounds for judicial review", available at: http://www.publiclawproject.org.uk/data/resources/113/PLP_2006_Guide_Grounds_JR.pdf. Deighton Pierce Glynn, "Judicial Review: Procedure Guide", available at: http://www.deightonpierceglynn.co.uk/resources/pdf/Judicial_Review_Procedure.pdf.

[81] For an overview of public law issues, see: Migrants' Law Project, "What is Public Law?", available at: http://themigrantslawproject.org/resources/what-is-public-law/.

a reasonable chance to challenge that decision in court.[82] Therefore the Home Secretary was acting outside her powers in having such a policy.

Acting in a reasonable manner

128) A public body must properly understand the law and apply it correctly in a particular case. It should consider each case on its own merit and must not adopt inflexible blanket policies – see for example the decision of the Supreme Court in *Lumba and Mighty* which held that the blanket policy of detention of foreign nationals liable to deportation adopted in the wake of the "foreign national prisoners' crisis" was unlawful because it allowed for no exceptions.[83]

Acting fairly

129) A public body must allow persons to put forward their cases fully – for example, by allowing them a reasonable time to produce documents. If the public body has information that is relevant to its decision, it should disclose it to the persons concerned and give them the opportunity to explain or deal with it before a decision is made, especially if the material could lead to an unfavourable decision for the persons concerned.

Proper reasons and consultation

130) A public body must give full and proper reasons for its decision so that the person affected can know the basis on which the decision has been taken. Where a decision is going to impact on an organisation then as part of the process of taking a fair decision, the public body may well have a duty to consult with the organisation concerned. If so, it has to provide a reasonable period of time for consultation and take into account the result of that consultation when making its decision.

131) The extent of these duties to act fairly may depend on the importance of the issue. For example, the courts have consistently held that asylum applications involve decisions of the highest importance and that only the highest standards of fairness will suffice.

The Human Rights Act

132) The Human Rights Act 1998 which came into effect on 2 October 2000 requires public authorities to act in a way that is compatible with the ECHR as far as it is possible for them to do so.

European law

133) There are two branches of European law that are relevant to the decisions of public bodies:
    a) European Union law: this is enforceable directly in domestic courts. Domestic courts can also make a "reference" to the Court of Justice of the European Union in Luxembourg if the law is unclear. This European law in the area of immigration and asylum cases takes precedence over English law. Examples are the rights of European workers, and refugee law related issues; and
    b) The ECHR which is enforceable in the European Court of Human Rights in Strasbourg and through the Human Rights Act.

[82] *Medical Justice, R (on the application of) v Secretary of State for the Home Department (Rev 1*) [2010] EWHC 1925 (Admin) (26 July 2010), [2010] EWHC 1925 (Admin).

[83] *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12 (23 March 2011) [2011] UKSC 12, [2012] 1 AC 245, [2011] 4 All ER 1, [2011] UKHRR 437, [2012] AC 245, [2011] 2 WLR 671.

Maladministration

134) Maladministration occurs when a public body acts in a way as a result of, for example: bias, neglect, delay, incompetence, ineptitude, turpitude, arbitrariness. A delay in taking action (for example, delaying making a decision), losing documents, making misleading and inaccurate statements are all examples of maladministration.

135) Many of the principles set out in respect of public law overlap, or are closely related to maladministration.

Data Collection and Dissemination and Public Law

There are some obvious public law principles where data collection can be very useful:

- delays in the provision of services or access to gateways to services (maladministration);
- letters giving an inadequate or unintelligible reason for a decision; and
- not informing people of decisions in time of their right to access a review of a decision.

How to Work Towards a Public Law Action

136) The key issue when working towards a public law action is to identify the recurrent problem as this will help to think about the evidence that is needed. The information needed will vary according to the problem with the public authority. Some examples of data collection which have been central to successful litigation are:

Age dispute cases in immigration detention

Background: Children who are in the UK without a parent or other guardian should not be put into immigration detention. However, the issue of age has become complex. The Home Office (and social services departments) have put into place age dispute procedures. These policies enable people claiming to be children to be treated as adults. In 2005 the Home Office had a policy that allowed immigration officers a very wide discretion to dispute age and subject an individual to detention. In these cases the Home Office would refer the person to the Refugee Council and they in turn would contact the local social services department. Social workers would then visit the individual in detention and conduct a detailed age assessment and make a new decision on age. There were many legal arguments which were used to support the contention that the Home Office's policy was unlawful. It was explained that other public authorities had much more careful procedures for disputing age and it was inappropriate for the Home Office's policy to be loosely worded when the consequences of the wrong decision had serious safeguarding issues and some children were being detained with adults.

The evidence which caused the Home Office to change its policy came about from the Refugee Council following up all age dispute cases in immigration detention. The Refugee Council's evidence was that immigration officers were making the wrong decision in the majority of cases.[84] The legal arguments became secondary as it was clear that a policy which allowed that level of incorrect decision making was untenable.[85]

[84] Refugee Council, "Not a Minor Offence: unaccompanied children locked up as part of the asylum system", May 2012, available at: http://www.refugeecouncil.org.uk/assets/0002/5945/Not_a_minor_offence_2012.pdf.
[85] *R (on the application of Y) Claimant v. The London Borough of Hillingdon*, [2011] EWHC 1477 (Admin)

Immigration detention of torture survivors and other vulnerable persons

Home Office policy has been that people who are torture survivors or whose detention at an immigration removal centre would be "injurious" to their health should not be subject to immigration detention unless the case has very exceptional circumstances.[86] However, the Home Office requires some "independent evidence" of the history of experience of torture.

Detention centres have nurses and doctors who are supposed to assess detainees when they are inducted into detention and to identity those who may have been subject to torture or who otherwise should not be in detention. This system has functioned poorly over many years with a number of NGOs raising concerns about large numbers of vulnerable people who have been subject to detention in contravention of policy.

However it was evidence collated by the *Helen Bamber Foundation* and *Freedom from Torture* of the numbers of people they accepted as meeting their referral criteria – as torture survivors – who had not been identified as such in detention, which caused the High Court (England and Wales) to hold that the system of review by clinicians in detention was "ineffective."[87]

Detained Fast Track

The High Court has recently found that the detained fast track programme, to determine asylum claims within two weeks, has been operating unlawfully.[88]

A number of organisations contributed evidence about the system. These included legal advisors who provided practical examples of the way the system hindered them in effectively representing their clients. Case studies of clients who were detained against Home Office policy were also supplied.

Collecting Data

137) It was recommended that, when collecting data, it is important to:

- At the outset, analyse the problem and work out the minimum information needed and the easiest method for collecting it. It is sensible to think about speaking to a legal advisor at an early stage if the issue is recurring and something the organisation is very worried about. Consulting with a solicitor at an early stage will provide a legal perspective on issues of stakeholder engagement and advocacy with a public authority. Solicitors may also provide advice on the type of data collection that will be useful.
- Consider issues of confidentiality and consent needed from any individual at the outset of the process. Trying to obtain consent later may not be possible or may be onerous.
- If data collection is completed in the context of working with an individual then try to build in data collection at a time when it is easy for the person working with the individual to briefly log the information rather than requiring this to be an additional onerous task.
- Ensure that the data is being collected carefully. Material which is presented to a court needs to be credible and it is important to be clear about the limits of the information.
- Be careful about what conclusions can be drawn from the information and that you are not overstating the evidence.

[86] UK Border Agency (UKBA), 'Enforcement Instructions and Guidance', ('**EIG**'); 55.1.1; 55.1.3

[87] *EO & Ors, R (on the application of) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin) (17 May 2013) [2013] EWHC 1236 (Admin), [2013] WLR(D) 190 ('**EO & Ors v SSHD**'); *Detention Action v SSHD* [2014] EWHC 2245 (Admin) (09 July 2014) ('**Detention Action V SSHD (High Court)**'), paras. 150 and 200.

[88] *Detention Action V SSHD* (High Court).

Case Studies

138) In addition to collecting statistics, it can be compelling to summarise the facts of individual cases. Personal stories can be very moving, particularly for the purposes of advocacy. This type of data collection can be very useful but needs early consideration of issues of confidentiality.

Writing to Public Authorities

139) If there is a recurrent problem then it would be sensible to raise this with the public authority in correspondence. This would mean keeping a careful record of all letters and telephone calls on the issue. It may also be worth asking whether the public authority is already monitoring the way it exercises its powers.

Collective Data Collection and Dissemination of Data

140) Where the problem is widespread and affects an entire sector (such as legal aid cuts) then there is a greater role for organisations to work together on data collection. Organisations may wish to share the following information:

- the way that access to legal aid has been compromised in order to devise what data can be collated;
- difficulties with referring clients to access legal advice (such as the number of calls before a law firm or organisation accepts a referral, the number of law firms or organisations unable to take cases on);
- case studies of vulnerable clients unable to access advice (differentiating between cases inside and outside scope) and difficulties caused by not accessing timely advice;
- recording clients who act as litigants in person and the outcome of their cases;
- recording examples of individuals provided with inadequate or negligent legal advice as a consequence of not being able to access publicly funded representation and so seeking privately funded advice or advice from those who are not legally qualified.

141) Such information is often shared on the Refugees Lawyers Group (Google group). However, this Google group tends to cover disparate issues and gives emphasis to legal practitioners operating in the field of immigration law generally.

142) It is important for NGOs to work together by sharing information on matters of common concern. Further thought could also be given to the ways in which NGOs and lawyers could work together to be aware of what legal challenges are being bought or planned so that NGOS can contribute effectively to litigious processes, and know which law firm or organisation to provide case studies, statistics or information to.

Session 5: Challenging Unlawful Immigration Detention

Fred Pigott (Wilsons LLP) led a session on challenging unlawful immigration detention.

143) Austerity measures and continuing high unemployment have fostered an environment in which some segments of the media propagate the view that "foreigners" are to blame. It is in this context that the UK Government's use of immigration detention has starkly increased. REDRESS and a number of other NGOs working with asylum seekers are concerned that the Government uses immigration detention in a disproportionately frequent manner. Detention is not a justifiable anti-immigration strategy and should be used sparingly, if at all, outside the penal context. Government directives affirm this,[89] but, in practice, the Home Office has significantly increased its use of immigration detention.[90]

144) In 1993, there was space to hold 250 such persons in detention at any one time; now there is space for 3,275.[91] At the same time, applications for asylum have fallen from 84,132 (in 2002) to 23,479 (year ending June 2014).[92] In comparison to any other European country, the UK detains asylum seekers in a disproportionately high manner.[93] In 2013, the UK received 23,507 new applications for asylum roughly half of whom experienced detention at some point in the asylum process. At the same time, Sweden received 54,300 applications and detained 2,550 asylum seekers.[94] The detention of an individual is also expensive in contrast to other policies (such as bail, reporting, sureties) that protect liberty and are cheaper to implement.

145) In the UK, there is no statutory time limit on how long someone can be detained in immigration detention. The UN Working Group on Arbitrary Detention and the UN Committee against Torture have recommended that the UK impose time limits and take all necessary steps to prevent *de facto* indefinite detention.[95] Indefinite detention is contrary to international human rights law. The European Returns Directive[96] limits immigration detention to six months to achieve removal, extendable by a further twelve months if necessary. The UK has opted out of this Directive.[97]

146) In contrast to the UK, other European countries have set an upper time limit on immigration detention. For example, the upper limit on immigration detention is 45 days in France;[98] 60 days in

[89] **EIG**; 55.1.1; 55.1.3.
[90] Home Office, "Immigration statistical summary 1999-2008"; 5 January 2011, p. 2.1a; and Home Office, "Immigration Statistics October – December 2012", 28 February 2013.
[91] Marchu Girma, Sophie Radice, Natasha Tsangarides, and Natasha Walter, "Detained. Women asylum seekers locked up in the UK", Women for Refugee Women, January 2014, available at: http://refugeewomen.com/wp-content/uploads/2014/01/WRWDetained.pdf, p.7.
[92] Home Office, "Immigration statistics April – June 2014", 29 August 2014, available at: https://www.gov.uk/government/collections/migration-statistics.
[93] Laura Padoan, "UNHCR concerned over UK's use of detention in asylum process", UNHCR, 23 February 2012.
[94] UNHCR, "The Facts: Asylum in the UK", available at: http://www.unhcr.org.uk/about-us/the-uk-and-asylum.html. 2014; Asylum Information Database, "Asylum in Europe: key Asylum Indicators 16 Countries", available at: http://www.asylumineurope.org/comparator.
[95] UN WGAD, "Human Rights of all Persons subjected to any form of Detention or Imprisonment", E/CN.4/1998/44, 19 December 1997, p. 11, para 33(b); UNCAT, Concluding observations on the UK's 5th review, (6-31 May 2013), CAT/C/GBR/CO/5UN ('**UNCAT, Concluding Observations**'), 27 May 2013, para. 30.
[96] EU Returns Directive 2008/115/EC (European Parliament and of the Council), 16 December 2008, ('**EU Returns Directive**').
[97] *Ibid*.
[98] L'administration française, 'Rétention administrative d'un étranger en instance d'éloignement', 11 February 2013.

Spain;[99] 1.5 months in the Netherlands; 6 months in Italy; and 18 months in Germany and Greece.[100] Home Office policy is that: "It is not an effective use of detention space to detain people for lengthy periods."[101] During 2013, of the people who were left in detention, 988 had been detained for between two and four months; 199 for between one and two years; and 50 for two years or longer.[102] In 2012, HM Inspectorate of Prisons ("HMIP") and the Independent Chief Inspector of Borders and Immigration ("ICBI") reported that a person had been held for nearly five years after spending almost eight months in prison for burglary.[103] Some immigration detainees are being held in prisons after having served a criminal sentence (rather than being transferred to Immigration Removal Centres),[104] which is only very exceptionally appropriate.[105]

147) In addition, contrary to the UK's own rules,[106] there remain too many vulnerable individuals being unlawfully detained in immigration detention, including: victims of trafficking,[107] torture, rape and domestic violence[108] and those with serious mental health and learning difficulties.[109] Detention systematically deteriorates the physical and mental condition of nearly everyone who experiences it and prolonged detention deepens the severity of these symptoms, which are already noticeable in the first weeks of detention.[110]

148) Those who have suffered torture in the past are disproportionately adversely affected by detention.[111] Detaining vulnerable individuals may amount to torture.[112] As recognised by the High Court (England & Wales), there is a "disturbing" lack of compliance by the Home Office with its own guidelines which are supposed to prevent the detention of vulnerable individuals outside exceptional circumstances.[113] Upon healthcare staff identifying an individual as vulnerable, files are sent to immigration caseworkers who invariably decide that the individual should, nonetheless, be detained, even where there is independent evidence of torture (the "Rule 35 report").[114] HMIP and ICIB have previously criticised the poor quality of the health-care assessment reports and the formulaic, resistant nature of the response from immigration caseworkers, as well as their tardiness.[115]

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[99] Spanish Immigration Act 2009, art 62.2 (Prepared under the Organic Law 2/2009).
[100] HMIP, ICBI, "Immigration detention casework: A joint thematic review by HMIP and ICBI", December 2012, ('**HMIP, ICBI, 'Joint Thematic Review', December 2012**'), para. 2.7.
[101] EIG 55.1.3.
[102] Home Office, 'Immigration statistics October – December 2013', 27 February 2014.
[103] HMIP, ICBI, 'Joint Thematic Review', December 2012, para 2.15.
[104] Hansard: HC Deb, 12 December 2013, c319W, approximately 25% of all immigration detainees in the UK are held in prisons.
[105] HMIP, "Report on an announced inspection of HMP Wandsworth 13-17 May 2013, 10-14 June 2013", available at: http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/wandsworth/wandsworth-2013.pdf.
[106] Detention Service Orders and Asylum Instructions, DSO 17/2012; *EO & Ors v SSHD* (High Court).
[107] *Detention Action v SSHD* (High Court), paras. 116-138, paras. 150-1.
[108] *Ibid.,* paras. 139-146.
[109] *Ibid.,* paras. 154-8.
[110] UN HRCouncil, Report of the Special Rapporteur on the human rights of migrants, 2 April 2012, A/HRC/20/24 ('**SR Migrants 2012**'), para. 48.
[111] Mr Justice Burnett, *R (on the application of EO, RA, CE, OE and RAN)* [2013] EWHC 1236 (Admin)
[112] [UN HRC], *Mr. C. v. Australia*, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002); SR Migrants 2012, para. 44; [UNCAT] *A v The Netherlands*, CAT/C/22/124/1998, 12 May 1999, paras. 6.3 and 9; [ECtHR] *Price v United Kingdom* (2002), app. no. 33394/96, 10 July 2001, paras. 29-30; [IACmHR] (2010), 'Report on Immigration in the United States: Detention and Due Process', OEA/Ser.L/V/II., Doc. 78/10, 30 December 2010, para. 69.
[113] *EO & Ors v SSHD,* para. 3.
[114] Medical Justice, "The Second Torture: the immigration detention of torture survivors", 22 May 2012, chapter 4, ('**Medical Justice: Second Torture 2012**'); See also, *Detention Action v SSHD* (High Court), paras. 133-4 and para. 129.
[115] HMIP, ICBI, 'Joint Thematic Review', December 2012; and HMIP Report on an unannounced full follow-up inspection of Harmondsworth IRC (14 - 25 November 2011), para H.23 p.13.

149) When the government detains vulnerable individuals it may be subjecting them to treatment incompatible with the prohibition of torture and ill-treatment. The High Court (England & Wales) has found that – on at least four occasions – mentally ill individuals have been unlawfully detained and their detention amounted to violations of article 3 ECHR.[116] In May 2013, the UN Committee against Torture, in its review of the UK's law and practice, recommended that the UK have a blanket ban on detaining those suffering from serious medical conditions or serious mental-illness, rather than allow for the detention of such individuals where officials believe conditions can "be managed in detention."[117]

150) Fred Piggott outlined the ways in which it would be possible to challenge the detention of an individual.

Detention

151) Individuals detained under immigration powers may be detained in an Immigration Removal Centre or short-term holding facility, or if they are a foreign national ex-offender who has completed their custodial sentence they may continue to be detained in prison. Individuals are most at risk of detention when:

a. they enter the UK;
b. apply for asylum or another kind of leave having already entered the UK;
c. after an application for leave (including asylum) is refused and they have no further appeals available. They may have received a letter from the Home Office saying they are "appeals rights exhausted";
d. at a reporting/signing event (it is common for someone at risk of detention to be detained when they go for their regular reporting/signing in, but people are also collected from their homes and even at their children's schools).

Temporary Admission, CIO bail and Bail

152) If an individual has been detained, they can apply to their Home Office caseworker for temporary admission to the UK (also called temporary release). Detained individuals can also apply to the Chief Immigration Officer (CIO), via the detention centre they are in, for CIO bail. This is different from ordinary or tribunal bail, which is determined by an immigration judge. CIO bail usually requires sureties to offer at least £5,000, and so is not often granted.

153) If applications for temporary admission and CIO bail are refused, it is possible to apply for tribunal bail. This will be heard at a bail hearing, in front of an immigration judge. It is possible for individuals to apply for bail if they have been in the UK for 7 days or more.[118] If an individual cannot find a lawyer to help them with their application for bail they can apply for bail themselves. *Bail for Immigration Detainees* (BID) has produced a handbook which provides advice on applying for bail.[119] A judge determining a bail application will do so looking at the reasonableness of their ordering a detainee's release, largely on the judge's view of the detainee absconding and the risk of re-offending.[120] The main conditions of release will be: a specified address; sureties; and a

[116] *S, R (on the application of) v SSHD* [2011] EWHC 2120 (Admin) (05 August 2011; *BA, R (on the application of) v SSHD* [2011] EWHC 2748 (Admin) (26 October 2011); *HA (Nigeria), R (on the application of) v SSHD* (Rev 1) [2012] EWHC 979 (Admin) (17 April 2012); *MD, R (On the Application Of) v Secretary of State for the Home Department* [2014] EWHC 2249 (Admin) (08 July 2014).
[117] UNCAT, Concluding observations, 27 May 2013, para. 30.
[118] Immigration Act (1971), para. 22(1B) of Schedule 2.
[119] Bail for Immigration Detainees, "Bail: Handbook", available at: http://www.biduk.org/download.php?id=203.
[120] Bail guidance issued to the judiciary: http://www.judiciary.gov.uk/wp-content/uploads/2014/07/bail-guidance-immigration-judges.pdf

requirement to report regularly at a police station or reporting centre. Sometimes people are released on condition of being fitted with an electronic tagging device.

154) As a result of changes brought into force from July 2014 through the Immigration Act 2014, if an application for bail has been refused by the First-tier Tribunal, the Tribunal will automatically refuse any further applications for bail made within 28 days of the last refusal – unless the individual applying can demonstrate there has been a material change in their circumstances.

155) Successful temporary admission and bail applications will include a requirement to live at a particular address on release. It is often difficult for migrants to provide such an address. If an individual is not able to do so, and is applying for bail, he or she can apply for what is known as Section 4 support accommodation as a bail address.[121] Section 4 support accommodation is usually provided to failed or refused asylum seekers who have no leave to remain in the UK and no ongoing legal case, but for whom there is a particular reason why they cannot leave the UK. Section 4 support accommodation is also used as emergency bail accommodation for people released from detention (whether the individual is an asylum-seeker or not) and does not necessarily mean they are entitled to Section 4 support itself.

156) A surety is someone who promises a sum of money guaranteeing the person applying for bail will keep to the bail conditions. If the detainee does not keep to the conditions, the surety is liable to lose the money they have assured.

157) In England and Wales, usually no money is handed over when someone agrees to be a surety, but if bail conditions are broken the money will be taken from their bank account. In Scotland, money is deposited if bail is granted, and it is reimbursed if the bail conditions are kept. The surety amount may be significant – it can be thousands of pounds. If the surety has a high income, it may be even higher. It is supposed to be an amount which would be difficult to lose. The bail application form has space for two sureties though there is no requirement to provide two sureties. The surety will need to attend the bail hearing and provide a form of identification, proof of address, occupation, financial status and immigration status. A criminal record check and immigration record check can be undertaken of all people who act as sureties. A person does not need to be a British citizen to act as a surety. The best sureties are close friends or colleagues, who know the detainee well. Local support or visitors' groups may offer advice in this regard.

158) There are often problems with bail hearings such as procedural irregularities, lack of legal representation and interpretation problems. Refusals are not appealable. The *Bail Observation Project (BOP)* was set up to monitor these. BOP has issued two reports on immigration bail hearings which detail the problems and call for improvements.[122]

Unlawful Detention

159) The Home Secretary has power to detain a person pending deportation under Schedule 3 of the Immigration Act 1971. However, this power is not unrestricted.[123]

a) the Secretary of State must **intend to deport** the person or **decide their asylum claim expeditiously** and can only use the power to detain for these purposes;

[121] Immigration and Asylum Act (1999), Section 4.
[122] BOP, reports, available here: http://closecampsfield.wordpress.com/bail-observation-project/.
[123] *Frances, R (on the application of) v Secretary of State for the Home Department & Anor* [2014] EWCA Civ 718, 23 May 2014, para. 45.

b) the deportee may only be detained for a **period that is reasonable** in all the circumstances;
c) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State **will not be able to effect deportation** within that reasonable period, s/he should not seek to exercise the power of detention;
d) the Secretary of State should act with **reasonable diligence and expedition to effect removal**.[124]

Failure to comply with the above principles may lead to a finding that the power to detain never existed, or was unlawfully applied and that detention is therefore unlawful.[125] The statutory powers to detain are framed in fairly broad terms, and the rule of law has been said to require a greater degree of certainity in the conditions for its exercise than provided for by statute.[126]

160) To provide that greater certainty, the Secretary of State is required to, and does, publish policy detailing the circumstances in which she will exercise the statutory power. The relevant policy is set out in the Chapter 55 of the Enforcement Instructions and Guidance.

161) While the Secretary of State's policy is not statute, the duty to follow published policy is a well established public law requirement, as are the requirements that she exercise her power: in a way that is in accordance with the relevant legislation; for the purpose it was granted; reasonably; rationally; in accordance with published policy; having regard to relevant considerations, and without having regard to irrelevant considerations; and in accordance with principles of natural justice.[127] Material failures to exercise the power to detain in accordance with public law principles, including in accordance with published policy may give rise to a cause of action in false imprisonment.[128]

Failure to Undertake Detention Reviews and Unlawful Detention

162) Under section 55.8 of the Home Offices' "Enforcement Instructions and Guidance," the Home Office is under an obligation to undertake regular reviews of detained persons' detention.[129] The relationship of the review to the exercise of the authority to detain an individual is very close. They go hand-in-hand. If the system works as it should, authorisation for continued detention is to be found in the decision taken at each review. The form used to undertake a "Monthly Progress Report" of detainees (Form IS 151F) often concludes with the words "Authority to maintain detention given."[130] The failure to conduct a meaningful review – as outlined under the section 55.8 of the Home Offices' "Enforcement Instructions and Guidance" – may result in a finding of unlawful detention.

> 55.8 Detention Reviews
> […] In all cases of persons detained solely under the Immigration Act powers, continued detention must as a minimum be reviewed at the points specified in the appropriate table below. At each review, robust, and formally documented consideration should be given to the removabillity of the detainee. Furthermore, robust and formally documented consideration should be given to all other information relevant to the decision to detain….Detention reviews

[124] *R v Governor of Durham Prison Ex p Hardial Singh* [1984] 1 WLR 904, para. 706D; and *R(I) v SSHD* [2002] EWCA Civ 888, para. 46.
[125] *Lumba and Mighty v Secretary of State for the Home Department* [2011] UKSC 12, 23 March 2011, para 188.
[126] Ibid., see also para. 190.
[127] *Anisminic v Foreign and Compensation Commission* [1969] 2 A.C. 146; *Racal Communications Ltd* [1981] AC 374, para 383, [1980] ALL ER 638, HL; *R v. Deputy Gorvernor of Parkhurst Prison, ex p. Hague* [1992] 1 A.C. 58, para. 162C-D.
[128] *Lumba and Mighty v Secretary of State for the Home Department* [2011] UKSC 12, 23 March 2011, paras 68 and 188.
[129] EIG, 55.8.
[130] *Shepherd Masimba Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23, 25 May 2011, para. 52.

are necessary in all cases to ensure that detention remains lawful and in line with stated detention policy at all times.

Table 1, below, sets out the minimum requirements in respect of the specific stages and levels at which reviews ust be conducted.

Table 1: Review of detention (non-criminal casework/non-third counry unit (TCU cases)

Period in detention	Authorised by
24 hours	Inspector / SEO
7 days	CIO/HEO
14 days	Inspector/SEO
21 days	CIO/HEO
28 days	Inspector/SEO
2 months	Inspector/SEO
3 months	Inspector/SEO
4 months	Inspector/SEO
5 months	Inspector/SEO
6 months	Assistant Director
7 months	Assistant Director
8 months	Assistant Director
9 months	Deputy Director
10 months	Deputy Director
11 months	Deputy Director
12 months and monthly thereafter	Director

Detention of Vulnerable Individuals and Unlawful Detention

163) Rules 34 and 35 of the Detention Centre Rules[131] and section 55.10 of the Homes Office's Enforcement Instructions and Guidance outline the policies relating to persons considered unsuitable for detention. Section 55.10 of the Home Office's Enforcement Instructions and Guidance states that vulnerable individuals must not be detained other than in very exceptional circumstances. The categories of vulnerable detainees are identified as:[132]

a) Unaccompanied children and young persons under the age of 18;
b) The elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;
c) Pregnant women, unless there is the clear prospect of early removal;
d) Those suffering from serious medical conditions which cannot be satisfactorily managed within detention;
e) Those suffering from serious mental illness which cannot be satisfactorily managed within detention. In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;
f) Those where there is independent evidence that they have been tortured;
g) People with serious disabilities which cannot be satisfactorily managed within detention; and
h) Persons identified by the competent authorities as victims of trafficking.

[131] Detention Centre Rules (2001), Statutory Instrument 2001 No. 238, Rules 34 and 35.
[132] EIG 55.10 states that the listed persons are "normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons".

If a decision is made to detain a person in any of these categories, the Home Office caseworker must set out the very exceptional circumstances for doing so on file.

164) The High Court (England & Wales) has recently found that a failure to conduct a medical examination of a detainee within 24 hours of their arrival within an Immigration Removal Centre, for the purposes of assessing whether or not they are a vulnerable individual, will amount to a material breach of policy, rendering detention unlawful.[133]

Longest periods of detention

165) As at 30 September 2014, National Statistics showed that 3,378 people are currently detained solely under Immigration Act powers (not under criminal law powers) in immigration removal centres, short term holding facilities and pre-departure accommodation. Those held for the longest periods were all male. The 20 longest recorded lengths of detention were as follows:

1. 1,701 Days - 4.6 years
2. 1,607 Days - 4.4 years
3. 1,265 Days - 3.4 years
4. 1,118 Days - 3 years
5. 1,091 Days - 2.9 years
6. 1,085 Days - 2.8 years
7. 1,014 Days - 2.7 years
8. 983 Days - 2.6 years
9. 966 Days - 2.6 years
10. 939 Days - 2.5 years
11. 903 Days - 2.4 years
12. 865 Days - 2.3 years
13. 802 Days - 2.1 years
14. 791 Days - 2.1 years
15. 777 Days - 2.1 years
16. 769 Days - 2.1 years
17. 742 Days - 2 years
18. 739 Days - 2 years
19. 728 Days - 1.9 years
20. 722 Days - 1.9 years[134]

Detained Fast Track Programme

166) In addition to regular immigration detention, the UK hosts a Detained Fast Track programme (DFT). Since the conference, and prior to the publication of this report, on 16 December 2014, the Court of Appeal (England and Wales) found that asylum seekers not at risk of absconding cannot be lawfully detained in the DFT.[135] In July 2014, the High Court (England and Wales) had found that the DFT was unfair, particularly to torture survivors.[136] As a result, the DFT programme is currently undergoing review.

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[133] *EO & Ors*. [2013] EWHC 1236 Admin, paras 51-3.
[134] Immigration statistics, July to September 2014, available at: https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2014/immigration-statistics-july-to-september-2014.
[135] *Detention Action v Secretary of State for the Home Department* [2014] EWCA Civ 1634 (Admin) (16 December 2014)
[136] *Detention Action v SSHD* (High Court)

Background

167) Detained fast track procedures were introduced in the UK from around 2000. Under the policy, where the Home Office deemed a case to be one capable of a quick resolution, the applicant for asylum or international protection could be held in detention until a decision was made. In 2003, this was extended beyond the initial decision to include any subsequent appeal process connected with the claim. Until 2008, selection for the fast track procedure was largely based on the country of origin of the applicant. However, this has since been replaced with a presumption that the vast majority of claims will be eligible for fast track. There are explicit exclusions only for those deemed to be particularly vulnerable; namely, pregnant women, the mentally ill, families with young children, and victims of torture. The test remains whether or not the Home Office believes that a quick decision can be made in the case.

168) The procedure begins with an initial screening of each applicant. Decisions as to which track s/he will encounter are made at this stage. The initial screening is based on a series of basic factual questions, rather than an examination of the substance of each individual claim. This is followed by a substantive interview, after which an initial decision is made. Where the application is refused, it can be appealed to the First-Tier and Upper Tribunal.

Compensation

169) If a period of detention has been found to be unlawful by the High Court (if the Secretary of State has not followed her policy on reasonable length of detention, reviews, or vulnerable detainees for example) the individual concerned may be able to seek financial compensation (damages).

170) Between 2011 and 2012, the Secretary of State paid out approximately £4.5 million in damages on unlawful detention claims. This increased to £5.0 million in 2012-13 and dropped slightly to £4.8 million in 2013-14.

Session 6: Removals

This session was led by Nigel Leskin (Partner, Birnberg Pearce and Partners).

171) Individuals are at risk of removal from the UK, if:

a) they do not have any leave to remain in the UK and have not applied for any;
b) their asylum or immigration application is refused; or
c) the period of leave they were granted access for, has expired.

172) Removals and deportations are carried out either on a commercial airline (one person) or by private charter flight (usually lots of people being removed to the same country at the same time) or, rarely, by boat (for example from the UK to Ireland).

173) Currently, if the Home Office is removing or deporting someone, they issue removal directions. Removal directions will have the date and time of the flight, and the flight number. It is still unclear whether the Home Office will continue to issue removal directions following changes to the removal procedure contained in the Immigration Act (2014). The Home Office has stated they will not issue removal directions for most cases, but this may be challenged.

174) When seeking to remove an individual, the Home Office must keep to certain notice periods – they have to inform the person they intend to remove at least 72 hours (including at least 2 working days) before the removal. This is so that individuals have access to the courts. Legal action bought by the London-based organisation *Medical Justice* led to the establishment of this notice period.[137]

175) Families must be given between 72 hours and 21 days notice. In relation to charter flights, the Home Office must give a minimum of five working days notice. There are a number of exceptions. In non-asylum cases, where a visa (tourist, visitor, student) may have been applied for but entry is refused, a removal/deportation will take place within 7 days. Where someone is taken off a flight after resisting a removal/deportation, this is referred to as a failed removal/deportation. In such cases the removal directions are re-sent within 10 days.[138]

176) When approached by a new client it is vital to obtain all records of any previous decisions concerning their immigration status and/or asylum application. Any missing documentation on a client's claim can be obtained from the Home Office pursuant to a subject access request.[139] Anybody can make a request; it does not need to be the legal representative. The fee is only £10.00 and the time for processing the request for information is up to 40 days.

177) Legal aid is not available for challenges to deportation orders and this means that there is no legal aid for expert reports.

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[137] *Medical Justice, R (on the application of) v Secretary of State for the Home Department (Rev 1)* [2010] EWHC 1925 (Admin) (26 July 2010)
[138] Home Office, "Guidance, Removals", available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330358/Chapter_60.pdf; Home Office, "Detention Service Order", available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301941/dso-3-2014.pdf.
[139] Information Commissioner's Office, "Find out how to request your personal information", available at: http://ico.org.uk/for_the_public/personal_information.

178) If challenging a decision to remove a family, it may be cheaper to lodge an application on behalf of one member of the family, as children will not be deported while their parents' deportation is being challenged, and one application costs less in Home Office fees than making an application for each member of the family.

179) It was also pointed out that assisted voluntary return may be the best option for individuals who have no appeal rights, for example.

Deportation following criminal sentence

180) When an individual is sentenced to over 12 months' imprisonment, he or she may be subject to automatic deportation. Deportation will usually be attempted after completion of the custodial sentence. If an individual is sentenced to a period less than 12 months, he or she will not be subjected to automatic deportation. However, the individual may still be removed if the government decides it is "conducive to the public good." Such individuals are given 28 days to make arguments as to why they should not be deported. The UK Government can deport an individual even if the person has family and children living in the UK. Deportations are almost always carried out on a commercial airline (one person) or by private charter flight.

181) In the case of European Union nationals, a person can only be deported after being convicted of a criminal offence if they have served a minimum of 2 years in prison and they are judged to be likely to reoffend.

Appealing a deportation

182) The decision to deport an individual no longer carries an automatic right of appeal. From July 2014, the Home Office (through the Home Secretary) has the power to certify deportation appeals so as only to allow them once the person has been returned and removed from the UK.

183) Appeals should not be certified if an individual's human rights would be breached by the deportation. According to the Home Office, this would only apply where there is "a real risk of serious irreversible harm." As such, the Home Office would consider an appeal from the UK where a person alleges they will be subjected to torture upon return, but the Home Office will be unlikely to grant a right to appeal from the UK if the person alleges that their rights to family life (article 8 ECHR) will be breached by the removal. The precise legal situation will only become clear after this is applied, and challenged in the courts. The Home Office intends to use this power on deportation cases where there is no parental relationship with a dependent child or children first.

184) If the Home Office certifies a deportation appeal right, it may be possible to challenge this certification through a judicial review.

185) EEA nationals can still lodge appeals in the UK. But, the Home Office does not have to wait for the outcome of the appeal to proceed with removal proceedings. However, there are some exceptions to this principle.[140]

186) There is no longer legal aid available for appeals that are allowed to proceed, unless the appeal is based on refugee grounds or article 3 ECHR (torture and ill-treatment) human rights grounds. This means that legal advisors take on such judicial reviews at risk. If an individual believes that their

[140] Free Movement, available here; "Updates and Commentary on Immigration and Asylum Law", http://www.freemovement.org.uk/.

deportation would be a disproportionate breach of their article 8 ECHR rights to family and private life, this may be a reason to challenge the deportation either through representations to the Home Office (although, this is very unlikely to succeed) or through judicial review, without legal aid – or with exceptional case funding (if available from the LAA).

187) If an individual decides to challenge the decision to remove/deport them, it is important to note that the changes to the Immigration Rules make it very difficult for individuals liable to deportation to obtain the right to remain in the UK. Where an individual liable to deportation serves a criminal sentence of more than 4 years, it will only be in exceptional circumstances that the "public interest in deportation" could be outweighed by human rights arguments. If an individual served a sentence of less than 4 years, and has a child who is a British citizen or has lived in the UK continuously for 7 years, that individual would still have to prove that it would be "unduly harsh" for their child to live with them outside of the UK, or for the child to live without them.

188) When an individual is deported from the UK following a criminal sentence, they cannot apply for leave to enter the UK again unless their deportation order is revoked.

189) If an individual has submitted new evidence to be considered as a fresh asylum claim, the Home Office would have to show that they have considered this evidence and rejected the evidence before they can remove / deport someone.

190) The Home Office should not issue a decision letter of refusal of asylum/human rights claim (ISI51B) and removal directions (ISI51D) at the same time. There should be 10 working days (5 working days if in detention) between issuing the refusal letter and issuing removal directions. However, if a client is issued with a refusal letter and seeks to submit further evidence in a fresh claim, the Home Office can decide that the further evidence does not meet the fresh claims criteria and commence removal proceedings within a shorter amount of time. Removal directions should always also be sent to the legal advisor working on the case. If procedures are not respected, the removal /deportation could be challenged.

191) It is also possible to challenge a decision to remove/deport an individual where:
    a) they have protection needs (articles 3 or 8 ECHR, where: there is an asylum claim pending [unless it has been decided that the UK is not responsible but a third country is]; an appeal to the asylum and immigration tribunal is pending [although if a client's asylum claim has been certified, it cannot be appealed in the UK – although it is possible to judicially review the certification]; further evidence to be considered as a fresh asylum claim has been submitted and the Home Office has not been made a decision on this yet);
    b) if European Union treaty rights would be breached;
    c) for very exceptional mental health grounds (this will generally be argued under human rights grounds);
    d) if an individual is being deported on the basis of a criminal conviction, but they were under the age of 18 at the time of conviction (although the Home Office may have grounds to use administrative removal if they do not have any leave to remain);
    e) if they are an unaccompanied asylum-seeking child, the Home Office accepts they are under 18, and there are not adequate reception arrangements in their country of origin (e.g. no social services);
    f) if there is an ongoing legal challenge as to an age dispute (when the Home Office does not believe an individual is less than 18 years old);
    g) if extradition proceedings are in place;

h) if the individual concerned is involved in certain other legal proceedings – e.g. a civil case against the Secretary of State for compensation (e.g. for unlawful detention); they are a victim of another crime; they are engaged in certain family law proceedings.

192) If one of the above reasons stand, an individual or their legal advisor can request that the Home Office cancels the removal directions or deportation arrangements. This is unlikely to be successful unless the Home Office realises it has made a mistake that will clearly be challenged in court and it wants to retract the decision.

193) If an individual submits further evidence for a fresh asylum claim after removal directions have been issued, the Home Office generally refuses the further evidence (as not meeting the fresh claim test) within a matter of hours and say the removal directions still stand. It may then be appropriate to apply for an urgent judicial review to try and secure an injunction to prevent removal/deportation. The injunction is an emergency, interim measure to stop a removal from taking place, to allow time for a full judicial review hearing or other decision making process to take place.

194) The judicial review will assess whether the law has been correctly applied and the right procedures followed. If an individual is successful in their judicial review, the case will normally go back to the Home Office, or the court that is found to have made an error of law, to re-consider. They may make the same decision again, but this time make the decision following the proper process or considering all relevant case law or evidence reasonably. Recent cuts to legal aid provision mean it is now much more difficult to get legal aid for a judicial review.

195) Where legal aid is available (such as where the appeal is based on refugee grounds or article 3 ECHR (torture and ill-treatment) human rights grounds), legal advisors can only receive legal aid for judicial reviews once permission for judicial review has been granted. This means that legal advisors will not benefit from funding for the time they need to spend drafting applications for permission to review, which may dissuade some advisors from pursuing such cases. It is possible for legal advisors to argue for an exception to be made to this, at the Lord Chancellor's discretion, but it is not yet known how often this will be granted. Some legal advisors may also be able to take on judicial reviews pro bono up to the permission stage, and then apply for legal aid after that.

196) Also, if an individual has had an appeal hearing or determination on the same, or substantially the same, issue within 12 months and they lost the appeal, legal aid for a judicial review will not be available. If they have appealed against a removal decision, and received the decision within the last 12 months, they also will not be eligible for legal aid to judicially review the attempt to remove them. There are proposals to make further cuts to legal aid available for judicial reviews. REDRESS and many other NGOs recently criticised the proposed changes.[141]

197) If a case is not automatically eligible for legal aid, the *Public Law Project* may be able to help individuals apply for exceptional case funding from the LAA. However, the individual must be able to show that their human or European Union rights would be infringed if they did not have access to legal aid.

198) For example, it may be argued that the refusal of a fresh claim by the Home Office was unreasonable and an error of law, and that the flight should be cancelled while a judicial review decides if the Home Office must reconsider the fresh claim. Or you may be seeking an injunction to

[141] Joint NGO Submission, 10 Reasons to Vote Against the Legal Aid Residence Test, July 2014, available at: http://www.redress.org/downloads/country-reports/140711Residence%20Test%20Briefing%20Paper.pdf.

stop a very imminent removal, and also judicially reviewing the decision to issue removal directions.

199) Until 2009, if someone submitted an application for judicial review after removal directions had been issued; those removal directions would be cancelled. After 2009 in detained cases, the Home Office will no longer defer removal if:
   a) within the previous three months, an application for judicial review of removal directions has been refused permission; and
   b) the Home Office decides that the new application for judicial review is on the same or virtually identical grounds as the previous application; or decides that the grounds raised in the new application could reasonably have been raised in the previous application.

200) Someone should not be removed, or issued with removal directions, on a commercial flight if they have a hearing date for a permission hearing for a judicial review or a substantive judicial review hearing. If someone is due to be removed on a charter flight, an injunction will be needed to stop their removal – awaiting a judicial review hearing is not a bar to charter flight removals because (according to the Home Office) of the high cost of chartering flights.[142]

Bail and Detention

201) Individuals subject to removal or deportation will often be detained in Immigration Removal Centres pending removal. As a result of changes bought into force from July 2014 through the Immigration Act (2014), an individual with a removal or deportation decision cannot be released on bail – unless the Secretary of State gives consent – if there are removal directions for them in force, requiring them to be removed within 14 days of the date of the decision being made about their bail application.

Tortured Upon Return

202) In cases where an individual has claimed asylum (citing torture), and the claim has been refused and the person is removed, only to be tortured again in their country of origin (or the country they were returned to), there may be grounds for reparation or relief for the harm caused by their removal. However, it would be necessary to show that the removal resulted from negligence on the part of the Home Office, for example that the Home Office made an irrational decision when refusing the individual's initial asylum application. All evidence submitted as part of an asylum claim in the UK should be kept, therefore. Where there are systemic cases of individuals being returned to torture, it is worth collecting the evidence and potentially bringing a case to challenge the practice of the Home Office.

[142] Home Office, "Judicial reviews and injunctions", available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330358/Chapter_60.pdf.

Session 7: Accessing Healthcare

Session 7 focused on the rights of migrants to access primary and secondary health care in the UK and was led by Louise Whitfield (Partner, Solicitor Advocate, Deighton Pierce Glynn Solicitors).

National Health System (NHS)

203) The NHS is a publicly funded health service founded on the principle that "good health care should be available to all, regardless of wealth."[143] Most patients' first point of consultation is their general practitioner (GP). NHS walk-in centres, dentists, pharmacists and optometrists also operate at the primary level. When a patient has a more serious problem and needs to see a specialist or attend hospital, this is known as secondary healthcare. On most occasions (excluding accidents and emergencies) a GP will refer an individual to a specialist, or to attend hospital.

Primary healthcare

204) Section 83 of the National Health Service Act (2006) (NHS Act) gives power to local primary care trusts to provide primary medical services to residents in their catchment area. People can access free primary care by registering as a patient with a GP. Those who have been a resident of the area for more than 24 hours but less than 3 months are able to register as a temporary patient; while those who have been in the area for longer than 3 months can register on a permanent basis with a local GP practice.[144] Registration is a matter of discretion for the GP. They are not obliged to take on new patients from outside the local area, or if their books are already full. However, they cannot discriminate against patients on the basis of their race, gender, social class, age, religion, sexual orientation, appearance, disability or medical condition, nor can they refuse to register someone unreasonably. Where a GP is unable to register a patient they still have a duty of care to provide any immediately necessary treatment (discussed below) for a period of up to 14 days.[145]

205) Some practices have refused to register people that are not long-term residents.[146] However, NHS Guidelines make it clear that anyone, regardless of their immigration status, is eligible to register with a GP.[147]

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[143] NHS choices, "The NHS in England", page last reviewed 28 January 2013, available at: http://www.nhs.uk/NHSEngland/thenhs/about/Pages/overview.aspx.

[144] NHS choices, "How do I register as a temporary resident with a GP?, available at: http://www.nhs.uk/chq/Pages/how-do-i-register-as-a-temporary-resident-with-a-gp.aspx?CategoryID=68&SubCategoryID=158.

[145] British Medical Association, "Overseas visitors and primary care", available at: http://bma.org.uk/practical-support-at-work/gp-practices/service-provision/overseas-visitors-and-primary-care.

[146] In 2011, the medical publication 'Pulse' conducted a survey of GPs which revealed that 29% of the 290 respondents restricted asylum seekers and other migrants from accessing free care on the basis of their immigration status. Almost half of the respondents admitted not knowing whether their primary care trust restricted access: "GPs treating asylum seekers unfairly targeted by PCOs", 18 July 2011, available at: http://www.pulsetoday.co.uk/gps-treating-asylum-seekers-unfairly-targeted-by-pcos/12426580.article#.VHzcUjSUeSo. See also: "Department of Health, Internal review of the overseas visitor charging system", part 2, available at: https://fullfact.org/sites/fullfact.org/files/782677R%20Chap%202%20of%20Review%20pages%201-52.pdf, pp. 21-22.

[147] NHS London, "Once for London: Pan-London Operating Principles for Primary Care, GP Patient Registration", available at: http://www.ealingccg.nhs.uk/media/3499/nhs_london_gp_patient_registrations_operating_procedures.pdf. The document provides that 'Nationality is not relevant in giving people entitlement to register as NHS patients for primary care services. Anyone who is in the UK may receive primary medical services at a GP practice', and 'Overseas visitors, whether lawfully in the UK or not, are also eligible to register with a GP practice even if those visitors are not eligible for secondary care services'.

206) No patient is required by law to show proof of identity or reveal their immigration status. In fact, NHS London's guidelines direct GP practices not to enquire about their patients' immigration status. However, asylum seekers may choose to show their application registration card (ARC) or other proof of their pending asylum application. Most GP surgeries will seek to clarify a patient's identity to ensure the accuracy of their records. To this end, practices can request proof of identity, but any request for documentation must be made to all patients so as to avoid a claim of discrimination under the Equalities Act (2010). Requests for proof of residency should be made on the same basis. GP practices cannot withhold registration if the patient fails to produce identification although they may ask the patient to bring documents on their next visit.

207) There is no charge for primary healthcare treatment. Prescriptions are free in all parts of the UK except for England where they cost £8.05 (at the time of writing). Some patients in England are exempt from charges, including those aged under 16 and over 60 and those in receipt of various mainstream benefits. To receive a certificate of entitlement for free prescriptions, they will have to complete Form HC1 available from some GP surgeries and NHS hospitals. They will then receive either a Certificate HC2 (full exemption from payment) or Certificate HC3 (partial exemption). Asylum seekers on asylum support are issued with an HC2 form which entitles them free prescriptions as well. Other asylum seekers and failed asylum seekers can seek reimbursement for prescription costs by making a Low Income Scheme HC1 claim.

What to do if registration is denied

208) Before anything else, a patient who is denied registration at a GP practice ought to request reasons for the decision, including copies of the relevant policies and guidelines under which the decision was made. NHS London requires practices to write to the patient explaining why they have been refused within a period of 14 days of the refusal.[148]

209) Medical receptionists tend to play a firm "gatekeeping" role and so may refuse to register a person for a reason they would not put in writing. Sometimes, just asking for the reason in writing will resolve the issue. If not, the next step is to make a complaint addressing the reasons for the decision, firstly to the GP practice and then to the Clinical Commissioning Group to which the practice belongs. Legal assistance may be required to draft the complaint or to pursue legal action.

Legal challenge

210) Two types of legal action may be raised in respect of a practice's refusal to register a patient:
    a. a claim of discrimination under the Equalities Act (2010); or
    b. an application for judicial review of the relevant policy.

211) Discrimination comes in two forms: direct[149] and indirect.[150] Direct discrimination occurs where a person is treated less favourably because of certain characteristics, including their age, disability, gender reassignment, sexual orientation, marriage or civil partnership, pregnancy or maternity, race, religion or belief, and sex. An example of direct discrimination would be a GP practice refusing to register someone on the basis of their race.

212) Indirect discrimination occurs where an organisation's practices, policies or rules which apply to everyone in the same way, have the effect of substantially disadvantaging a group of people with a shared characteristic compared to other people without that characteristic. An organisation can

[148] Ibid.
[149] Section 13.
[150] Section 19.

justify indirect discrimination if the practice, policy or rule was a proportionate means of achieving a legitimate aim.

Common problems vulnerable individuals face
The following situations are likely to amount to indirect discrimination and the decisions are likely to be unlawful:

- A GP surgery refuses to register someone because they say they are not a permanent resident;
- A GP surgery refuses to register an individual as they do not have proof of identification and/or proof of address;
- A GP surgery fails to offer interpreting services, or the services offered are inadequate.

213) The way in which legal aid contracts are distributed means that there are now only three firms in London that have legal aid contracts for discrimination work. However, if a firm which does not have a contract for discrimination work is carrying out other work in relation to the individual (such as their immigration case), that firm may still be able to bring a claim for discrimination. However, if an individual is only seeking to bring a claim for discrimination, it may be difficult to obtain legal aid representation.

214) Judicial review allows a person to challenge the legality of a decision or enactment of a public body. Judicial review is ultimately concerned with the process by which a decision or enactment is made rather than the correctness of the decision. The decision and policies of a local health care authority are amenable to judicial review.

Secondary health care

215) The rules on eligibility to secondary healthcare are clearer than those for primary healthcare. Section 175 of the NHS Act allows the Secretary of State to make regulations to charge people who are not "ordinarily resident" in the UK. Charges can be imposed for certain types of hospital treatment. The National Health Service (Charges to Overseas Visitors) Regulations (2011) (Charging Regulations) sets out the basis of calculating the charges. "Ordinarily resident" is not defined in the NHS Act, but the courts have come to formulate a broad test of residence which takes into account whether a person is living in the UK on a lawful and settled basis.[151] In 2012, the Government conducted a review of overseas visitors' access to the NHS amid speculation that some individuals were entering the UK specifically to take advantage of free medical treatment (so-called "health tourism").[152] The review led to the enactment of the Immigration Act (2014), which expanded the pool of foreigners who could be charged for secondary healthcare by redefining the term "ordinarily resident" to exclude any person without ILR in the UK.[153] A person must be a resident in the UK for a minimum of five years to apply for ILR. Certain categories of vulnerable foreigners are exempted from charges for hospital treatment, including refugees, asylum seekers, and refused asylum seekers supported under Section 4 or 95.[154] The Government has confirmed that these exemptions will not be affected by amendments to the charging regime.[155]

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[151] *R v Barnett LBC Ex p Shah (Nilish)* 1983 2 AC 309 HL.
[152] Department of Health, "2012 Review of overseas visitors charging policy", 3 July 2013, available here; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210439/Overseas_Visitors_Charging_Review_2012_-_Summary_document.pdf.
[153] Section 39.
[154] Regulation 11 of the Charging Regulations.
[155] Department of Health, "Visitor & Migrant NHS Cost Recovery Programme, Implementation Plan 2014-2016", 14 July 2014, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/329789/NHS_Implentatation_Plan_Phase_3.PDF, (**"Department of Health Cost Recovery Programme Implementation Plan**"), para. 104.

Free treatment

216) Refused asylum seekers without section 4 or 95 support, and various categories of undocumented migrants are therefore liable to pay for secondary healthcare. However, some types of treatment are made free of charge to all patients, regardless of their immigration status. This includes:
   a. compulsory mental health treatment;
   b. diagnosis and treatment of certain communicable diseases such as tuberculosis;
   c. diagnosis and treatment of certain sexually transmitted diseases; and
   d. emergency treatment. This refers to a patient's treatment in an Accident and Emergency department only.[156]

Immediately Necessary

217) Separately from emergency treatment, NHS providers must also offer treatment that is "immediately necessary" to any patient regardless of whether payment can be made in advance. Failure to do so could be unlawful under the Human Rights Act 1998.[157] The phrase "immediately necessary treatment" is not defined in any regulation so it is a matter of clinical judgment whether to treat a person who is not ordinarily resident in the UK before obtaining payment up-front. There is some guidance on the matter. The Department of Health says that the aim of immediately necessary treatment should be: to save a patient's life, prevent a condition from becoming immediately life-threatening, or promptly to prevent permanent serious damage from occurring.[158] Furthermore, the British Medical Association says that it is irrelevant whether the patient's condition arose in the UK or abroad for the purposes of assessing whether treatment is immediately necessary.[159]

Urgent

218) The same considerations apply for treatment which falls below the threshold of being immediately necessary, but is still urgent. NHS providers are encouraged to try to secure payment up front or at least a deposit, but should not withhold or delay treatment if payment is not made.[160] Once again, the "urgency" of treatment is a matter of judgment for the treating clinician (not a NHS manager).

Elective surgery

219) Routine elective surgery that could wait until a patient returns home is considered non-urgent.[161] Hospitals can withhold non-urgent treatment until a patient pays the required amount or agrees to enter a payment plan.

Failure to pay

220) NHS providers are required by statute to raise and recover fees from "chargeable" patients.[162] These are patients who are not ordinarily resident in the UK and do not fall within an exempt

[156] NHS Choices, "Information for visitors to England", last updated 2 October 2013, available at: http://www.nhs.uk/NHSEngland/AboutNHSservices/uk-visitors/Pages/accessing-nhs-services.aspx.
[157] Department of Health, "Guidance on implementing the overseas visitors hospital charging regulations", Last updated 31 October 2013, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254530/ovs_visitors_guidance_oct13a.pdf, ("**Department of Health Guidance on implementing charging regulations**"), s 4.3.
[158] Ibid, s 4.5.
[159] British Medical Association, "Overseas visitors and primary care", available at: http://bma.org.uk/practical-support-at-work/gp-practices/service-provision/overseas-visitors-and-primary-care.
[160] Department of Health Guidance on implementing charging regulations, s 4.9.
[161] Ibid, s 4.12.

category. Only certain forms of secondary healthcare are free of charge to everyone regardless of their status, as mentioned above. Chargeable patients who receive treatment on an immediately necessary and urgent basis without up-front payment will be billed. NHS providers cannot waive fees.[163]

221) It is unclear how often outstanding payments to the NHS are enforced. However, failure to pay hospital bills can result in immigration sanctions. Visitors with NHS debts of £1,000 or more may be refused an extension of their stay or denied re-entry into the UK in future.[164] The Government has acknowledged its policy may adversely affect the elderly, persons with disabilities, pregnant women and members of particular races who are more likely to require hospital treatment and conversely, less likely to have the means to pay for such treatment.[165] Nonetheless, the Government is satisfied that any indirect discrimination is justified as a proportionate means of achieving a legitimate aim, namely protecting the integrity of the NHS system and ensuring its availability free of charge to those who are entitled to it.

What action to take?

If a client is refused secondary healthcare, recommended action is to:

a) find out the **reason** for the refusal/delay in treatment and find out where this decision is coming from (i.e. managers or clinicians);
b) make a **complaint**;
c) consider a **legal challenge**, for example, if the hospital trust is not following guidance about whether the treatment is immediately necessary or urgent, their decision is likely to be unlawful and can be challenged by way of judicial review. This usually results in a fresh decision applying the guidance correctly which hopefully leads to an agreement to treat but sometimes, expert evidence is required.

Charging and consent

222) When a patient receives immediately necessary or urgent treatment, they will be invoiced. Patients are supposed to be informed about the fact that they will be charged. Some Hospital Trusts ask people to sign a consent form which explains the charging procedure and which also enables the NHS Trust to pass information about the treatment onto the Home Office. Failure to pay may negatively impact an ILR application (a case is currently pending at the Court of Appeal in relation to this point). Pressures to cut budgets, and save money have led to an increase in the number of outstanding bills being reported to the Home Office by NHS Trusts.

Referral of patients for hospital treatment that will costs money

223) Not all patients presenting before a GP will be aware of the NHS' bifurcated structure. GPs have a duty to advise patients that registration with a GP does not mean free access to NHS hospital treatment. As stated above, patients who are not ordinarily resident in the UK must pay for their entire secondary healthcare, barring some procedures. However, GPs should not refrain from referring patients for hospital treatment on the basis that they may be charged. It is for the secondary care provider to determine whether a patient is entitled to free care or not.[166]

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[162] See generally: Charging Regulations.
[163] Department of Health Guidance on implementing charging regulations, s 4.10.
[164] Immigration Rules rr 320, 321, 321A and 322.
[165] Department of Health, "Equality Analysis – Immigration Sanctions for those with unpaid debts arising from the NHS (Charges to Overseas Visitors) Regulations 2011, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213024/EqIA.pdf.
[166] Department of Health Guidance on implementing charging regulations, s 5.13.

Miscellaneous issues

Pregnancy

224) Women who are ineligible for free secondary health care may be charged for maternity care received at a hospital or from a specialist. Maternity care includes care before, during and after the birth. All maternity care is considered "immediately necessary treatment" and must be provided even where a patient has no prospects of paying for it.[167] However, they will be billed for the services they receive and failure to pay a bill may lead to negative sanctions in an application for ILR.

NHS surcharge for temporary visitors

225) The Immigration Act (2014) allows the Secretary of State to impose a medical levy on persons from outside the European Union seeking to enter the UK for a period of six months or more.[168] The levy is supposed to deter visitors from "exploiting" NHS services and is a safeguard against non-payment of NHS bills. Students will have to pay £150 a year and all other visitors will pay £200 a year, on top of existing visa fees.[169] The levy will not apply to asylum seekers, failed asylum seekers and refugees.

Charging short-term migrants for primary care and other services

226) The Government is reportedly considering extending current charging regulations and practices in respect of short-term migrants – that is, people in the UK for less than six months. Services that may become chargeable include Accident and Emergency and certain services available in primary medical care, other than GP and nurse consultations.[170]

Confusion about entitlement to health care

227) A report by the NGO *Doctors of the World* included a survey of 1,449 migrants. The report found that 90% of the migrants surveyed had not registered with a GP even though they were eligible to register.[171] This startling figure is illustrative of the lack of awareness among new migrant communities of their entitlements to access the NHS, and specifically primary health care. Twenty percent of respondents said that they were reluctant to seek medical care for fear that it would cause problems due to their immigration status. It is essential for anyone with a health issue, ailment or injury to consult a GP or other health provider to obtain a diagnosis of their problem and commence treatment as soon as possible. The consequences of leaving a problem unchecked are obvious for the individual and the health system. Failure to take prompt action can endanger the individual's health and necessitate more serious treatment later on. It is estimated that Accident and Emergency treatment costs the NHS three times more than GP consultations.[172]

[167] Ibid, s 4.7.
[168] Section 38.
[169] Department of Health Cost Recovery Programme Implementation Plan, para. 100.
[170] Ibid, para 106-107.
[171] Doctors of the World, "The truth about 'health tourism'", 12 July 2013, available at: http://doctorsoftheworld.org.uk/blog/entry/the-truth-about-health-tourism.
[172] Ibid.

Conclusion

228) In the post meeting feedback, participants felt that the meeting had been helpful in meeting its targets to share information and highlight the challenges community groups and NGOs are facing. Participants suggested that a Conference Paper be issued and that organisations present continue to discuss the ways in which cuts to public services are impacting their work. The event feedback received showed the participants thought that they had learned or understood the issues explored better as a result of the meeting.

229) REDRESS is grateful to the speakers and the attendees, who included representatives of the following law firms and universities: Rights of Women; Strategic Legal Fund; Chrysalis Family Futures; Islington Law Centre; Birnberg Peirce and Partners; Wilsons LLP; Deighton Pierce Glynn Solicitors; Law for Life; Apoio a Mulher Brasileira no Exterior (AMBE); Refugee Council; Latin American Women's Rights Service; Hackney Migrant Centre; CARIS Haringey; Bar Pro Bono Unit; Zimbabwe Association; Lewisham Refugee and Migrant Network; Refugee Women Association; Southall Black Sisters; Luton Law Centre; Haringay Leaving Care Team (Asylum); Southwest London Law Centre; SHP (Preventing Homelessness, Promoting Social Inclusion); Helen Bamber Foundation; Bindmans LLP; NHS Anxiety and Trauma Team; NHS Traumatic Stress Clinic; and to the graduate students that attended from Kings College London; the University of Nottingham; Cambridge Univeristy.