REDRESS SUBMISSION TO 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

INTRODUCTION

1. The Redress Trust (REDRESS) is an international human rights organisation whose mandate is to seek justice and reparation for torture survivors.[1] For more than twenty years[2] REDRESS has helped individual torture survivors both in the UK and abroad and has accumulated vast experience in the legal challenges involved in both international and domestic law in seeking justice for such persons and accountability of perpetrators.[3]

2. This is a response to the Ministry of Justice's **further** consultation paper on legal aid entitled *Transforming Legal Aid: Next Steps* (the "Revised Consultation Paper"). REDRESS made a submission on 4 June 2013 (the "initial submission") in response to the Ministry's earlier consultation *Transforming legal aid: delivering a more credible and efficient system* paper (the "Initial Consultation Paper").

3. REDRESS is concerned that the Ministry of Justice's Revised Consultation Paper does not adequately address the impact that the proposed changes to legal aid would have on torture survivors. As such, REDRESS' concerns raised in the initial submission remain:

    - The proposals are still unsupported by detailed and accurate data[4]
    - The "strong connection to the UK" proposal remains prejudicial to torture survivors
    - The impact of the proposals on the judicial review process remains prejudicial to torture survivors

4. The legal aid changes proposed would, upon implementation, seriously undermine access to justice for segments of society, particularly torture survivors. The proposals would impact upon

[1] Www.redress.org.
[2] REDRESS was founded on 10 December 1992.
[3] REDRESS has intervened and/or provided witness statements in a number of UK torture-related cases including: *R (on the application of Al Skeini and Others) v the Secretary of State for Defence* [2007] UKHL 26*; Al-Saadoon and Mufdhi v The United Kingdom* (Application number: 61498/08), European Court of Human Rights (9 April 2009); *R (Evans No 2) v Secretary of State for Justice* [2011] EWHC 1146 (Admin); *Ndiki Mutua and others v. The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB)
[4] REDRESS remains supportive of Public Law Project's response to the Initial Consultation Paper – see http://www.publiclawproject.org.uk/documents/Draft_response_re_legal_aid_for_jr_conditional_on_permission.pdf.

fundamental legal protections including equal protection under the law, equality of arms between parties, as well as Government accountability.

5. REDRESS focuses this response on those proposals for reform which will have a direct impact upon its work. Accordingly, we focus on responding to questions four and six of the schedule of consultation questions in the Revised Consultation Paper.

REDRESS RESPONSE

Question 4: Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons (Introducing a residence test)

6. The Ministry of Justice's Revised Consultation Paper proposes to retain a residence test for civil legal aid. The test would extend to all areas where civil legal aid is still available. There are two limbs to this test. The applicant must satisfy the requirements of:
    a. lawful residency in the UK; and
    b. residency in the UK for a continuous period of at least twelve months at some point.

7. REDRESS has reviewed the proposed amendments to this residence test provided for in the Ministry of Justice's Revised Consultation Paper.[5] REDRESS recognises that the Government will not seek to impose such a residence test on specific categories of individuals, including victims of trafficking. **However, the Ministry of Justice's Revised Consultation Paper does not address the impact of the residence test on torture survivors. As such, REDRESS' position on the residence test set out in the initial submission has not changed.** Accordingly, we re-iterate these concerns hereunder:

    - The proposal to limit access to legal aid to those with a strong connection with the UK will have an impact on those who live **outside** the UK (including foreign nationals who have been subjected to torture or abuse abroad by UK army personnel), those who are living in the UK unlawfully, or those who have difficulties evidencing twelve months continuous lawful residence in the UK.

    - The reforms will have impact on torture victims, especially foreign nationals who were tortured by UK agents. REDRESS therefore reiterates its previous submission that the proposed residence test will exclude a number of cases, including (but not limited to):

        a. where a person suffers mistreatment at the hand of police, immigration removal personnel, the staff of immigration detention facilities, such as physical acts of violence, false imprisonment, assault or malicious prosecution, they will be unable to get public funding to bring a claim if they have not been in the UK lawfully for twelve months and the individuals or organs carrying out the abuse may not face sanctions for their unlawful behaviour; and

[5] Transforming Legal Aid: Next Steps, Annex B: Response to Consultation, para. 133, available at: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/consult_view, last accessed 6 October 2013.

b. survivors of torture, or the family members of those unlawfully killed by UK forces in their home country, could not obtain legal aid to challenge breaches of their human rights. The European Court of Human Rights has clearly articulated that the UK's human rights obligations may extend to such situations. We are concerned that cases – including cases that REDRESS intervened in[6] – would not have been eligible for legal aid if the residence test had been in force. Further, these cases concerned appalling acts of violence which no society based on the rule of law would wish to see unpunished and complex areas of law and could not have been brought by individuals directly, or by NGOs.

- The proposal to introduce a residence test (even as somewhat restricted in the Revised Consultation Paper) excludes an entire class of litigants. As such, the residency test proposal breaches provisions of the European Convention on Human Rights, including:

  a. Article 6(1) which protects the right to an independent hearing;
  b. Article 13 concerning the claimants' rights to an effective remedy (also provided in the Human Rights Act[7]); and
  c. Article 14(1) concerning non-discrimination on any ground such as national or social origin.

8. Cases such as *Al-Skeini,*[8] and *Ali Zaki Mousa*[9] brought the practice of British authorities and their agents in foreign conflict zones (or where those same agents have authority or control over individuals extra-territorially) under the scrutiny of British courts, thus ensuring that human rights standards do indeed apply to the actions of British security forced abroad. The principles the courts upheld in these important cases are consistent with recommendations from the United Nations Committee against Torture;[10] further, they are consistent with the Foreign and Commonwealth Office's *Strategy for the Prevention of Torture 2011-15* ("the Strategy")[11] that "[t]he work that we do to contribute to preventing torture globally is underpinned by… our domestic reputation and practices…"[12] However, the proposed residency test would instead grant impunity to the UK for its most egregious human rights violations and leave victims with no recourse to pursue justice.

9. The UK Government's support of human rights at home while allowing impunity for its own actions abroad was criticised in *Al-Skeini v United Kingdom*[13] by Judge Bonello:

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[6] Above, note 3.
[7] Human Rights Act 1998
[8] *Ibid.*, note 3.
[9] *Ibid.*, note 3.
[10] UN Document CAT/C/GBR/CO/5, available here: http://www.un.org/ga/search/view_doc.asp?symbol= CAT/C/GBR/CO/5, last accessed 4 June 2013
[11] FCO, *Strategy for the Prevention of Torture 2011-15,* 27 October 2011, at: http://www.fco.gov.uk/resources/en/pdf/fcostrategy-tortureprevention.
[12] Ibid, page 10. The Strategy also states, at pp. 4-5: "… HMG must have a good record itself. As the Foreign Secretary has said, where problems have arisen that have affected the UK's moral standing we will act on the lessons learnt and tackle the difficult issues head on… The position of the Government is clear: the prohibition on torture applies to all individuals. The Prime Minister has said, 'I think torture is wrong … there is … a moral reason for being opposed to torture – and Britain doesn't sanction torture… I would say if you look at the effect of Guantánamo Bay and other things like that, long term that has actually helped to radicalise people and make our country and our world less safe'. Our reputation on torture prevention worldwide is boosted by showing how the UK achieves compliance with our legal obligations to prevent, prohibit and punish torture."
[13] Application No.55721/07, Before the European Court of Human Rights, 7 July 2011, (2011) 53 E.H.R.R. 18, page 13.

> I think poorly of an esteem for human rights that turns casual and approximate depending on geographical co-ordinates. Any state that worships fundamental rights on its own territory but then feels free to make a mockery of them anywhere else does not, as far as I am concerned, belong to that comity of nations for which the supremacy of human rights is both mission and clarion call. In substance the United Kingdom is arguing, sadly, I believe, that it ratified the Convention with the deliberate intent of regulating the conduct of its armed forces according to latitude: gentlemen at home, hoodlums elsewhere.

10. The United Nations Committee against Torture General Comment No. 3[14] sets out in full the responsibility on a State party to provide judicial remedies to victims of torture or ill-treatment and have effective rights to redress. In particular, it says:

> 30. Judicial remedies must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation**. States parties should provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress…**
>
> 38. States parties to the Convention have an obligation to ensure that the right to redress is effective. Specific **obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include**, but are not limited to: **…the failure to provide sufficient legal aid** and protection measures for victims and witnesses; as well as the associated stigma, and the physical, psychological and other related effects of torture and ill-treatment…[emphasis added]

11. REDRESS recognises that the Revised Consultation Paper would enable individuals to request exceptional funding. However, discretionary access to exceptional funding (which is not guaranteed) would fail to meet the obligation that claimants that have been tortured have access to judicial remedies in the UK.

12. Further, paragraph 122 of the Revised Consultation Paper implies that applicants who fail to meet the residence test in relation to an inquest may also be refused exceptional funding, and that there is no guarantee to access to justice for relatives of those killed abroad. Such a position would fail to comply with the UK's international obligation to prevent the global practice of torture.

13. Many claimants who were not resident in the UK when they were subjected to torture, unlawful killing or arbitrary detention by UK agents, have been able to seek redress in the UK. Judgments in their cases have resulted in some of the most significant jurisprudence of its kind.[15] By imposing a residence test, future claims concerning torture committed by UK agents abroad will be barred from judicial review, as the Government has not addressed this aspect of REDRESS' concerns as raised in its response to the Initial Consultation Paper.

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[14] UN Document CAT/C/GC/3, available here: http://www.un.org/ga/search/view_doc.asp?symbol=CAT/C/GC/3, last accessed 4 June 2013

[15] Public Interest Lawyers' Response to Ministry of Justice Consultation on reforms to Legal Aid: 'Transforming Legal Aid: Delivering a More Credible and Efficient System', 31 May 2013, para. 16, available at: http://www.publicinterestlawyers.co.uk/go_files/files/NU0K79GXUYLN.pdf , last accessed on 30 September 2013.

14. We ask that the Government explicitly responds to all the above concerns, which relate to the UK's international obligations.

Question Six: Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons. (Civil merits test – removing legal aid for borderline cases)

15. REDRESS regrets that the Ministry of Justice intends to pursue this proposal. We do not believe the proposal will best serve the interests of justice. Judicial review is an important mechanism providing oversight of, and a check to, the exercise of executive and public authority power.

16. Landmark judicial decisions that have helped to clarify and develop various aspects of international law have arisen out of cases that may have been perceived to have a "borderline" prospect of success. Furthermore, and almost by definition, when new or novel points of law arise or are argued the case could be regarded as "borderline" because it may constitute a challenge to previous ways of considering matters before the court.

17. Borderline cases often raise difficult, complex, highly controversial, and fiercely contested points of law that make it difficult to assert their merits from the outset. It is vital that these cases have the opportunity to be argued. Often these cases touch upon aspects of public international law. In the past REDRESS has intervened in a number of such cases, to provide to the courts analyses of international human rights law and comparative law, or by providing witness statements to one party. We are concerned that some solicitors may not take the risk of bringing cases which could develop international law and/or the jurisprudence of UK courts as regards fundamental human rights. It would be inimical to the rule of law if the prospect of a negative decision against the Government on such difficult and complex cases was a reason to inhibit litigation by the denial of legal aid.

18. We therefore request that the Government provide detailed explanation of how it does not consider "that the proposal would prevent or hinder the development of case law".[16]

[16] Transforming Legal Aid: Next Steps, Annex B: Response to Consultation, para. 175