

Draft Order laid before Parliament under section 41(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2014 No.

**LEGAL AID AND ADVICE,
ENGLAND AND WALES**

**The Legal Aid, Sentencing and Punishment of Offenders
Act 2012 (Amendment of Schedule 1) Order 2014**

Made - - - - *****
Coming into force - - *4th August 2014*

The Lord Chancellor makes the following Order in exercise of the powers conferred by sections 9(2)(b)(1) and 41(1)(a) and (b), (2)(a) and (b) and (3)(b) and (c) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012(2).

In accordance with section 41(6) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, a draft of this instrument was laid before Parliament and approved by resolution of each House of Parliament.

PART 1

General

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 and comes into force on 4th August 2014.

(2) In this Order “the Act” means the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

(1) Section 9(2) enables the Lord Chancellor to modify Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10). Section 42(1) of the Act provides that in Part 1 of the Act “modify”, in relation to an Act or instrument, includes amend, repeal or revoke and related terms are to be interpreted accordingly.

(2) 2012 c. 10.

PART 2

Amendment of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Excluded services: services provided to non-residents

2.—(1) Part 2 of Schedule 1 to the Act (excluded services) is amended as follows.

(2) In the opening words, after the third “Schedule” insert “or this Part of this Schedule”.

(3) After paragraph 18(3) insert—

“19(1) Civil legal services provided to an individual who does not satisfy the residence test in relation to the services.

Residence test

(2) An individual satisfies the residence test in relation to services if—

(a) on the day on which the individual makes an application for a determination under Part 1 of this Act in relation to the services in question (“the application day”), the individual is lawfully resident in the United Kingdom, the Channel Islands, the Isle of Man or a British overseas territory, and

(b) the individual is within sub-paragraph (3), (4) or (5).

(3) An individual is within this sub-paragraph if, on the application day, the individual is less than 12 months old.

(4) An individual is within this sub-paragraph if, on the application day—

(a) the individual has at any time been lawfully resident in the United Kingdom, the Channel Islands, the Isle of Man or a British overseas territory for a period of 12 consecutive months, and

(b) the total number of days on which the individual was absent from the United Kingdom, the Channel Islands, the Isle of Man and the British overseas territories during that period did not exceed 30.

(5) An individual is within this sub-paragraph if—

(a) on the application day—

(i) as a result of the determination of a claim for asylum in the individual’s favour, the individual has leave to enter, or to remain in, the United Kingdom based on rights described in paragraph 30(1) of Part 1 of this Schedule,

(ii) a period of 12 months or more has elapsed since the date on which that claim was made, and

(iii) there has been a period of 12 consecutive months beginning on or after that date during which the total number of days on which the individual was absent from the United Kingdom, the Channel Islands, the Isle of Man and the British overseas territories did not exceed 30, and

(b) when the services are provided, the individual continues to have leave to enter, or to remain in, the United Kingdom based on rights described in paragraph 30(1) of Part 1 of this Schedule as a result of the determination of the claim for asylum mentioned in paragraph (a)(i) in the individual’s favour.

Exceptions

(6) Sub-paragraph (1) does not exclude from Part 1 of this Schedule services provided to an individual if—

- (a) on the application day—
 - (i) the individual has made a claim for asylum, and
 - (ii) the claim has been recorded by the Secretary of State but has not been determined or abandoned, and
- (b) when the services are provided—
 - (i) that claim has not been determined or abandoned, or
 - (ii) as a result of the determination of that claim in the individual's favour, the individual has leave to enter, or to remain in, the United Kingdom based on rights described in paragraph 30(1) of Part 1 of this Schedule.

(7) Sub-paragraph (1) does not exclude from Part 1 of this Schedule services provided to an individual if—

- (a) on the application day—
 - (i) as a result of the determination of a claim for asylum in the individual's favour, the individual has leave to enter, or to remain in, the United Kingdom based on rights described in paragraph 30(1) of Part 1 of this Schedule, and
 - (ii) a period of less than 12 months has elapsed since the date on which that claim was made, and
- (b) when the services are provided, the individual continues to have leave to enter, or to remain in, the United Kingdom based on rights described in paragraph 30(1) of Part 1 of this Schedule as a result of the determination of the claim for asylum mentioned in paragraph (a)(i) in the individual's favour.

(8) Sub-paragraph (1) does not exclude from Part 1 of this Schedule services provided to an individual if—

- (a) on the application day—
 - (i) the individual is a resettled refugee, and
 - (ii) a period of less than 12 months has elapsed since the last date on which the individual entered the United Kingdom before becoming a resettled refugee, and
- (b) when the services are provided, the individual continues to be a resettled refugee.

(9) Sub-paragraph (1) does not exclude from Part 1 of this Schedule services provided to an individual if, on the application day—

- (a) the individual is a member of Her Majesty's United Kingdom forces, or
- (b) the individual is part of the immediate family of a member of Her Majesty's United Kingdom forces.

Definitions

(10) For the purposes of this paragraph—

- (a) an individual is not lawfully resident in the United Kingdom, the Channel Islands or the Isle of Man if the individual requires leave to enter or remain in the United Kingdom, the Channel Islands or (as the case may be) the Isle of Man but does not have it, and
- (b) an individual is not lawfully resident in a British overseas territory if the individual requires an equivalent form of leave in that territory but does not have it.

(11) A reference in this paragraph to a day on which an individual was absent from the United Kingdom, the Channel Islands, the Isle of Man and the British overseas territories is a reference to a day for the whole of which the individual was so absent.

(12) In this paragraph—

“the application day”, in relation to services provided to an individual, has the meaning given in sub-paragraph (2);

“claim for asylum” means a claim by an individual for leave to enter, or to remain in, the United Kingdom based on rights described in paragraph 30(1) of Part 1 of this Schedule which is made at a time when the individual is in the United Kingdom;

“resettled refugee” means an individual who has leave to enter, or to remain in, the United Kingdom for more than 6 months, other than as a result of a claim for asylum, and who—

- (a) is a refugee, as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006(4), or
- (b) is accorded rights and benefits in the United Kingdom equivalent to those accorded to a refugee, as so defined.

(13) For the purposes of this paragraph a claim for asylum is determined—

- (a) if the claimant does not appeal against the Secretary of State’s decision on the claim, when the period for appealing against the decision ends, or
- (b) if the claimant appeals against the Secretary of State’s decision on the claim, when the appeal is finally determined or withdrawn.

(14) For the purposes of this paragraph, one individual (“A”) is part of the immediate family of another (“B”) if—

- (a) they are married to each other,
- (b) they are civil partners of each other,
- (c) they are cohabitants (as defined in section 62(1) of the Family Law Act 1996(5)), or
- (d) B is A’s parent or has parental responsibility for A.”

Amendment of Part 1 of Schedule 1 to the Act

3.—(1) Part 1 of Schedule 1 to the Act (services) is amended as follows.

(2) In paragraphs 1 and 10, for sub-paragraph (3) (in each place) substitute—

“(3) Sub-paragraphs (1) and (2) are subject to—

- (a) the exclusions in Part 2 of this Schedule, with the exception of paragraph 19 of that Part, and
- (b) the exclusion in Part 3 of this Schedule.”

(3) In paragraph 3, after sub-paragraph (2) insert—

“(2A) But paragraph 19 of Part 2 of this Schedule does not exclude from sub-paragraph (1) services provided in relation to abuse of an individual that took place at a time when the individual was a child.”

(4) In paragraph 5, after sub-paragraph (2) insert—

(4) S.I. 2006/2525.

(5) 1996 c. 27. Section 62(1) was amended by section 58(1) of, and paragraph 40 of Schedule 10 to, the Domestic Violence, Crime and Victims Act 2004 (c. 28) and section 82 of, and paragraph 13(1) and (2) of Part 1 of Schedule 9 to, the Civil Partnership Act 2004 (c. 33). There are other amendments to this provision but none is relevant.

- “(2A) But paragraph 19 of Part 2 of this Schedule does not exclude from sub-paragraph (1) services provided in relation to—
- (a) the discharge of a patient liable to be detained or recalled under—
 - (i) the Mental Health Act 1983⁽⁶⁾, or
 - (ii) paragraph 5(2) of the Schedule to the Repatriation of Prisoners Act 1984⁽⁷⁾, or
 - (b) deprivation of liberty authorised by—
 - (i) section 4B of the Mental Capacity Act 2005⁽⁸⁾ (deprivation of liberty necessary for life-sustaining treatment etc),
 - (ii) an order under section 16(2)(a) of that Act (powers to make decisions about the personal welfare, property and affairs of a person lacking capacity), or
 - (iii) Schedule A1 to that Act⁽⁹⁾ (hospital and care home residents: deprivation of liberty).”
- (5) In paragraph 6, after sub-paragraph (2) insert—
- “(2A) But paragraph 19 of Part 2 of this Schedule does not exclude from sub-paragraph (1) services provided in relation to community care services which a relevant person may provide or arrange to provide under the Children Act 1989⁽¹⁰⁾.”
- (6) In paragraph 9, after sub-paragraph (2) insert—
- “(2A) But paragraph 19 of Part 2 of this Schedule does not exclude from sub-paragraph (1) services provided in relation to—
- (a) the inherent jurisdiction of the High Court in relation to children, or
 - (b) deprivation of liberty in exercise of the inherent jurisdiction of the High Court in relation to vulnerable adults.”
- (7) In paragraph 11(3)(a), for “3 and 11” substitute “3, 11 and 19”.
- (8) In paragraphs 12(2) and 18(4)(a), for “paragraph 11” (in each place) substitute “paragraphs 11 and 19”.
- (9) In paragraphs 13, 15, 16, 17, 20, 24, 25, 26, 27, 28, 29 and 30, for sub-paragraph (2) (in each place) substitute—
- “(2) Sub-paragraph (1) is subject to—
- (a) the exclusions in Part 2 of this Schedule, with the exception of paragraph 19 of that Part, and
 - (b) the exclusion in Part 3 of this Schedule.”
- (10) In paragraph 19—
- (a) after sub-paragraph (2) insert—
- “(2A) But paragraph 19 of Part 2 of this Schedule does not exclude from sub-paragraph (1) services provided in relation to—
- (a) judicial review in respect of the lawfulness of detention,
 - (b) proceedings before the Special Immigration Appeals Commission,

⁽⁶⁾ 1983 c. 20.

⁽⁷⁾ 1984 c. 47. Paragraph 5(2) was amended by S.I. 2008/2833.

⁽⁸⁾ 2005 c. 9. Section 4B was inserted by section 50(1) and (2) of the Mental Health Act 2007 (c. 12).

⁽⁹⁾ Schedule A1 was inserted by section 50(5) of, and Schedule 7 to, the Mental Health Act 2007 (c. 12).

⁽¹⁰⁾ 1989 c. 41.

- (c) judicial review of a negative decision in relation to an asylum application (within the meaning of the EU Procedures Directive) where there is no right of appeal to the First-tier Tribunal against the decision, or
 - (d) judicial review of certification under section 94(11) or 96(12) of the Nationality, Immigration and Asylum Act 2002 (certificate preventing or restricting appeal of immigration decision).”, and
- (b) for sub-paragraph (7) substitute—
- “(7) Sub-paragraphs (5) and (6) do not exclude services provided to an individual in relation to judicial review described in sub-paragraph (2A)(c) or (d).”
- (11) In paragraph 23(4)(a), for “3 and 8” substitute “3, 8 and 19”.
- (12) In paragraph 32—
- (a) for sub-paragraph (4) substitute—
- “(4) Sub-paragraph (1) is subject to—
- (a) the exclusions in Part 2 of this Schedule, with the exception of paragraph 19 of that Part, and
 - (b) the exclusion in Part 3 of this Schedule.”, and
- (b) in sub-paragraph (5)(a) for “6 and 8” substitute “6, 8 and 19”.

PART 3

Transitional provisions

Application

4. The amendments made by articles 2 and 3 to Schedule 1 to the Act do not apply to a pre-commencement application for civil legal services.

Pre-commencement applications for civil legal services

5. In this Part, a “pre-commencement application for civil legal services” means an application for civil legal services that is—

- (a) made before 4th August 2014; or
- (b) a new application for civil legal services within the meaning of article 7.

6.—(1) For the purpose of article 5(a), an application, other than an application made to the CLA, is made before 4th August 2014 if the application is—

- (a) for Controlled Work and the application is signed and dated before 4th August 2014;
- (b) for Licensed Work, other than an application for emergency representation, and the application is—
 - (i) signed and dated before 4th August 2014 and received by the Director by 5.00pm on 11th August 2014; or

(11) Section 94 was amended by sections 27(1) to (7) and 47 of, and Schedule 4 to, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c. 19); section 47(8) of the Immigration, Asylum and Nationality Act 2006 (c. 13); S.I. 2003/970; S.I. 2003/1919; S.I. 2005/330; S.I. 2005/1016; S.I. 2005/3306; S.I. 2006/3215; S.I. 2006/3275; S.I. 2007/2221; S.I. 2007/3187; and S.I. 2010/561.

(12) Section 96 was amended by section 30 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c. 19).

- (ii) submitted through the Client and Cost Management System before 4th August 2014;
or
 - (c) for emergency representation and the application—
 - (i) results in a determination being made by a provider before 4th August 2014 and that determination is notified within five working days of the determination to the Director;
 - (ii) is emailed or faxed to, and received by, the Director before 4th August 2014; or
 - (iii) is submitted through the Client and Cost Management System before 4th August 2014.
- (2) For the purpose of article 5(a), an application that is made to the CLA is made before 4th August 2014 if—
- (a) the individual makes the application to a CLA Specialist Telephone Provider before 12.30pm on 2nd August 2014; or
 - (b) the CLA Operator Service transfers the individual to a CLA Specialist Telephone Provider before 12.30pm on 2nd August 2014 and—
 - (i) the call is not answered by the CLA Specialist Telephone Provider before 12.30pm on 2nd August 2014;
 - (ii) the individual leaves a message with the CLA Specialist Telephone Provider before 12.30pm on 2nd August 2014; and
 - (iii) the individual makes the application to a CLA Specialist Telephone Provider within two weeks of leaving the message.
- (3) In this article—
- “CLA” means the Civil Legal Advice Operator Service and the CLA Specialist Telephone Providers;
- “CLA Specialist Telephone Provider” means a provider under the 2013 CLA Contract⁽¹³⁾ between a provider and the Lord Chancellor;
- “Client and Cost Management System” means the client and cost management system used by the Director in relation to applications for civil legal services;
- “emergency representation” means—
- (a) legal representation (within the meaning of regulation 18 of the Merits Criteria Regulations) that is not Controlled Work, or
 - (b) family help (higher) (within the meaning of regulation 15(3) of the Merits Criteria Regulations),
- which is provided following a determination made on an urgent application;
- “provider” means a person who provides civil legal services under Part 1 of the Act (legal aid); and
- “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday for the purposes of paragraph 1 of Schedule 1 to the Banking and Financial Dealings Act 1971⁽¹⁴⁾.

7.—(1) An application is a new application for civil legal services referred to in article 5(b) if either paragraph (2) or (3) applies.

⁽¹³⁾ The contract is available at www.justice.gov.uk/legal-aid. Copies can be inspected at the Legal Aid Agency (Head Office) at 102 Petty France, London, SW1H 9AJ.

⁽¹⁴⁾ 1971 c. 80.

(2) This paragraph applies where an individual makes an application for civil legal services on or after 4th August 2014 and the following conditions are met—

- (a) civil legal services have been provided to that individual as a result of a pre-commencement application for civil legal services falling within article 5(a) (“the original application”);
- (b) the further application for civil legal services relates to the same case for which civil legal services were provided as a result of the original application; and
- (c) the further application for civil legal services is—
 - (i) for a different form of civil legal services to that provided as a result of the original application; and
 - (ii) the different form of civil legal services falls within the same variety of work as the form of service for which civil legal services were provided as a result of the original application.

(3) This paragraph applies where an individual makes an application for civil legal services on or after 4th August 2014 and the following conditions are met—

- (a) civil legal services that are Licensed Work have been provided to that individual as a result of a pre-commencement application for civil legal services falling within article 5(a) (“the original application”);
 - (b) the further application for civil legal services relates to the case for which civil legal services were provided as a result of the original application; and
 - (c) as a result of the further application for civil legal services, the Director has decided in accordance with regulation 37(3)(b) of the Procedure Regulations that the certificate should cover more than one set of proceedings.
- (4) In this article “variety of work” means one of the following—
- (a) Controlled Work; or
 - (b) Licensed Work.

Interpretation of Part 3

8. In this Part—

“Controlled Work” has the meaning given in regulation 21(2) of the Procedure Regulations;

“form of civil legal services” has the meaning given in regulation 12(3) of the Merits Criteria Regulations;

“Licensed Work” has the meaning given in regulation 29(2) of the Procedure Regulations;

“the Merits Criteria Regulations” means the Civil Legal Aid (Merits Criteria) Regulations 2013(15);

“the Procedure Regulations” means the Civil Legal Aid (Procedure) Regulations 2012(16).

(15) S.I. 2013/104, to which there are amendments not relevant to this Order.

(16) S.I. 2012/3098.

Signed by authority of the Lord Chancellor

Date

Name
Parliamentary Under Secretary of State
Ministry of Justice

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10) (“the Act”). Part 1 of Schedule 1 to the Act describes the matters on which civil legal aid is generally available (subject to merits and means tests). Part 2 of Schedule 1 lists services that are not to be available, even where they might otherwise fall within the descriptions of services in Part 1 of Schedule 1.

Article 2 of this Order adds to Part 2 of Schedule 1 a new general exclusion for civil legal services provided to individuals who do not satisfy the residence test (new paragraph 19 of Part 2 of Schedule 1). In general, the residence test requires an individual to be lawfully resident in the United Kingdom, the Channel Islands, the Isle of Man or a British overseas territory at the time of applying for civil legal services, and to have been lawfully resident in such a place for at least 12 months in the past. The effect of the new exclusion in paragraph 19 of Part 2 of Schedule 1 is that the services listed in Part 1 of Schedule 1 are only to be available to those individuals who satisfy the residence test. However, exceptions are provided for asylum seekers, resettled refugees and members of Her Majesty’s United Kingdom forces and their immediate families, who are not required to meet the residence test.

While the residence test will generally apply to all services described in Part 1 of Schedule 1 to the Act, Article 3 of this Order amends that Part of the Schedule to provide that the residence test does not apply in relation to certain services.

Article 4 provides that the amendments made by articles 2 and 3 to Schedule 1 to the Act do not apply to pre-commencement applications for civil legal services. Articles 5 to 7 define a “pre-commencement application”.

A full impact assessment of the effect of the policy implemented by this instrument on the costs of business and the voluntary sector was produced with the Government’s response to consultation, Transforming Legal Aid: Next Steps, and is available at <https://consult.justice.gov.uk/>.