



HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: [Legal aid, children and the residence test](#), HC 234

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Written evidence from witnesses:

- Mr Shailesh Vara MP, Minister for the Courts and Legal Aid, Ministry of Justice

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Members present: Dr Hywel Francis MP (Chair); Baroness Berridge; Mr Robert Buckland MP; Baroness Buscombe; Baroness Kennedy of the Shaws; Lord Lester of Herne Hill; Baroness Lister of Burtersett; Baroness O’Loan; Mr Virendra Sharma MP; and Sarah Teather MP

Questions 9-21

Witness: **Mr Shailesh Vara MP**, Minister for the Courts and Legal Aid, Ministry of Justice, gave evidence.

Q9 Dr Hywel Francis (Chair): Good morning everyone, and welcome to this Joint Committee on Human Rights session in relation to our inquiry into the implications for access to justice of the Government’s proposals to reform legal aid. Minister, welcome. For the record, could you introduce yourself, please?

Mr Shailesh Vara MP: I am Shailesh Vara, Parliamentary Under-Secretary of State in the Ministry of Justice, with responsibility for courts and legal aid.

The Chair: Thank you. I welcome you to the very first session of this Committee that you have attended as a Minister. I also place on record our thanks to you for the very prompt way in which you responded to our report, which we published in December, in particular for the recommendations you accepted on asylum seekers and refugees and the residence test. We are doubly grateful to you for the swiftness of your response and the way you responded to particular recommendations.

I shall begin by asking you a simple but obvious question. The Government’s justification for the residence test is that legal aid should be targeted at those with a strong connection to the UK because they have made a contribution, to tax for example. Can you explain the

justification of this in relation to children? Children do not pay tax, and children do not choose where they are born and where they live.

Mr Shailesh Vara MP: The justification is that they should have a strong connection to the country, which can include the factors that you mentioned: tax and other contributions. Clearly we have to recognise that the law applies both to children and to adults, even though children cannot work. That said, we have made a number of exceptions in the case of children and not only following your suggestions: indeed, we have made wider exceptions as well.

The Chair: On that basis, should you not exclude all children?

Mr Shailesh Vara MP: Not necessarily, because we have tried to make sure that where there is vulnerability, where there are special needs among certain categories of children, that is covered. The rule seeks to ensure that for those who pay for the legal aid, the British taxpayer, there is some sense of accountability. They are entitled to feel that the money they are putting into the system is going to people with a strong connection to the UK.

The Chair: But all children are vulnerable.

Mr Shailesh Vara MP: There are categories of vulnerability. Some children are more so, and we have tried to identify those and to cover those in the exceptions.

The Chair: But surely in terms of human rights, the needs of children are more important than the needs of taxpayers.

Mr Shailesh Vara MP: I am in no way saying that the needs of children should not be taken into account. I am saying simply that for the specific purpose of access to legal aid, we feel that all people should have a strong connection to the country. We recognise that there can be categories of children for which we should make exemptions, and we have done that, but I do not think there should be blanket coverage.

Q10 Baroness Kennedy of The Shaws: Mr Vara, we have had evidence from the Children's Commissioner and persons who are very much involved in specialising in the concerns and interests of children. They speak about the importance of children having a voice in the legal system and the fact that children do not have a voice. So we want to press you on this: why not make an exception for all children, given that children are disadvantaged in a courtroom or a tribunal because they just do not have the same kind of voice that an adult would have? Therefore all children fall into the category of "vulnerable".

Mr Shailesh Vara MP: In terms of having a voice, they have lots of representative bodies, such as the people who have given evidence to you, who are their voice. Children, by definition, are not going to be as knowledgeable or articulate as adults, so they require assistance and they have representatives both in the bodies that represent them, and, indeed, in parliamentarians. We are here to be their voice as well.

Baroness Kennedy of The Shaws: How often do you think parliamentarians make themselves available to give legal advice and attend at tribunals? How often do you think that is likely to happen?

Mr Shailesh Vara MP: What I mean, Baroness Kennedy, is that we have lots of categories of people and each of them will speak up for children in a different context. I am not saying that parliamentarians should appear individually at tribunals, but I certainly have parents who come to me with issues regarding children.

Baroness Kennedy of The Shaws: I should like to press you on whether your department has actually done a costing of what this would mean. We are given to understand that the numbers would be really very small.

Mr Shailesh Vara MP: As far as the residence test is concerned, we have not historically kept a list of nationalities, so we do not have the figures. There is an element of principle here, though: if people are applying for legal aid in Britain, there ought to be a strong connection to the country. I think 12 months is perfectly reasonable: it allows people to settle if they are able to contribute. In the case of children, we have strained very hard and have taken advice from various people, including this august Committee, and we have made provisions. Some of the organisations that you referred to, the children's groups, we have also spoken to, so it is not as though the MoJ has been sitting in a cloud and coming to conclusions without consulting widely. Indeed, we made exceptions following the responses that we received to the initial consultation last April.

Baroness Kennedy of The Shaws: It cannot be beyond the wit of your department to estimate the cost for the very small numbers of children who will be involved in this. You say that the taxpayer is entitled to know. If this is de minimis, a very small amount money, and provides protection to vulnerable children, it might be a cost that the public feel they are prepared to bear, given that it is about children.

Mr Shailesh Vara MP: You raise a fair point, Baroness Kennedy, but as I say, I do not know the answers, because we simply do not have the data from which to extract the information that you ask about.

Q11 Lord Lester of Herne Hill: Mr Vara, as you know, on 7 May the Secondary Legislation Scrutiny Committee reported on introducing the instrument that will give effect to the residence test. It recommended that that instrument should not be laid until this Committee—and, for that matter, another Committee: I forget which—reports first. You wrote saying, “No, we won’t do that. We won’t wait”. I do not understand, and I would like to ask you, how importantly you take this Committee and the other Committee, because it looks from your refusal that you do not give them much importance. You are going to charge ahead without waiting for our report, which you would have the benefit of before you finally decided what to do. What do you think about that?

Mr Shailesh Vara MP: Lord Lester, if we did not take this Committee seriously, we would not have introduced some of the exceptions that were recommended by it. We do take this Committee very seriously, which is evidenced by fact. As for waiting for Committees to report, you will appreciate that there is a huge domino effect in all sorts of activities. People have to proceed as they see fit, based on the evidence they have, and events will then take their course. To hold up proceedings regularly while another Committee or another organisation reports would be quite cumbersome. As I say, we did take advice and we had a consultation. We took on board the views of those who were consulted, we took on board the views of this Committee, and there comes a point when you have to say, “We have to stop waiting for people. We have to get on”.

Lord Lester of Herne Hill: I appreciate that you have to get on, but here we have the House Secondary Legislation Scrutiny Committee and this Committee, both anxious for you to reach an informed decision before you lay the instrument. I do not understand from your answer what the rush is about.

Mr Shailesh Vara MP: Politics is about getting things done. I do not mean to be glib when I say that, but we are in the business of getting things done. There is a backdrop of huge economic difficulty. A lot of the decisions that we are taking are a consequence of that backdrop. We therefore have to move on and take decisions. Some of them are difficult. Nevertheless, we have to take them in good faith, which is how we take them. We do the best research and the best consultation, take the best advice that we can, form an opinion and move on. If others come up with a different view as we are going along, of course we listen.

Lord Lester of Herne Hill: Yes, but you will not be listening before you lay the instrument. You will not be listening to what this Committee has to say, will you?

Mr Shailesh Vara MP: With respect, we have listened to this Committee, which is why we have introduced some of the exceptions that we have introduced.

Q12 Baroness O'Loan: Minister, this Committee has a history of responding quickly to draft legislation. We also have a history of receiving legislation very late for comment. Is it not possible for the department to consider its obligations in order to enable proper scrutiny of legislation, particularly by the human rights committee, in the process of managing the laying of instruments? You talked about the importance of getting things done. I would say to you that the important thing, surely, is to get them done right. You tell us that this is a time of economic difficulty, but you do not actually know the cost of what you are trying to save and you do not know how many children are involved. Is that an appropriate action for a Government?

Mr Shailesh Vara MP: We do know that there will be some savings, although we do not know how many. In terms of working together, clearly we try to work as expeditiously as possible, and where improvements can be made, then certainly they can be. In terms of the number of people involved, as I said I do not know how many there are. There is also the element of the principle here. I do not think it is unreasonable for the British taxpayer to be able to say that the money that they are contributing to the Exchequer, from where the Legal Aid Fund comes, is going to go to people who have a strong connection to the United Kingdom. Twelve months for a residence test is a sensible period. We should also recognise that there are a huge number of exceptions. At the outset, when we had the consultation, the exceptions that we had in place were for asylum seekers and those serving in the Armed Forces and their immediate families. Since then, we have come a hugely long way. The JCHR has a considerable list not only of its own recommendations but of various other sources' recommendations. So we are listening.

Baroness O'Loan: Do you know, Minister, the total expenditure in this area of activity?

Mr Shailesh Vara MP: In this specific area? Are we talking about legal aid as a whole?

Baroness O'Loan: No, we are not; we are talking about actions in which all children may be involved.

Mr Shailesh Vara MP: I do not know, but we recognise that they were categories that we needed to exempt, so we have exempted them.

Baroness Berridge: Minister, I agree with you on the point of principle that there will be some savings, but these children may end up turning up at the court office or at proceedings unrepresented. That, of course, means that processes perhaps do not go as speedily as they would have done, and when you have unrepresented people, but particularly unrepresented children, attending, that can end up with the court system incurring more costs. Is there any way in which you are going to liaise with the Courts Service and the judiciary to try to calculate, once the regulations change, whether you have seen an increase in the number of children and a backing-up of costs, not just in proceedings but particularly at the court office? We could end up spending more money over time, and the statistics will be very important for us in assessing that.

Mr Shailesh Vara MP: Yes. Clearly we are in regular contact with the court services. The judiciary is of course independent, but nevertheless we work closely with it, and we will of course be keeping a very beady eye on how this is impacting. Perhaps I may also say, while on the subject of taking note of this Committee, as Lord Lester mentioned, that it is my understanding that previously you asked whether the Lord Chancellor would take account of a certain category of 700 people. He has, and they have now been exempted.

Q13 Baroness Lister of Burtersett: Minister, you have responded to a number of our questions by talking about an element of principle, but another important principle is involved here, and that is compliance with the UN Convention on the Rights of the Child. As you will be aware, our witnesses last week—the Children’s Commissioner for England and Anita Hurrell from the Coram Children’s Legal Centre—were categorical in their belief that even after the very welcome concessions, the residence test will not be compliant with the UN convention. Could you therefore explain in what way you believe it will be compliant, in particular with Articles 2, 3 and 12?

Mr Shailesh Vara MP: As I said earlier, you will be aware that we take advice as well. We are confident that we will be compliant with the United Nations Convention on the Rights of the Child. I accept that there is a difference of view here, but it is our view that we are in compliance.

In terms of Article 2, those who are vulnerable will be looked after, and exemptions are made there. On the best interests of the child, absolutely—and we have made exceptions to allow for that. In terms of Article 12 on respect for the views of the child, that clearly overlaps with the best interests of the child. Likewise, we have again made exceptions. I note what you say, that some organisations dispute our analysis, but I disagree. I believe that we are in compliance with our international obligations, and indeed there are also the exceptional funding criteria. We must not overlook those. Where a particular party feels that they have not been given legal aid, they can apply for exceptional funding. That exceptional funding goes specifically to the heart of our international obligations, both in terms of Article 6 and in terms of our EU obligations. There is another criterion at the end of the exceptional funding criteria which says that if we may be in breach, we still have to give funding. I think we have covered a lot of ground to try to make sure that all matters of concern are taken care of.

Baroness Lister of Burtersett: The Office of the Children’s Commissioner is not just any other organisation. The commissioner has a responsibility for this.

Mr Shailesh Vara MP: Absolutely. I did not mean that in a demeaning sense, and please do not in any way interpret it as such. I would simply say that there are many eminent people and eminent organisations with a different view. But I repeat the point that we do not come to these decisions lightly. We consult widely. We consult organisations—individuals who are directly affected and who work on this issue day in and day out. As a consequence of that, we have made huge changes.

Baroness Lister of Burtersett: As I say, we appreciate those changes, but this goes back to a point made, I think, by Baroness Kennedy. The UN convention is not just a convention for vulnerable children, however they are defined; it is a convention for children, full stop. I think you would accept that the exceptional funding has to be very exceptional indeed in order to get that funding. I think it would be very difficult for the kind of children who Baroness Berridge has talked about to get that funding. I do not think that we can rely too much on it.

Mr Shailesh Vara MP: By definition, exceptional means exceptional. It is not meant to be another route whereby if you are turned down in one way, do not worry because you can apply for exceptional funding and get it that way. It is meant to be for categories that, for the specific circumstances of the case, should have been included but for whatever reason have not been. Therefore, an application is made through that route. May I also say that there are various other routes for redress as well? We should not always think that it is only the law and the courts that can give satisfaction. There are extensive organisations and individuals out there who provide a huge amount of support to the people we are talking about. I think that the culture of saying, “We need to go to the law”, needs to change, especially if the lawyers and the process of law are being paid for by the taxpayer.

Sarah Teather: Minister, just picking up on the point about exceptional funding raised by Baroness Lister, I believe I am correct in saying that 2% of cases are able to access exceptional funding. Certainly people have told me that it is almost impossible to access that funding. It is very opaque and most people have no idea how to go through the process. It is also extremely slow, so if a remedy is needed quickly, that option will not be available to you. Is that correct?

Mr Shailesh Vara MP: If there are procedural aspects, I am happy to go away and look at them. As I said earlier, the numbers will by definition be low because exceptional means precisely that; exceptional means a few.

Sarah Teather: I appreciate that, but when Questions are asked on the Floor of the House about some of the vulnerable categories that do not appear to be included, the response from Ministers is always, “But there is exceptional funding”. So I would say to you in return that you cannot have it both ways either.

Mr Shailesh Vara MP: What I would say to you is that I am not going to simply say “exceptional funding,” I would simply say, “Look at where we started when we did the consultation in April, when we said that the exceptions would be asylum seekers and those in the Armed Forces and their immediate families”. Look at where we are now. We simply

would not have got to where we are now, with the list of exceptions that we have, if we were simply saying, “It is all down to exceptional funding”.

Sarah Teather: I think we will pick up on one of those points later.

Q14 The Chair: Minister, you have mentioned that you took advice on the decisions you are taking to ensure that they are compliant with the convention. Would you publish that advice?

Mr Shailesh Vara MP: I cannot commit to that at the moment because there are conventions for government and I would need to look into that. I am not sure that it is right for all decisions and advice being taken to be published. That comes down to the way Governments operate as a general rule rather than me taking an ad hoc decision here.

The Chair: Will you write to the Committee?

Mr Shailesh Vara MP: Yes, I will write to you.

Mr Viendra Sharma: Minister—

Mr Shailesh Vara MP: When I say that we have taken advice, I mean that in a broad sense. That covers a lot of people: consultees and other people we will have spoken to. I take it that you, Dr Francis, were referring to specific legal advice. I will see what advice we have had, but first I need to check whether it is advice that we can pass over to you or otherwise.

The Chair: We are interested in the advice, whatever it is. I beg your indulgence for a moment, Mr Sharma, because there are a couple of supplementary questions.

Baroness Lister of Burtersett: I do not know about the protocols on this, but I wonder whether it is possible to have a list of the organisations that were consulted and which said that they believed that this is compatible with the UN Convention on the Rights of the Child—not necessarily seeing what they said, but just to know who they are.

Mr Shailesh Vara MP: We have responded to the consultation and I believe that it is an open document. Those who made their submissions are unlikely to harbour secrets. After all, we have replied to the consultation. Certainly, as the open and transparent Government we seek to be, I am minded to say that the views of those who wrote into the consultation are published. Sorry, I understand that we have summarised the views but that we have not published all of them. I am a relatively new Minister of a few months, although I suppose it is getting on for eight months, but we will certainly give you as much information as convention allows.

Baroness Lister of Burtersett: That would be helpful, because certainly our sense is that organisations that work in the area of children’s rights and with children do not believe that it is compatible, so it would be very helpful to know which organisations have responded to you.

Mr Shailesh Vara MP: Certainly, but what I will say is that when we come to decisions such as this, they are not based simply on speaking to some people. We have had the consultation which the organisations you have referred to will have had the opportunity to

reply to, and in some cases I think they did reply. They have had an opportunity to make their contributions.

The Chair: I think that Baroness Lister is being extremely polite. I think she is implying that there are no children's organisations that support your position.

Mr Shailesh Vara MP: That does not necessarily mean that we are wrong.

Q15 Lord Lester of Herne Hill: Minister, I think I heard you say that you want to change the culture of going to law. You are not saying that exactly, are you? I was thinking about how the only reason why 200,000 British Asians from east Africa were able to come to this country, notwithstanding the racist Commonwealth Immigrants Act 1968, was because we were able to go to law before the European human rights commission. You are surely not saying in the context of legal aid that you want to treat people using alternatives to law: rather, that you want them not to use law. You are surely not saying that.

Mr Shailesh Vara MP: What I am saying is that we are trying to ensure that where people can progress their matter without going to the law, that has to be preferable. Going to the law is a very stressful experience and most people try to avoid it at the best of times. I am trying to say simply that if there are other avenues for pursuing the same end, they should be pursued. Many of the Asians—I am mindful of your distinguished record in this area—were actually British citizens. After the expulsion of Ugandan Asians in 1972, there was a big hoo-hah in this country, with people saying, “You can’t come to this country”, or “Don’t let them in”. Actually they were British citizens, but that was lost in the small print.

Q16 Mr Viendra Sharma: Minister, you have excluded asylum seekers from having to satisfy the residence test that you mentioned earlier. Why are unaccompanied children not considered to be equally vulnerable and therefore not also excluded from having to satisfy the test?

Mr Shailesh Vara MP: A lot of unaccompanied children will probably qualify for asylum status or refugee status, which is also exempt, so I would have thought that many of the categories are already covered by the exemptions. To the extent that they are not, as I said earlier we believe that people should have a strong connection to the UK. If a child is unaccompanied, there are many other avenues by which redress can be pursued for them.

Q17 Baroness Buscombe: Minister, we have heard from the Children's Commissioner and others that children who have been granted limited leave until the age of seventeen and a half will face a time gap in which they cannot get access to civil legal aid after they have been granted that leave. For example, if they have an ongoing age dispute and are refused asylum, what would happen to such ongoing proceedings?

Mr Shailesh Vara MP: I am not sure of the technicalities, but the residence test is simply a 12-month residency, subject to the 30 days. If there are time gaps, where would that fit into the 12 months? The 12 months is meant to be a simple test.

Baroness Buscombe: We had an example last week from the Children's Commissioner of a time gap in which the children were lost between stalls, as it were, because of their age. They were not old enough to get civil legal aid, so they were caught between stalls.

Mr Shailesh Vara MP: We have talked about children and adults, so I am not quite sure where an age issue comes in. The principal thing here is residency. I am happy to go away and look at it and at the particular context in which the issue has been raised.

Baroness Berridge: If I may add to that, I think the point was that there can be situations where the children fall within one of the exceptions, for instance to claim asylum, so they are then granted legal aid. Of course it might not just be those proceedings; there might also be an ongoing age dispute. Once the asylum claim is refused, they are no longer in that exemption so they drop out, but there is other ongoing litigation. This is a practical point. Does that mean that their legal aid will carry on for the purposes of the other matters, or does everything come to a halt at that point? I think that was the point they were making.

Mr Shailesh Vara MP: On the basis that I think I get what you are asking—if I have not, please come back to me—if a person qualifies as someone who has been given asylum status here, is applying for asylum or is an asylum seeker, they would get civil legal aid for all matters. If their status changed, so would the decision on legal aid because the decision is based on meeting the criteria. That would be the general case for anything. Someone will get the residence test if they apply for general civil legal aid in the normal context of business here. If they did not fulfil the criteria, the circumstances would change. But coming back to this issue, they would qualify as an asylum seeker and get all the benefits that go with that. If subsequently their status changed, they would then no longer be asylum seekers and they would be subject to the 12-month residency test. If they do not comply with that then, yes, they would be exempt because they would not qualify.

Baroness Buscombe: I think it still creates the vacuum that we heard about from the Children's Commissioner. What happens then?

Mr Shailesh Vara MP: What happens then is that they fall into the category of where they do not qualify because of residency. This is a residency test for which we have made exemptions, and in this instance the exemptions are asylum seekers. If they are no longer asylum seekers, they do not fit the criteria for exemption and they fall back into the general pool of those people who do not qualify.

Baroness Kennedy of The Shaws: What the commissioner was pointing out—it is something the Committee knows about because it has heard evidence about it in the past—is that young people are often on the cusp between being a child and being an adult. Arguments are made that they are not really children and that the age they are presenting as is not their true age. There can be disputes as to age. It is not possible for that category of person to pursue such disputes in circumstances where legal aid is no longer forthcoming, but there is still an argument as to whether they really are in fact only 16, even though people think that they might be over 18. There is no way of continuing with legal advice for them because the legal aid has been stopped.

Mr Shailesh Vara MP: The residency test applies to children and to adults. Forgive me if I am missing something here. You may well have been told about the little gap between being a child and moving into adulthood. The residency test is about a period of time for individuals rather than dealing with what stage of progression an individual has reached between childhood and adulthood.

The Chair: We need to make progress now.

Baroness Berridge: There has been very detailed evidence about this. In terms of the taxpayer funding all litigation, someone might be 80% of the way through the other proceedings when the asylum claim fails. There may be other evidence needed to determine other things. Perhaps you could look at the evidence we received last week in detail. Is it really a good use of public money to fund proceedings for 80% of, say, an age dispute, and then see it being dropped? Could we ask you to look in detail at this evidence and then consider whether all ongoing proceedings should finish?

Mr Shailesh Vara MP: I am happy to look at this, but I have to say that if you have rules in mainstream society, when the rules kick in they kick in. In this instance, if you are an asylum seeker you will qualify, but then a certain contingency takes place and you do not qualify. Why should we make an exception in this case when, as a general rule, we would not make an exception in normal circumstances? There are all sorts of hurdles and contingencies that kick in for a broad spectrum of activities throughout life. We have tried to ensure that those who we feel are in need and who are vulnerable should be and are exempted, but if it is felt that they are no longer in the category of exemption, I am afraid that they will not be exempted.

Q18 Baroness Berridge: We have also received evidence about children from destitute families who should be able to pass the residence test, but they might not be able to produce the documentation. They qualify, but they cannot produce the requisite documentation. Do you accept that the residence test could leave some children who are eligible for legal aid without access to it because expecting them to produce documents might be very difficult?

Mr Shailesh Vara MP: I do not think I did so at the outset, but perhaps I may thank Dr Francis and the Committee for the report and for your suggestions. I mentioned that we have taken some of those suggestions on board, but I do not think that I thanked you for that helpful report. One of the things that came out of it was the production of evidence. We are looking to make the assessment of evidence a lot more flexible than perhaps it was before. We propose to produce an SI, and with it will be a list of a lot of the evidence that we require, and we will be mindful of precisely the kind of circumstances that you mention. We will try to ensure that if there is any difficulty in producing documentation, those who genuinely fit the category of being exempt can be dealt with. That being said, however, if someone is simply missing basic documentation showing how long they have been living in this country, I should like to think that there is some landlord, a bill from a telephone company or whatever out there. In the modern world we live in, there are many ways of trying to ascertain the evidence we would want in order to determine 12 months' residency.

Baroness Berridge: Will there be specific measures in relation to children? Paper utility bills even for adults are becoming less likely. The evidence that a child will have in order to prove residence might be different. Will that be covered?

Mr Shailesh Vara MP: We will look carefully at how flexible we can be, and recognising the difficulties that some individuals will have, we will try to be as flexible as we possibly can.

Q19 Sarah Teather: I want to look at one of the changes that you say you made in response to comments that this Committee and others have made. Of course you have excluded Sections 17 and 20 of the Children Act cases from the residence test, but looking at the detail,

it is clear that it does not exclude all legal remedies, in particular judicial review. That is because you would have had to have excluded Section 17 and 20 cases under paragraph 19 of Part 1, Schedule 1 to LASPO. I have to say that when I looked at that, I could not help but feel that it was a bit of a sleight of hand or a fig leaf. It was something that you were able to say you had done in response to comments, but in fact it left an awful lot of things unchallengeable for very vulnerable children who the Government have acknowledged they wish to make provision for. We took evidence last week which I am sure you will have read. I wonder whether you acknowledge the concerns that by doing it in this way, children could end up being advised that they have a meritorious claim, but the solicitor would not be able to pursue it. As it was put to us last week, it is the equivalent of saying, “You can go to the High Court, but you can go there on your own”.

Mr Shailesh Vara MP: I think it is important to remember that judicial review is not the be-all and end-all. We want to be at a stage where people do not have to make an application for judicial review. There is an exemption for judicial review. Civil legal aid is not available, but the residency test applies in this area to individuals seeking civil legal aid for judicial review and there are limited exceptions. For example, there is an exemption for judicial review in respect of the lawfulness of detention, which is basically to do with liberty, proceedings before the Special Immigration Appeals Commission, and limited and specific immigration and asylum matters. The residence test does apply, but we have tried to make exemptions where we felt it was appropriate to do so.

I have to say that by virtue of having a residency test, there are going to be categories of person who will fall out of it. We have tried to ensure that certain categories of people are exempted: that is, those people whose circumstances we feel merit their being exempted.

Sarah Teather: Do you not acknowledge the very definition of these children? Section 17 relates to the provision of services for children in need, such as the additional care needs of a disabled child or accommodation for children? These are the very children who the Government say they are concerned about. In many of these cases where a challenge needs to be made to the local authority, the only way to do that is via judicial review. Certainly, the threat of judicial review is often what results in things being done rapidly. I cannot understand why the Government have done it like this and then did not also make an exemption through a similar amendment under paragraph 19 of Part 1 of Schedule 1 to LASPO at the same time. If the Government are doing something in good faith, which is to acknowledge that under Sections 17 and 20 there are vulnerable categories that we wish to exempt, why did the Government not go back and do this properly?

Mr Shailesh Vara MP: We feel that we have done this properly and that we have acted in good faith. The fact is that there is a huge list of categories. Before, it was asylum seekers, but we have now included those with refugee status. That is a large category of people. Again, we have acted in good faith, but there are always going to be limits on how far we can go.

Q20 Mr Buckland: Minister, I turn to special educational needs issues. These were not specifically covered by our report, but I think there has been some correspondence with your ministerial colleague Mr Hughes about the potential problems that could be faced by children who are applying to the First-tier Tribunal in SEND—special educational needs and disability—cases. It is clear from the evidence we heard from the Coram Children’s Legal

Centre and others that we are talking about a very small number of cases here, but because legal aid has to be applied for by the parent or guardian, it is their residency status that will determine eligibility. Of course we will very often be dealing with children with special needs who were actually born in this country and are British. Would the Government consider exempting paragraphs 2 and 19 of Part 1 of Schedule 1 to LASPO cases so that children who are in this category and who need legal help for this type of hearing or process can get that help?

Mr Shailesh Vara MP: I think we have to draw a line somewhere. As I said earlier, these are very difficult decisions. It is a residency test, and we do believe that people should have a very strong connection to the UK. I am not persuaded that we should make another exemption in the case of special educational needs.

Mr Buckland: But of course we are talking about the children here who do have a connection, although the application is made via their parent or guardian. Is that not, first, a rather worrying anomaly, and secondly, are we not talking about a very small category?

Mr Shailesh Vara MP: Again, there is the element of principle and the element of introducing a test and then having exemptions rather than having a blanket category of people who are exempted, “regardless of.” We have tried to be as fair as possible by recognising categories where we felt that there ought to be an exemption. In the case you are referring to, Mr Buckland, I am not persuaded that we should be going in that direction.

Mr Buckland: Perhaps I will have another go at this in another venue, but I am very grateful to you for your answer.

Mr Shailesh Vara MP: Thank you for giving that notice. I will be mindful to answer all your questions.

Sarah Teather: I just want to supplement the questions of my colleagues on this point. As the Minister who worked on this particular legislation, one of the changes we made very deliberately was to allow children to go to the tribunal on their own. We were piloting it and it was one of the first times that it had ever been done. It was done in order to bring us more into line with the UNCRC. Of course, this change to the residence test undermines that for the very children who my colleague has been discussing.

Mr Shailesh Vara MP: I am not sure that it does. As far as access to tribunals is concerned—Baroness Berridge asked earlier about access to courts and other support—we will be working with other agencies and closely with the judiciary to make sure that there is access and that the proper courses are followed.

Sarah Teather: That is not really an answer, but I presume that we have run out of time.

Q21 Baroness O’Loan: Very briefly, I want to follow up on what Mr Buckland said. He asked you about children who are born here. They are British citizens whose parents do not qualify under the residency test. Is it not possible to make an exception for those children who, on your own principled position as to who should qualify, have a very definite connection?

Mr Shailesh Vara MP: I come back to the procedure. There are other agencies through which people can go. As a Member of Parliament, I have had parents coming to me and I have taken up issues related to special educational needs, and legal aid has never been mentioned along the way.

Baroness O'Loan: But the fact remains, Minister, with respect, that there are cases where judicial review is the only route. These children will be excluded despite the fact that they satisfy your first principled test.

Mr Shailesh Vara MP: We have given judicial review very careful thought. We have made some exemptions, and we feel that those are the exemptions that should stay. Regrettable though it may be, we do not propose to extend them.

Baroness Berridge: I just want to check that I have properly understood the situation. My colleague is more expert in the area of special educational needs, but as I understand it, these children with special educational needs may in fact be British. However, let us say that the parent is undocumented in this country and the other parent resides overseas. The resident parent dies and the other parent comes from overseas and has been resident here for only a couple of months, and thus fails the residence test. That child will be left without that particular funding. I am genuinely trying to check that I have understood that that is the scenario. It is because the parent who came back to take care of the child would not qualify, and therefore the child would not have access to this particular section of legal aid funding.

Mr Shailesh Vara MP: How many people are we talking about?

Baroness Berridge: We accept that it is a very small number of cases.

Mr Shailesh Vara MP: In my nine years as a Member of Parliament, I have never come across that scenario. I go back to the exceptional funding criteria to see whether they can be looked after there. The criteria do talk about our obligations, and that is a route that may be pursued. But, as I say, we have to draw the line somewhere, and residency is precisely what it says: residency.

Baroness Berridge: I understand where you have drawn the line.

Mr Shailesh Vara MP: At the moment we have no plans for special educational needs to be exempted.

Sarah Teather: The Coram Children's Legal Centre told this Committee that it has seen cases like that. You said in answer to Baroness O'Loan's question a moment ago that there are other routes people can take to get satisfaction. You indicated writing to MPs. I wonder whether you could list for Members of the Committee the other routes that you consider people could use to get satisfaction, not including MPs writing stropky letters, which I do not actually think is a very adequate answer.

Mr Shailesh Vara MP: I accept that you are not happy with my answer. When you say, "List them," there are all sorts of agencies outside that look after children and seek to promote their welfare and so on.

Sarah Teather: They use the law to do so, do they not?

Mr Shailesh Vara MP: They do not always go to the courts. They do not always say, “We have an issue and a problem here, and the only way of resolving it is to go to court”. That is not so. Perhaps I may give an example, which is not meant to be glib. You may buy a product from a shop, but when you get home you find that it is not what you thought when you bought it. You could consider the Misrepresentation Act 1967 and take the supplier to court and get satisfaction that way. Alternatively, you could go to the retailer and follow the complaints procedure. I am minded to say that you will probably get the result you want with the phrase “costs for lawyers” not coming into it at all.

Sarah Teather: I think it would be wonderful if that were the case for special educational needs, but I feel that we are rather a long way from that Utopia.

The Chair: Minister, thank you very much. I shall choose my words carefully, but this has been a useful and instructive evidence session. You have undertaken to write to us, notwithstanding government conventions. I would suggest to you that some government conventions are there to be broken, particularly in relation to a far superior convention: namely, the UN Convention on the Rights of the Child. When you consider these matters, I hope that you will set those two conventions alongside each other. Once again, thank you.