

A submission by Southall Black Sisters on the government's proposals for the reform of legal aid in respect of gender related violence and immigration cases.

Summary

Southall Black Sisters is extremely concerned about and critical of the government's proposed withdrawal of legal aid in non-detention and non-asylum immigration cases. The proposals will have a highly detrimental and discriminatory impact on abused migrant women who have insecure immigration status and who need to make applications to remain indefinitely in the UK on the basis of their experiences of gender-related violence. If the proposals go ahead in their present form, abused migrant women and children will face life-threatening consequences and suffer serious violations of their fundamental human rights and freedoms. Elsewhere in the proposals, the protection principle underscores the government's decision to retain for the most part, legal aid for abused women and vulnerable people who cannot be expected to navigate their way through the law and legal processes but the same logic is absent in respect of abused women and children who have insecure immigration status. The proposals in this respect fail to meet equality and human rights standards for this category of vulnerable people as set out in domestic and international law.

About Southall Black Sisters

1. Southall Black Sisters (SBS) is one of the UK's leading organisations for black and minority women. We have been in existence since 1979. In 1983, we set up a not for profit, advice, resource, campaigning and advocacy centre for black and minority women, with a particular focus on the needs of South Asian women. The bulk of our work is directed at assisting vulnerable women and children - the overwhelming victims of domestic and other forms of gender-related violence – obtain effective protection and assert their fundamental human rights¹.

Loss of legal aid for victims of violence who need to make applications to remain in the UK indefinitely under the Domestic Violence Rule or some other category in immigration cases.

¹ For more information about our work see <http://www.southallblacksisters.org.uk>

2. SBS is particularly concerned about the withdraw legal aid from non-detention immigration cases as set out in the government's recent response to the consultation on proposals for legal aid reform- *'Legal Aid Reform in England and Wales: the Government Response June 2011'* ².

3. In this briefing paper we focus specifically on the potential loss of legal aid funding for all applicants who have experienced gender-related violence or abuse and who wish to apply to remain in the UK under the Domestic Violence Rule (DV Rule) or some other grounds in immigration law. This includes trafficked women and women who are brought to the UK to work as domestics in private households. Our concern is informed by 30 years of pioneering work on addressing the needs of abused black and minority women who are trapped in violent and abusive marriages as a result of the operation of immigration rules.

4. In 1992, SBS gave written and oral evidence on the impact of immigration rules and practice on migrant women experiencing domestic violence to the Home Affairs Select Committee on Domestic Violence.³

5. This evidence was well received and led to a series of successful meetings and negotiations between SBS and the Home Office from 1999 to 2002 which culminated in the introduction of the DV Rule in immigration law. The Rule enables spousal visa applicants to apply to remain in the UK indefinitely as victims of domestic abuse without fear of deportation. Under the Rule, an applicant has to provide evidence of domestic abuse to show that this caused the breakdown of their marriage.

² We are concerned about many aspects of the proposed withdrawal of legal aid, but our main concern is with victims of abuse who need to apply to remain in the UK on the basis of such abuse. They are some of the most vulnerable users who use our services.

³ House of Commons Home Affairs Committee, 1993. *Report of Inquiry into domestic violence* HMSO, London.

The Present position

6. At present, legal aid funding is available for persons seeking to make applications to remain in the UK indefinitely on the basis of their experiences of violence and abuse. Many women apply under the DV Rule and/or invoke the Human Rights Act or seek leave on some other, including compassionate grounds. As we demonstrate below, our concern is that if the proposed withdrawal of legal aid goes ahead⁴, abused migrant women and children who have insecure immigration status will remain trapped in violence and face serious, life threatening consequences. Our view is that the proposed withdrawal of legal aid will defeat the purpose of the DV Rule.⁵

The Government's Response

7. At the consultation stage of the legal aid proposals, SBS made a detailed submission on the impact of the loss of legal aid for abused migrant women. (See **Appendix 1**) The Government responded with the following:

Domestic Violence Immigration Rule cases

Key issues raised

90. A number of respondents called for legal aid to be retained for these cases, citing both the complexity of the issues and that the victim of abuse will have been traumatised. They also refer to the Home Office project in this area ('Sojourner') which they suggest will be undermined by the removal of legal aid. The Sojourner project provides four weeks (20 working days) of money to cover essential housing and living costs for victims of domestic violence. During this time,

⁴ See for example para 89. Under the Immigration Rules, someone on a spousal visa, which is valid for a limited period of time, and who finds themselves in an abusive relationship, can apply for indefinite leave to remain under the 'domestic violence immigration rule'. Under the consultation proposals, such cases would be removed from scope. 'Legal Aid Refore.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdfm in England and Wales: the Government Response June 2011. <http://www.justice>

⁵ On 26th July 1999, Margaret Moran MP raised a question in the House of Commons about the purpose of the (then) domestic violence concession. In reply the Home Office Minister- Mike O'Brien stated: 'The domestic violence concession has been introduced for overseas spouses who wish to remain in the United Kingdom, but who wish to leave their partner because of domestic violence before completion of the 12 month probationary period. The concession allows them to settle in the United Kingdom even if they are no longer living with their sponsor provided they comply with the conditions set out in the concession'

victims are encouraged to complete an application for indefinite leave to remain under the domestic violence immigration rule. Once this application is submitted to UKBA, money for essential living costs will be provided for a maximum of 4 additional weeks (20 working days) while UKBA considers the application. Respondents also pointed to a discrepancy between the proposed lack of legal aid for these cases and its availability in private family law cases where domestic violence is shown to be present.

The Government response

91. The Government's view is that these applications are comparable to other immigration applications, albeit that individuals need to obtain documentary evidence of their domestic violence. Whilst individuals may well find it difficult to fill in the forms, it is not specialist legal advice that is required. This is something that can be addressed through guidance or non-specialist help rather than legal aid.

92. In terms of the comparison with private family law, the Government is seeking to prevent a victim of domestic violence from facing their abuser in court without legal representation. In immigration cases, the victim is making a paper-based application to the Home Office, and the Government therefore considers the situations to be different. Legal aid will continue to be available for those seeking a civil injunction to prevent domestic violence irrespective of their nationality or immigration status.⁶

8. We set out below the highly detrimental impact that the proposals will have on abused women and children with insecure immigration status.

The impact of the proposals on abused women who have insecure immigration status.

9. Domestic violence devastates the lives of victims, causing lasting damage to their physical and mental health. The impact is much greater for women who are particularly vulnerable due to factors such as age, disability or state of mental health and cultural and religious background. All women face considerable obstacles in leaving a violent relationship however, black and minority women face

⁶ See paras 89-92 'Legal Aid Refore.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdfm in England and Wales: the Government Response June 2011. <http://www.justic>

greater internal (cultural or religious pressures to tolerate abuse) and external (isolation and racism) obstacles.

10. In the vast majority of cases, abused migrant women find it difficult to report their experiences of physical, sexual and financial abuse for fear of further violence, deportation and destitution. Many echo similar stories of violence, domestic servitude, imprisonment, threats, acute isolation, rape, extreme cruelty abandonment and neglect. Their immigration and other essential documents are often taken away from them and many are reported to the immigration authorities in retaliation for leaving an abusive marriage or relationship. In almost all cases, the aim of the abusers is to humiliate and punish women knowing that they are unlikely to be accepted by their families and the wider society, due to powerful cultural, religious and social reasons. Mental health problems, depression and suicide attempts also feature strongly in such cases. South Asian women for instance, are up to three times more likely to commit suicide than women in the general population due to the additional pressures that they face.⁷ There have been cases where women with insecure status have either killed themselves or have been killed or seriously harmed. Many are also destitute because of the operation of the ‘no recourse to public funds’ rule, are unfamiliar with the available systems of support and do not speak fluent English.⁸

Why DV Rule applications are not straightforward ‘paper’ applications

11. The government states that DV Rule applications are ‘comparable to other immigration applications’ and that all that is required is guidance or non-specialist help rather than legal aid. This is simply not the case.

12. The precise numbers of women who have insecure status and are subject to domestic violence or abuse from their spouses and extended members of their families is not known. SBS and the UK Border Agency (UKBA) estimate that there are about 1000 to 1500 cases of mainly women caught in

⁷ Veena Soni Raleigh *Suicide Patterns and Trends in People of Indian Sub-Continent and Caribbean Origin in England and Wales*, Ethnicity and Health, Vol 1, No. 1, 1996.

⁸ A study of 60 Asian women in the UK found for instance that 73% were unaware of services available to support Asian women, 83% felt language barriers prevented Asian women from seeking help and immigration status and fear of deportation impacted upon seeking help (See Each 2009) .

this predicament, although it is also recognised that there will also be significant under-reporting of such cases.

13. Between September 2009 and September 2010, SBS dealt with 46 cases and 982 enquiries from women across the UK who experienced violence and abuse and who needed to make applications to remain in the UK as victims of domestic violence. A significant proportion of these were ‘overstayers’, i.e. women whose status had never been regularised by their husbands. In all 46 cases, legal aid advice and representation was needed to make applications under the DV Rule and/or under some other grounds. In all but two cases where outcomes are known, the women obtained leave to remain either at the first instance or on appeal. Access to legal aid advice and representation was critical in making their applications or in their appeals, which in turn secured their protection.

14. We set out below why it is misleading for the government to argue that DV Rule and other leave to remain applications on the grounds of gender violence are straightforward applications:

- In respect of domestic violence, a person has to satisfy the immigration rules and be mindful of the Immigration Directorate Instructions (**See Appendix 2**) which are complex since they require an evidential based approach which has to be satisfied to the balance of probabilities.
- A typical application under the DV Rule, without complications, will involve gathering crucial evidence of domestic violence and assessing the evidence and the facts of a particular case against the legal requirements under the Rule. Formal requests for reports from the police, social services, health authorities and other agencies often need to be made and for this, fees are usually payable. More often than not, delays in providing such evidence can also compel legal practitioners to take further legal action to ensure that an application is not prejudiced.
- Significantly, complex facts in a case can make the process of applying under the DV Rule far from straightforward. In many cases, out of malice, abusers will write to the UKBA seeking to curtail the leave of their partner, which usually results in mounting a challenge to the curtailment of leave at the same time as making a DV Rule application. Women sometimes have also been wrongfully arrested and charged for harassment and violence against their abusers which can also lead to further complications. In such cases, legal practitioners have to obtain further information from the police and CPS, or wait for the outcome of criminal proceedings since the outcome is highly relevant to DV Rule applications. Many women also

become ‘overstayers’ usually because they are unaware that their abusers have failed to regularise their stay and/or they are too frightened to report their experiences. In these and other complicated factual circumstances, legal practitioners have to prepare detailed submissions which address the myriad of problems encountered and assess the facts and evidence in line with the law.

- Witness statements from the victim and any witnesses also need to be drafted and submitted as part of the application process and this requires great skill and care so that the case meets the legal requirements of the DV Rule. Lengthy representations are always necessary to explain the absence of stipulated evidence. The representations also have to raise any human rights implications on risk of return to countries of origin. Such arguments rely almost exclusively on reports from country, medical and cultural experts for which fees are payable. Without such expert evidence to substantiate a claim, a woman will not be able to have a fair hearing and her application is more likely than not to fail.
- At the same time as making DV Rule applications, destitute applicants also need to make formal requests for the £972 application fee to be waived and this must be supported by evidence of destitution.
- All DV Rule and related applications have to be mindful of evolving case law because complex facts and the nature of the evidence obtained can give rise to legal disputes as to the correct interpretation of the DV Rule.⁹
- Many DV Rule applications are refused at first instance but won on appeal, for which advice and representation is necessary for the purposes of obtaining a fair hearing. At this stage, further evidence from experts is always relied upon to substantiate a claim. In 2010, SBS’ statistics showed that the majority of our cases were refused at first instance but won on appeal. We have a 100% success rate at appeal. A recent survey by Rights of Women also showed that 60% of all domestic violence applications are won on appeal.
- It is a criminal offence for a non-accredited person to give immigration advice. The majority of support services for victims of domestic violence do not have such accreditation which is why they refer to legal immigration practitioners and caseworkers.
- Women’s organisations and other support services across the UK have varying degrees of quality, experience and capacity. Most do not have the training or skills necessary to assess the merits of a case or carry out complicated case or representation work which involves

⁹ See for example, the case of *AI (Pakistan) v SSHD* [2007] EWCA Civ 386

detailed knowledge of immigration law. The gap that will be left cannot be met by other support services. The lack of access to quality advice and representations will have a detrimental impact on how applications are prepared and represented at the initial or appeal stage.

- High levels of vulnerability and lack of basic knowledge and skills amongst migrant women will make it difficult if not impossible for them to represent themselves and to cross examine experienced UKBA officers on the interpretation of facts and evidence in the light of evolving case law.
- Many support services for victims of domestic violence are closing due to lack of funding and this is especially true of specialist BME women's organisations. Others have staff that are trained only to provide support and counselling to women. Many will refuse to assist women in making DV Rule or other related applications for fear of being found to be negligent and/or of exposing women to a potential risk of serious harm.
- The proposals also defeat the purpose of the 'Sojourner Project' pilot scheme, which the present government has pledged to continue until March 2011, pending a more permanent solution to ensure that abused women with insecure status can access emergency housing and funds for essential living costs from which they are currently barred due to the operation of the 'no recourse to public funds' requirement in immigration law.

Examples of typical SBS cases that required legal aid advice and representation

15. Case Example 1: Ms. M was referred to Southall Black Sisters in 2010 for assistance because she had faced domestic violence from her husband and in-laws. On one occasion, Ms M was forced to resist her husband's attempts to drag her out of the matrimonial home. In retaliation, her husband told the police that she had assaulted him and Ms. M was cautioned. Ms. M did not speak English and did not know how they worked; she therefore did not report the domestic violence she had faced to the police. She explained that the police interpreter had informed her that signing the police caution would not cause her any problems. She had signed the caution because she feared further violence from her husband who had threatened to kill her and that she was afraid of being homeless and destitute.

Ms M's initial application (made without the aid of reputable legal practitioners) was refused by the UKBA because she did not have strong evidence to support her allegations of domestic violence and because on the face of it, the police caution suggested that she was the perpetrator of violence.

SBS referred Ms M to legal aid practitioners and assisted her with counselling and other practical support including finding accommodation. She was also referred to a qualified psychotherapist because her mental health had deteriorated.

In preparation for her appeal, her immigration lawyers instructed experts to provide reports on her mental health and cultural context which dictated how she had responded to the domestic violence; to explain why she had accepted the police caution and the likely impact on her if returned to India. She was represented at her appeal hearing by an immigration barrister and following the hearing, was granted Indefinite Leave to Remain on the basis that she was credible as a victim of domestic violence and needed protection.

16. Case Example 2: *Ms. S came to the UK in November 2008 on a 2 year spouse visa. She contacted SBS in 2010 for advice and support in respect of an application to remain in the UK as a victim of domestic violence. Ms. S told us that she experienced physical, emotional, verbal and sexual abuse from her husband and her mother-in-law.*

On 18th January 2010, Ms. S was tricked into returning to Pakistan on the pretext of a holiday and she was subsequently abandoned. She managed to return to the UK but at the airport, she discovered that her spouse visa had been curtailed and she was detained.. She was eventually released following intervention by an immigration solicitor based in Cardiff who also submitted a DV Rule application on her behalf. In the meantime, Ms S went to stay with a family in Cardiff but was forced to leave after experiencing sexual harassment. Ms. S moved to Southall and transferred her case to a local Law Centre.

In October 2010, Ms. S' application was refused and her solicitor submitted an appeal. She had reported her experiences of domestic violence to the police in Cardiff but it was not recorded correctly and was therefore not accepted as evidence. Her new solicitors therefore had to obtain further evidence which included a report from a domestic violence expert, a medical expert report because a report from a local hospital that she had attended, lacked details and did not attribute her injuries to her experiences of domestic violence. For her appeal, Ms S' solicitors also prepared a comprehensive and detailed statement from her which addressed all the points that had been raised in

the UKBA's refusal note. Ms. S' appeal was heard on 8th December 2010 and unusually for such cases, her appeal was allowed then and there. The judge based his decision on the consistency and credibility of evidence as provided by Ms. S as well as the excellent way in which Ms. S' appeal was prepared by her legal team.

17. In view of the above, we are at a loss to see how the process of making DV Rule or other similar applications can be characterised as merely a 'paper' exercise.

A Discriminatory approach

18. Elsewhere in the proposals, the government has recognised that legal aid should be retained where there is ongoing or risk of domestic violence or abuse¹⁰ and where vulnerable persons are unable to navigate their way around the law and legal processes¹¹. Yet the same recognition is not extended to victims of gender-related violence in immigration law. Such exclusion will be highly discriminatory on a number of grounds including race, gender, poverty and mental health.

Equality Impact Assessments in removing non-detention immigration cases from the scope

19. We are of the view that there has been no proper equality impact assessment in respect of gender, race, disability or other forms of inequality. The Equality Impact Assessment (EIA) published by the Ministry of Justice¹² does not engage at all with the group of women most likely to be affected by the proposed withdrawal of funding from DV Rule and related cases

Breaching domestic and international discrimination and human rights standards

20. The government proposals are potentially in breach of international human rights law, this includes the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention of the Rights of the Child (CRC) and the Universal Declaration of Human Rights. (UDHR). The proposals also breach domestic law in respect of human rights and

¹⁰ See for example *The Proposals for the reform of Legal Aid in England and Wales*. In cases of domestic violence and forced marriage or those involving vulnerable adults, legal aid has been retained.

¹¹ See paragraph 4.56 and paragraph 4.57. *The Proposals for the reform of Legal Aid in England and Wales*

¹² See Paragraph 8.37 and 8.38 *Legal Aid Reform: Scope Changes Equalities Impact Assessment (EIA)*

discrimination law such as the Race Relations Act 1976, Sex Discrimination Act 1975, Public Sector Equality Act 2010 and the Human Rights Act 1998.¹³ In the case of women fleeing violence in the UK, acting with due diligence to protect their right to life and to be free from torture, cruel and inhuman and degrading treatment means that the government must ensure all women have access to legal and welfare services as well as protection and provide services which help them regain security and human dignity.

21. We confirm that we are willing to give oral evidence based on this submission.

Southall Black Sisters

11 July 2011

¹³ For a full discussion of the human rights implications by withdrawing legal aid to vulnerable adults and children subject to abuse and violence and immigration control, see *'No Recourse No Safety'* by Amnesty International and Southall Black Sisters March 2008