<u>4PB International Child Law Group response to 'Transforming legal aid – delivering a more credible and efficient system'</u>

<u>Introduction</u>

1. 4PB is the largest specialist family set of chambers in England. It is recognised domestically and internationally as the leading set in Children Law. It is ranked in Band 1 by Chambers and Partners and by Legal 500. Awards won by 4PB in the last 2 years include,

   (a) Chambers & Partners Awards 2012□Alex Verdan QC - Family Silk of the Year,
   (b) Jordans Family Law Awards 2012□Charles Hale - Junior of the Year□ and Michael Gration - Young Barrister of the year
   (c) Chambers & Partners Awards 2011□David Williams - Family Junior Barrister of the Year
   (d) Jordans Family Law Awards 2011□Winner of Family Law Set of the Year□ and Teertha Gupta - Winner of Family Barrister of the Year□.

   In addition to these awards 4PB has had many other nominations.

2. 4PB has long supported pro bono work - Christopher Hames has been nominated for a pro bono award in 2013 and Justin Ageros was nominated in 2011. Pro Bono work carried out by Counsel from 4PB in 2012 includes

   (a) appearing pro bono in 2 cases in the UK Supreme Court in (Henry Setright QC, Teertha Gupta QC, Charles Hale, Rebecca Foukes and Dorothea Gartland) ,
   (b) filing an amicus curiae brief pro bono in the US Supreme Court (David Williams QC and Jacqueline Renton)
   (c) instructed pro bono in relation to an application to the European Court of Human Rights (David Williams QC).

   In addition to these high profile cases (in which members of chambers have appeared for charities, academic institutions and parties to proceedings) counsel from 4PB have acted on a regular basis in other family courts instructed via the Bar Pro Bono Unit and other organisations.

3. 4PB has particular expertise in international children cases, including abduction, relocation, stranded spouses, forced marriage and others. Henry Setright QC, Teertha Gupta QC and Hassan Khan were all involved in the drafting of the Forced Marriage Act. Counsel are instructed on legal aid, privately and via Cafcass to represent the parties and children in the most complex and sensitive international cases. 4PB is perhaps the most regularly instructed chambers by members of the Official Solicitors Panel of Solicitors who conduct child abduction cases forwarded to the English Central Authority by other worldwide Central Authorities. Counsel from 4PB have appeared in most of the leading cases in international children law in England including

(a) Re S (a Child) [2012] UKSC 10 in the UK Supreme Court in February 2012 (Henry Setright QC)
(b) Re E (Children) [2011] UKSC 27 in the UK Supreme Court in May 2011 (Henry Setright QC, Baroness Scotland QC, David Williams QC)
(c) Mercredi-v-Chaffe in the Court of Justice of the European Union in December 2010 (Henry Setright QC, Marcus Scott Manderson QC, David Williams QC).

4. That specialism and expertise is offered and drawn upon in the field of continuing education for the judiciary and members of the professions both domestically and worldwide. Recently members have delivered lectures to European Judges at the Academy of European Law in Florence (David Williams QC), to an international audience of judges and practitioners at the World Children's Congress in Sydney (Rachel Chisholm) and to the family judges of the English High Court and Court of Appeal (Henry Setright QC and David Williams QC).

5. 4PB has a long standing and evidence based commitment to diversity and equality issues. 38 out of 75 tenants are women. Members of Chambers are actively involved in schemes with the Social Mobility Foundation, with 'Pathway's to Law' and with schemes operated by the Inns of Court to encourage equality and diversity at the Bar. 4PB members sit as Deputy High Court judges, recorders and Deputy District Judges. They are members of various Bar Standards Board and Bar Council committees including the Professional Conduct Committee. They also have considerable experience of the legal aid system; members having worked for predecessors to the Legal Aid Agency and having sat on Law Society/Legal Aid Board and Legal Services Commission Review Committees.

6. We believe that the experience that we collectively bring to bear places us in a unique position to comment on the potential advantages or disadvantages of the proposed reforms to legal aid where they impact on the field of international children law. We hope that our track record demonstrates that our observations are not motivated by a narrow or selfish desire to protect any financial interest we may have but rather by our commitment to the public interest in ensuring that access to justice is a reality for those caught up in cross-border family disputes

and the public interest in ensuring that the international Conventions, which have been designed to protect children from the harmful effects of cross-border parental disputes, operate effectively to provide that protection to children. England and Wales is recognized throughout the world as one of the jurisdictions with the strongest commitment to those international Conventions, not merely in word but in deed, in their faithful and effective implementation. We believe that such a commitment has brought incalculable benefits to the children and adults caught up in cross-border parental conflict. It also brings huge (albeit unquantifiable) social benefits in the medium to long term to society as a whole.

Executive Summary

7. In summary we conclude that,

(a) By reference to real life examples of cases we conclude that the proposed residence requirement would exclude from legal aid cases where there are very real and significant risks to the welfare of children.

(b) The residence requirement is indirectly discriminatory on grounds both of nationality and race. In respect of EU citizens it would require rules which would make it extremely complex to operate. In respect of non EU citizens the indirectly discriminatory effects would disproportionately affect those most vulnerable and in need of skilled legal assistance.

(c) Even allowing for exclusions to ensure compliance with EU and other international obligations the proposals will seriously compromise the ability of the English courts to effectively implement our international obligations and harm the well established reputation England holds in the international community for such effective implementation.

(d) Applying a residence requirement in a case where the English court has a jurisdiction over a child and where the child's welfare is a paramount or a primary consideration is inappropriate. Such cases cannot involve forum shopping.

(e) Cross border cases involving children are usually complex and the Convention rights of parties and children (inc UNCRC) are at risk of very serious infringement. The harm to children can be severe and permanent if such cases are not handled appropriately.

(f) The economic and social costs of applying the residence requirement in such cases are likely to outweigh any savings given the relatively small number of such cases.

(g) For these reasons we believe that they should be exempt from the proposed residence requirements.

(h) Another possible option for making further improvements in the cost-effective resolution of these cases might be a greater use of mediation, in particular judge led mediation.

8. We identify and give examples in Annex A of real cases where, if the proposed residence requirement (and no exemption applied) had then been in force, we believe legal aid would not have been available and that the welfare of the children involved could have been seriously compromised. The ability of the parent (or, in appropriate circumstances, the children by directly instructed solicitor) to participate and the court to provide justice and thereby protection to the children would have been seriously undermined had legal aid not been available. It should be noted that this is only a very small sample of cases which we might have identified as being affected.

9. The UK is a signatory to the 1989 United Nations Convention on the Rights of the Child and the European Convention on Human Rights. We believe that in order to meet our commitments to adults and children pursuant to these Conventions that legal aid should remain available and that implementation of the current proposals would lead to infringements of the rights protected by those Conventions.

10. The current proposals appear to be indirectly discriminatory on the basis of nationality and race. All EU citizens would probably have to be excluded from the proposals to avoid infraction proceedings. The remaining individuals caught by the proposals will often be adults whose ability to secure access to justice without legal aid will be eliminated or so severely compromised as to be effectively eliminated.

11. Cross-border cases are amongst the most complex cases which come before the courts. This is recognized in the rules relating to allocation of such cases, which are largely reserved to the High Court, Family Division - see Practice Direction of 3rd November 2008 [2009] 1 FLR 365 and the Allocation and Transfer of Proceedings Order 2008

12. In all cases before the courts' of England concerning children their welfare is either the 'paramount' or 'a primary' consideration. If the English courts' jurisdiction is potentially engaged the welfare of the children is central. The proposed changes if applied to cases concerning children carry with them a real risk of the welfare of children (both in general through the application of the proposed amendments as a whole, and individually within specific cases) being placed in serious jeopardy because of the inability of individuals to access legal aid to issue proceedings in order to protect their children, or to participate in complex proceedings where their welfare is in issue.

13. The proposals carry with them real risks of parents being unable to secure legal representation in the most complex cases concerning children. The Article 6

rights of both the parents concerned and of the children subject of (and potentially parties to) the proceedings are engaged, and threatened. The proposed exception within the consultation document by which legal aid could be granted in particular ("exceptional") cases, 'outside the rules' will be of limited use in cases which require urgent action to protect children, due to the delay that frequently arise when the Legal Aid Agency ("LAA") are asked to consider such applications.

14. Delays in the LAA in processing even standard applications create difficulty. Persuading the LAA that the case falls into an 'exceptional' category is likely to take so long that the children will be endangered whilst the decision is taken and the delay will, at times, in of itself fundamentally alter the nature of the case. Delay is inimical to all cases involving children, and delay is often magnified as a problem in cross border cases.

15. We suggest that the nature and complexity of this sort of case should lead to the recognition they will or should be within any 'exception', in particular if that is defined (in part) as being deprived of access to justice if legal aid is not available. The commonly encountered factual complexities , considered together with the Convention and Treaty obligations that arise in the context of cross border disputes (examined below), international cases lead us to conclude that such cases should be **exempted from the scheme** proposed by the Consultation document The following categories of cases should be exempt from the residence requirement,

(a) Applications under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("1980 Hague Convention"), whether pursuant to Article 12 or Article 21
(b) Applications pursuant to the Inherent Jurisdiction of the High Court
(c) Applications under EC Regulation 2201/2003 (Brussels II Revised Regulation 2003) "Brussels II Revised Regulation 2003") pursuant to Art 11(6-8) or for registration and enforcement of an order
(d) Applications under the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ("1996 Hague Convention")
(e) Applications under the Forced Marriage (Civil Protection) Act 2007 ("FMA 2007")
(f) Relocation cases under section 8 or section 13 of the Children Act 1989

16. We suggest that international / cross border disputes concerning children should be **exempt** from the scheme as they are exceptional cases for the following reasons:

a. They are cases with an inherent degree of complexity (both legal and factual) sufficient for them to be reserved (in the case of proceedings brought pursuant to the 1980 Hague Convention) to the Family Division of the High Court;
b. They require a relative degree of urgency, for instance: in respect of jurisdictional, legal issues needing to be determined as a preliminary issue and / or substantive decision needing **to be made in respect of** children who have been abducted from their state of habitual residence, or in relation to whom orders need to be made / enforced. Indeed, in some instances the need for urgency is imposed upon the state of England and Wales by virtue of their Convention and Treaty obligations – see for instance, article 11(2) of Brussels II Revised Regulation 2003 and article 11 of the 1980 Hague Convention;
c. They are cases which are already deemed to be exceptional as a result of the various Convention and Treaty obligations (examined below) which place a duty upon the state of England and Wales already to provide legal aid to those involved in these cases;

17. The extent of LAA funding in these cases is believed to be limited, compared to the benefits to
(a) children whose welfare is then protected
(b) vulnerable adults who are protected and represented
(c) the efficient operation of the court system in such cases and the savings in judicial and court time[1]. ;
(d) our standing in the international community; and
(e) the relative cost saving (compared to the limited portion of the total legal aid fund currently spent on cases of this type) in ensuring that where, for example, children and where appropriate accompanying parent that have travelled to this jurisdiction in a manner considered by the court to be wrongful they are promptly returned to the jurisdiction deemed to have responsibility for them, removing any burden on the social welfare system as they may otherwise have raised

18. We suggest that the sums spent on these areas are a good investment and that the benefit to the state of investing in these areas far outweighs the relatively limited cost that will need to be contributed to fund appropriate representation in cases concerning this important area of law. To the extent that the Consultation

[1] From a practitioners' perspective it is clear that the previous legal aid changes have already created a significant increase in the number of parents now acting in person, with the consequential effect of additional court time needing to be set aside to determine cases, additional delay to the determination of court proceedings, and undoubtedly additional cost to the government / state as the result of a far less efficient court system than was previously operative

identifies the need to ensure public confidence in the system, we believe that to remove funding from cases concerning any of these complex international children issues would undermine that confidence and create a huge raft of additional problems in the way in which justice is accessed in this state, together with the efficiency of the administration of justice.

19. Cross-border cases concerning children are often not only the most complex but also the most heavily contested. This is because the stakes are often so high. It is therefore difficult to bear down very significantly on the costs more than has already been done. The limitation on the use of experts to 'necessity' and the fact that most cases occur in the High Court where case-management is strong lead to highly cost –effective resolution. One area where further progress might be considered is in the use of judge-led mediation. Whilst this is emerging in European jurisdictions as a useful measure it has yet to take root in England. Consideration of a pilot-scheme might be worthwhile although given the highly polarized nature of such proceedings it might not be as valuable as it might be in purely domestic private law disputes.

Analysis

20. This document concentrates on those parts of the consultation relevant to international family law. Particularly:
(a) Chapter 3, concerning eligibility for civil legal aid;
(b) Chapter 3, concerning the merits test applicable to the grant of civil legal aid;
(c) Chapter 6, concerning reforms to civil legal aid;
(d) Chapter 7, concerning experts fees.

21. This amounts to around 4 questions within the consultation.

22. The impact assessment which deals with general approach and specifically the residence test says,

The primary objective of the proposed reform package is to bear down on the cost of legal aid, ensuring that we are getting the best deal for the taxpayer and that the system commands the confidence of the public. Our aim is to do so in ways that ensure limited public resources are targeted at those cases which justify it and those people who need it, drive greater efficiency in the provider market and for the Legal Aid Agency, and support our wider efforts to transform the justice system.

4.3 These objectives are of critical importance. We believe these to be legitimate aims which we intend to pursue with regard to principles of equality and non-discrimination. These objectives underpin and motivate the package of reforms *which we believe represent a proportionate means of achieving these aims.*

Introducing a residence test

5.3.1 Impact on clients: We anticipate that this proposal will have an adverse impact on those who do not satisfy the residence test (assuming for this purpose the proposal amounts to a provision, criterion or practice) as, subject to the exceptions set out in the consultation paper, those affected will no longer receive civil legal aid. We recognise that this proposal may have the potential to put non-British nationals at a particular disadvantage compared with British nationals, as British nationals will be able to more easily satisfy the test than other nationals. However, we believe this is justified for the reasons set out below.

5.3.2 Impact on providers: We have no data upon which to base an assessment of likely impact on providers although we believe the proposals are unlikely to result in negative equality impacts on this group (assuming for this purpose the proposal amounts to a provision, criterion or practice). However, we acknowledge that the extent of impact on a given provider firm may be dependent upon the extent to which they rely on income from impacted civil legal aid work. Were any disadvantage to materialise, given that those managing firms engaged in work impacted by this proposal are more likely to be male and non-disabled when compared to the population as a whole, they may be disproportionately affected. We consider any such impact to be justified for the reasons set out below.

5.3.3 Justification: We believe that this proposal is a proportionate means of achieving the legitimate aims set out in section 4. The requirement for 12 months of previous lawful residence at the time of the application for civil legal aid applies irrespective of nationality and targets limited public funds available for civil legal aid at those who have a strong connection to the UK, improving the credibility of the scheme. We will ensure that legal aid will continue to be available where necessary to comply with obligations under EU or international law, and exceptional funding (where the failure to provide legal aid would breach the applicant's rights under the European Convention on Human Rights or EU law) will be available in respect of persons who do not meet the residence test. Furthermore, the proposed exception for asylum seekers will minimise any impacts on those with protected characteristics.

<u>Chapter 3 – eligibility for civil legal aid – Introducing a residence test</u>

23. The basis for this proposed change is set out within the consultation document at §3.42. Its genesis is addressed at §2.5:

"The LASPO reforms have done much to ensure that taxpayer funding is targeted at those who need it most and for the most serious cases. However, there remain some anomalies which we believe undermine the credibility of the scheme and of the wider justice system. The legal aid scheme should be as fair on taxpayers as on legal aid applicants. In criminal matters, everyone is entitled to a defence, and legal aid should foot the bill for those who cannot afford to pay. However, we do not believe it is right for the taxpayer to pick up the bill for those who can afford it, for civil cases that lack merit, or for matters which are not of sufficient priority to justify public money and which are often better resolved through other non-legal channels. We are also clear that someone should have a strong connection with the UK in order to benefit from civil legal aid"

24. The justification for such is set out at §3.44

> "*We are also concerned that the availability of legal aid for cases brought in this country, irrespective of the person's connection with this country, may encourage people to bring disputes here."*

<u>The proposal</u>

25. The proposal is set out at §3.48 onwards. It is reproduced below in full:

> *3.48 Our proposal is to require applicants for civil legal aid to satisfy a residence test in order for civil legal aid to be available under the England and Wales scheme. The test would comprise two limbs.*
>
> *3.49 First, the individual would need to be lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time an application for civil legal aid was made. This would have the effect of excluding both foreign nationals and British nationals applying from outside the UK, Crown Dependencies or British Overseas Territories from receiving civil legal aid. It would also have the effect of excluding, for example, illegal visa overstayers, clandestine entrants and failed asylum seekers from receiving civil legal aid.*
>
> *3.50 Second, the individual would also be required to have resided lawfully in the UK, Crown Dependencies or British Overseas Territories for 12 months. This 12 month period of lawful residence could be immediately prior to the application for civil legal aid, or could have taken place at any point in the past. However the period should be continuous. The fact that the residence period could have been in the past would mean, for example, that people who had previously lawfully resided within the UK, Crown Dependencies or British Overseas Territories on a visa for 12 months, or British nationals who had lived within the UK, Crown Dependencies or British Overseas Territories for 12 months, would immediately satisfy this limb of the test on their return.*
>
> *3.51 The residence test would be carried out by the legal aid provider who was dealing with the application for civil legal aid. They would need to see*

evidence that the client was lawfully resident and had previously been lawfully resident for 12 months, and they would need to retain copies of this evidence on file for audit purposes.

3.52 We consider that a 12 months' lawful residence requirement indicates that the individual has more than just a passing connection to the UK, Crown Dependencies or British Overseas Territories, but also represents a test which is not unduly restrictive for those people who are present in this country.

3.53 We would ensure that legal aid would continue to be available where necessary to comply with obligations under EU or international law.

3.54 Under LASPO, (Section 10) there is a power for legal aid to be granted in exceptional circumstances where a case is excluded from the scope of the civil legal aid scheme. This would continue to be the case, including in respect of persons who did not meet the residence test.

<u>The potential impact</u>

26. It is implicit in this that family cases come within the definition of 'civil legal aid'. This can be seen on one of the later exemptions where it is said that asylum seekers will be eligible for legal aid including for family proceedings.

27. It is assumed that the Government do not intend to make any changes in respect of our commitment to the funding of legal aid for Applicants for return orders under the 1980 Hague Convention and that non-means and non-merits legal aid will continue to be made available in such cases.

28. Further, it is assumed that the changes do not intend to apply to the funding of Respondents to care proceedings who currently have non-means, non-merits legal aid.

29. If the proposals do extend to 1980 Hague Convention and to care proceedings, those parents who did not meet the residence test and whose children are either: (a) the subject of state intervention; or (b) require state assistance to obtain the return of their children to the state from which the said child/ren had been abducted, would face being litigants in person in proceedings that might result in their children being taken into care without their consent; one of the most draconian functions of the state or being unable to secure the return of their abducted child

30. Under the current proposals, parties in the following types of cases would face insurmountable difficulties in obtaining legal aid, and will thus be prevented from accessing justice:

(a) Respondents in cases under the 1980 Hague Convention who have taken their children and 'fled' to this jurisdiction or moved here with no prior connection to this jurisdiction;

(b) Applicants in states that are signatories to the 1980 Hague Convention who seek the return of their children who have been abducted to this jurisdiction under the wardship / inherent jurisdiction of the High Court of England and Wales;

(c) Respondents to cases brought under the wardship / inherent jurisdiction of the High Court of England and Wales who wish to oppose a return of their children to a state that is not a signatory to the 1980 Hague Convention;

(d) Competent children who seek to be separately represented in any of the proceedings mentioned above at (a) – (c); under the current scheme would be eligible for public funding, but who may on the Consultation proposals be unsuccessful in any such application on the same grounds as a Respondent (or Applicant) would fail in the examples at sub paragraphs (a), (b) and (c) (above),

(e) Children subject to 'domestic' cases, including contact and leave to remove, funding for whom has been maintained within the scheme imposed pursuant to LASPO, who cannot fulfil the residence and presence requirement[2]

(f) Stranded spouses who have been residing in this jurisdiction for less than a year before they are then taken back to their country of origin and abandoned by their spouse, often with the consequential effect of their spouse then removing the children from their care and bringing the children back to this jurisdiction;

(g) Some forced marriage cases, for instance:

i. if the person to be protected has been brought into this jurisdiction and has been here for less than 12 months prior to being forced into a marriage in this jurisdiction;

ii. if the person to be protected has been in this jurisdiction for less than 12 months prior to being removed from this jurisdiction and then forced into marriage;

iii. if the person to be protected has been forced into marriage elsewhere before being brought into this jurisdiction, and then seeks relief upon arrival

[2] This may be of particular concern, as it would mean that certain 'categories' of child/ren would be treated different to others within the context of private law proceedings, for a reason over which those child/ren who fall outside of the scheme for this reason have absolutely no control

iv. if the person to be protected has been forced into marriage elsewhere and needs to seek relief upon arrival, including declaratory relief e.g. B v I (Forced Marriage) [2010] 1 FLR 1721)

(h) Applicants seeking an order for contact in this jurisdiction, pursuant to Article 21 of the 1980 Hague Convention;
(i) Respondents in an application for a foreign contact order to be enforced, pursuant to article 21 of Hague Convention 1980 (in cases where the Respondent parent has not yet been in this jurisdiction for 12 months);
(j) Applicants for recognition and enforcement of a foreign order pursuant to the provisions **Brussels II Regulation** (EC) No 2201/2003 ("Brussels II revised") (save where they were legally aided in the country of origin)
(k) Applicants for recognition and enforcement of a foreign order pursuant to 1996 Hague Convention (which might be particularly important in the context of a 1980 Hague Convention return where protective measures have been imposed in the returning state which require enforcement in this jurisdiction).

It seems inevitable that there are other categories of litigant that stand to lose out on the basis of this proposal, but which are not listed above.

<u>General points</u>

31. The logic that the Government has applied to the imposition of a 'residence test' can scarcely be said to apply to a case involving children, where on the basis of the jurisdictional rules (but subject to Art. 12 Brussels II Revised Regulation 2003, which has an independent "substantial connection" requirement) the courts of this country will have jurisdiction based upon the children's habitual residence or, at the least, presence in this jurisdiction. If the courts of England have jurisdiction over children and are exercising either,
(a) a statutory jurisdiction under an international Convention,
(b) a paramount welfare jurisdiction under domestic law

it would be wholly inappropriate to apply a residence requirement upon parents as a precondition for the grant of legal aid as the result would be that they will prevented from being properly represented in cases involving their own children. This is even more the case when an individual is a mandatory respondent to an application (see Family Procedure Rules 2010), or a mandatory applicant to proceedings concerning their children, in circumstances in which domestic and international legislation nominates the English courts as competent to take decisions about those children.

32. This point not only applies where the court is exercising a jurisdiction over children if those children are habitually resident or present in this jurisdiction, but

also if the court needs to exercise an emergency or provisional jurisdiction in respect of children who are only present in this jurisdiction (including those that are present for a temporary purpose).

33. In respect of access to justice for parents whose children have become the subject of proceedings on an emergency or provisional basis, it is strongly arguable that notwithstanding any previous connection to this jurisdiction a parent resident abroad should be entitled (if eligible on existing grounds) to legal representation so that they can properly engage in the proceedings that have been commenced. It is important that any such representation can commence work at the earliest available opportunity, without artificial barriers put in place by a complicated legal aid test. Experience suggests that the LAA are slow to grant funding 'outside the rules' and that any funding that is granted on this basis is only provided following numerous appeals and advice from counsel.

34. Ultimately, it is suggested that the considerable impact that the imposition of a residence test is likely to have on international family law is an unintended side effect of an attempt to target other areas of civil law in which the perception is that legal aid has been exploited. Accordingly, serious consideration should be given to making all international children law cases exempt from the implementation of any of the proposals contained within the consultation document.

35. The consultation appears to be based upon the idea that litigants 'forum shop' in order to obtain a litigation advantage by bringing proceedings before the courts of this jurisdiction. The applicable jurisdictional rules (which are covered above only in brief) demonstrate that in litigation concerning children, that suggestion is entirely misconceived. The various Conventions and Regulations that apply to this area of law (in addition to the domestic statutory scheme contained within the Family Law Act 1986) have strict and stringent rules providing for the appropriate exercise of jurisdiction in respect of children (save where parents agree and the exercise of jurisdiction outside of the imposed rules is in the best interests of the child), thus preventing 'forum shopping'.,.

36. There is a real risk that the rules that would be imposed were the Consultation proposals adopted would serve only to slow this process, preventing the courts of this jurisdiction from swiftly remitting a case regarding children to the court of competent jurisdiction. In an abduction context, whilst this process is delayed the abducting parent and the children concerned will more likely than not remain in this jurisdiction, possibly on state benefits, whilst the procedural barriers to swift litigation that would be raised by the implementation of these proposals are surmounted.

37. It is therefore suggested that, short of preventing 'forum shopping' (which does not, and cannot, occur in a case concerning children), the rules concerning legal

aid that would come into effect pursuant to the Consultation proposals would actually serve to prolong litigation, waste funds, place a greater strain upon the social welfare system and, of paramount importance, prevent the prompt commencement of welfare based litigation before the *correct* forum, to the detriment of the children concerned.

38. The scheme, if applied to all of the scenarios set out above, seems also to be in breach of a number of our international obligations under the 1980 Hague Convention and BIIR.(as set out below).

39. Recent research carried out by Professor Nigel Lowe (funded by the Nuffield Foundation) concluded that international abduction cases continue to rise and that delays in dealing with them risk undermining the purposes of the Conventions. Introducing complexities into the legal aid scheme such as the residence requirement is likely to add to delay.

<u>Specific points</u>

<u>Respondents to applications made pursuant to the 1980 Hague Convention</u>

40. Pursuant to Article 26 of the 1980 Hague Convention:

> *"Each Central Authority shall bear its own costs in applying this Convention.*
> *Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers.*
>
> *However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.*
>
> *However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice"*

41. The UK has entered such a reservation; however applicants are entitled to non-means, non-merits tested legal aid. Pursuant to Article 25 of the 1980 Hague Convention:

"Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the

same conditions as if they themselves were nationals of and habitually resident in that State."

42. On one reading of Article 25 in light of the proposed residence requirement, a respondent would be entitled to legal aid as they would have to be treated as if they were "*nationals of and habitually resident in*" this jurisdiction. There are difficulties, however:

- Such wording does not get around the requirement of continuous residence for 12 months, which applies seemingly regardless of nationality or habitual residence;
- In circumstances where both nationals of and those habitually resident in England are nonetheless subject to the 12 month continual residence requirement, Article 25 might not provide any 'get out clause' at all.

43. Such a requirement would only serve to increase the current disparity between Applicants, who would on the basis of the consultation continue to be entitled to non-means, non-merits tested legal aid, and Respondents, many of whom on this proposal would not be entitled to legal aid at all[3].

44. Many Respondents' to 1980 Hague Convention proceedings have suffered from domestic abuse and have fled to England because they have not been protected in the requesting state. By definition, having recently fled, they will almost certainly fail the residence test. These individuals and their children may then face a return to that situation without the court properly investigating their situation. Applying any sort of exemption if they can prove domestic violence (as for domestic private law proceedings) risks creating a chicken/egg situation. They can only get legal aid if they can prove violence but they cannot obtain proof without having lawyers who can assist them in obtaining the relevant documents from the requesting state.

45. The 1996 Hague Convention includes provisions designed to safeguard a return where there are risks associated with repatriating children to the requesting state following an abduction, however again the court will require some proof (both of the risk asserted and of the availability in the state of return of the relief sought) before implementing protective measures that will be enforceable upon return. The same chicken/egg situation identified above would arise, with the risk that an unrepresented Respondent would have to return the subject children to a situation of risk with inadequate (or no) protection. The importance of effective protective measures upon return has recently been emphasised by the United Kingdom Supreme Court in **Re E (Children) [2011] UKSC 27.**

[3] But in respect of this, please see the section regarding **Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes** (below)

<u>Applicants seeking access across an international border, pursuant to article 12 of Hague Convention 1980</u>

46. Article 21 provides that:

> *Article 21*
>
> *An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.*
>
> *The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.*
>
> *The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.*

47. Imposing a residency rule will prevent parents seeking an order for contact (an Applicant) pursuant to article 21 of Hague Convention 1980 from being able to access the courts of this jurisdiction. This will undermine our obligations under the Hague Convention 1980.

<u>Wardship returns, stranded spouses and forced marriages.</u>

48. It seems perverse that a person whose children have been abducted to this jurisdiction entirely against their will whilst they remain abroad would not be entitled to public funds in order to remedy that wrong, on the basis that they have no connection with this jurisdiction.

49. Cases of this type are entirely different to those envisaged by the consultation, and the examples used to justify a residence test as set out at §2.5 and §3.42. There is no forum shopping involved in attempting to remedy an abduction, stranding or forced marriage. Proceedings are brought in this jurisdiction out of necessity in order to remedy the grave wrong that precipitates the issue of proceedings. A residence test is accordingly entirely inappropriate in the circumstances. Equally individuals may have fled from abuse of themselves and their children and may then face being returned because their case cannot be presented to the court.

50. Stranding and forced marriage are now well recognised as pervasive and increasingly apparent wrongs that require a swift and easily available remedy. To prevent those subject to such wrongs, who are among the most vulnerable, from accessing such remedies by erecting an artificial barrier to the grant of legal aid serves only to undo the work of the courts (in relation to stranded spouses – see *Re S (Wardship: Stranded Spouses)* *[2011] 1 FLR 305* and in relation to forced marriage - *A Chief Constable and AA v YK & Others* *[2011] 1 FLR 1493* and *R (on the application of Quila and another) and R (on the application of Bibi and another v Secretary of State for the Home Department* *[2011] UKSC 45*) and of the government itself (see the Forced Marriage (Civil Protection) Act 2007).

Applicants for recognition and enforcement of a foreign order pursuant to the provisions of Brussels II revised

51. Article 50 of Brussels II Revised Regulation 2003 provides as follows:

> *"An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in the procedures provided for in Articles 21, 28, 41, 42 and 48 to benefit from the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement"*

52. Accordingly in the context of an application for enforcement, an Applicant for the enforcement of an order must, if they have been granted legal aid in the jurisdiction which made the order that they seek be enforced, have made available "*the most favourable legal aid or the most extensive exemption from costs and expenses provided for by the law of the Member State of enforcement*".

53. The justification for such may arise from the preambles and the commitment within them for a robust recognition of agreements/orders made in other states, see for example the preambles numbered [1], [5], [21] and [22].

54. Almost by definition all Applicants for registration and enforcement will fail the test as they are resident abroad. By establishing a rule the effect of which would be to ensure that any applicant for enforcement would not be entitled to legal aid, thus nullifying the impact of Article 50, the proposal does fall foul of the intention of Brussels II Revised Regulation 2003 as established by its preambles, and would serve to effectively neuter Article 50.

55. It could therefore be said that to establish such a scheme would be contrary to the spirit, if not the letter, of the Regulation.

Applicants for recognition and enforcement of a foreign order pursuant to the 1996 Hague Convention:

56. There is no equivalent within the 1996 Hague Convention to Article 25 of the 1980 Hague Convention or to Article 50 of Brussels II Revised Regulation 2003.

57. That said, it would appear to be perverse to be entitled to apply a different funding standard to the operation of the 1996 Hague Convention where that convention serves to:

a. Bolster or otherwise support the operation of the 1980 Hague Convention, particularly by establishing an enforceable mechanism pursuant to which children can be protected upon return; and
b. Provide an alternative (but similar) mechanism for the recognition and enforcement of enforceable orders to that established by BIIr.

58. Accordingly the arguments that arise in relation to the operation of the 1980 HC and Brussels II Revised Regulation 2003 can also be applied to the 1996 Hague Convention.

Chapter 3 – eligibility for civil legal aid - the merits test

59. Pursuant to §3.80, the consultation suggests that the current merits test applicable to civil legal aid is too lax in its provision of funding to cases classified as ‘borderline’, and that the test should be stiffened, such that a case would have to be considered to have ‘moderate’ prospects of success or greater in order to be granted legal aid. ‘Moderate’ for this purpose has been deemed to equate to a 50% chance of success or higher.

60. It will necessarily be difficult in a case concerning children to give an indication of ‘success’ at the first stage of litigation prior to any evidence being filed and the applicant's lawyers fully understanding the exact remit of the case. Success in these types of cases is also sometimes relative. For instance, a respondent in a 1980 Hague Convention case may have no chance of defeating the application for summary return, but may nevertheless be justified in opposing the application in an attempt to secure undertakings or some other reassurance of favourable conditions upon return. Previously counsel’s advice that legal aid should be granted to a respondent in such circumstances was often sufficient for funding to be granted. It may be more difficult to obtain funding purely to argue for protective measures upon the imposition of a more stringent test.

61. It might be difficult to argue against the raising of the bar in this sense, but it might be possible to argue for the test to be relative to the reasonable expectations of the client, rather than relative to the application that has been made. If the test is applied arbitrarily in that sense it is likely to have a significant impact upon those who might otherwise be funded to seek protection from the courts.

Chapters 6 and 7 – reforms to advocates fees in care cases and experts fees

62. In the circumstances this document will not substantially address these areas, save as to flag them up for individual responses in light of the potential impact upon fees in general and the availability of experts to report in cases.

63. We are not aware that the recent restrictions upon experts fees have had a significant impact in children abduction cases where experts reports are required on issues such as rights of custody.

Discrimination

64. *5.3.1 Impact on clients: We anticipate that this proposal will have an adverse impact on those who do not satisfy the residence test (assuming for this purpose the proposal amounts to a provision, criterion or practice) as, subject to the exceptions set out in the consultation paper, those affected will no longer receive civil legal aid. We recognise that this proposal may have the potential to put non-British nationals at a particular disadvantage compared with British nationals, as British nationals will be able to more easily satisfy the test than other nationals. However, we believe this is justified for the reasons set out below.*

65. It appears to us that the effect of the residence test is plainly both directly and indirectly discriminatory on the basis of nationality and probably race. The Impact Assessment seems to accept this.

66. The idea that a parent in complex and difficult (both legally, factually and emotionally for that parent) will be faced with a scenario whereby they are either not entitled to legal aid and access to justice at all as a result of not meeting any of the residency requirements, or as a result of only being resident in this jurisdiction for a shorter period of time, even if that time is sufficient to say that they are residing in this jurisdiction (for the purposes of other legal tests) is unreasonable and arbitrary.

67. In respect of EU citizens it would be unlawful: Bressol –v-France C73-08 . When a similar rule was applied to student funding, in order to comply with EU law rules had to be put into place to count residence elsewhere in the EEA for EEA

nationals, giving rise to very complex rules that have been difficult to administer and would have led to additional litigation. It seems that unhappy experience would now be repeated here, save that in this instance the welfare of children would be jeopardized whilst the LAA dealt with any calculation (and possible determination) of periods of time spent in one jurisdiction or another.

68. The proposed changes also have some parallels with the situation that was considered by the ECtHR in ***Anakomba Yula v. Belgium* - 45413/07**, where a judicial decision refusal to grant legal aid to a mother on the basis that she was unlawfully resident in Belgium without "*particularly compelling reasons to justify the difference in treatment between individuals with a residence permit and those without*" was held by the court to amount to a failure in the states obligation "*to regulate the right of access to a court in a manner that was compatible with the requirements of Article 6 § 1, taken together with Article 14*". The ECtHR in that case placed particular emphasis upon "*serious issues related to family law that were decisive not only for the applicant but also for other individuals*"[4].

69. Article 12 of the Treaty Establishing the European Community ("EC Treaty") provides that "(w)ithin the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.". The extent to which discrimination may arise contrary to Article 12 of the EC Treaty in the context of domestic legal aid provision was examined in detail by the European Commission in its Green Paper - **"Legal aid in civil matters: the problems confronting the cross - border litigant" (Brussels, 9.2.2000 COM(2000) 51 final).**

70. The Green Paper highlighted the problem of Member States of the European Union imposing different criteria for legal aid eligibility which could result in significant disadvantages to a cross-border litigant. The Green Paper recorded that**:**

> *"It is a corollary of the freedoms guaranteed by the EC Treaty that a citizen must be able, in order to resolve disputes arising from his activities while exercising any of those freedoms, to bring or defend actions in the courts of a Member State in the same way as nationals of that Member State. In many circumstances, such a right to access to justice can be effectively exercised only when legal aid is available under given conditions."*

71. The Green Paper specifically addressed the question of potential discrimination arising through the imposition of a residence test and a presence test for legal aid eligibility. The Paper considered that even if a domestic system did not directly discriminate against a litigant on the basis of nationality, indirect discrimination

[4] The judgment is only available in French, and as such the quotes at this paragraph are taken from the press release - http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-1631

would be almost certain to arise through a residence or presence test for legal aid eligibility.

72. After an examination of European case law on the topic, the Green Paper concluded that:-

> *"This case law taken as a whole, suggests that any beneficiary of a Community law right (including a cross-border recipient of services or purchaser of goods) is entitled to equal treatment with nationals of the host country, as regards both formal entitlement to bring actions and also the practical conditions in which such actions can be brought, irrespective of whether he is, or ever has been, resident or even physically present in that country. It is only logical that the right to bring actions comprises the effective right of access to courts, and hence entitlement to legal aid, when a national of the State would, mutatis mutandis, be so entitled*
>
> *This would imply not only that rules restricting entitlement to legal aid to nationals of the Host State, but also conditions requiring foreign nationals to be resident or even present on the national territory in order to be assimilated to nationals, would be struck at by Art. 12 of the EC Treaty and such conditions could therefore not be invoked against Community nationals involved in litigation in the Host State.*
>
> ***Even a condition which was not formally discriminatory (such as a residence or presence condition applicable to nationals and foreigners alike) could constitute disguised discrimination (since nationals are far more likely to satisfy it than foreigners are) and would hence be impermissible unless it could be justified on objective grounds. It would be for a Member State to invoke such grounds in a given case, but a priori it is difficult to envisage what they might be."*[5] (emphasis added).**

73. The UK Government's response to the Green Paper was, at the time, wholly positive: *"(l)egal aid is already available to foreign nationals bringing or defending proceedings in the UK. There are no residence requirements and therefore no discrimination against foreign nationals as regards eligibility for civil legal aid. The proposals in this section would therefore cause the UK no difficulty."*[6]

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[5] The aforementioned case of ***Anakomba Yula v. Belgium* - 45413/07** may be taken to imply the application of an elevated standard in cases concerning children, as the decision reached by the court impacts not just upon the litigant subject to the legal aid decision, but also upon the other parent, any other holder of parental responsibility and, fundamentally, upon the child whose welfare must be either the "paramount" or the "primary" consideration

[6] http://www.publications.parliament.uk/pa/cm199900/cmselect/cmeuleg/23-xiii/2324.htm

74. Following on from the recommendations of the Green Paper, the need for European Legislation to avoid discrimination which might arise through Member States' legal aid systems was clear. The EU "Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes" was introduced to "*promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice*" (recital 5). It provides that *"(a)ll Union citizens, wherever they are domiciled or habitually resident in the territory of a Member State, must be eligible for legal aid in cross-border disputes if they meet the conditions provided for by this Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State."* Article 1 of the directive states that it covers cross-border disputes and Article 3 says that *"(n)atural persons involved in a dispute covered by this Directive shall be entitled to receive appropriate legal aid in order to ensure their effective access to justice."*

75. The Directive enshrines the well-established principle which was laid down in Article 47 of the Charter of Fundamental Rights of the European Union, which is the Right to an effective remedy and to a fair trial. Article 47 states that *'legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'.*

76. We would suggest that upon an application of the aforementioned principles, as enshrined within European authority (both of the CJEU and the ECtHR), documents arising from the European Commission, the Governments response to those documents and, finally, the aforementioned Council Directive, and as mentioned above, any implementation of the proposals contained within the Consultation document would amount to direct and/or indirect discrimination. It is therefore likely that they would be unlawful, contrary to our various treaty obligations, and a breach of Articles 6 and 14 of the ECHR[7].

Conclusion

77. This document is intended to serve a number of purposes. At the forefront, it has been prepared as a technical response to the Consultation, highlighting the various areas in which it is submitted that the proposals contained therein are unreasonable, unnecessary and disproportionate compared to stated aims when considered in the context of family law and in particular this most

[7] The authors, and the ICLG at 4PB, would like to thank Maria Wright of Freemans Solicitors for identifying the various authoritative documents referred to in this section (concerning discrimination), and for her assistance in drafting it.

complex area of family law. We believe they are therefore unsustainable.

78. We also hope this response highlight the inconsistencies inherent in the Government's approach to the grant of legal aid (as demonstrated by the Consultation proposals), when compared with their stance on the actions that can only be commenced (or engaged in) *if* legal aid is granted.

79. Nowhere is this inconsistency more starkly demonstrated than when considering the issue of forced marriage, in respect of which the Government has recently implemented substantive legislation and made a series of strong statements. If these proposals are implemented, protection for vulnerable individuals who are the victim of forced marriage will be that much more difficult (if not impossible) to obtain, particularly for the most vulnerable of people who have been removed abroad and who will also be out of the reach of other protective authorities otherwise available to them in this jurisdiction.

80. We do not think that the policy behind these proposed legal changes currently applies to the way in which parents and children access the court systems of this jurisdiction on a daily basis in relation to international children law cases, those cases being some of the most complex and challenging cases in the family court system.

81. The number of international children law cases increases on an annual basis – as is highlighted by Professor Lowe's research and by the most recent annual report from the Office of Lord Justice Thorpe Head of International Family Law and Justice - thus making it more imperative than ever that the quality of representation and access to justice that is currently available to parents and children involved in these cases remains in place. If these intended changes are passed, it is our serious and considered concern that the ability of the English family law system to deal with cross-border children cases will be seriously compromised with resultant serious harm to the children it is there to protect. In addition the excellent reputation that the UK has in the international family law community will be significantly tarnished.

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ANNEX A

A. Respondent in 1980 Hague Abduction case.

The Respondent father had moved to England with the mother and the parties son. After a short period the mother returned to her home country, an EU state. She brought Hague Convention proceedings. The father was publicly funded. The father asserted they had agreed a permanent move. The mother said it was only temporary and produced documents from her employer which supported this. The father said they were forged. The court ordered a forensic document examiner to analyse the documents. He concluded they were forged. The mother's application was dismissed.
The father was resident in England but had not been so for 12m. He would not have been eligible under the proposed rules. His English was poor and it is unlikely that he could have articulated his case or secured an expert report. His child may well have been wrongly returned.

B. Applicant in non-Hague summary return case.

The father sought the summary return of his child to a Caribbean country. The mother had previously abducted the child within the Caribbean and he had obtained a return of the child from that country. The mother retained custody of the child. She later removed the child to England and began co-habiting with a man with a history of mental health problems. The father sought the return of the child. He was granted legal aid to pursue the return of the child under the Inherent Jurisdiction. The Court made an order returning the child.
The father would not have been eligible had the resident/1 year residence test applied. Had he not had legal aid the child may well have remained here and been exposed to further risks as well as being permanently deprived of the father.

C. Respondent in non-Hague Summary return case.

A Somalian mother came to England to avoid her daughter being removed from her care and placed in the care of the father. The father would have subjected the girl to FGM had she been placed in his care. The sole reason for the removal was because the mother had become pregnant out of wedlock. The Somalian court made a custody order in the father's favour on the basis that the mother was unsuitable to care for the child she having become pregnant. The father sought the return of the child to Somalia pursuant to the inherent jurisdiction. He was privately paying. The mother was granted legal aid. The matter was listed for a fact-finding hearing. The High Court concluded the mother had been subjected to a high level of violence in the marriage as a result of which she had left the father. The court found the father would subject the child to FGM if returned. Expert

evidence on the laws of Somalia was obtained. The mother had the benefit of leading and junior counsel.
Whilst the mother was resident in England she had not been resident for 1 year. She would have faced litigating a complex and highly sensitive matter in person with privately paid counsel on the other side. This is so extreme that it might fall within an 'access to justice' exception but on its face it would be excluded. The child might have been returned to Somalia to face FGM. The mother would have probably been imprisoned (or worse) if she had accompanied the child.

D. Applicant for registration and enforcement of Brussels II revised order.

A Portuguese father sought the registration and enforcement of an order for shared custody of his child. The mother defended the application under Art 23 (a) BIIR. A hearing took place in the High Court. The mother succeeded. On appeal to the Court of Appeal the father succeeded.
The father was neither resident nor had he lived here for 1 year. He had not been legally aided in Portugal as the order was reached in 'mediation' and approved by the court. He probably would not have succeeded in securing the registration and enforcement and his relationship child would have been permanently ruptured.

E. Applicant for a forced marriage protection order pursuant to the Forced Marriage (Civil Protection) Act 2007

The Applicant for a forced marriage protection order was a 17 year old boy of Nigerian origin. He had lived in England from 2003 until July 2010, when he was removed to Nigeria by his mother against his will. Following his removal a solicitor in London was appointed by the court to act as the child's next friend. Legal aid was granted to that solicitor for that purpose. An application was made pursuant to the Forced Marriage (Civil Protection) Act 2007 and the Inherent Jurisdiction of the High Court seeking orders protecting the child from being forced into marriage and to obtain the child's return to England and Wales.

The child's family opposed his return to England, asserting that he was happy in Nigeria. Various evidence was adduced from the child supporting that assertion, however the child was also in contact with his solicitor, and he suggested that the evidence was either not prepared by him, or had been obtained by duress. The child's mother was in due course imprisoned for contempt of court, having disobeyed a number of orders.

Upon the child's return he disclosed that whilst in Nigeria he had been subjected to threatened and actual physical violence at the hands of this family, and that he had been required to undergo exorcisms to "cleanse" him of his resistance to marriage.

Whilst the child had previously been resident in England for the necessary 12 months, he was not resident at the time that protection was required. Obtaining the return of the child in the teeth of his parents objections was a long, difficult and complicated process necessitating the advice of a specialist

solicitor who liaised with the appropriate Government agencies and lawyers in Nigeria, who joined in seeking the child's return. The child was at grave risk during the course of the proceedings. If legal aid had not been made available, the child may never have been returned and would have been at continuous risk of physical harm or death in Nigeria.

F. Applicant in a Stranded Spouse case

The Applicant was the mother of a child who, at the time of the commencement of the proceedings, was 6 months old. The mother (a Pakistani citizen) and father (a British citizen of Pakistani origin) had had an arranged marriage in February 2008, following which the mother had come to England on a spousal visa sponsored by the father. She had fallen pregnant and given birth in January 2010. Following the birth the child (who was born prematurely) had spent a period of time in hospital. In March 2010 the father had suggested that the mother return with him to Pakistan, the mother had not wished to leave the child. It was found that in order to get the mother to Pakistan the father had drugged her with sleeping pills. Once in Pakistan he had abandoned her at her parents' house, removed her travel documents (including her visa) and returned to England, separating the mother from her child. Having abandoned the mother, the father had written to the British High Commission in Islamabad, seeking to prevent the mother returning to England. The mother was granted legal aid to seek the return of the child to her care.

The court made findings of fact as above, and ordered the disclosure of the judgment to the immigration authorities. They granted the mother leave to return to England, and the child was placed into her care.
The mother was not resident in England at the time of her application for legal aid, and so would not be eligible for legal aid under the proposals. Her case required urgent action to reunite her with her child, following her enforced separation from him, at a very young age. Had the mother not been eligible for legal aid she may not have been granted such urgent assistance, perhaps irrevocably damaging her relationship with her son.