

ILPA's Briefing for the House of Commons Report Stage for the Nationality and Borders Bill – Part 5: Modern Slavery, Clauses 65 and 66 Amendment

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

[Clause 65: Civil legal aid under section 9 of LASPO: add-on services in relation to the national referral mechanism](#)

Proposed Amendment

Clause 65, page 63, line 30, leave out subclauses (2) to (7) and replace with:

“(2) After paragraph 32A ([Victims of slavery, servitude or forced or compulsory labour](#)) insert–

“Pre-National Referral Mechanism advice

32B (1) Civil legal services provided to an individual in relation to referral into the national referral mechanism and connected immigration advice.

General exclusions

(2) Sub-paragraph (1) is subject to the exclusions in Part 2 of this Schedule.

Specific exclusions

(3) The civil legal services described in sub-paragraph (1) do not include—

- (a) advocacy, or
- (b) attendance at an interview conducted by the competent authority under the national referral mechanism for the purposes of a reasonable grounds decision or a conclusive grounds decision.

(4) In regulation 5(1) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (S.I. 2013/480) (exceptions from requirement to make a determination in respect of an individual's financial resources), after paragraph (l), insert—

“(m) civil legal services described in paragraph 32B of Part 1 of Schedule 1 to the Act (Civil legal services provided to an individual in relation to referral into the national referral mechanism).”

Briefing

This amendment keeps the proposed wording of the civil legal services that the government is seeking to fund for this work, as set out in clause 65. However, it removes the need to have the advice on referral to the National Referral Mechanism (NRM) attached to an existing immigration or asylum matter. The government has been clear that it wishes to prevent matters such as trafficking being raised at a late stage, however the best way to do this is to facilitate access to legal advice at as early a stage as possible. The clause as currently drafted does not change the current position for survivors with an asylum matter, as where there is an existing asylum matter advice on referral to the NRM can rightly be paid for by the LAA already.

Bringing this work within the scope of legal aid is particularly important for cases where there is no asylum claim, but there is an immigration claim, for example where the person may be eligible for a grant of discretionary leave to remain or leave as an overseas domestic worker if they were recognised as a victim of trafficking. These victims may be too scared to come forward to the authorities or not know what immigration options are available. The lack of access to independent advice is a powerful deterrent to people coming forward when they are escaping exploitation. The current position is that they would be unable to easily access legal advice, as immigration advice on this issue is not in scope for legal aid. This means that an application for exceptional case funding would need to be made and

granted before the person could see a lawyer. This is a lot of additional administration in a sector which is already overstretched¹, and many providers are reluctant to make these applications². The difficulties faced by direct applicants were recently highlighted by the Justice Select Committee, which recommended the process be reformed in order to be more accessible to them³. Further, the application would be extremely unlikely to be granted. This is therefore an unnecessary barrier to this group of people accessing legal advice.

Two case studies from a member highlights this:

We assisted the pro bono department of a non legal aid law firm when they helped a potential survivor apply for exceptional case funding (ECF) in August 2020. The funding was requested in order to provide advice on an NRM referral and associated immigration advice. This application was refused, a request to review the decision was refused and a decision on a second review is pending a final decision from the Legal Aid Agency. One ground of refusal at first review stage was that no decision had yet been made to remove the individual (as they have not come forward to the authorities) and "if a decision to deport or remove your client from the United Kingdom is made, an application for ECF could be made at that stage." The application remains undecided, 13 months after the original submission.

We assisted the same pro bono department to make another application for ECF for a similar case in January 2021. That application is still pending an initial decision by the Legal Aid Agency.

The amendment would encompass beneficiaries in the clause as currently drafted and those currently excluded from the scope of legal aid, to meet the objective of enabling claims to be made as early as possible.

The amendment would also remove the requirement to assess the financial means of a person who requires advice on a referral into the National Referral Mechanism. This is also the case elsewhere in

¹ <https://justice-together.org.uk/learning/our-research/> and <https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>

² <https://publiclawproject.org.uk/uncategorized/improving-exceptional-case-funding-providers-perspectives/>

³ 'The Future of Legal Aid' at paragraph 118 available online at https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/70/7006.htm#_idTextAnchor064

the Bill, as seen in clause 24(4). As set out in [this briefing](#) from ATLEU, Anti-Slavery International, Simpson Millar and the Human Trafficking Foundation, the means test acts as a significant barrier to justice for people who are not eligible, as even the receipt of subsistence payments can be enough to exclude a person from accessing a lawyer.

[Clause 66: Civil legal aid under section 10 of LASPO: add-on services in relation to national referral mechanism](#)

Proposed amendment

Page 66, line 1, leave out Clause 66.

Purpose

This clause will no longer be required if the above amendment to clause 65 is made.

Briefing

Clause 66 makes provision for exceptional case funding to be granted for civil legal services in relation to referral into the national referral mechanism. Exceptional case funding is granted to cases that would otherwise be out of scope of legal aid funding. As the draft amendment to clause 65 would bring advice on referrals into the National Referral Mechanism within scope of legal aid funding, exceptional case funding application would no longer be required, and this clause would be unnecessary.