

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

Summary

The Bill as it currently stands only allows potential victims of modern slavery/trafficking, who are *already in receipt of legal aid* for an immigration, asylum or human rights claim, to receive legal aid advice regarding a referral into the National Referral Mechanism. Requiring this vulnerable group of people to already be in receipt of legal aid in order to receive legal advice, about seeking a positive reasonable grounds decision as a potential victim of slavery/human trafficking, creates an unnecessary barrier to accessing early-stage legal advice. There is a particular barrier for those who are not seeking asylum, but who may have an immigration claim if they are recognised as a victim of trafficking. These victims may be too scared to come forward to the authorities. They may not know what immigration options are available. This restriction has been critiqued by the Joint Committee on Human Rights and Dame Sara Thornton, the Independent Anti-Slavery Commissioner. The lack of access to independent immigration advice is a powerful deterrent to people coming forward when they are escaping exploitation. **We strongly urge members of the House of Lords to support the amendment to Clauses 65 and 66, which have been tabled by Lord Paddick.**

Background

The Immigration Law Practitioners' Association ('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

Tabled Amendment

LORD PADDICK

Leave out Clause 65 and insert the following new Clause—

“Civil legal aid under section 9 of LASPO: add-on services in relation to the national referral mechanism

(1) In Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (civil legal services qualifying for legal aid), after paragraph 32A 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.”

(2) 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 civil legal services that the Government is seeking to fund for this work, as set out in Clause 65. While Clause 65 is a ‘step in the right direction’¹, it contains an unnecessary barrier. The above amendment removes this barrier: the requirement to have the advice on referral to the National Referral Mechanism (‘NRM’) attached to an existing immigration or asylum matter.

¹ Joint Committee on Human Rights, *Legislative Scrutiny: Nationality and Borders Bill (Part 5)—Modern slavery* (21 December 2021) <<https://committees.parliament.uk/publications/8328/documents/84688/default/>> accessed 20 January 2022.

The Government has been clear that it wishes to prevent matters such as trafficking being raised at a late stage. 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. Where there is an existing asylum matter, advice on referral to the NRM can already be paid for by the Legal Aid Agency ('LAA').

Therefore, the Clause should ensure that it brings cases where there is no asylum claim, but there is an immigration claim, within the scope of legal aid. For example, a 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. They may 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. As reiterated by the Joint Committee on Human Rights, 'these provisions would only help victims of slavery or human trafficking who already receive legal aid and who know to ask for it—it does not assist all victims of slavery or human trafficking who may want advice about entering the NRM, including victims of modern slavery in wholly domestic situations'.²

The current position is that a potential victim of trafficking or modern slavery, who wishes to make an immigration claim, 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 requires a significant amount of additional administrative work in a sector which is already overstretched. The sparsity of providers specialising in immigration and asylum law, resulting in geographical cavities or "deserts" in legal aid provision, has been well documented.³ Additionally, many providers are reluctant to make these applications.⁴ 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

² *ibid*, page 31, para 97.

³ Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <<https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>> accessed 20 January 2022; J. Wilding, M. Mguni, T. Van Isacker, *A Huge Gulf: Demand and Supply for Immigration Legal Advice in London* (2021)

<<https://justice-together.org.uk/wp-content/uploads/2021/06/A-Huge-Gulf-FINAL-report.pdf>> accessed 20 January 2022.

⁴ Public Law Project, 'PLP Survey Shows Lack of Faith in Legal Aid Scheme' (20 January 2020) <<https://publiclawproject.org.uk/uncategorized/improving-exceptional-case-funding-providers-perspectives/>> accessed 20 January 2022.

them.⁵ Further, the application would be extremely unlikely to be granted. This is therefore an unnecessary barrier to this group of people accessing legal advice.

Dame Sara Thornton, the Independent Anti-Slavery Commissioner, echoed these sentiments in her letter of 7 September 2021 to the Home Secretary,⁶ regarding these clauses:

'It is recognised that access to good quality and specialist legal advice can be vital for victims and survivors of modern slavery to assist them in being formally identified as a victim, to access support, to engage with criminal justice processes, to seek compensation and to secure their immigration status. However, there are often significant barriers for survivors to access legal aid in practice, including uncertainty around entitlements and the funding structure for immigration legal aid which can discourage lawyers from taking on modern slavery cases.'

'I am aware that outside London and the South East, victims and survivors already often experience significant difficulties in accessing legal aid lawyers.'

'I understand from colleagues in the sector that exceptional case funding is extremely difficult to secure in practice. It is described as time consuming and unlikely to be successful, requiring a lot of work upfront with the solicitor only paid if the application is successful.'

A case study from a member, provided in 2021, 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

⁵ Justice Committee, *The Future of Legal Aid* (27 July 2021) at paragraph 118 <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/70/7006.htm#_idTextAnchor064> accessed 20 January 2022.

⁶ Letter from the Independent Anti-Slavery Commissioner to the Home Secretary regarding the Nationality and Borders Bill (7 September 2021) page 10 <<https://www.antislaverycommissioner.co.uk/media/1668/iasc-letter-to-the-rt-hon-priti-patel-mp-home-secretary-march-2021.pdf>> accessed 20 January 2022.

“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.’

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. 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 70, line 23, 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.

Conclusion

The proposed amendments would enable victims of modern slavery and trafficking, who these Clauses were intended to assist, to access legal aid advice when needed by separating assistance from the requirement to have already secured legal aid for an asylum, immigration or human rights matter. The Government aims to prevent matters such as trafficking being raised at a late stage. These amendments would further that aim by ensuring that persons have the requisite legal advice at an early stage. We urge members of the House of Lords to support Lord Paddick's amendment to Clause 65, and to oppose the question that Clause 66 stand part of the Bill.

Should you require further information regarding this briefing, please contact the Immigration Law Practitioners' Association at info@ilpa.org.uk.