

Response to Ministry of Justice's Consultation: Legal Aid Means Test Review

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.

Introduction

This is a response to the consultation by the Ministry of Justice ('MoJ') on its proposed changes to the means test for legal aid.¹

It remains ILPA's position that access to justice, including to legal aid legal advice and representation should be available to all who require it. ILPA supports any proposals that ensure better access to legal aid in immigration and asylum law, particularly for all vulnerable persons, and disagrees with any proposals that would reduce access or pose an impediment on this facet of their fundamental and constitutional right of access to justice. In particular, we welcome the proposals to introduce new disregards and increase allowances, income and capital limits, which have been long overdue.

We do have concerns about some of the limits and changes proposed, which the Public Law Project ('PLP') has helpfully set out in their response to this consultation.² We endorse their response, which reflects the concerns of our members. We agree with PLP that many of the proposals rest on the false assumption that households of modest means, at or above national median levels of income and capital, do not require legal aid and can thus afford to privately pay for legal advice and representation.

We would like to highlight a few matters. We note that by the time these proposed changes come into effect inflation may have risen significantly, with prices increasing by 20% between 2019 and

¹ Ministry of Justice, 'Open consultation: Legal Aid Means Test Review' (updated 1 June 2022) <<https://www.gov.uk/government/consultations/legal-aid-means-test-review/legal-aid-means-test-review#chapter-5-immigration-and-asylum-under-18s-and-non-means-tested-cases>> accessed 7 June 2022.

² Public Law Project, *Public Law Project briefing on the Legal Aid Means Test Review consultation (Civil proposals)* (June 2022) <<https://publiclawproject.org.uk/content/uploads/2022/06/220606-PLP-MTR-Response-FINAL.pdf>> accessed 6 June 2022.

2026 according to the Bank of England's inflation forecasts,³ meaning the allowances and limits will fail to properly reflect the actual costs people face. Rather than promising a review within three to five years, which may or may not happen, it would seem a missed opportunity to future proof these proposals by linking them to inflation and reviewing them annually. Failure to take such a step would mean that these changes may already be out of date by the time the proposals come into effect.

Professor Donald Hirsch's research from May 2022, commissioned by The Law Society, highlights this failure in the proposals, and recommends thresholds and allowances used in legal aid are updated annually in line with the Consumer Prices Index, with the CPIH variant including housing for gross income thresholds, and that such upratings are backdated.⁴ Prof Hirsch also notes a structural issue in the proposals, which substantially disadvantage lone parent families, and recommends lone parents are given 'a supplementary cost of living allowance equal to half the amount that would be assigned to a partner or additional adult'.⁵ Finally, Prof Hirsch recommends that 'Housing Benefit income, and the housing element of Universal Credit, should not be included when applying the gross income limit, because doing so would exclude some civil applicants in high-rent areas with low disposable income.'⁶ We support these three recommendations.

The rationale used to justify the proposal to end the status of Universal Credit ('UC') as a passporting benefit is namely cost and fairness. The review notes that '[s]ome individuals are unable to apply for UC and are therefore disadvantaged by the current system (e.g. pensioners, students and those on non-passporting legacy benefits)',⁷ which the review states creates a disparity. Surely the solution would be to find a remedy which would allow these groups to access legal aid, "levelling up", rather than removing legal aid from the UC cohort and penalising them. Those who work and receive UC are arguably the "working poor". If they had the means they would no longer receive UC. With respect to the costs of allowing people who work and receive UC to access legal aid, the counterfactual needs to be considered. If this group is no longer eligible for legal aid, could they afford to pay for legal representation? If people are unable to regularise their immigration status, the problems they face are far reaching because of the impact of the hostile environment.

Finally, we do not support any proposals that would increase the administrative burden of busy and stretched legal aid providers. The sustainability of the immigration and asylum legal aid sector is already in question, and thus the MoJ should reduce rather than increase the administrative burden and financial risk placed upon providers. Providers must be properly remunerated for the time taken to undertake means testing.

³ Donald Hirsch, *More affordable justice: Proposals to reform the legal aid means tests and implications for living standards* (Centre for Research in Social Policy Loughborough University, May 2022) page 8, §2.5
<<https://www.lawsociety.org.uk/topics/research/more-affordable-justice-legal-aid-means-test-report>> accessed 31 May 2022.

⁴ *ibid* 1.

⁵ *ibid* 1.

⁶ *ibid* 1.

⁷ (n 1) §198.

Given that many of our Members practise in immigration and asylum law, we have answered the relevant questions in Chapter 5 of the consultation. Our lack of response to any particular question should not be taken as endorsement of, disagreement with, or ambivalence towards the proposal.

Chapter 5: Immigration and asylum, under-18s and non-means tested cases

40. Do you agree with our proposal to align the immigration representation Upper Tribunal capital threshold (currently £3,000) with those usually used for civil legal aid – namely a lower threshold of £7,000 and an upper threshold of £11,000? Please state yes/no/maybe and provide reasons.

Yes.

We support the MoJ's proposal to increase the lower and upper disposable capital thresholds for immigration and asylum cases in the Upper Tribunal, bringing them in line with civil legal aid thresholds being proposed for licensed work as part of the wider Means Test Review. This will increase the upper threshold by £8,000 and we hope to see it result in access to representation for a wider set of individuals.

However, we support three further recommendations.

First, there must be a commitment from the MoJ to review and update thresholds annually, to ensure that these remain correct against CPI, as the cost of living and inflation increases.

Second, we agree with PLP that the MoJ should go further in its proposals. Capital limits should be aligned with welfare benefits, and exclude both primary residences and trapped capital for the purposes of the assessment. As we explain in our response to Question 41, it must be recognised that there will be many persons with immigration and asylum cases who have saved capital to pay for their expenses as they have no recourse to public funds and may not have the right to work. Requiring them to liquidate and use their life savings to pay for their legal case (and make contributions, if they have capital above £7,000), leaves them without any safety net, and as PLP notes it is 'inconsistent with the approach taken in other areas of public policy, such as welfare benefits (where the upper capital limit is £16,000 and the primary residence is not included)'.⁸

Third, there should be a mechanism for those above the £11,000 capital threshold, who would suffer significant hardship if they were excluded from legal aid and had to pay for private representation, to access legal aid.

41. Do you agree with our proposal to remove the exemptions on the payment of income and capital contributions for immigration and asylum representation in the Upper Tribunal, replacing them with the new proposed income and capital thresholds for civil legal aid? Please state yes/no/maybe and provide reasons.

⁸ (n 2) §154.

No.

We strongly oppose any proposals to impose contributions for immigration and asylum representation in the Upper Tribunal. Asylum and immigration applicants may not have the right to work, and may have no recourse to public funds. They may rely on their capital in order to support themselves. Asking legal aid recipients to make a contribution for immigration and asylum representation in the Upper Tribunal introduces a new obstacle to those who wish to access justice. The unintended consequences have not been considered. Those eligible for legal aid are the poorest in society, with constrained and limited means, often without the safety net of public funds. Unexpected, but vital, expenses push people into poverty and debt and this risk is acute for those with no recourse to public funds. Therefore, requiring them to make a contribution for representation in the Upper Tribunal could result in significant hardship for individuals.

We support PLP's recommendation to introduce a right to request a hardship review following which normal civil income and capital limits can be disapplied, and/or contributions waived. A hardship review process, as exists for criminal legal aid, will help ensure that a person who cannot afford to pay for private representation will not be required to do so, or to make contributions, where they would cause hardship.

Contributions are likely to act as a deterrent to those who wish to pursue their matters before the Upper Tribunal. There has been no consideration as to the consequences if people do not feel able to pursue matters before the Upper Tribunal: decisions that should be challenged will go unchallenged. People may decide it would be cheaper to make a new application than to pursue an appeal. This is the very course of action of which the current Home Secretary is critical; however, these proposed changes to legal aid may force people to act in this way.

42. Do you agree with our proposal to increase the immigration representation First-tier Tribunal capital threshold from £3,000 to £11,000? Please state yes/no/maybe and provide reasons.

Yes.

We support the MoJ's proposal to increase the capital threshold for controlled work in the First-tier Tribunal from £3,000 to £11,000. We hope that it will increase eligibility for the cohort.

However, our reply is subject to the same three recommendations detailed in Question 40: capital limits should be updated annually, aligned with welfare benefits, exclude both primary residences and trapped capital, and there should be a right to a hardship review. As acknowledged by the MoJ in paragraph 306 of the consultation, 'many' in this cohort 'are likely to be particularly vulnerable and may find it difficult to represent themselves or understand the legal position in this area without professional support (therefore ensuring access to justice).'

7 June 2022