

Judge Melanie Plimmer

% Jane Blakelock
PA to Judge Melanie Plimmer
FTT President, Immigration and Asylum Chamber
Judicial Office
3rd Floor, 15 – 25 Breems Buildings, London EC4A 1DZ
By email only

8 April 2024

Dear Judge Plimmer,

Supporting Litigants-in-Person in the Legal Aid Crisis

We are writing as we hope that we can meet to discuss the way forward for unrepresented litigants in light of the current legal aid crisis.

The Immigration Law Practitioners' Association (ILPA) is a professional association and registered charity, the majority of whose members are barristers, solicitors, and advocates practising in all aspects of immigration, asylum, and nationality law. Our members see their role in appeals as assisting the Tribunal in the administration of justice. We write with this at the forefront of our mind.

Many of our members either currently practice in legal aid, wish to undertake legal aid work, have previously held a contract to undertake legal aid work which they have surrendered, or have a substantial interest in the legal aid crisis due to the support services they provide in communities.

The Legal Aid Crisis

There is considerable evidence that supply of legal aid services in immigration and asylum far outstrips demand, with considerable swathes of England and Wales described as 'advice deserts' due to the dire shortages in those regions. Recent research by Dr Jo Wilding has found that over half of asylum claimants are unable to access a legal aid lawyer.¹ Public Law Project has documented both the severe regional and national shortages and the impact this has on providers, support organisations, and individuals in need.²

Our members who are legal aid practitioners report that they cannot meet the demand for their legal aid services. Consequently, many are compelled to severely reduce the portion of their workload dedicated to legal aid due to it being increasingly financially unviable. This is exacerbated by outdated fees, which have remained stagnant since 1996, and were further cut in 2011, despite inflation and increasing complexity in this area of the law. For instance, one of our large legal aid provider members has ceased to act in almost all First-tier Tribunal appeals,³ while another large

¹ Jo Wilding, 'Over half the people seeking asylum are now unable to access a legal aid lawyer' Free Movement (25 October 2023)

<<https://freemovement.org.uk/over-half-the-people-seeking-asylum-are-now-unable-to-access-a-legal-aid-lawyer/#:~:text=At%20least%2051%25%20of%20asylum,of%20new%20applications%20for%20asylum>> accessed 4 March 2024.

² PLP, 'Access to immigration legal aid in 2023: An ocean of unmet need' (September 2023)

<<https://publiclawproject.org.uk/content/uploads/2023/09/Oceans-of-unmet-need-Sep-2023.pdf>> accessed 15 February 2024.

³ For example the impact of the legal aid payment system is outlined in the 'Open Letter from Duncan Lewis Public Law Team to the Lord Chancellor and the Director of Legal Aid Casework: Legal Aid Reform' (11 July 2023) <<https://drive.google.com/file/d/1jp77NNlzoZpXBOIHcvyenNKYweClpges/view>> accessed 3 April 2024:

'The [Standard Civil Contract] does not provide for payments on account for controlled work, which constitutes

legal aid provider struggles to take on work at the Legal Help stage. Some legal aid practitioners have even surrendered their legal aid contracts as a result of the lack of financial sustainability and cannot sensibly resume legal aid services in the current market. According to the Law Society's analysis, 65.8% of the population do not have access to an immigration and asylum legal aid provider.⁴ The Ministry of Justice's statistics show an increase of nearly 10,000 immigration and asylum controlled work claims between 2018-2019 and 2022-2023, but a drop of 51 immigration and asylum legal aid providers and 81 offices in the same period of time.⁵

Our members working in charitable and other not-for-profit support organisations report that they find it increasingly difficult to refer their service users to legal aid practitioners. This is important, as many support organisations do not have the funding necessary to pay for crucial experts and other disbursement costs such as for interpreters and translators.

They are seeing a significant number of individuals with refusals who had little or no representation in their initial asylum claim. This situation could exacerbate the complexity of preparing an appeal, as some refusals may stem from claims which would have been granted had they been better prepared and presented. Robustly preparing such appeals without legal representation is challenging and legal aid practitioners with limited capacity may be deterred from assisting clients at appeal stage who were previously unrepresented, given the additional complexities involved. We are told by one member in the South West, where the legal aid crisis is particularly acute, that they are protectively lodging appeals on behalf of clients, despite not having the capacity to represent them. They are also helping non-legal organisations support individuals with lodging appeals, aiming to prevent them from missing crucial appeal deadlines that could expose them to the hostile environment, destitution and homelessness, or, worse, *refoulement*.

As this crisis unfolds, after considerable delay, the Home Office's backlog clearance resulted in protection decisions in tens of thousands of cases. The Government's analysis states, '*in the 4 weeks from 20 November to 17 December 2023 there were 20,481 initial asylum decisions made. This number of decisions compares to a total of 20,039 decisions made in the whole of 2021*', and that 25,550 claims in the backlog were refused last year.⁶ This is in addition to other immigration decisions that attract a right of appeal. It appears from the quarterly Tribunal statistics that the First-tier Tribunal (IAC) is already experiencing an increased workload in asylum and protection, with the Tribunal quarterly statistics for the end of 2023 noting that '*Asylum/Protection (AP) receipts*

the bulk of substantive immigration and asylum work that is funded by legal aid. The consequence of this is that legal aid providers are not paid for work undertaken, often for up to three years after this work commences. At present the firm carries a significant amount of controlled work that is in progress and cannot be billed, which has a detrimental impact on our ability to take on this kind of work, despite our commitment to representing vulnerable individuals.'

⁴ The Law Society, 'Immigration and asylum – legal aid deserts' (8 February 2024)

<<https://www.lawsociety.org.uk/campaigns/civil-justice/legal-aid-deserts/immigration-and-asylum>> accessed 15 February 2024.

⁵ Ministry of Justice, 'Review of Civil Legal Aid - Call for evidence: Annex C: Civil Legal Aid Data' (19 January 2024)

<<https://www.gov.uk/government/calls-for-evidence/review-of-civil-legal-aid-call-for-evidence/review-of-civil-legal-aid-call-for-evidence#AnnexC>> accessed 3 April 2024.

⁶ Home Office, 'Additional statistics relating to Illegal Migration (December 2023)' (2 January 2024)

<<https://www.gov.uk/government/statistics/statistics-relating-to-the-illegal-migration-bill/additional-statistics-relating-to-illegal-migration-december-2023>> accessed 27 March 2024.

increased by 420% compared to the same period in 2022 (to 13,000)'.⁷ This exercise is not complete, as the Home Office is now moving on to decide claims made between 28 June 2022 and 6 March 2023 (inclusive): the "Nationality and Borders Act 2022 (NABA)" cohort.

ILPA has detailed the extent of the immigration and asylum legal aid crisis in various consultation responses, including most recently to the Ministry of Justice as part of its Review of Civil Legal Aid. The scale of the crisis is exemplified by the sheer number of responses from the immigration and asylum sector to that consultation, many of which can be accessed on ILPA's website.⁸

Litigants in Person

The culmination of various elements of the legal aid crisis has led and will continue to lead to an increasing number of appellants representing themselves in the Tribunal.

Litigants-in-person, unfamiliar with both tribunal procedures and the law, will face significant difficulties for that reason alone. In asylum claims, these challenges are particularly acute. The law is exceptionally complex. To discharge their onerous evidential burden, appellants must adduce evidence involving geo-political factors, trace evidence from overseas, and obtain evidence from medico-legal, country, and other experts. This evidential burden is all the weightier with the new standard of proof under section 32 of the Nationality and Borders Act 2022. Appellants often bear the weight of trauma and mental health difficulties, compounded by English not being their first language. Preparation for the appeal, as well as any hearing, is often distressing and re-traumatising. We are concerned that there is a high risk of procedural unfairness and miscarriages of justice occurring under such conditions.

The consequences of miscarriages of justice in protection claims are of the severest kind: *refoulement*, which may endanger their lives. Even if they are not removed from the UK, they are left in the severest form of legal limbo due to the hostile environment.

We kindly request a meeting with you to explore potential solutions to help mitigate the risk of injustice and to try and ensure that as many people as possible can access the free representation to which they are entitled under the law, the availability of which the Lord Chancellor has a statutory duty to secure.

While our members are diligently exploring all available options to assist such appellants in need of representation, there are some areas which would benefit from engagement with the Tribunals, including:

- **Whether the Tribunals can collect data on the number of unrepresented appellants.** This would include data on the number of litigants-in-person, any delay-related concerns caused by their lack of representation, and the outcomes of such cases. This is particularly important, as the National Audit Office recently found that the *'MoJ does not collect sufficient data to understand whether those who are entitled to legal aid are able to access it. Delivering access to justice is one of MoJ's three key priorities. However, MoJ lacks a good understanding of both the demand for legal aid and the capacity of existing providers so it*

⁷ Ministry of Justice, 'Tribunal Statistics Quarterly: October to December 2023' (14 March 2024) <<https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-october-to-december-2023/tribunal-statistics-quarterly-october-to-december-2023#immigration-and-asylum>> accessed 3 April 2024.

⁸ ILPA, 'Review of Civil Legal Aid ('RoCLA') <<https://ilpa.org.uk/review-of-civil-legal-aid-rocla/>> accessed 27 March 2024.

*cannot ensure advice is available to those entitled to it.*⁹ To this end, we were also considering whether we might set up an Appeals Observation Project with universities to document the impact of the current crisis on access to justice and the courts.

- **Whether it is possible to work with regional hearing centres to develop a signposting process.** Possible solutions could include a duty desk, or otherwise signposting information for litigants-in-person as a case management step in light of the width of the First-tier Tribunal’s case management powers. We would be more than happy to discuss how civil society could assist with this signposting.
- **Whether there ought to be updated guidance amid the ongoing legal aid crisis, internally for Tribunal listings staff and/or for judges regarding the listing and adjournment of appeals where procedural fairness may be compromised due to the appellant’s lack of legal representation.**

We are grateful for your time and consideration of this matter. We would welcome the opportunity to meet with you and discuss these matters in greater detail, including to understand how our members can better support the Tribunal in the fair and just disposal of appeals.

Yours sincerely,

Zoe Bantleman
Legal Director
Immigration Law Practitioners’ Association

⁹ National Audit Office, ‘Government’s management of legal aid’ (9 February 2024) (‘NAO 2024 Report’) page 7 <<https://www.nao.org.uk/wp-content/uploads/2024/02/governments-management-of-legal-aid.pdf>> accessed 3 April 2024.