ILPA BRIEFING FOR ADJOURNMENT DEBATE ON LEGAL AID 15 DECEMBER 2010

"I believe that there is much in our British system of justice of which we can all be proud. Its defect has been that it has not been equally available to everyone and has depended upon the resources and advice for which one can pay. It has been said by one famous judge that justice is available to the public in the same way as the Ritz Hotel is available, and on the same terms."* Arthur Skeffington MP, HC Deb 26 October 2010 1954 v 531 cc 1889-98 (in a debate on on the Legal Advice and Assistance Act 1949)[1]

THE CUTS PROPOSED

There are three main ways in which it is proposed to cut legal aid:

(i) Remove legal aid from certain types of case
(ii) Lower the income levels below which people qualify for legal aid
(iii) Reduce payments to legal representatives.

In immigration, it is proposed to remove all legal aid for immigration (as opposed to asylum cases) cases. Legal aid would be cut for both the stage of making an application to the Home Office and any appeals against refusal. These include cases where arguments are based on the right to family and private life under Article 8 of the European Convention on Human Rights and where the person faces removal/ deportation from the UK. The exceptions would be that people in immigration detention would still get legal aid to challenge their detention (although not for help with their immigration cases) and national security cases before Special Immigration Appeals Commission would still get legal aid. It is also proposed to cut legal aid from asylum support cases (applications from people seeking asylum for housing and subsistence). Cuts to other areas of legal aid will affect poor migrants and refugees, as they will affect all who are poor as will the lowering of the income levels below which people qualify for legal aid.

While there is mention of general human rights exception it is proposed that legal aid would not be available for claims involving Article 8 (right to private and family life) including before the Immigration and Asylum Chamber of the First Tier Tribunal because, it is suggested, people can represent themselves. While it is clear that it is intended to fund cases of people who are poor and face domestic violence, it is unclear whether immigration cases involving domestic violence will be funded. Rules exist to allow those whose relationships break down because of domestic violence to remain in the UK, in an effort to ensure that people do not stay in abusive relationships because they fear removal. These rules provide essential protection.

People will have to go to their MPs for advice

It is a crime to give immigration advice in the course of a business whether or not for profit unless a solicitor, barrister, or registered with the Office of the Immigration Services Commissioner. So, deny legal aid and only those voluntary organisations registered with the Office of the Immigration Services Commissioner (OISC) will be able to help. Giving legal advice to migrants and refugees is a heavy responsibility and involves getting to grips with complex laws – many voluntary organisations will feel that registering to give immigration advice and maintaining the required standards is not something they can take on. At which point, they will not be able to assist. There is already a lot of *pro bono* work by solicitors and barristers for migrants and refugees; there is very limited room for growth. Many people will go to MPs, as MPs and their caseworkers are not required to register with the OISC. There is concern that people who simply cannot manage with representation will

[1] US judge, Judge Sturgess *"Justice is open to everyone in the same way as the Ritz Hotel"*

put themselves at risk in seeking to raise money to pay for representation. People who know little of what is supposed to happen are vulnerable to exploitation, including by those who pretend that they are qualified to give legal advice to make a profit. The best protection against bad legal advice is good legal advice, for those who cannot pay that means good legal advice funded by legal aid.

ARGUMENTS AGAINST CUTTING LEGAL AID

Legal aid is an insurance policy against abuse of power and incompetence

Legal aid is the State's insurance policy that laws that affect poor people are put into effect in the way intended. Government departments are powerful; those who are affected by their decisions and are poor are not. Legal aid is an essential safeguard against inequality of arms and also serves to maintain scrutiny of those Government departments. This latter is about justice, but it is also about money – scrutiny is one way to try to ensure that departments spend their money doing what they should and do not waste it.

The real cost savings lie in implementation of the "polluter pays" principle

If the Government really wants to save money then rather than looking to the legal aid budget it should look to the departments making the decisions. If a department wants to pass lots of laws or wants to change procedures, it should meet the costs of these for the legal aid budget and the court system. If it passes laws in haste, or implements new procedures, without thinking them through, it should meet the costs generated for legal aid and for the courts by those bad laws. If its poor decision-making and delay lead to challenges, it should meet the costs to the legal aid system and to the courts of those challenges. If its conduct of any litigation arising out of a case causes costs, it should meet those costs.

Tackling the behaviour of Government departments would result in savings not only in immigration cases, but in cases that the Government proposes should still receive legal aid funding, asylum cases, and also in cases where people do not receive legal aid but are paying their own legal costs. The savings could be huge. Ministers have said that all Government departments must make cuts, but the problem is that this is happening in silos, no department is looking at savings it can make to another department's budget.

The UK Border Agency does implement laws and procedures in haste, is notorious for its delays, and has been heavily criticised by the courts for both poor decisions and its conduct in litigation. When asked by ILPA in a freedom of information request what it spent on litigation, it replied that it did not know, and suggested we ask Treasury Solicitors (the Government solicitors) as they might know.

In immigration there have been Acts of Parliament in 1993, 1996, 1999, 2002, 2005, 2006, 2007, 2008 and 2009, plus many more regulations and rule changes, many of which have been hastily devised and led to all sorts of confusion. The courts have been critical of the UK Border Agency's handling of cases. Lord Justice Ward, in the Court of Appeal in See e.g. *MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229,[2] said

> *"The history fills me with such despair at the manner in which the system operates that the preservation of my equanimity probably demands that I should ignore it, but I steel myself to give a summary at least… What, one wonders, do they do with their time?*
> *…I ask, rhetorically, is this the way to run a whelk store?"*

People's human rights will be violated

The Government suggests in its consultation paper that immigration cases are cases about matters of personal choice. It recognises that immigration cases involve human rights, especially the right to

[2] http://www.bailii.org/ew/cases/EWCA/Civ/2009/1229.html

family and private life (Article 8 of the European Court of Human Rights). Its only answer to this is to say that people can represent themselves at appeals.

Personal choice?

Many of those studying or working in the UK are excluded from legal aid because of the eligibility tests, let alone the proposed thresholds. Those who meet the current financial criteria for legal aid are likely to have extremely limited 'personal choices'. Business matters are already excluded from the scope of legal aid. These are cases about whether people are allowed to join spouses, partners and parents; about whether people will have to leave the country in which they have lived for years, sometimes for decades, leaving close family members behind. They are cases about whether a person who has fled domestic slavery can live safely in the UK away from those who abused them. They are cases about whether a person is entitled to work and can thus support themselves or to a roof over their head and something to eat. They are cases where a wrong decision, based on a misunderstanding of the evidence, threatens to change the course of a person's whole life. The lack of personal choice is illustrated by the case studies appended to this briefing.

Can applicants represent themselves?

The law in this area is voluminous and extremely complicated. The Supreme Court, and its predecessor, the House of Lords, whose work is confined to deciding the most complex points of law, have given more judgments on Article 8 in recent years than on almost any other area of law.

In the influential study, *Tribunals for diverse users*,[3] Professor Hazel Genn and her team observed

> *"...there are limits to the ability of tribunals to compensate for users' difficulties in presenting their case. In some circumstances, an advocate is not only helpful to the user and the tribunal, but may be crucial to procedural and substantive fairness"*

Judges have also made their position clear. The law is complicated, and the way in which cases are handled is frequently incomprehensible.

> *"I am left perplexed and concerned how any individual whom the Rules affect (especially perhaps a student, like Mr A, who is seeking a variation of his leave to remain in the United Kingdom) can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done".* (Lord Justice Longmore in *AA(Nigeria) v SSHD* [2010] EWCA Civ 773, Para 87)
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> *"It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it." (Lord Scott, Chikwamba v Secretary of State for the Home Department* [2008] 1 WLR 1420, [2008] UKHL 40
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> "*... it is important to appreciate that under s 11 of the Immigration Act 1971 a person can be admitted into this country while an application is being considered, without* ***being regarded from***

[3] Genn, H., Lever, B. and Gray, L., DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice), January 2006

the legal point of view as having entered into this country. Davis J, not unreasonably in the court below, described this as an Alice in Wonderland" situation. Although that description is appropriate, the provisions of s 11 are of value because it enables a person who makes a claim to enter this country not to be detained but to be released temporarily while his position is considered." ((then) Lord Justice Woolf in *R (Veli Tum) v Secretary of State for the Home Department [2004] EWCA Civ 788*

*"I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. The provisions are labyrinthine (*Court of Appeal in *Kaczmarek v Secretary of State for Work & Pensions* [2008] EWCA Civ 1310. The Court of Appeal in *Lekpo-Bozua v London Borough of Hackney & Ors* [2010] EWCA Civ 909 also described the provisions of domestic legislation pertaining to European free movement law as '*labyrinthine'*)

The late Mr Justice Hodge, then President of the Asylum and Immigration Tribunal, giving evidence before the Constitutional Affairs Committee, stated

" The AIT and its judges, whenever they have been asked, have always said that we value representation and we want as many people to be legally represented as possible, and whenever we discuss these matters with the Legal Services Commission, which we do periodically, that is entirely what we say....—the change in representation has been very much driven by the Legal Services Commission's worries about the total cost of their budget rather than anything to do with us."[4]

Mr Justice Collins was giving evidence in that same session and stated of litigants in person *"...it makes it more difficult to give proper consideration when you do not have the evidence put before you in the form that it ought to be put."*

The Hon Mr Justice Blake, President of the Immigration and Asylum Chamber in the Upper Tribunal, speaking at the Annual Conference of the Office of the Immigration Services Commissioner on 6 December 2010 identified case management as critical and spoke of how targeted grounds of appeal enable the tribunal to do its job better. He emphasised that having competent representatives before it assists the Tribunal.

There is no legal aid for hearings before the Asylum Support Tribunal and the tribunal has expressed concern at the effect of this,[5] as has the Joint Committee on Human Rights.[6] Citizens' Advice has conducted two studies of asylum support appeals. In 2007 it looked at 223 cases and found that among the 36 represented appellants, the success rate was 58 per cent. Among the 187 unrepresented appellants it was 29 per cent. In its June 2009 Evidence Briefing *Supporting justice: The case for publicly-funded legal representation before the Asylum Support Tribunal* it looked at 616 appeals. It found that where the Asylum Support Appeals Project provided representation the success rate was 71.3%. The success rate for those who receive pre-hearing advice from the project was 60.9%. The success rate for those who receive neither pre-hearing advice nor were represented at appeal was 38.6%. The Evidence Briefing observed that the high success rates for cases where the Asylum Support Appeals Project was involved "*is strongly suggestive of poor quality (or, at least, inadequately informed) initial decision-making by the UKBA"*

[4] Oral evidence Taken before the Constitutional Affairs Committee on Tuesday 21 March 2006, see http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm

[5] See, in particular, the Asylum Support Adjudicators annual reports for 2000-01 and 2004-05

[6] Treatment of Asylum Seekers, Joint Committee on Human Rights, Tenth Report of Session 2006-07, HL 81-1, HC 60-1

On 17 November, the Chair of the Administrative Justice and Tribunals Council spoke on Radio 4's *Today* programme,[7] speaking on *Today* (R4 – see), highlighted the failure of public bodies to get decisions right first time across many areas of public decision-making. He identified that, in immigration, there was a 37% success rate on appeal; and that this (and similar figures in other areas) indicated the degree to which public bodies were getting decisions wrong. He expressed concern that this was only the tip of the iceberg because there were many more decisions made by public bodies that were not brought before tribunals, many of which would be correct decisions but others he feared would be wrong but just not remedied. He also voiced concern that public bodies fail to learn the lessons of cases brought to tribunals, perhaps putting the matter right in the individual case but repeating the same mistake in other cases. All this reflects ILPA's experience.

The risk that money is spent less effectively

Because immigration cases are such serious cases, and because the conduct of the UK Border Agency frequently leaves much to be desired, there are likely to challenges to decisions to refuse funding. It is likely that many of these will go to court. It is the case under UK law that there is a right to challenge an administrative decision against which you have no effective appeal, before a judge in the High Court (judicial review). There are likely to be many challenges arguing that unrepresented people in these complex cases have no effective right of appeal before the Immigration and Asylum Chambers in the tribunals.

There are also concerns that people who might otherwise have relied on their immigration case will claim asylum as the only way of putting for their arguments that they be allowed to stay. Would it not be easier, simpler and cheaper to provide legal aid in the first place so that people have an effective right of appeal and a chance of getting a final decision within a reasonable time?

CASES (*Name have been changed)*

Alegria
Alegria lived with her husband and their child in the UK. When her son was seven, the two year probationary period for marriage came to an end. Her husband refused to support her application for settlement and left her for someone else. She was left to work to support her son and mother-in-law. She held two jobs as a cleaner. Initially an application for settlement was made on the basis of a concession relating to her child's length of residence in the UK. This was returned because no fee had been paid but was not considered properly. By this time Alegria's probationary leave as a spouse had expired. A further application on the grounds of right to family life under Article 8 of the ECHR was made. It was refused, with no right of appeal because it was made 'out of time and as a result she was told that she no longer had permission to work to support her family. Legal aid was granted for a judicial review of the failure to grant a right of appeal or to consider the human rights arguments. The lawyers registered Alegria's son as British. The court granted the judicial review permission to proceed and at only at this point did the UK Border Agency settle. We also registered the son as British. We got permission, and then the Home Office settled, granting her Indefinite Leave to Remain. Without legal aid, Alegria and her son would not have been able to regularise their stay or remain together. She would never have been able to afford to pay for legal advice and because her situation was complex and involved High Court action, she could never have done it without legal advice.

A
A is twelve. He came to the UK when he was four to join his father and father's British partner. The father left the UK but A remained in UK with the British partner. A's aunt has been in the UK for over seven years with her two daughters. She applied to regularise her status, that of her

[7] http://news.bbc.co.uk/today/hi/today/newsid_9197000/9197123.stm

daughters and that of A. This has been refused. A needs separate legal advice on his rights to private and family life. No notice of removal has been issued so A is in limbo – until such a notice is issued he cannot challenge the removal. He cannot be expected to represent himself or to gather relevant evidence.

AA (family reunion case)
AA is over 65. She is a refugee and has Indefinite Leave to Remain. AA made an application for her daughter K to join her in the UK under the Immigration Rules. The Entry Clearance Officer in Ethiopia refused the application on the basis that AA was unable to maintain and accommodate her daughter as AA was in receipt of Income Support. AA appealed the decision. AA's appeal was successful on Article 8 of the European Convention on Human Rights (private and family life grounds). A detailed statement was provided to the Tribunal setting out the history of AA's relationship with her daughter - her daughter's severe learning difficulties and the compassionate circumstances due to the rest of AA's children having been killed during the civil war and AA living alone in the United Kingdom. K has since arrived in the UK.

M
M approached a support charity registered to give immigration advice for assistance with applying for indefinite leave to remain at the end of her two year's probationary leave as a spouse. She came on the day that the original visa expired, without any supporting documentation. The application was submitted out of time by about ten days. It was refused on the grounds that her husband had applied for Income Support, and thus they could not meet the maintenance requirement. However, this was erroneous – there had been no Income Support claim – although the family lived on a low income, and for a short time the previous year were in receipt of Incapacity Benefit following an accident at work. Because the application was late, there was no right of appeal. The charity asked that the decision be reconsidered but the decision to refuse was upheld without any evidence that caseworkers had checked the details about the alleged Income Support claim. M was told she needed to return to her country of origin.

The charity was regulated top provide immigration advice but, as OISC regulated advisors, cannot pursue judicial review. They referred her to a solicitor. The solicitor sought judicial review. After two and a half years the UK Border Agency has now granted Indefinite Leave without the matter going before a Judge.

An advisor at the charity observes *"While the client was certainly at fault for applying late, the UK Border Agency made a simple mistake that required the solicitor seeking judicial review to correct. The client and her family struggle financially: they would not have been able to correct this error without access to a legally-aided solicitor."*

X (asylum support case)
X is from Zimbabwe. He submitted a fresh claim for asylum in 2005. Further representations have been since; the most recent substantive expert evidence was submitted in August 2009, to which no reference was made in a decision in March 2010. X lived with a friend until summer 2010 but friend could no longer support him and he became homeless and destitute. He lodged an application for 'section 4' support (support for persons whose application for asylum has failed) by himself which was refused. His appeal was dismissed on the basis that he was an asylum seeker as he had further representations outstanding (the Secretary of State had not dealt with the most recent representations in her most recent decision. He came to a legal representative who applied for 'section 95' support, support for persons with an outstanding application. This was refused as the Home Office records were incorrect, showing no further representations outstanding. The representative gave notice that a judicial review of the refusal would be sought. The Home Office then considered the application properly and granted 'section 95' support.

About ILPA

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency, Ministry of Justice and other 'stakeholder' and advisory groups.

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