



**For Westminster Hall debate on the detention of children
under immigration act powers 17 June 2009
Supplementary Briefing from the Immigration Law Practitioners'
Association on Immigration and Asylum Legal Aid**

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 and other advisory groups including the UK Border Agency Detention User Group and the Legal Services Commission Civil Contracts Consultative Group.

ILPA is a member of the Refugee Children's Consortium and has contributed to, and endorses, the Consortium's briefing for this debate.

Funding of legal representation for immigration and asylum cases, including those of families and including families in detention is very much in the news at the moment, as Refugee and Migrant Justice has gone into administration. This briefing provides background for those who wish to raise this in the debate.

The Legal Services Commission is tendering for new contracts in asylum and immigration legal aid. The new contracts will start in October. The tender has not yet been announced; it has been postponed many times. Applicant organisations and firms were supposed to have been notified of the outcome during the week commencing 29th March 2010. On 26th March this was postponed to the week commencing 5th April 2010. On 9th April 2010 it was postponed indefinitely. On 27th April 2010 it was postponed to a date not before 6 May. It was subsequently postponed to the end of May and letters to ILPA and to The Law Society set out that the original reason we had been given for the delay (the pending General Election) was not the real reason, which was the need to conduct further checks. At the very end of May we were informed that the end of May deadline would be met and were given the date of 4 June. On 4 June, a further delay, unspecified, was announced and there has been no subsequent announcement.

The Legal Services Commission held a failed bid round for contracts in immigration removal centres last year. It extended existing contracts until the current bid round.

The delays and the absence of any information are causing tremendous difficulties for firms and organisations working in this field. We urge Ministers to require the Legal Services Commission to announce the results of the tender without any further delay.

Refugee and Migrant Justice has gone into administration, explaining in that the acute difficulties caused by lack of payment for 'work in progress' in immigration and asylum cases are the reason for this. Refugee and Migrant Justice is not alone in this; and the situation threatens to decimate the whole sector.

The Immigration Law Practitioners' Association has long raised the questions of payment by the Legal Services Commission for 'work in progress' and the abolition of 'stage billing' in immigration and asylum cases as they affect all providers in this area and met, along with the Legal Aid Practitioners' Group, the Legal Services Commission and others, with the Lord Bach on this matter on 2 December 2009.

It used to be the case that legal representatives could bill every six months for work done and for disbursements in the previous six months. This process was abolished in 2004 and now there are only certain stages of a case at which a representative can present a bill. One justification for the new arrangements was said to be that initial decisions on asylum cases made by the UK Border Agency would be completed within six months, so the legal work would be done within this time. This has not happened.

The Legal Services Commission saved itself no money by the abolition of stage billing. It simply put off paying until later. ILPA repeatedly pointed out to the Commission that the effect of the abolition of stage billing meant that the Commission could not see how much money it was spending or what it owed, since providers cannot put in bills until the relevant stage of a case is completed. The Commission's estimates we have seen on these matters appear to be rough and ready in the extreme. We raised concerns as to how the Commission's approach could be equated with sound financial management. We recall that the Commission's accounts were qualified by the National Audit Office in October 2009. The question of payment for work in progress is one example of matters of financial management that need to be addressed

For over a year ILPA was told by the Commission that they were not convinced that the problem we had identified was real. Then, when we met the Lord Bach, we were told that it was real, and the situation was unsatisfactory, but that the Commission was in no position to put it right because it could not produce the money. This being money which practitioners have paid out and which the Commission will at some stage have to pay in any event. The Lord Bach agreed that it was not satisfactory that the date at which a bill could be presented was determined not by the Commission and not by the provider, but by the actions of the UK Border Agency, an Agency long beleaguered by delays. Subsequent to the meeting, The Lord Bach did agree that under the new legal aid immigration and asylum contract disbursements could be billed every six months, but did not agree to the stage billing of fees.

Payment now for work in progress and the reintroduction of stage billing would involve spending money now. But it would remedy the situation created by the unsatisfactory procedures set up and tolerated previously. It is in everyone's interest that the Legal Services Commission is able to keep track of its expenditure.

It is also of course the case that if providers are forced to close, then the Legal Services Commission will be obliged to pay up all the money that it owes to those

organisations and firms in any event, while losing their enormous contribution to the sector. As these are 'fixed fee' cases, if they transfer the Legal Services Commission will be paying both the fixed fee to the other original provider and to a new provider.

An amendment to the current and new contracts, making provision for staged billing, would be welcomed by all within the sector, and by all those desirous of seeing the Legal Services Commission get its financial house in order. It is not the case that changes could not be made now. ILPA and others have discussed with the Legal Services Commission such changes being made mid-contract over the past three years.

Solicitors are under their code of conduct obliged to settle a bill within 28 days of the invoice being received, thus even the new arrangements for disbursements can leave them carrying these liabilities for many months before the Commission pays up. Some invoices will in any event carry a shorter time frame for payment. As to other costs, it is of course necessary to pay salaries, rent etc. on time. Providers are carrying these costs for the months and in some cases years until payment is made by the Commission.

Refugee and Migrant Justice is far from being the only organisation affected. It does however exemplify some of problems with current arrangements. First, because it specialises in complex asylum cases, a very large number of which take a very long time to be resolved. Secondly, because it is very large. It is ironic that those organisations and firms who best approximate to the 'Carter' model (so-called after the Lord Carter's *Review of Legal Aid Procurement*) championed by the Legal Services Commission are those who carry the greatest liabilities under the current arrangements. Refugee and Migrant Justice is a charity and thus not in a position to obtain bank loans. But we should emphasise that banks are often reluctant to lend to private providers, seeing the sums involved as being sums they would associate with capital investment projects rather than to deal with questions of cashflow. The question of stage billing is one that requires to be addressed for all providers working in the field. Current levels of fixed fees in immigration and asylum cases leave providers no margin to enable them to carry these enormous and unreasonable liabilities.

When new contracts for Legal Aid in immigration and asylum are announced, providers will then have a period of time in which to decide whether to accept the offers made to them by the Legal Services Commission. The situation as far as work in progress and staged billing are concerned is likely to be a factor in their decision. The legal aid sector in asylum and immigration risks being decimated beyond repair.

We have repeatedly voiced our concern that the current arrangements may change the types of people who are able to obtain legal representation. Providers may only be able to carry a certain number of people with long and complex cases among their case-load. There is a real risk that the need to manage cash-flow affects the choice of cases, and affects the extent to which the most experienced and specialised providers are able to take on the complex and difficult cases that most need their help. While a case can be billed at an 'hourly rate' if the work done on it exceeds three times the amount represented by the fixed fee, there are a large tranche of

cases where the time spent exceeds that which can be billed on the fixed fee but does not qualify for exceptional payment.

We have seen the statement quoted in the press attributed to a Ministry of Justice spokesperson:

"If Refugee and Migrant Justice fails we accept that there will be some disruption while their clients look for help from another adviser. However LSC believe that capacity will not be adversely affected as clients and caseworkers will be able to transfer to other organisations as has happened in similar situations in the past."

We suggest that the situation is graver than this might suggest. Refugee and Migrant Justice is a very large provider, with 13 offices in different parts of the country including in areas where there is little alternative provision, and some 270 staff. Other providers, very often because of the same problems with work in progress, and exacerbated by the delay in the announcement of the tenders, are limited as to the number of cases they can absorb or new staff they can take on. The spectre of thousands of clients approaching other advisors who do not have the capacity to represent them will put pressure throughout the sector. Even if, eventually, the capacity could be re-created elsewhere there would be tremendous disruption in the meantime and there would undoubtedly be clients who did not have representation at a crucial time and disruption caused to the UK Border Agency processes and Tribunal hearings.

There is considerable expertise in the immigration and asylum legal sector and the loss of any it should be a matter of concern to the Ministry of Justice. Refugee and Migrant Justice and the Immigration Advisory Service were grant-funded to provide representation in immigration and asylum cases at a time when there was no legal aid for representation at immigration and asylum appeals from the time of the previous Conservative Government. We do not think that other providers, the UK Border Agency or the Tribunal and courts would share the view expressed by the Ministry of Justice spokesperson that clients should simply go elsewhere but consider rather that they would believe that Refugee and Migrant Justice plays an important role in the sector and would be extremely difficult to replace. Refugee and Migrant Justice is not the only provider under threat and the risk of loss of expertise from many parts of the sector if the work in progress question is not addressed is high.

The prospect of the Legal Services Commission paying out, at once, all that it owes to Refugee and Migrant Justice and having nothing to show for its expenditure but the loss of a highly valued organisation has nothing to commend it whatsoever. Refugee and Migrant Justice should not be lost in this way, and nor should the other providers who will surely follow unless the current systems of payment are addressed and rectified.

ILPA has written to the Secretary of State for Justice and the Minister responsible for legal aid, and has copied the Legal Services Commission into its correspondence, indicating its willingness to meet with them and provide whatever assistance it can to them in resolving what can properly be described as the current crisis.

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