ILPA INITIAL RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION ON LEGAL AID

INTRODUCTION

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 and non-governmental organisations 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, and other, advisory groups. ILPA is a member of the Civil Contracts Consultative Group set up following the litigation between the Law Society and the Legal Services Commission and the Legal Services Commission Immigration Representative Bodies group. ILPA has attended Ministry of Justice meetings on the subject of legal aid and has also provided evidence to the Justice Committee and its predecessors on the question of legal aid as it affects immigration and asylum law.

This is ILPA's interim response to the consultation, with our initial views on the main parts of the Green Paper relevant to our areas of expertise. At this stage we are concentrating on responses to questions 3, 7-11, 32 and 49-50. We shall respond in more depth on these and other questions but, following indications from the Minister, including at the All Party Parliamentary Group on Legal Aid, that it would be useful to have information at an earlier stage, has prepared this initial response which covers:

- **Requests for clarification of certain proposals in the consultation paper**
- **Means by which the Ministry of Justice could make savings equal to, or in excess of, those identified as resulting from cuts to legal aid in immigration and asylum support cases**
- **Areas in which ILPA identifies that the assumptions informing the proposal are flawed and that implementation of the proposals will lead to perverse or unintended consequences**
- **Suggestions for future work that should be undertaken by the team leading the review**

REQUESTS FOR CLARIFICATION

Clarification of these matters would assist in informing ILPA's subsequent responses to this consultation.

- The Ministry of Justice has set out that asylum cases will remain within the scope of legal aid. These include claims for protection under the 1951 UN Convention relating to the status of refugees and cases where there is serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c) of the EU Qualification Directive). **We should welcome confirmation that it is proposed that claims based on Article 3 of the European Convention on Human Rights (prohibition on torture and inhuman or degrading treatment or punishment) remain within the scope of legal aid.**

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- There is an exception in the consultation paper which has the effect of retaining family cases involving domestic violence with scope. **We should welcome confirmation that it is proposed that immigration cases involving domestic violence remain within scope.** 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.[1] Examples of such cases appear in Annexe 3.

- Those recognised as refugees may apply for their family members, who may be living in situations of considerable danger in the country fled, to join them in the UK.[2] **ILPA would welcome confirmation that refugee family reunion cases are being treated as asylum cases and thus are proposed to remain within scope.** Examples of such cases appear in Annexe 2

- **We should appreciate confirmation that it is proposed that when an appellant whose case is not within the scope of legal aid succeeds before the First Tier Tribunal but the Home Office appeals legal aid will be granted for onward appeals**? In such cases the initial appeal has been found to be meritorious and the Home Office is advancing a point of law.

As to the telephone gateway we should appreciate clarification of the following aspects of the proposals:

- **the level of qualification that it is proposed that the telephone advice line's diagnostic operators and second tier specialist advisors should have;**
- **who is proposed to be responsible for regulating them and the nature of that regulation;**
- **how it is proposed that records of advice given will be maintained and what those records will consist of.;**
- **how conflicts / potential conflicts will be dealt with.**

MEANS BY WHICH THE MINISTRY OF JUSTICE COULD MAKE SAVINGS

(This part of the response is relevant to
Question 48: Are there any other factors you think the Government should consider to improve the administration of legal aid?
Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons; and
Question 50: Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.)

ILPA is concerned that the proposals in the consultation paper will result in grave injustice. As set out in this section, we fear that they will do so without producing the intended savings.

A 'comprehensive' spending review?

Tackling the behaviour of Government departments would result in savings not only in cases it is proposed to take out of the scope of legal aid, but in cases that the Government proposes should still receive legal aid funding and also in cases where people already do not receive legal aid but are paying their own legal costs. The savings, which would benefit individuals, could be huge. When this was raised with the Minister at the All Party

[1] HC 395 as amended, rules 289A to 289C.
[2] HC 395 Rule 352Aff

Parliamentary Group on Legal Aid in December 2010, he noted that all departments are looking to make cuts in their own budgets. However, ILPA is aware of no evidence that suggests that the UK Border Agency is examining how it could take steps that would reduce expenditure in the Ministry of Justice, whether on legal aid or in the courts.

Moreover, legal aid plays an essential part in ensuring that Government departments spend money wisely, and as parliament intended.

Taking the UK Border Agency as an example, a 'polluter pays' principle, whereby the department that generates costs for the legal aid budget and for the courts, meets those costs, would tackle:

- The need for a department to consider whether it is appropriate to bring in new laws or procedures, especially in haste, with provisions drafted in haste and the worse for that.
- The quality of decision-making
- The Home Office's conduct as a litigant

This would produce savings not only in the Ministry of Justice but in the Home Office itself. The official statistics for 2009,[3] published in August 2010, record that 48% of immigration appeals succeeded. This figure, illustrating that initial decisions are only a little more likely to be correct than if the UK Border Agency tossed a coin, cost not only the UK Border Agency, but also the Ministry of Justice in court time. They cost individuals who are funding themselves. They also have enormous implications for the rights of those individuals, including rights to private and family life under Article 8 of the European Convention on Human Rights.

The Ministry of Justice should take steps to ensure that it is in a better position to identify the need for, and demand, legal aid impact assessments and to challenge impact assessments produced by departments when these are inadequate.

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 behaviour of the UK Border Agency has driven judges to despair. See box below. There are many other examples of similar concerns through this response and we should be happy to provide many more should this be of assistance.

"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?" Lord Justice Ward, in the Court of Appeal in *MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229[4]

Moving costs around

Complex questions of immigration, asylum and nationality law will not go away but will fall to be dealt with in other parts of the system. For example:

[3] Control of Immigration, Statistics, United Kingdom see http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1510.pdf
[4] http://www.bailii.org/ew/cases/EWCA/Civ/2009/1229.html

- Detention cases often involve consideration of a deportation/removal case where the person is being detained against removal.
- People who might otherwise not have advanced a claim for asylum may do so; domestic violence cases, for example, currently advanced as applications for leave to remain under the immigration rules are highly likely – and in many cases with clear justification – to be advanced as claims to asylum if the traumatised individuals concerned cannot access free, quality legal advice in connection with making an application under the rules.
- It is likely that there will be an increase in public law challenges (before the High Court) where otherwise the matter might have been dealt with, at less expense, before a tribunal
- Challenges to refusals to fund a case will be an area of litigation in themselves, and may prove more costly than funding the cases directly.
- A person's immigration status is relevant to other proceedings including criminal proceedings and questions of social entitlements and will have to be dealt with in the context of those proceedings.

The examples in Annexe One help to illustrate these points.

The costs associated with the above will reduce the savings anticipated in the impact assessments and render those impact assessments inaccurate as to their financial calculations.

We identify other indirect costs of the proposals in this response.

FLAWS IN THE ASSUMPTIONS INFORMING THE PROPOSALS/PERVERSE OR UNINTENDED CONSEQUENCES OF IMPLEMENTATION

These are organised under the relevant consultation questions.

Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons; and
Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings

ILPA limits this response to the questions of the removal of immigration and asylum support cases from scope, although the remarks below are also pertinent to cases where a person's immigration status is a relevant matter (e.g. welfare benefits cases). ILPA does not agree with these proposals.

The consultation paper states

> *"4.12 In reaching our view about which types of issue and proceeding should continue to justify legal aid, we have taken into account the importance of the issue, the litigant's ability to present their own case (including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law), the availability of alternative sources of funding and the availability of alternative routes to resolving the issue. We have also taken into account our domestic, European and international legal obligations."*

Proper consideration of these factors would lead to the conclusion that legal aid for immigration and asylum support cases should remain within scope.

'the importance of the issue'

The consultation paper says:

> *"4.19 ...there is a range of other cases which can very often result from a litigant's own decisions in their personal life, for example, immigration cases resulting from decisions about living, studying or working in the United Kingdom. Where the issue is one which arises from the litigant's own personal choices, we are less likely to consider that these cases concern issues of the highest importance."*
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> ..
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> *"4.201 We recognise that some of these cases may be of importance, in that they raise issues of family or private life, although individuals are not in any immediate risk as a consequence of the decision in their case. However, these cases do not raise issues of such fundamental importance as asylum applications, where the issue at stake may be, literally, a matter of life and death. In contrast to those cases, an individual involved in non-detention immigration cases will usually have made a free and personal choice to come to or remain in the United Kingdom, for example, where they wish to visit a family member in the United Kingdom, or to fulfil their desire to work or study here. We therefore consider that routine public funding is less likely to be justified. "*

ILPA considers that it is necessary for the Ministry of Justice to revisit these statements, as in ILPA's experience they are not applicable to the vast majority of immigration and asylum support cases that are funded under legal aid.

Many cases involving whether a person can work in the UK are already not within the scope of legal aid,[5] and the requirements of the immigration rules mean that where cases involving work and study remain within scope, it will be rare that the individual will meet the means test for legal aid. This is also true for all but the poorest applicants in family immigration cases; in very many of the immigration rules cases where the applicant is required to show as a minimum that they will have adequate accommodation and support in the UK without recourse to public funds,[6] they will not be eligible for legal aid.

In practice the Legal Services Commission has for several years now required the means of the UK-based sponsor to be assessed in certain cases. Where the applicant is a spouse or civil partner then the means of both the applicant and the sponsor will be assessed. In family applications the level of maintenance required to be shown is equivalent to income support, but there are many other applications under the immigration rules in which Article 8 could be in issue but higher levels of maintenance are required to be evidenced and so applicants will not qualify for legal aid even where the case remains within scope.

Immigration and asylum support cases concern:

- whether people are allowed to join or remain with spouses, partners, children and parents;
- whether people will have to leave the country in which they have lived for years, sometimes for decades, often as a result of someone else's decision, for example a parent or former spouse or partner, including cases in which they will be leaving close family members behind.
- whether a person who has fled domestic slavery can live safely in the UK away from those who abused them.
- what happens to a person when a relationship breaks down, including as a result of domestic violence;
- what happens to children whose claims for asylum having failed, cannot be returned to their country of origin because their safety and welfare cannot be guaranteed;

[5] Access to Justice Act 1999, Schedule 2.
[6] HC 395, *passim*. For the definition of public funds see HC 395 paragraph 6ff, as amended.

- whether a person is entitled to a roof over their head and something to eat or will be left destitute homeless and hungry. This is the specific subject of asylum support decisions where the test of eligibility for support is imminent destitution.[7] The courts have highlighted that in such cases Article 3 of the European Convention on Human Rights may be engaged.[8]

At paragraph 4.101 of the consultation paper the government states (with regard to a particular category of family proceeding):

> *'...we recognize that families must have a practical means of taking part in proceedings brought by public authorities that affect the integrity of the family unit'.*

In the family cases in question the prospect is of families being separated through children being taken into care. In these cases the family members remain in the same country, under the same jurisdiction and the ultimate hope and aim will be the reintegration of the family unit. In immigration cases what is at stake is the disintegration of the family unit through separation across borders, in circumstances where a deportee will be prevented from returning to the UK for many years and a person administratively removed will have no automatic entitlement to return.

Examples of cases are set out in Annexe One.

The test for cases under Article 8 is whether the proposed interference with the right to private and family life is reasonable and proportionate or not. Thorough-going knowledge of the principles established in domestic and European jurisprudence is essential to do justice to these cases. Only where the interference with the rights of the individual is disproportionate and unreasonable, i.e. where it goes beyond mere matters of personal choice, can the case succeed. Matters of private and family life are matters that most people, whether subject to immigration control or not, regard as the most important elements of their existence.

Where rights to family life, affecting the applicant and family members, including those British and settled, are at issue, the interests of justice require that a proper standard of publicly funded advice and representation should be afforded.

Legal aid can assist individuals in obtaining redress against official mistakes, incompetence or misconduct. The import of those mistakes will depend on the powers of the Government departments challenged. In immigration, the UK Border Agency has very extensive powers: for example to refuse entry, forcibly to remove, not to mention powers of entry, search and detention.

'...the litigant's ability to present their own case including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law'

"...the litigants ability to present their own case'

The law in this area is voluminous and extremely complicated as described below. Those affected include people unfamiliar with UK laws and procedures, with very limited or no support networks in the UK, with little or no understanding of what would constitute a correct application of the law, or a correct procedure. In many cases English will not be the litigant's first language.

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[7] Immigration and Asylum Act 1999, section 95.

[8] See for example the *Limbuela* case [2005] UKHL 66.

Understanding what should happen is all the more difficult given the delays that have beset the UK Border Agency's decision-making and the not infrequent occasions on which policies introduced by the Agency have been found to be unlawful by the domestic and international courts.[9]

It is proposed that those detained will get assistance to apply for bail but not with their substantive immigration case. Even with such assistance, bail will not always be granted. Those detained are ill-placed to gather evidence for their case, to meet the procedural requirements of the tribunals and courts. Furthermore, as discussed, the strength of the substantive application may be a key factor in the strength of a bail application.

'...the venue before which the case is heard'

The tribunals may have been designed to be simple to navigate, but they are not.
In the influential study, *Tribunals for Diverse Users*,[10] 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"*

There is no legal aid for hearings in asylum support cases and the (then) Asylum Support Tribunal has expressed concern at the effect of this,[11] as has the Joint Committee on Human Rights.[12]

A case study: asylum support

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, but among the 187 unrepresented appellants it was 29 per cent. For its June 2009 Evidence Briefing *Supporting justice: The case for publicly-funded legal representation before the Asylum Support Tribunal* it looked at 616 appeals and wrote

"Among all 616 appeals the success rate was 45.3 per cent. And it must be noted that, in the six-month period covered by our study, October 2008 to March 2009, the UKBA withdrew (or conceded) no fewer than 277 (27 per cent) of the 1,027 new appeals lodged with the AST, before they reached an oral hearing or paper-only decision. Indeed, including appeals conceded by the UKBA, the AST's own monthly outcome statistics show an overall success rate, in the six-month period October 2008 to March 2009, of 54.9 per cent. Such an overall success rate is strongly suggestive of poor quality (or, at least, inadequately informed) initial decision-making by the UKBA."

It looked at 115 appeals where the Asylum Support Appeals Project provided represented:

"Of these 115 appeals, 82 were allowed or remitted to the UKBA for a fresh decision – a success rate of 71.3 per cent. Including the 46 cases in which the ASAP gave advice to the appellant immediately prior to the hearing, but did not represent him or her at the hearing, the success rate among the 161 appellants who received pre-hearing advice from the ASAP, or were legally represented at the hearing, was 60.9 per cent. Among the 316 oral appellants who received neither

[9] See, for example, *R (Baiai et ors) v SSHD* [2008] UKHL 53; *Metock v UK* (European Court of Justice, C-127/08); *Pankina et ors v SSHD* [2010] EWCA Civ 719; *ZN (Afghanistan) and others v Entry Clearance Officer* [2010] UKSC 21 *Diego Andres Aguilar Quila v SSHD* [2010] EWCA Civ 1482, all of which have necessitated /will necessitate changes to the law and/or immigration rules.

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

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

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

representation at the hearing nor prehearing advice from ASAP, however, the success rate was just 38.6 per cent."

On 17 November, the Chair of the Administrative Justice and Tribunals Council spoke on Radio 4's Today programme,[13] highlighting 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 (we assume the figure included immigration and asylum cases); and stressed 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 complexity of the law goes not only to the whether the litigant is able to present his/her case, but also to the tribunal judge or judge's ability to manage the case.

What the judges say

The late Mr Justice Hodge, former 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."[14]

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, noted how the Tribunal had benefited from having Lord Justice Sedley, a Court of Appeal judge, sit in the Immigration and Asylum Chamber including on a particularly complicated Article 8 case.[15] He made reference to the importance of case management and observed that the immigration judges of the tribunal need competent representatives for both parties before it to enable them to do their task and that targeted grounds of appeal enable the tribunal to do its job better. He recalled the hierarchy of laws with which the tribunal is dealing: domestic law, the cases of the European Court of Justice and those of the European Court of Human Rights.

ILPA suggests that the tasks of case management and dealing with a hierarchy of laws are made considerably more difficult when dealing with litigants in person. The presence of interpreters at tribunal hearings does not assist in the preparation of a case. Detailed

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

[14] 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

[15] *FH (Post-flight spouses) Iran* [2010] UKUT 275 (IAC), see http://www.bailii.org/uk/cases/UKUT/IAC/2010/00275_ukut_iac_2010_fh_iran.html

submissions, correctly identifying points of law and pertinent evidence, including expert evidence, having been sourced and then organised in a bundle, assist Tribunal judges and the Court of Appeal. Representatives of the parties can be asked to amplify particular points, whether in submissions or by presenting evidence and given directions with which they must comply in the stringent timescales that apply in this jurisdiction.[16]

ILPA members have been present at Tribunal hearings in which immigration judges have expressed feelings ranging from disappointment to utter despair that the UK Border Agency has not seen fit to provide a representative. We have also seen a number of cases where, despite not having sent a representative to the hearing, the Home Office has sought to appeal the decision.

Home Office conduct of litigation can also create challenges with which an unrepresented appellant is ill-equipped to deal. Home Office representatives frequently arrive at a hearing with few or no papers. The contents of decisions can be changed at the last minute on the day of a hearing or in the course of the hearing, for example the withdrawal of concessions made in a reasons for refusal letter. New evidence is often served on the day of the hearing. These can lead to adjournments.

Appeals from the First Tier Tribunal are on points of law only. In immigration cases a lay appellant whose appeal is dismissed is ill-placed to assess whether the judge's determination is legally correct. There are five days in which to grapple with the procedures, consider the determination and draft grounds of appeal in an appropriate case. By the same token an immigration appellant whose appeal is allowed but where the UK Border Agency seeks permission to appeal has very little hope of defending the decision of the First Tier Tribunal without specialist legal advice. At the Upper Tier Tribunal a 'response' and 'reply' is provided for in the Procedure Rules. This is aimed at concentrating the parties' minds in advance in an attempt to reduce the need for, or length of, court hearings and gives the Respondent the opportunity to re-open issues determined against him/her. This can get quite technical and involves further tight procedural timeframes. Home Office failure to comply with the timeframes or procedure is common. The Court of Appeal is procedurally still more complex than the tribunal.

While a representative providing advice on legal aid must be satisfied of the merits of the appeal, an unrepresented appellant is under no such constraints. Unrepresented appellants are ill-placed to identify points of law that they can properly rely on, but equally they may seek to advance other points, requiring tribunal judges and judges to wade through copious evidence and letters by way of pleadings only to discover that no arguable point of law is being advanced.

In cases that will entail the removal of children there may be family proceedings afoot at the same time.

"...the complexity of the law'

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. The leading case was that of *Huang and Kashmiri* in the House of Lords in 2007[17] but only a year after that judgment not one but four cases concerning Article 8 were heard by the House of Lords, with judgment on all four being

[16] See the Asylum and Immigration Tribunal Procedure Rules (SI 2005/230 (L.1) as amended) and the Upper Tribunal (Tribunal Procedure) Rules (SI 2008/2698 (L.15) as amended).

[17] See [2007] UKHL 11

given on 25 June 2008.[18] Recent confirmation of the complexity has come with the judgment of the Court of Appeal in *Diego Andres Aguilar Quila v SSHD.*[19] Government lawyers advising the Minister on the policy of raising the marriage age were found by the Court of Appeal to have approved a policy that was not in accordance with Article 8. Two of the judges in the Court of Appeal praised the judgment given in the High Court by Mr Justice Burnett but ultimately concluded that his decision was wrong in law.

There is a plethora of statute law, caselaw, regulations, rules and guidance, relating not only to substantive matters but also to procedure. Changes in the law are frequent, necessitating understanding of previous provisions and transitional provisions. The weight of precedent, from the European Court of Justice, the European Court of Human Rights and the Higher Courts, is heavy. It overlays a system that largely defies comprehension and is not susceptible of interpretation by application of principles of common sense. The comments of the judiciary have repeatedly testified to this.

What the judges say

"...it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires" E B Kosovo v SSSHD [2008] UKHL 4. House of Lords

"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". AA(Nigeria) v SSHD [2010] EWCA Civ 773, Court of Appeal, Lord Justice Longmore at Para 87

"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." Chikwamba v Secretary of State for the Home Department [2008] UKHL 40, House of Lords per Lord Scott

"... 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 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." R (Veli Tum) v

[18] *E B Kosovo (FC) (Appellant) v SSHD* [2008] UKHL 41; *Chikwamba v SSSHD* [2008] UKHL 4; [2008] *Beoku Betts v SSHD* [2008] UKHL 39; *AL Serbia v SSHD; R (Rudi)v SSHD* [2008] UKHL 42
[19] [2010] EWCA Civ 1482

Secretary of State for the Home Department [2004] EWCA Civ 788 , Court of Appeal per Lord Justice Woolf

"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 but, to cut a convoluted story short, she was a "person from abroad" pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 and, although her presence in this country was lawful – unless and until removal pursuant to regulation 21(3) of the Immigration (European Economic Area) Regulations 2000 – she did not enjoy the right to reside here at the material time because she was not a "qualified person" as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. A more comprehensive tour of the labyrinth can be found in Abdirahman" *Kaczmarek v Secretary of State for Work & Pensions* [2008] EWCA Civ 1310, Court of Appeal. See also *Lekpo-Bozua v London Borough of Hackney & ors* [2010] EWCA Civ 909 where the Court of Appeal again described the provisions of domestic legislation pertaining to European free movement law as *'labyrinthine.'*

'the availability of alternative sources of funding'

It is not realistic to expect the voluntary sector to take on this responsibility. To give immigration advice in the course of a business 'whether or not for profit' an advisor must be a solicitor, barrister, or regulated by the Office of the Immigration Services Commissioner.[20] Moreover in order to give publicly funded immigration advice, advisors must be accredited on the Law Society's Immigration and Asylum Accreditation Scheme.

When ILPA raised this at a meeting on the proposals at the Ministry of Justice it appeared that it was not a matter that had been considered by the Ministry of Justice. If legal aid is cut, then unless voluntary organisations take on the responsibilities and expense of becoming regulated advisors, those too poor to pay will not receive assistance with their cases. Among those likely to be affected by this are MPs and their caseworkers, who are not regarded as giving advice *'in the course of a business'* and will be one of the few sources of advice on immigration left.

ILPA has long strongly supported the notion of independent regulation of those giving immigration advice. The greatest protection against poor advice is access to high quality advice and that protecting the pool of excellence and competence in legal representation is the first defence for clients. Those who cannot afford to pay for such advice are, as described, vulnerable to exploitation as they seek to find the necessary funds. They are also vulnerable to those giving poor quality advice.

Consideration should be given to the social costs and implications of putting applicants who cannot afford legal representation in a position where they cannot appeal without it. Inevitably some of those desperate not to be removed or deported from their families and communities, to have family members join them in the UK and not to be returned will resort to desperate and potentially dangerous measures, such as resorting to loan sharks or unsafe work to raise the money to afford representation. Such individuals are vulnerable to exploitation.

[20] Immigration and Asylum Act 1999, s 84

'...the availability of alternative routes to resolving the issue'

By contrast with other areas of civil legal aid advice, the consultation paper does not identify any 'alternative means of resolution' for the individuals in need of the immigration advice which it is proposed to take out of scope. Nor does ILPA. It is not possible to deal with an immigration problem through mediation with the UK Border Agency or by any other private resolution; resolution can only be achieve through legal knowledge and effective representation to the UK Border Agency and the Tribunal.

'We have also taken into account our domestic, European and international legal obligations'

See comments above. Article 8 is a matter of the UK's obligations under the European Court of Human Rights. The UK's obligations under that instrument are also engaged by cases of human trafficking[21] and by circumstances in which leaving people destitute constitutes inhuman and degrading treatment.[22]

At the Child Trafficking Advice Line Advisory Group meeting at the Home Office in December 2010, the representative of the UK Border Agency present emphasised the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings that require the provision of legal aid.[23] In this regard we observe that the Convention also treats of the question of compensation, a matter relevant to proposals to cut legal aid for cases before the Criminal Injuries Compensation Authority. We recall the following evidence submitted to the Home Affairs Committee:

> *"Case 1*
> *5.2 The first case involved an asylum claim by two Romanian sisters, MM and EM, who were trafficked into the UK as minors and who were subjected to years of sexual abuse, exploitation and violence at the hands of their trafficker and his accomplices. Once they escaped from their trafficker they were referred to the Poppy Project under whose care they remain to date. Having claimed asylum and having, over many months, assisted the police in their criminal investigations the two sisters gave chief prosecution evidence at Snaresbrook Crown Court which led to the successful conviction and sentence of the trafficker to 21 years imprisonment in November 2006. Despite the fact the sisters gave their evidence unshielded and without witness protection measures and their identities were disclosed during the trial proceedings (all leading to the Crown Court Judge to issue a note to the SSHD and the AIT that he was "in no doubt" as the serious safety risks that would befall the sisters on return to Romania), no apparent communication of the Judge's comments and the reality of such risks to the sisters took place between the Police (or the CPS) and the Home Office, which continued to refuse the sisters' claims for protection. Eventually, following a hearing at the AIT, the Home Office granted the sisters Humanitarian Protection in the UK. No doubt the length of the criminal investigation together with the trial proceedings and the intensification of the sister's fears, following the trafficker's conviction, as to the fate that might befall them at the hands of his criminal accomplices on return to Romania may have caused the sisters, in their unprotected position in the UK, lasting mental injury and damage.*
>
> *5.3 Subsequently, in the summer of 2007, the sisters were the first successful trafficking survivors in the UK to be granted awards of compensation by the Criminal Injuries Compensation Authority (CICA) for the injuries they sustained as a result of the sexual*

[21] See e.g. *Siliadin v. France*, 73316/01, European Court of Human Rights, 26 July 2005 (Article 4).
[22] *Limbuela* [2005] UKHL 66 (Article 3)
[23] Council of Europe Treaty Series CETS No. 197

abuse they suffered and for the loss of opportunity as enslaved victims of trafficking in the UK.[24]

In cases of European free movement law there is a complex interface between domestic and international law. This is made all the more complex by the UK's failure to give effect in a timely manner to judgments of the European Court of Justice. The UK's approach to cases of the family members of EEA nationals was found to be incorrect by the European Court of Justice in its judgment in *Metock v Ireland* (the same approach was taken by Ireland). The UK Border Agency's *Entry Clearance Guidance and Instructions* now state candidly

> *The ECJ judgement on Metock in July 2008 prohibited Member States from having a general requirement for third country national spouses of EEA nationals to be lawfully resident in another EEA member state before they can benefit from a right to reside under the EU Free Movement of Persons Directive. Therefore, we can no longer apply the lawful residence requirement (which was based on the case of Akrich) or our own domestic legislation (the Immigration Rules) to family members seeking first admission to the EEA from outside the EEA.*[25]

Yet the UK has yet to amend its regulations, despite ILPA's consistently pressing it to do so.[26]

Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons; and
Question 8: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.

ILPA does not agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice. ILPA does not consider that the gateway is suitable for immigration or asylum support cases.

As ILPA understands the consultation paper, the proposal is for a two-tier system in which initial contact with an 'operator' will be the diagnostic stage and the stage at which the caller is advised whether or not they are eligible for Legal Aid. The operator will route the person to the most suitable service for their circumstances, including advice from a Legal Aid specialist. Callers would sometimes but not invariably be referred for face to face advice where cases seem to be too complex to be dealt with on the phone.

ILPA is concerned that the system could work to keep people out of the legal aid to which they are entitled, or to timely assistance, because the complexity of immigration law, not to mention the imperfect understanding many applicants have of the procedures in their own cases, gives rise to a risk that the diagnosis of the case will be imperfect.

ILPA considers that there are no savings to be achieved through establishing the telephone gateway. On the contrary, as set out below there is a real risk that this system would increase costs overall. The simplest and quickest way to provide advice in immigration cases is to meet with the client, see their documents and be able to ask questions.

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[24] See Home Affairs Committee, Sixth Report of Session 2008-2009 *The Trade in Human Beings: Human Trafficking in the UK*, Written Evidence, HC 23-II, Memorandum submitted by the Trafficking Law and Policy Forum.
[25] Entry Clearance Guidance and Instructions, ECN 2.5
[26] See, *inter alia,* ILPA's 30 September 2009 submission to the Joint Committee on Human Rights, reprinted in the Committee's *Enhancing Parliament's role in relation to human rights judgments* HL 85/HC 455, Session 2009-2010.

The purported justification for introducing a 'telephone gateway' is said to be that those seeking civil legal aid 'find the process time-consuming, inconvenient and stressful'. Legal problems are invariably stressful but a significant source of stress is being unable to access a specialist advisor in whom one has confidence to try to tackle the problem. The experience of ILPA members is that for clients – and the voluntary sector organisations which seek to assist them in practical ways other than giving legal advice which the law prohibits – one of the most stressful things in the process of obtaining advice is finding an advisor with the capacity to take on their case within the necessary time frame or at all. For the clients of ILPA's members, this problem is compounded by the often very short deadlines within which action must be taken to prepare and submit an application or to challenge a refusal by the UK Border Agency or the Tribunal.

A considerable number of cases are referred by voluntary sector agencies who do not give legal advice. They build up relationships with firms of whom they think highly or whose specialism in a particular area they recognise. Similarly the firms learn to trust their referrals. Both parties identify the information pertinent in the referral. These referrals can work efficiently in local areas and in specialist areas of the law and every effort should be made to ensure that they can continue.

Experience from the police station telephone advice line and the advice line for immigration advisors

ILPA members have experience of running the police station immigration telephone advice and second tier advice helplines, the latter for advisors. In both cases, the advice line does not have a gateway function. In the case of the police station advice line, detainees are automatically given access to an advisor who must be accredited by The Law Society at Level Two of its immigration scheme.

The main drawback of telephone advice is not being able to see important documents such as passports to see the visas and current conditions/time limits, copies of decisions by the UK Border Agency or determinations by Tribunal judges or copies of relevant supporting documents etc. It takes longer to advise if a client needs to describe these or read them over the telephone and it is impossible to be certain that you have been given an accurate and complete description. The caller may have documents in their possession which are significant but which they do not mention to the advisor because they do not appreciate the significance of them. The problem is exacerbated by language difficulties. The Legal Services Commission has arranged with Language Line that those running the police station advice line can call Language Line to provide an interpreter for a three way telephone conversation where the client does not speak English. Language Line charges £0.89 per minute or £53.40 per hour for this service. This is far in excess of what a community interpreter will charge a legal aid firm - £15 per hour is the going rate up to £25 per hour for those with an interpreting qualification. In immigration cases the telephone gateway is likely to make the interpreting costs much higher than the costs of face to face advice.

The Legal Services Commission also funds a specialist support service for legal advisors. This is an example of where telephone advice can be effective. As with the police station advice line, the advice is given by experienced specialists in an already properly regulated context. The people calling the specialist support line are qualified advisors who have already taken instructions from the client. The advisors who operate the telephone advice line are solicitors with a minimum of five years post-qualification experience. Those to whom they provide advice are solicitors and advisors in voluntary sector agencies with legal aid contracts, who are regulated under The Law Society scheme.

In ILPA members' experience, people want and need the reassurance of meeting face to face with a suitably qualified advisor, even if in the end that advisor tells them that their problem is incapable of the resolution they desire.

Qualification / regulation

A person who is not qualified and experienced in asylum law, detention or the law pertaining to cases before the Special Immigration Appeals Commission will not be able to distinguish:

- a real emergency (e.g. with regard to deadlines for action) from a case about which the client is understandably highly anxious but is not an emergency as such;
- that the client has a claim for asylum. Clients do not always identify this themselves, if the advisor cannot then s/he could wrongly determine, if immigration cases are removed from scope, that the case is out of scope;
- the level of complexity of the case and the need for a referral for face to face advice

If the diagnostic operator cannot make these distinctions then resources will be wasted and clients with emergencies may not access specialist help in time or at all.

For the asylum work which will remain in scope, a telephone gateway presents may barriers. As acknowledged in the consultation paper, the clients in question may be traumatised, having fled persecution. They may not speak English. Trust is a significant problem. The matters under discussion are very sensitive, the person may still be in fear, or fear for family members and comrades left behind. Persecution may have taken the form of rape or sexual abuse, or been the result of the person's religion or sexual identity being unacceptable in the country s/he has fled. Distress and mental health problems are far from uncommon. Physical conditions such as HIV/AIDs may be difficult to speak about. Asylum clients too often require significant reassurance that their advisor is independent of the Government. In members' experience it is hard for many of them to grasp that although the State pays for their legal advice, their representative is independent of the State. Asylum clients are often highly suspicious of interpreters from their own countries or region. This can be a problem with face to face advice, but it is one which can be resolved by calling for another interpreter. The same problem arises for clients with cases before the Special Immigration Appeals Commission. Many cases are before the Commission because it is contended that the appellant, or the evidence held, poses a danger to the national security of the United Kingdom. Such people are unlikely to speak candidly on the phone to give their instructions. These problems also arise in immigration cases if they remain within scope.

The diagnostic operator, unable to see the person to whom they are speaking, will not know whether that person is alone, or whether they are giving information under duress. A person who ought to be claiming asylum as a victim of human trafficking may present on the phone as someone seeking advice about an in-country visa application if their trafficker is standing close by when the call is made. Likewise in the case of a victim of forced marriage or domestic violence, where the settled spouse or members of the family may be present when the call is made. The mentally ill may in fact wish or need to give instructions via a third party, but the identity and authority of a third party to give instructions cannot be verified over the phone, and the mentally ill must be protected from those who purport to have authority to give instructions on their behalf if they have no such authority. There is a similar problem with verification of the identity / authority of adults seeking to give instructions on a child's behalf, but a child may have difficulty in giving instructions face to face, let alone over the telephone.

The quality, integrity, confidentiality and value for money of the service is jeopardised by all the factors above. If the wrong diagnosis is made, the wrong signposting will follow. This is not cost effective. As to cost, the scheme will give rise to duplication of work in terms of

taking instructions. It is unclear whether the scheme will attempt to refer to specialists, for example firms which, because of their location and long-established referral patterns, have experience in cases from particular countries. It is also unclear what will happen to people calling about a problem which is not within scoe, whether they will merely be told that they cannot be helped or be referred to private solicitors and if the latter, on what basis the representative would be chosen.

Question 32: Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.

ILPA does not agree with this proposal.

The fixed fee for advising in an immigration case is £260; £459 in an asylum case. The nominal hourly rate for preparation is £58.50. That hourly rate is paid if the value of the case exceeds three times the fixed fee. If the case were to take just less than three times the fixed fee then only the fixed fee would be paid and the payment per hour would work out to just over one third of the nominal rate or around £19.50 per hour. Rates are essentially unchanged since 2001. Yet these are the rates that it is proposed to cut. For comparison Her Majesty's Court Services current Guideline Hourly Rates for 2010 for a Grade B solicitor (over four years post qualification experience) would be £242 and for Outer London for a Grade C (less than four years post qualification experience) £165.

The Legal Services Commission has said that it considers that across the immigration and asylum caseload there will be 'swings and roundabouts': that legal aid fixed fees will not cover the costs of all cases, but would more than cover the costs of others.[27] We have seen nothing from the Legal Services Commission that examines the effect of removing legal aid from immigration cases; it has not made any proposals to reassess whether it still considers that there will be 'swings and roundabouts' if practitioners are restricted to undertaking asylum and detention cases. Cases before the Special Immigration Appeals Commission are funded on full certificates but there are relatively few of these cases and they are undertaken by the very few practitioners with experience in these complex cases.

It is clear from the above that strategies for financial survival include firms seeking to specialise either in cases of exceptional complexity that will take three times the fixed fee, or identifying a sufficient number of cases sufficiently straightforward to be brought within the fixed fee or reducing the proportion of legal aid work they undertake. From the outset many organisations, including ILPA, have repeatedly expressed concerns that fixed fees will lead to 'cherry-picking' of cases. That the concerns have proven founded is admirably summarised in the report *Review of quality issues in legal advice: measuring and costing asylum work* (June 2010) produced by the Information Centre for Asylum Seekers and Refugees (ICAR) for Refugee and Migrant Justice, the Immigration Advisory Service and Asylum Aid and the sources cited.

Legal aid work can only survive while there are firms not only willing, but also able to deliver it. In certain parts of the country, following the latest tender, there is no legal advice in immigration and asylum. Devon Law Centre has closed, and many of those in Plymouth now have to go as far afield as Bristol to find legal representation. In the Dover ports area no contracts have been let in asylum and immigration. The Legal Services Commission has not responded to requests to know what its contingency plans for these areas are.

If providers are lost to the legal aid scheme, those providers will be lost for good and the risk is that this will affect the intention to keep asylum cases within scope.

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[27] *Legal aid: the way forward* Cm 6993, Legal Services Commission and Department for Constitutional Affairs.

There is a need for the Ministry of Justice to look at how it can best support the best lawyers and advisors doing legal aid work. And the more they are able to flourish, the better value the Government gets from the legal aid budget.

FUTURE WORK

We recommend that as part of the consultation the Ministry of Justice meet with immigration judges and asylum support judges. Both have experience of unrepresented appellants; as described, for asylum support cases it is currently the position that no legal aid is available for representation at appeal (although legal aid is available for the preparation of appeals.) It is important to note that advice on asylum support is not a matter for which one has to be a solicitor, barrister or regulated by the OISC to give advice, save where to give such advice entails giving immigration advice, but the experience of the asylum support judges may be instructive nonetheless.

We recommend that the Ministry of Justice meet with migrants who have been through the process and with voluntary organisations who provide support to migrants and persons seeking asylum, including referring them to legal representatives.

ILPA is very willing to meet to meet with the Ministry of Justice to discuss the matters set out in this initial response in more detail and to provide further information where this would be of assistance.

ILPA
22 December 2010.

Annexes appear below.

For further information, please get in touch with alison.harvey@ilpa.org.uk

Please see below for Annexes

Annexe 1 – Immigration and Asylum Support Cases
Annexe 2 – Refugee Family Reunion Cases
Annexe 3 – Domestic Violence Cases

ANNEXE 1 – IMMIGRATION AND ASYLUM SUPPORT CASES

(anonymised or names changed)

Alegria

This case shows the complexity of immigration situations, immigration law and immigration (including tribunal) proceedings resulting in a protracted and distressing situation for the client and her family:

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 a British citizen. The court granted the judicial review permission to proceed and only at this point did the UK Border Agency settle, 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.

B

This case shows the value in early intervention by competent Legal Aid lawyers. While a threat of judicial review proved necessary, a judicial review was avoided. It also provides example of the serious nature of crossover between immigration matters and criminal injuries compensation. (The main body of this submission highlights an example of children trafficked into prostitution.)

B was sent to the UK when she was 12 to stay with her uncle. She is now a young adult. Almost as soon as she arrived the uncle started sexually to abuse her. This abuse continued until she ran away from home when she was still a teenager. During this time she attended school achieving what in the circumstances were very good GCSE results. She reported her uncle to the police after running away and he was arrested. The case came to trial and he was convicted on several counts of rape of a minor and sentenced to 15 years. B only realised that she had no immigration status when she tried to apply to university to study a course in social work. She approached several lawyers for advice and some offered to take her case on but she could not afford the fees. One legal aid lawyer took her case on but did not do any work on it. She then found representatives who helped her prepare an application on the basis of Article 8. It was refused by the UK Border Agency. The representatives indicated that they would seek judicial review if the UK Border Agency

would not reconsider. The Agency then reconsidered and granted discretionary leave. Here representatives also helped her make a claim to the Criminal Injuries Compensation Authority. She was awarded £22,000. She now works for a charity with young people, and mentors young people in difficulty. Her representative says, *"She is a very determined and inspirational young woman who has applied to do an access course that will enable her to go to university next year where she intends to study to become a social worker."*

R

This case highlights the nature of immigration cases in detention, and the importance of an early intervention by competent Legal Aid lawyers which might have avoided his very lengthy detention (and cost to the taxpayer of such) and resolved his immigration situation without such protracted proceedings by ensuring the matter was properly and fully investigated and presented. It also gives some indication of the potential exploitation to which individuals may be exposed when competent Legal Aid advice and representation is not available; and highlights the investigative and evidential complexity required to deal properly with many deportation proceedings.

R was a young man in his early 20s. When he was referred to his lawyer he had been in immigration detention for 19 months. He had a criminal conviction so served some part of a detention and training order. He had lost his appeal against deportation and an order had been made. He had come to the UK as a young child with his mother and siblings from a war-torn country.

He mentioned on a second legal visit that he had never met his previous legal advisors. He had been told by his mother that she had somehow managed to borrow money to pay the previous advisors. These advisors took instructions from him over the phone and faxed him a witness statement to sign for his appeal against deportation.

When his lawyer looked at the appeal bundle presented the statements were badly drafted. They were 'frighteningly short'. The determination had dealt initially with a dispute about the client's age and then concluded that both he and his mother were liars about his age and that he should be deported. The immigration judge went on to suggest that the client had been dishonest about his age and so had received a shorter sentence from the Crown Court. This despite probation accepting that he was under 18 at the time of the offence.

His mother sobbed at every visit to the lawyer. The client said that she had sobbed since he could remember. He described how he had to look after her and his siblings. He spoke of memories of being in care and once being taken to a clinic where his height was measured. He described the schools he went to in the UK to show that he was under 18. An age assessment was carried out and was helpful.

The legal representative obtained psychiatric assessment of the mother. The lawyer trawled the mother's social service records and learned that she had been raped back in her own country and that she frequently cried at meetings with social services about her children. The expert was also able to explain why the mother had given the Home Office an incorrect date of birth for her son which had caused the initial problem regarding her son's age. Numerous documents in the social services records and letters from schools showed the

client's age as being under 18 at the relevant time. The lawyer arranged for an independent social worker to meet him so he could for the first time explain how much his family meant to him. The lawyer also got in touch with the offender supervisor with whom the client had had some brief dealings. None of the above had been pursued by the previous advisors.

Removal directions were set. A fresh application was submitted arguing that the relevant jurisprudence of the European Court of Human Rights had not been considered by the immigration judge. Removal was deferred. The further supporting evidence was submitted. Permission for judicial review was obtained on the papers with some very pertinent observations by the High Court judge. The judicial review was allowed and the claim remains under consideration. Further evidence has also gone in.

Subsequent to these developments on the substantive case, the client was granted bail. He has gone back to his mother and siblings. He has gone to college where his tutor has been glowing with praise for his diligence and maturity. He has also stayed in touch with people he had known in immigration detention and they continue to support each other and move on with their lives positively. He has not reoffended. His lawyer writes that he stays in touch 'and is patient.'

Legal aid funded his challenge to removal, the investigations carried out to obtain new evidence, expert reports and representation at the High Court on his successful judicial review.

Z

The case gives example of how Article 8 is often not understood or considered by UK Border Agency decision-makers. As indicated in the main body of this submission, Article 8 is not straightforward (legally or evidentially) and hence competent legal advice and representation can be critical.

Z and his daughter had an unblemished immigration history for six years. He was a migrant student. Confusion arose over an application for an extension of his stay which was not his fault. He was classed as an overstayer. There were no protection (asylum) issues. Z and his daughter made subsequent applications as dependants on his wife (a Tier 2 migrant) which were refused with no right of appeal. Z's daughter has lived in the UK all her life. There had been no consideration of Article 8 in the decision, and then inadequate consideration. Permission was granted in the judicial review and at this point the Home Office granted three years Discretionary Leave to remain.

A

This case shows the complexity of immigration processes (where a decision has been made, but which cannot be appealed albeit that an appeal may lie at some point in the future if the UK Border Agency decides to act on that decision. Without legal advice and representation it is unrealistic to expect that this child or his family can identify and act on legal solutions to this, yet without such solutions this child's immediate future would be a limbo of unlawful residence in the UK.

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 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.

M

This case shows the poor quality and, in some instances, carelessness of UK Border Agency decision-making – here making and maintaining a refusal on incorrect grounds. It indicates how the intervention of competent Legal Aid lawyers can be critical, and can save the taxpayer money (here the intervention ultimately avoided the need for the matter to come before a High Court judge).

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 to 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."*

R

This case shows the value of competent Legal Aid lawyers addressing complex aspects of the immigration rules and Article 8. It also highlights how the circumstances of many of those who may qualify for immigration legal aid are likely to mean they are not able to understand or address legal, evidential and (in some instances) procedural complexities.

R has lived in the UK since 1994. He came to the UK as a student and worked in IT for over 12 years until he was made redundant. At this point he became aware that he had no immigration status. His savings and redundancy money were used up; his marriage fell apart; he was evicted from his flat. He spent a period street homeless. He secured accommodation in a hostel. His representatives assisted him with an application under the long residence rule (14 years residence) and based on Article 8. He also volunteered for the Hostel where he was staying running the soup kitchen, working in their cafe and maintaining their computers. His application was granted and he is now seeking work and spending time with his son who is excelling in his studies and in sport.

T

This case particularly highlights the importance of the intervention of competent Legal Aid lawyers, not merely to investigate and present complex evidential material but to continue to act to pursue the UK Border Agency to ensure that clients receive status papers. (Expert knowledge of the immigration system can be critical, as can a capacity to take further legal action, to encourage or ensure the system to deliver on its obligations – even after it has acknowledged them.)

T's mother died of cancer while her (the mother's) claim for asylum was pending. Nothing happened on T's case. When she turned 16, T was moved out of foster care and into a bedsit in a shared house, where she felt frightened and intimidated. Her former foster mother continued to be immensely supportive. T went to see a legal aid lawyer. T knew very little about the circumstances that had led her mother to leave their country. Some of the little that she did know appeared to confirm what her mother had said, but some did contradict it. This was confusing and frightening for T. It was clear that T could not make an application based on what little she knew of her mother's claim for asylum. Her lawyer put forward a claim for discretionary leave. Meanwhile, T became pregnant, her boyfriend, while staying with her, was in no position to support her. The claim for discretionary leave was eventually accepted on the basis of T's statement and the lawyer's detailed representations but the decision was never sent. Her case went from pillar to post in the UK Border Agency until the lawyer managed to track down the official who had made the decision on the grant of leave who tracked down the case to ensure that T was issued with the positive decision.

N

This case gives another example of the importance of underlying immigration issues to resolving immigration detention.

N had been in the UK for 16 years. He has a daughter who is a British citizen with whom he remained in touch. At the time when he was put in immigration detention he was in a wheelchair with a fractured hip. He caught TB in detention; the UK Border Agency was intending to remove him while he was recovering from TB. His lawyers moved for judicial review of the decision to remove him and managed to stop removal. The case was subsequently settled and he has been granted discretionary leave to remain.

L

This case highlights the evidential complexity of immigration cases concerned with a person's private and family life (Article 8). It is simply unrealistic to expect that without competent legal advice and representation the lay person could understand the nature, amount and type of evidence that may be available and required, or be able to obtain it and present it in such a case. It also gives a compelling example of how separation of family members is often at the heart of such cases, the enormity of what this could mean in practice and indicates other costs (such as care costs) to the UK that can result if such cases are not properly dealt with.

L (an adult) entered the UK illegally in 2000. He instructed his lawyer in 2008 to regularise his status. He lived with his disabled mother and assisted her with personal care. She had abandoned him in his country of origin when he was nine and he then became a street child. Before an application was made he was arrested and removal action was initiated. The lawyer collated evidence, including of the role he played in his mother's care, namely reports by a social worker and an occupational therapist, medical reports on the mother and statements of the client, his mother, siblings, other family members and pastor. These addressed why he was best placed to give his mother personal care, and his fractured childhood. The lawyer obtained supporting evidence of the situation of street children in his country of origin. The relationship between mother and son was complicated by feelings of anger and guilt and this emerged in the statements. The IJ commented that she was "struck by the honesty in the witness statements and oral evidence, which admits human failings of parenting... and the jealousy that has arisen since the Appellant has been reunited with his mother. These uncomfortable truths and disclosures tend to lend support to the credibility of the witnesses' other statements".

S

This case shows the complexity of investigation, evidence and presentation required in many deportation and Article 8 immigration cases. Having regard to the situation in the client's country of origin, it also gives particularly compelling example of how such cases inevitably concern not lifestyle choices for individuals and families but the prospect of separation of families (including partners, and children and parents). In some instances, separations that may prove to be permanent or final.

Client S was a Zimbabwean national. He had arrived in the United Kingdom and secured valid Entry Clearance in the early 2000's. He made subsequent applications for leave to remain, these finally being refused about four years after his arrival. At the time instructions were received this client was living with his British citizen fiancé (who he had met in Zimbabwe) and their three British children. The children were at the time aged between four years and five months old. The Secretary of State sought the deportation of S as a consequence of the six-month prison sentence he received for working without permission and using a false instrument in order to gain that employment. Both S and his partner had been diagnosed with HIV, S also suffering from a rare HIV related vascular tumour. The deportation appeal came before the Tribunal in 2008. In support of that appeal various expert reports were obtained and submitted. These included substantive reports from a consultant in genitourinary medicine, an HIV consultant, the Helen Bamber Foundation; a specialist in Zimbabwean healthcare and a Zimbabwean country expert as well as supporting

statements from four other family members, the local MDC branch and medical professionals involved with the family. The appeal bundle ran to 370 pages. The Determination and Reasons of the Tribunal was 20 pages long and concluded with a finding that S's removal to Zimbabwe would be a disproportionate interference with his Article 8 Right and contrary to paragraph 380 of the Immigration Rules.

There can be very little doubt that without the substantial legal work undertaken on behalf of S and his family he would have been removed from this country and the family permanently separated. It is inconceivable that he could have prepared this case himself without such legal assistance.

Y

The case provides a short example of how immigration decision-making and procedures may well prove to be beyond many individual's abilities without legal advice and representation. As indicated in the main body of this submission, decision-making by the UK Border Agency is especially poor. Without adequate means to remedy this in individual cases, the prospects of that situation getting better are remote. This (and this case) also gives a simple example of how the UK Border Agency has it within its grasp to significantly reduce Legal Aid and court costs.

Client Y is a British citizen whose sister, a national of a West African country had applied for Entry Clearance to visit her in the United Kingdom. Y was a young woman with no other family in the UK. Y was eligible for legal aid. The ECO refused the application and Y was represented at the subsequent appeal. That appeal was refused by the immigration judge. The representatives pursued an application for reconsideration. This was ordered and following a further hearing the appeal was allowed.

The husband of Y was, approximately two years later, refused Entry Clearance to join Y here. The same representatives assisted Y with the initial application for Entry Clearance which had been misrepresented by the Entry Clearance Officer. Y's husband was able to join her as a result of a successful appeal.

M

This case gives example of the critical link between detention and underlying immigration issues, such as deportation. It also highlights how failures by the UK Border Agency can cause significant Legal Aid and court costs, while showing the importance of competent legal advice and representation to dealing with immigration processes and that agency in order to family separation that may prove to be extended or permanent.

Client M was a Zimbabwean national with the benefit of Indefinite Leave to Remain. He had arrived in the United Kingdom in the early 2000s. He was recognised as a refugee in line with his wife (as a consequence of which he was granted Indefinite Leave to Remain). In 2008 the Secretary of State issued a Notice of intention to deport M as a consequence of three motoring offences stretching back three years. It should be noted that these offences involved no other individuals. M was subject to immigration detention. Following a successful

adjournment request his deportation appeal was due to come before the Tribunal several months later. It proved exceptionally difficult to convince the Home Office that M did in fact have Indefinite Leave to Remain. The representatives undertook substantial work in order to try and secure documentary evidence of M's status. Notwithstanding that they first informed the Home Office that M benefited from ILR in September it was not until the end of October that the Home Office conceded that this was the case. (An urgent Data Protection Act request was made to the Home Office – a response was not received until nearly four months had gone by). As a consequence the deportation proceedings were withdrawn and M was immediately released from detention.

There were a number of aggravating factors to this case. M had a 12-year-old daughter with whom he enjoyed regular and frequent contact. She was utterly distraught at the prospect of her father being deported. M himself had significant medical problems. A bail application for M was refused partly because the immigration judge was not satisfied that he did have indefinite leave to remain. M has successfully pursued an application for damages against the Secretary of State.

There is no doubt that M's detention and ill health would have meant that he could not have undertaken the significant enquiries that his representatives were able to make on his behalf. When they first accepted instructions his deportation appeal was listed to take place three days later. His ill health had meant that he had not been able to secure any alternative representation and had only been able to lodge the Notice of appeal. There was a very serious risk that given the Home Office position his deportation appeal would have been dismissed and he would have been removed from this country with little prospect of return given the bar on those subject to deportation orders.

A

This case shows the legal and circumstantial complexity that arises in many immigration cases. It also indicates how legal expertise may be critical (particularly, as highlighted in the main body of this submission, in Article 8 cases) in dealing with immigration and appeal proceedings. An error of law would have been necessary for any intervention by way of reconsideration; and it cannot be expected that lay persons will or can understand or present such errors by themselves. It also gives example of the nature and length of family separation that is involved or at risk in many of these cases.

A was a Zimbabwean teacher, who came to the UK as a visitor, and varied her leave successfully to student. She had a seven year old daughter who remained in Zimababwe. A's initial intention was to return at the end of her studies. During the currency of her leave to remain she developed a rare type of life threatening cancer and was hospitalized for more than three months during which time she became an overstayer. Whilst ill she met a British citizen and later married him. A made an application to regularise her status on the basis of marriage. Her daughter was by then 10 and applied to join her mother in the UK but due to A's unresolved application the child's own application was refused. Throughout the entire period A was sending money back to her daughter. Whilst still waiting for her application to be processed A had her first child with her husband. Whilst still at hospital someone recognized her husband as a man who was on the child protection register and

informed the Social Services who immediately intervened. Social Services informed the family that the baby would be taken into care unless the husband moved out of the matrimonial home and had no contact. He then commenced proceedings attempting to get contact with his daughter. The Social Services were involved and there are still ongoing proceedings in this respect. The husband is currently seeking unsupervised contact with the child.

A was granted 3 years Discretionary Leave (DL) because of these circumstances. She requires the court's permission to take her child out of the jurisdiction for longer than 28 days and is obviously tied to the UK because of the child's father's contact.

Her representatives assisted her in preparing an application for her now 14 year old daughter to join her on article 8 grounds as there are no provisions within the Immigration Rules to allow people with Discretionary Leave to be joined by their dependent children. The application was refused by the Entry Clearance Officer in Pretoria on that basis. The immigration judge dismissed the appeal on the basis that A client could exercise her family life with her daughter by travelling back to Zimbabwe and visiting her. The representatives obtained an order for reconsideration and at a second stage reconsideration hearing won the appeal, on the established basis that you cannot exercise your family life as a parent by short visits.

O

This case gives example of the Article 8 in immigration cases, and importantly highlights both how without legal advice and representation individuals may well be deprived of their procedural rights (here to an in-country right of appeal) and how the poor quality of decisions and actions of the UK Border Agency may often be at the heart of such problems. As indicated in the main body of this submission Legal Aid is important to holding the UK Border Agency to account, and for ensuring there is some protection against that agency's standards slipping further with obvious detrimental consequences of many more people.

O was a national of a Central American State who was granted six months leave to enter as a visitor on arrival in the UK. O had come to visit his British citizen girlfriend. O was visiting in order to meet his girlfriend's family and to investigate the possibility of setting up home with her in this country. O intended to return to his home country at the end of his visit where he had employment. The relationship between the couple and O and his girlfriend's family flourished to the extent that they decided to attempt to marry whilst O remained in this country. They made their own application for a Certificate of Approval. During the processing of this application O's girlfriend discovered that she was unexpectedly pregnant. O's girlfriend then suffered a severe episode of depression for which she was prescribed medication. O himself wished to remain in this country in order to support his partner and, being wary of the length of time and Entry Clearance application may take to be processed, was also concerned that he may miss the birth of his child. Prior to the expiry of O's leave to enter an application for leave to remain on his behalf was submitted by his representatives. The Home Office refused the application and asserted that O had no right of appeal against the decision claiming that when the application was made he had no extant leave. He was advised that he only had an out of country right of appeal. The position of the Home Office was incorrect and unlawful. Substantial representations were submitted on

behalf of O and the submission that he did indeed enjoy an in-country right of appeal was made on a number of separate occasions. After many months the Home Office finally accepted that O had the right to appeal from within the United Kingdom. The appeal was allowed at first instance before the Tribunal.

Without the advice and representation received O would have either had to remain in the country unlawfully in order to support his wife or would have had to return to Mexico for an undetermined period of time.

T

This case provides example of the complexity of immigration processes, often caused by the UK Border Agency's poor conduct and decision-making, and of the need for legal advice and representation to ensure that individual's procedural and substantive rights are respected. Here too, it would seem that the UK Border Agency (or its predecessor) had it within its power to avoid Legal Aid and court costs.

T was a national of a North African country who had studied in the United Kingdom for a number of years and had extant leave to remain as a student in order to complete a degree level course. She had no family in her country of origin and had not lived there since she was five years old. In addition to studying T cared for her British citizen grandmother who was extremely unwell and who required considerable assistance. T had been in a relationship with a British citizen for seven years. Advice and representation were provided to T to enable her to pursue an application for leave to remain as the unmarried partner of a British citizen. The application was submitted prior to the expiry of T's leave. The application was rejected by the Home Office who claimed that the prescribed fee had not been paid. In fact investigations by her representatives confirmed that the Home Office had not approached the bank for payment of a fee. The application was therefore resubmitted with representations asserting that the application should be considered as an in-time one thus attracting a right of appeal if refused. The application was returned on a second occasion by the Home Office who now claimed that T had not provided photographs or documents relevant to the application. A standard letter was sent making this allegation including confirmation that "the missing items are identified by a red cross next to them in the relevant part of the form." No such annotation was found on the form and as a consequence the application had to be re-submitted with further representations drawing attention to the errors of the Home Office and again asserting that if the application were refused and in-country right of appeal should be granted. Six months after the original application had been issued the Home Office refused it claiming that sufficient documentation had not been submitted. This was an incorrect statement and simply ignored the volume of documents that had been provided. T was provided with an in-country right of appeal which was allowed by the immigration judge on the day of the hearing itself.

Without the benefit of publicly funded Legal Help it is extremely unlikely that the Home Office would have treated the application of T as being an in-time application which attracted a right of appeal. T would not have had sufficient knowledge or experience to have challenged the Home Office's assertions in relation to the invalidity of the application. She would not therefore have been able to challenge the decision by way of an appeal while she remained in the UK.

M

This case gives example of how domestic workers in the UK may often be exposed to significant exploitation and how, without legal advice and representation in immigration matters, a domestic worker may simply be unable to take control of his or her immigration status or escape an employer's exploitation.

M was a national of a South Asian State on a domestic worker visa. Despite being in the UK for approximately six years she had almost no English and a very basic education, having left school at a very young age. He employer wrote to the UK Border Agency to inform them that she no longer wished to employ her and renew her domestic worker visa, this was as a result of an argument the employer had had with M's boyfriend. Her employer then appeared to change her mind when M separated from her boyfriend and said she would support an application to renew her domestic worker visa. By this time the UK Border Agency had refused to extend M's domestic worker visa.

M came to (legal) appointments with her employer who attempted to speak on her behalf. It was explained to her employer that she would not be able to be present when M was giving instructions.

M's appeal was allowed under Article 8 ECHR Right to a private life as her employment as a domestic worker enabled her to financially support her son and daughter in India and pay for their educations. M was granted Discretionary Leave to Remain in the UK. After her grant of Discretionary leave she was able to leave her employment as a domestic worker. It transpired that although she had a work contract with her former employer, that her employer did not honour this contract and required her to work additional hours for no additional payment. M was too afraid to say anything about this; it had been as a result of M's boyfriend raising this issue with her employer that her employer had contacted the UKBA to say that she did not wish to renew M's visa.

M would not have been in a position to afford private legal representation. Without Legal Help representation it is unlikely that M would have understood her rights or would have been able to lodge her appeal against the decision to refuse to renew her domestic worker visa and subsequently her human rights as guaranteed by the ECHR would never have been considered.

X (asylum support case)

This case gives example of both the complexity of asylum support questions (even trying to understand what type of support may properly be applied for) and the poor way in which these are often dealt with the UK Border Agency.

X is from Zimbabwe. He submitted a fresh claim for asylum in 2005. Further representations have been made since; the most recent substantive expert evidence was submitted 2009, to which no reference was made in a decision more than six months later. X lived with a friend until summer 2010 but that 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.

Annexe 2

CASES – REFUGEE FAMILY REUNION

A

This case shows the complexity, particularly circumstantial and evidential, that may arise in Article 8 cases and in refugee family reunion cases.

A is over 65. She is a refugee and has Indefinite Leave to Remain as a refugee. A 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 A was unable to maintain and accommodate her daughter as A was in receipt of Income Support. A appealed the decision. A'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 A's relationship with her daughter - her daughter's severe learning difficulties and the compassionate circumstances due to the rest of A's children having been killed during the civil war and A living alone in the United Kingdom. K has since arrived in the UK.

C

This case also shows the complexity, particularly circumstantial and evidential, that may arise in Article 8 cases and in refugee family reunion cases. In addition it highlights procedural and legal complexities that a lay person cannot be expected to deal with.

C was seeking family reunion, outside the immigration rules, for his sister. C was a recognised refugee but there is no entitlement to family reunion for siblings. C had arrived in the UK as a minor. C had been kidnapped in his country of origin where his whole family had been killed with the exception of his younger sister. She was also kidnapped, and he had not heard from her since the day that they were both taken. Both client and sister had been taken from their home town to the traditional family home, where they were kept following kidnapping.

Following recognition as a refugee, C had made attempts to locate his sister through the Red Cross, but without success. One consequence of C's escape and his search for his sister was that an adult who had helped him was murdered. C managed to get in touch with another person in his home country who, after a year of searching found his sister. She had been kept as a sexual slave for five years at this point. The person who found her assisted her escape and she stayed in hiding. It had been held in the appeal that the authorities in the country were complicit in allowing the persecutors to operate freely without hindrance from the law. The representatives collated a lot of evidence of attempts made to locate her, evidence of C's original asylum claim, and a statement as well as representations on family life. They obtained evidence that there were people willing to support the sister.

The initial hurdle was that C's sister was not allowed to make the application because she did not have a passport. This was resolved. A couple months later the UK consular authority said that they would not accept the application without a fee. The representatives pressed them to consider exercising their discretion to waive the fee. Finally this was referred to the UK. But still it was refused. Further representations and further complaints were made. Eventually the case was referred to the UK for consideration outside the immigration rules.

After a further delay, Entry Clearance was granted. After a variety of problems with travel, the applicant eventually made it to the UK and she is settling in, with assistance from friends and counselling. Legal Aid costs were approaching £1000, at private rates, much more. Without Legal Aid, she would have remained in her home country

D

This case highlights the speed with which applications may need to be made (not in this instance because of procedural or administrative time limits), which a lay person cannot be expected to be able to achieve.

D had indefinite leave to remain as a refugee and was not working because she was looking after her severely disabled daughter. An application was being made for her husband and eight year old son to join her.

While the application was being prepared the husband died suddenly, as a result of a heart problem. This left the son on his own. There were no relatives nearby to look after him. He was being looked after, after a fashion, by some family friend who could not afford to keep him. There was immense potential for abuse and exploitation. In a single day the lawyers prepared the application. It was refused. An appeal succeeded. The family are now reunited.

C

This case highlights how Article 8 immigration cases cannot properly be described as about lifestyle choices as opposed to family separation (often long-term and potentially permanent). It also indicates the circumstantial and evidential complexity for which legal expertise is needed in order for these cases to properly and successfully presented.

C was a national of Iraq who sought to join his parents in the UK. In the early 2000's, C's father had to flee his country of origin. He fled with his wife and three young daughters, leaving C behind because C is disabled by polio and moves in a wheelchair. The escape from the country involved trekking through mountainous terrain on foot and it would not have been possible to take C. His parents reluctantly left him with his frail grandfather. The rest of the family reached the UK where they were refused asylum but granted Exceptional Leave to Remain. They were not advised that they could appeal against the decision to refuse asylum. They subsequently obtained Indefinite Leave to Remain and then British Citizenship. C's mother has brain injury arising from a car crash in her country of origin. Her husband looks after her full-time and is thus not available for work. An application by C to join his parents was refused four years ago on the grounds that he would not be maintained and accommodated without recourse to public funds. The appeal was also dismissed - the judge did not accept the argument that Article 8 of the European Convention on Human Rights was breached by the continuing separation. A fresh application was made recently supported by psychiatric evidence of the impact on C's mother of his continuing absence. It was becoming increasingly necessary for C's grandfather - who has a heart condition - to look after him. Special permission had to be obtained for the application to be made locally in the country of origin. The British Embassy has now telephoned to say that C was to be granted indefinite leave to enter to be reunited with his family. Through no fault of his own this child (who has just turned 18) has lived apart from his parents and three sisters for the last eight years. He did not understand why he could not be with them and thought they did not want him. The separation has had a profound psychological impact on the family.

ANNEXE 3 DOMESTIC VIOLENCE CASES

N

This case shows example of both the difficulties that domestic violence victims may face in addressing their immigration situation (including in applications to the UK Border Agency and in appeal proceedings), but highlights the particular importance of competent legal advice and representation to addressing such situations.

Client N entered the UK on a two year spouse visa to join her British husband. After N arrived in the UK her husband's behaviour changed and he became controlling and physically, sexually and verbally aggressive towards her. N was threatened with a gun by her husband, which was reported to police. N left her husband on various occasions but he would plead for her to go back, saying that he had changed. N was unaware of domestic violence services and could not talk to her doctor about the situation because her husband accompanied her to GP appointments.

The final time N's husband lured her back to the house he locked her into the house and attacked her. He said she had broken in and called the police. N managed to get half way out of the front door when her husband was calling police. When the police arrived her husband had N trapped at the front door. N was hysterical and arrested for breaching the peace and taken to a police cell before being admitted to hospital with serious bruising.

N's domestic violence application was refused despite submission of police reports, letter from a domestic violence organisation, photographs of marks on N's body, photographs of fire arms owned by N's husband and witness statements. The final attack on N happened after her application was refused. The UK Border Agency made no attempt to interview N about the fact they were not satisfied that her marriage had broken down permanently as a result of domestic violence, as per their own guidelines. Nor did they apply the relevant case law concerning domestic violence applications being allowed on oral evidence only, in recognition of the fact that it is often very difficult to obtain documentary evidence of domestic violence.

N was unaware of the domestic violence immigration rule and was afraid that she would be returned to China and as a result kept returning to her husband. He threatened that he would, in any event, have her sent back to China. Preparing the application and subsequent appeal involved a great deal of liaison with the police, hospital, GP and domestic violence project. This is not something that the N would have been able to do alone. Preparation for the appeal was complex as N was very traumatised, making taking her statement difficult. She was also very traumatised at the appeal and at one point ran out of the court room. Additionally, the court interpreter was quite harsh with her adding to her discomfort.

Due to N's limited English and the trauma she experienced as a victim of domestic violence it would have been a considerable challenge for her to collect evidence and prepare for her appeal. N would not have been able to pay for private legal representation. If her appeal had been dismissed there is a possibility she would have returned to her husband rather than face the shame of returning home after a failed marriage. Fortunately, her appeal was allowed and the immigration judge commented on the helpfulness of the preparation of the

appeal. The domestic violence application exists to protect (usually) women from staying in abusive relationships, which can be matters of life or death.

T

This case shows how a victim of domestic violence may face serious ongoing abuse and threats long after an application for indefinite leave to remain has been made and hence be highly unlikely to be able deal with immigration procedures on her own; and shows the complexity of evidence that may need to be obtained and presented in these cases. It also again highlights poor quality decision-making by the UK Border Agency in dealing with or dismissing such evidence, causing Legal Aid and court costs.

T was a young woman granted leave to enter as the spouse of her British citizen husband. Upon arrival her husband embarked upon a campaign of mental and physical abuse this included forcing the couple's young child to refer to T in the most derogatory terms. T was raped by her husband. Due particularly to T's naivety and young age she was unaware of her ability to report spousal rape to the authorities. T continued to live like this for two years at which stage she was entitled to apply for ILR. In keeping with his entirely controlling demeanour her husband instead made an application for further leave to remain for her. A neighbour befriended T and upon being advised of her predicament referred her to Women's Aid who thereafter referred her to her representatives. They were in the process of assisting her with an application for further leave when her husband again physically attacked and sexually assaulted her. The charges initially laid against T's husband were dropped and as a consequence the bar on him returning to the matrimonial home lapsed. As a consequence T and the child immediately moved to a refuge.

The application to the Home Office was refused on the basis that the evidence provided (from the women's refuge, a GP report, a college report on a violent incident and a police report) were simply repetitions of statements of what T had claimed had happened to her.

T was an extremely traumatised individual. Whilst her appeal was ultimately successful there is little doubt that T would not have been able to secure the appropriate evidence both in relation to the initial application and her appeal without legal advice and assistance.