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Dear Mr Stokes

Consultation on proposed amendment to the Lord Chancellor's authorisation on the scope of legal aid – business cases

This is the response of the Immigration Law Practitioners' Association to this consultation in so far as it relates to immigration cases, in particular EC-Turkey Association Agreement ("Ankara Agreement") cases.

1. We believe that the proposed amendment to paragraph 9 of the Lord Chancellor's Direction/Authorisation and the explanation given for it in the consultation letter are predicated on misinterpretation of paragraph 1(h) of Schedule 2 the Access to Justice Act.

2. We believe that fundamentally the issue is not whether the statutory words "matters arising out of the carrying on of a business" are capable of excluding activities prior to the establishment of a business, but whether they are capable of excluding legal advice and representation in connection with immigration status at all. We say they are not. We agree with the Funding Review Committee in the case of *Cakmak*, an Ankara Agreement case in which the Legal Services Commission sought to revoke a public funding certificate on the basis of paragraph 1(h) of Schedule 2 of the AJA, but in which the Funding Review Committee stated that such cases arise from a need to establish individual immigration status, not from "the carrying on of a business" (FRC hearing 2 March 2006, LSC reference BLBDNVE18C16/A/A/1).

3. We understand that this was previously also the view of the Legal Services Commission itself in relation to Ankara Agreement cases. So far as we are aware, it was not until the 2004 case of *Tum* was referred to the European Court of Justice by the House of Lords that the Commission attempted (unsuccessfully) to advance the argument that the matter might fall within the paragraph 1(h) exclusion. The statutory wording has not been amended, and in our view,

amending the wording of the authorisation now is not capable of changing its effect.

4. We are also aware that immigration cases are generally dealt with very specifically, and often quite differently, from other areas of law in the Funding Code. We would expect that if funding for immigration cases were to be excluded then the Act would specifically say so; but it does not.

5. Furthermore, when the Access to Justice Act 1999 was going through Parliament Hansard reveals that the Lord Chancellor's Department sought to explain the need for paragraph 1 of Schedule 2 in the following way:

> *It is important that scarce public funds are directed to where help is most needed. The Government are not persuaded that cases that involve, for example, disputes arising from the course of running a business, inheritance, partnerships or trusts meet that criterion.*
>
> (Hansard debates, 4 March 1998, Column 1060)

Later in debate the Lord Chancellor stated:

> *Businessmen who are running profitable businesses have the option of insuring against the possibility of having to take or defend legal proceedings… I do not believe that the taxpayer should have to meet the legal costs of sole traders who do not take out adequate insurance.*
>
> (Lords Hansard debates, 21 January 1999)

These passages demonstrate precisely what the aim of paragraph 1(h) of Schedule 2 is, namely to exclude from public funding disputes arising from the course of running a business (either having to take or defend legal proceedings) that could reasonably be expected to be insured against.

6. No insurance can be obtained to protect an individual against losses where the Home Office makes an erroneous decision in relation to that individual's immigration status. There is no sense in which the aim of the provision was to protect the public purse from cases where a branch of the Government makes an unlawful decision about whether the individual may enter or remain in the UK. Whilst the ability to remain in the UK will plainly have a knock-on effect on a business, equally the business may survive despite the requirement for the individual to leave the UK.

   ILPA therefore believes any interpretation of AJA Schedule 2 paragraph 1(h) that would have it exclude immigration cases from public funding is unsustainable and untenable in the light both of what Parliament was led to believe and of the practice of the Legal Services Commission itself in the past. Accordingly, the proposed amendment to paragraph 9 of the Direction/Authorisation is not capable of having the effect in relation to Ankara Agreement (or any other immigration business case) to which the consultation letter aspires, because immigration judicial review is not excluded at all.

7. If, contrary to the above, the amendment were capable of excluding judicial review proceedings arising from immigration decisions then our observations would be:

    a. Turkish nationals are, with the possible exception of some applicants seeking to establish themselves under EU law, the only immigration business applicants likely qualify financially for legal aid. This is because the financial requirements of the present immigration rules themselves would exclude others from eligibility, whereas the old rules applicable to Ankara Agreement cases impose no financial minimum so it would be perfectly feasible to qualify for the purpose of establishing a small business with capital below legal aid eligibility limits. The intended effect of the proposed amended would therefore be discriminatory in that it would impact disproportionately on Turkish nationals.

    b. It would also undermine the effect of the ruling of the European Court of Justice in *Savas* [2000] INLR 398 that the standstill clause in the Agreement is of direct effect, and the ruling of the Court of Appeal in *R (otao A) v SSHD* [2002] EWCA Civ 1008 that *Savas* had settled the position in Community law. It is as a result of these cases that the 1973 business immigration rules [HC 510] still apply to Turkish nationals with, inter alia, the financial effect noted above. It would be to make a mockery of the UK's Community law obligations if Turkish nationals of modest means who can qualify to establish themselves in business under HC 510 were to be deprived of any effective remedy to challenge negative decisions by being excluded from legal aid for judicial review.

    c. By definition any case which qualified for such funding would be meritorious. So the effect of the proposed amendment (if allowed to have the misconceived effect contended for in the consultation letter) would be to protect the UK government from effective challenge of negative decisions in the cases of applicants of modest means, who are precisely the category of applicant who ought to be beneficiary of the standstill clause and the Savas judgement, and who were intended to benefit from the Access to Justice Act itself.

    d. The principles of effective remedy within the law, and the UK's EU obligations, seem to us far to outweigh any "principle" that "legal aid should not be used for this purpose" which is asserted in your consultation letter. We are aware of no such "principle". Certainly the modest financial implications mentioned in your letter seem a small price for which to sell the important principles which we have cited, and which are consistent with what parliament was told when the Access to Justice Act was passed, as the passages from Hansard which we have quoted above demonstrate.

e. The consultation letter also mentions the notion that the availability of legal aid for judicial review in Ankara Agreement cases is "illogical" when Legal Help is excluded. For the reasons indicated above ILPA believes that there is no illogicality, because Legal Help is not excluded in Ankara Agreement cases. These are immigration cases, not cases "arising from the carrying on of a business". Neither assertions to the contrary nor the proposed amendment to paragraph 9 of the direction/authorisation will change that fact.

Yours sincerely

Chris Randall
Chair