

ILPA BRIEFING**House of Commons – Committee 19 July 2011****LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –
Bill 205****Clause 1: Amendments Nos. 83, 84 & 85 in the name of Kate Green MP****83**

Clause 1, page 2, line 7, at end add –

- (10) The Lord Chancellor must ensure that no areas of law within the scope of legal aid prior to the enactment of this Act are removed from the scope of legal aid unless and until a full independent assessment of the costs of removal has been undertaken and presented to Parliament and in particular unless and until it has been reasonably established that the removal from scope will not increase the deficit.

84

Clause 1, page 2, line 7, at end add –

- (11) The Lord Chancellor must ensure that a detailed strategic plan to fund the not for profit advice sector is adequately prepared prior to any decisions being made on changes to the scope of legal aid, to ensure that individuals are not left without access to legal advice and representation in relation to problems of welfare benefits, employment, debt, housing, or immigration, education or asylum support.

85

Clause 1, page 2, line 7, at end add –

- (12) The Lord Chancellor must ensure, before implementing any changes to legal aid in this Act, that in no part of the country will the proposals result in advice deserts where it is not reasonably practicable for any person to be able to access legal advice and assistance in relation to welfare benefits, employment, debt, housing, or immigration, education or asylum support.

Presumed Purpose

These amendments provide opportunity for the Committee to consider the potential costs of removing the specified areas from the scope of Legal Aid, and the adequacy of the Government's impact assessments. They appear to be probing amendments, giving members of the Committee the opportunity to raise concerns about whether there will be savings (Amendment 83); the effect of the cuts on the not for profit sector and the risk of advice deserts, where there are no providers, generally or in a particular area of law.

Costs of the changes (Amendment 83)

ILPA identifies a number of costs flowing from the removal of immigration from scope, which have parallels in other areas. The complexity of the scope changes and of the resultant definitions will be costly to administer, both for any successor to the Legal Services Commission and for those giving advice, especially in areas where the some matters remain in scope, but some do not. Costly bureaucracy does not look set to die with the Legal Services Commission.

There will be challenges and litigation around whether an individual should be given exceptional funding. Local authorities will be called upon to pay the legal costs of children and adults at particular risk whom they are supporting. If they do so, they will pay at private rates; much higher than legal aid rates. If they do not, this is likely to be challenged. Where a parent cannot get legal aid to challenge removal or deportation on the grounds that they have British citizen children, a human rights judicial review is likely to be sought in the name of the child; a much more complicated and costly procedure. The courts and tribunals will struggle as litigants in person try to make sense of a complex and fast-changing area of law.¹ Lawyers will be accused of being too clever by half, no doubt. Faced with clients who are children, whom it is proposed to send unrepresented all the way to the Supreme Court, including on a Home Office challenge to a successful appeal against a represented Home Office; faced with people, including British and settled people, who are seeing their families torn asunder, faced with the victims of domestic violence, trafficked persons and the mentally ill, with people who have no entitlement to work, no access to public funds and thus no money to pay for advice, we make no apology for fighting for them to be represented properly. All this will cost money.

These costs are dwarfed however by the costs that will result from reduced scrutiny and the attendant increased lack of accountability of the UK Border Agency. These costs that will affect all cases, not only legal aid cases or those cut from scope. The UK Border Agency continues to make poor decisions (with high overturn rates on appeal²), to create delays in immigration proceedings and to fail consistently and timeously to apply the decisions of the courts.³ This is the department of which Lord Justice Ward stated *"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 wheel store?"*⁴

¹ There have been new immigration acts of parliament in 1993, 1996, 1999, 2002, 2004, 2006, 2007, and 2009. In 2010, the Immigration Rules were changed on ten occasions, often with but a few days notice and with complex transitional provisions. We recall the words of Lord Justice Longmore *"I am left perplexed and concerned how any individual whom the Rules affect ...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, para 87).

² Tribunal Service statistics for 2010/11, first three quarters: of those allowed or dismissed, appeals were allowed in: 28% of asylum, 56% of managed migration, 51% of entry clearance, 47% of family visit and 28% of deportation/other appeals: see <http://www.justice.gov.uk/publications/statistics-and-data/tribunals/quarterly.htm>

³ See ILPA's submissions to the Joint Committee on Human Rights on implementation of Strasbourg judgments, for example of 30 September 2009, available at www.ilpa.org.uk/submissions/09%2009%2030%20ILPA%20JCHR%20rule%20of%20law.pdf

⁴ *MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229

Effects on the not for profit sector (Amendment 84)

To provide immigration legal services in the course of a business, whether or not for profit, you have to be authorised under Part V of the Immigration and Asylum Act 1999. Broadly this means being a solicitor, barrister, member of the Institute of Legal Executives or regulated by the Office of the Immigration Services Commissioner.⁵ Thus generalist charities, unable or unwilling to employ lawyers or assume the responsibilities that come with regulation, are unable to help people who need legal advice on immigration. The broader not for profit sector will be affected by these proposals, as it struggles with people it is unable to assist.

The Chief Executive of the Legal Services Commission told the Committee⁶:

“The issue around market sustainability... is the impact of the three different budget reductions in relation to the single gateway, the fee reductions and the changes in scope. The area where we have had some concerns is about the large reductions in scope and the ability of certain parts of the legal services market to adapt to that, particularly the not for profit sector, which the Government absolutely accept in their impact assessments, and in the immigration and asylum field.”

Remuneration rates in immigration and asylum work are virtually unchanged since 2001. ILPA set them out in detail in an annexe to its response to the Ministry of Justice consultation, so committee members may judge them for themselves,⁷ comparing them to Her Majesty’s Court Services Guideline Hourly Rates.⁸ Let us keep matters in perspective. As revealed in a Freedom of Information request in June this year,⁹ redundancies in the Legal Services Commission have cost £7million, including £1m to just four individuals. That dwarfs the redundancy bill for Refugee and Migrant Justice, as it is set to dwarf the redundancy bill for the IAS.

Payment can only be claimed when the case reaches a particular stage; a matter in the control of the UK Border Agency, not of the Commission or the lawyer, resulting in firms and organisations unable to bill the Legal Services Commission, sometimes for years.¹⁰ Not for profits have little, or no (depending on their constitution) potential to ease their absolute or cash-flow problems with private paying clients. Problems will increase if only asylum cases remain in scope, because the fixed fee is so unequal to the work that must be done on a case.

Refugee and Migrant Justice, which had sought to survive on a predominantly asylum caseload, went into administration in June 2010. Many of its clients’ files lie unclaimed in boxes. In June 2011, the Immigration Advisory Service, followed suit. Other not-for-profits have got out of immigration and advice or reduced the amount that they do: this is less visible, but it hurts the clients just the same. The risk is that the changes will simply push not for profits out of the asylum advice-giving sector.

⁵ MPs and their staff do not give advice in the course of a business, so they and their caseworkers can see people in their surgeries.

⁶ 12 July 2011, Afternoon Session: Q158

⁷ See www.ilpa.org.uk/submissions/11%2002%2014%20To%20MOJ%20Legal%20Aid%20_2_.pdf

⁸ See <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/guideline-hourly-rates-2010.pdf>

⁹ See

www.legalservices.gov.uk/docs/access_to_information/FOI_5291_FINAL_Redacted_for_publication.pdf

¹⁰ See ILPA submission to the Ministry of Justice

Advice Deserts (Amendment 85)

The Ministry of Justice said in paragraph 306 of its response to the consultation

“... if there is any short term disruption in supply in some areas, this can be mitigated through:

- ...
- *running a short, focussed retender exercise, for example as undertaken immigration matters in Dover following the 2010 bid round.*

It neglected to mention that the immigration tender was let in November 2011 but only in July 2011 was a firm appointed to take the Dover cases.

It neglected to mention that it also ran a ‘focused retender’ for Plymouth, where no contract in asylum had been let and that this failed, meaning that the nearest asylum advice to Plymouth is in Bristol.

It neglected to mention that no Bristol firm or organisation had the capacity to provide interim cover in Plymouth and that interim arrangements were only put in place from 15 February 2011. Those interim arrangements are that cover is provided on a Tuesday and Wednesday 10am-5pm by a firm based in Enfield, London.

It neglected to mention that in East Essex a shortfall in supply could not be picked up; attempts to resolve this without a re-tender have so far failed.

Now we add to the picture that the Immigration Advisory Service, which went into administration this month, had offices in Bristol and served Essex from its Cambridge office. Advice deserts are not a future threat; they are a present reality.

The Legal Services Commission has stated that there will be an ‘orderly transfer’ of Immigration Advisory Service files. We disagree. Carolyn Downs, chief Executive of the Legal Services Commission, told the Home Affairs Committee last November *“In relation to the RMJ going into administration, all the cases which were with RMJ were passed on to other providers some months ago. That was successfully transferred from the RMJ to other providers.”*¹¹

ILPA does not consider that is accurate. The administrators of Refugee and Migrant Justice have paid, and continue to pay tens of thousands of pounds to store Refugee and Migrant Justice files.¹² ILPA members report boxes of files in their offices, ‘transferred’ from Refugee and Migrant Justice, but where the clients have never come to their offices to instruct them, despite being written to at the last known address, and where no other provider has called for the files. Thus we shall be convinced that former IAS clients are not wandering in advice deserts when we see it; not when we are told so.

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¹¹ Tuesday 30 November 2010, The Work of the Legal Services Commission published as HC 649-i see www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/uc649-i/uc64901.htm, response to question 31 asked by Ben Gummer MP.

¹² ILPA is a creditor and as such receives reports.