

People living with HIV/AIDS and immigration control:

1. This note accompanies a short presentation to be given to the Central West London Sexual Health Providers Forum meeting on Tuesday, 13 September 2011. Appended to this note is a two-page ILPA information sheet on "AIDS/HIV Cases and Removal". Other information sheets are available in the Info Service section of the ILPA website (where it is also possible to sign up to receive this service for free by email):
<http://www.ilpa.org.uk/pages/info-service.html>
2. Questions raised as of particular interest to the forum concern people living with HIV/AIDS, who are undocumented or have been refused leave to remain:
 - how or where to obtain legal advice, and the availability of legal aid
 - types of application that may be considered or made
 - options for support and assistance for those with 'no recourse to public funds'

Availability of legal advice and assistance (and Legal Aid)

3. Two points to note:
 - a. ILPA does not provide legal advice and assistance. However, the directory of members who provide advice (this only includes those members who have agreed for us to make their details publicly available) is available online at:
<http://www.ilpa.org.uk/pages/find-immigration-advice.html>
 - b. ILPA cannot recommend particular advisers. We have several members and it is not appropriate for us to recommend one over the other, still less to recommend a non-member.
4. Another way to find legal advice is to contact the Community Legal Advice helpline on 0845-345 4345. This is open Monday to Friday, 9am to 8pm; and Saturday, 9am to 12.30pm.
5. Legal Aid is currently available in all immigration cases, provided the claimant passes the means test and the case passes the merits test:

- the means test is essentially an assessment of the person's income and savings (and other significant assets)
 - the merits test for advice and assistance in dealing with the UK Border Agency is relatively low, though providing the advice or assistance must be of some real benefit to the client
 - the merits test for bringing an appeal against a refusal of leave by the UK Border Agency is that the case has a better than 50-50 chance of success (but if the chances of success are borderline or unclear, this may be sufficient if the case is of particular importance to the client – e.g. an asylum appeal)
 - the merits test for bringing a judicial review claim (an application to the High Court where there is no right of appeal against the UK Border Agency's decision or action) is similar to that for bringing an appeal
6. There have been many developments, particularly since 2004, which have restricted the time that an immigration adviser may spend providing advice and assistance on Legal Aid. Since October 2007, fixed fees have meant that advisers are paid the same fee for all cases (regardless of the complexity of or time spent on each case¹). There has been no increase in the fees for immigration advice since April 2001, and from October 2011 the fees are to be reduced by 10%. These and other factors mean that it has become increasingly difficult for good advisers to afford to continue to do Legal Aid cases; and many have stopped or significantly reduced the proportion of Legal Aid work they do. This trend seems set to continue.
7. The two largest not-for-profit providers of Legal Aid in immigration have both closed – Refugee and Migrant Justice (formerly the Refugee Legal Centre) closed last summer; the Immigration Advisory Service closed this summer. Like others, they were unable to make Legal Aid pay (despite not being profit-making organisations).

¹ There is some exception made for cases that are so complex they require more than three times the notional time covered by the fixed fee.

8. The Legal Aid, Sentencing and Punishment of Offenders Bill will, if implemented, make this already difficult situation very much worse. Firstly, it is set to remove Legal Aid for all immigration cases – except for asylum claims and appeals, challenges to immigration detention and some judicial review claims (though the Bill seeks to exclude most non-asylum judicial review claims). More information on the Bill is available from evidence submitted to the House of Commons Public Bill Committee currently scrutinising the Bill. This includes evidence from ILPA and the National AIDS Trust². All the evidence submitted to the Committee is available at: <http://services.parliament.uk/bills/2010-11/legalaidsentencingandpunishmentoffenders/committees/houseofcommonspublicbillcommitteeonthelegalaidsentencingandpunishmentoffendersbill201011.html>

Potential claims made by people living with HIV/AIDS:

9. It is important to make some general distinctions between various applications for leave, which people living with HIV/AIDS may make. In principle, there may be applications:
- solely or almost solely based on the HIV/AIDS
 - where the HIV/AIDS is relevant
 - where the HIV/AIDS is irrelevant
10. In principle, people living with HIV/AIDS may make any application that people not living HIV/AIDS may make. Someone, who satisfies the requirements of the Immigration Rules or meets the criteria of any Home Office policy or concession under which leave is granted, should be granted leave to remain regardless of the HIV/AIDS. However, it is not the purpose of this note to review the entirety of the Immigration Rules and policy. What follows relates to some of the more common claims that may be made by

² Others who have submitted evidence concerning the effect for migrants include Al-Hasaniya Moroccan Women’s Centre, Amnesty International UK, Barnardo’s, Bail for Immigration Detainees, British Red Cross, The Children’s Society, the Discrimination Law Association Just Rights, Refugee Action, Refugee Children’s Consortium, René Cassin, Southall Black Sisters, South East Strategic Partnership for Migration, Still Human Still Here and the Zimbabwe Association.

people living with HIV/AIDS, who are undocumented or have been refused leave.

11. Some people living with HIV/AIDS make or have made asylum claims. That is a claim that the person is a refugee³ or would be at risk of inhuman or degrading treatment if returned to his or her home country⁴. Such a claim may well be unsuccessful if it is based solely or largely on the HIV/AIDS. To successfully claim refugee status, the person must show that he or she is at risk of persecution in his or her home country by reason of race, religion, nationality, membership of a particular social group or political opinion. A successful claim might be made if someone can show he or she would be refused HIV treatment because of one of these reasons; and there are examples of asylum claims based upon particularly severe stigma and mistreatment that a person faces in his or her home country by reason of his or her living with HIV/AIDS.

12. A claim that it would be inhuman or degrading treatment to return a person living with HIV/AIDS to his or her home country also may well be unsuccessful – particularly in view of the decision of the House of Lords and the European Court of Human Rights in the case of *N (Uganda)*⁵. Some further information about this case is given in ILPA’s February 2010 “AIDS/HIV Cases and Removal” information sheet.

13. Nonetheless, some people living with HIV/AIDS may have good Article 8 claims. Such a claim is essentially founded upon a person’s private and family life in the UK. A claim may succeed if to remove the person from the UK (or require him or her to leave) would constitute a disproportionate interference with that private and family life. The HIV/AIDS may be a relevant factor in such a claim, though it is unlikely in most cases to be a sufficient factor in and of itself. Some further information is given about such cases in ILPA’s February 2010 “AIDS/HIV Cases and Removal” information sheet.

³ 1951 UN Convention relating to the Status of Refugees, Article 1(A)(2)

⁴ 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3 (incorporated into UK domestic law by the Human Rights Act 1998)

⁵ [2005] UKHL 31; and Application No. 26565 before the European Court of Human Rights

14. In all applications for leave, evidence submitted in support of the application can be critical. This is especially so in relation to Article 8 claims. The late Lord Bingham gave some indication of the sorts of matters that may be relevant in Article 8 claims when he said this in the case of *Huang*⁶:

“Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant.”

15. However, the social, emotional and/or financial dependence of a person living with HIV/AIDS upon his or her partner, parent, child, friends, neighbours, befrienders, community, carers, supporters etc. is not made out simply by asserting that he or she is dependent on these people (the same is true of the dependence on others upon the person living with HIV/AIDS). At a minimum, witness statements from the person living with HIV/AIDS and the other key individuals describing the relevant relationships and their importance is likely to be required to make out an Article 8 claim. Further information is provided by ILPA's August 2008 “Article 8” information sheet.

16. Some other types of case that may be relevant are legacy cases and long residence applications. Long residence applications are made under the Immigration Rules for settlement (indefinite leave to remain). To succeed, a person will need to show either that he or she has been living in the UK for 10 continuous years and his or her presence throughout this time has been lawful (having temporary admission is not lawful presence for these purposes); or he or she has been living in the UK for 14 continuous years and at no time has a decision that he or she is to be removed or deported been

⁶ [2007] UKHL 11

made. Further information is provided by ILPA's July 2008 "Long Residence Rules" information sheet.

17. Legacy cases are cases of people who claimed asylum before March 2007, have not been granted asylum or indefinite leave to remain, and are still in the UK. Although there is no distinct legacy application (someone is either in the legacy or not), in many legacy cases the person may have the basis for an Article 8 claim. This is because he or she will have been in the UK for many years, and over that time the sorts of dependencies referred to by Lord Bingham (see above) may well have developed and become particularly important. More information about legacy cases is provided by ILPA information sheets, including the August 2011 "Legacy Cases 8 – Cases Not Concluded" information sheet.

Accessing health and other services or support:

18. Members of the Forum likely have better information than I on services that may be available. The South East Migrant Health Network highlight the following organisations offering support and information:

- Terrence Higgins Trust has three offices in London, see <http://www.tht.org.uk/contactus/london/>
- African AIDS Helpline is for those of African origin living in England, see <http://www.africaninengland.org.uk/>
- National AIDS Helpline: http://www.aidshelpline.org.za/default.aspx?link=site_home
- Positively UK offers peer mentoring and support groups for men and women living with HIV/AIDS: http://www.positivelyuk.org/contact_us.php

19. Whereas initial diagnosis and counselling is provided free of charge on the NHS; beyond this, undocumented migrants and refused asylum-seekers may be refused free NHS treatment for HIV/AIDS. Those who are in receipt of free NHS treatment, however, should continue to receive that treatment free of charge. Generally, in England, urgent and emergency treatment is freely available on the NHS, and general practitioner treatment can be provided free.

Treatment for specified infectious diseases is also available free, but HIV/AIDS is not one of those specified. However, an NHS Trust has a general discretion to provide treatment free of charge. In *R (YA) v Secretary of State for Health*⁷, the Court of Appeal indicated that factors that should be considered in relation to that discretion include the situation of those refused asylum-seekers who cannot return to their home country.

20. Where an undocumented migrant or refused asylum-seeker is receiving or requires care services, whether or not delivered directly from his or her local authority, he or she may be entitled to accommodation under section 21(1)(a) of the National Assistance Act 1948 if the accommodation is necessary to make the provision of care reasonably practical. A summary of the Court of Appeal ruling on this, given in *SL v Westminster City Council*⁸, is provided by the solicitors bringing the case, see:

http://www.pierceglynn.co.uk/news_1.htm#789

21. Advice on financial and accommodation support for asylum-seekers and refused asylum-seekers is available from the Asylum Support Appeals Project. This is not a service available direct to asylum-seekers or refused asylum-seekers. Rather it is a second tier support service, available to migrant community organisations and others assisting asylum-seekers and refused asylum-seekers, see:

http://asaproject.org/web/index.php?option=com_content&view=article&id=50&Itemid=99

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⁷ [2009] EWCA Civ 225

⁸ [2011] EWCA Civ 954