

Legal Aid – current practice and developments

1. This note is to accompany a presentation and discussion with members (mentors and mentees) of the Mentoring & Befriending Project of the Migrant & Refugee Communities Forum, to take place on Thursday, 6th October 2011.
2. The note first sets out some short description of how Legal Aid works, identifying some of the key practical problems that are current. Next, the note describes the current policy developments that are underway, with particular emphasis on the Legal Aid, Sentencing and Punishment of Offenders Bill, and finally it addresses some of the opportunities to influence these developments.
3. There are different arrangements for Legal Aid in Scotland and in Northern Ireland. This is because there are distinct justice systems in each of these countries/areas, and the administration of justice is devolved to the Scottish and Northern Ireland governments. This note is solely concerned with Legal Aid in England and Wales, and particularly with Legal Aid in immigration and asylum cases (and to a lesser extent some other ‘social welfare’ areas).
4. For more information about Legal Aid, please see the ILPA information sheets on ‘Legal Aid’ (of which there are 12) and on the ‘Legal Aid Bill’ (of which there are four). All ILPA information sheets (and other information) is available at:
<http://www.ilpa.org.uk/pages/info-service.html>

Current practice:

5. Legal Aid is administered by the Legal Services Commission (LSC). The LSC is a public body responsible to the Ministry of Justice. The LSC runs two Legal Aid schemes – one for Legal Aid in criminal law matters (this is called the Criminal Defence Service), and the other for Legal Aid in civil law matters (this is called the Community Legal Service).

6. In immigration and asylum, Legal Aid work on claims made to the UK Border Agency is undertaken on what is called Legal Help (LH). Legal Aid work on appeals against UK Border Agency refusals is undertaken on what is called Controlled Legal Representation (CLR). At each of these stages, a means and merits test applies. The merits test is different and more restrictive at the appeals stage (better than 50% chance of success) than at the initial claim stage (significant benefit to client). Legal Aid work for judicial reviews and higher appeals (that is appeals to the Court of Appeal and beyond) is called certificated work. For it too, there is a means and merits test; the latter being essentially the same as that for Controlled Legal Representation (appeals). If a client does not satisfy both the means and merits test, Legal Aid must be refused.

7. Since October 2007, all new Legal Aid cases have been subject to fixed fee arrangements. There are fixed fees for each of Legal Help (asylum), Legal Help (immigration), Controlled Legal Representation (asylum) and Controlled Legal Representation (immigration). This means that legal advisers are not generally paid according to the amount of time spent or needed on each case. Rather, they are paid a fixed fee for all cases of the same type. Thus for all asylum claims (LH), regardless of how complicated and time-consuming any particular claim may be, the same fixed fee is paid. The same applies for asylum appeals (CLR), immigration claims (LH) and immigration appeals (CLR). There is an exception to the fixed fee arrangement. If a legal adviser has to spend more than three times as long as the notional time to which the fixed fee relates, the legal adviser is paid an hourly rate for the case. The fixed fee system is a problem. It provides perverse incentives – i.e. for cherry-picking of the most straightforward cases, and for doing less work on each case.

8. The arrangements for when legal advisers are paid have also caused problems. Legal advisers are generally not paid unless and until they close a case, or a case stage. Thus, Legal Help work done on an asylum claim is not paid unless and until the legal adviser closes the Legal Help case (stage). This would not stop the legal adviser assisting with an appeal by opening up a

Controlled Legal Representation case (stage) for the same client – however, again the legal adviser would not be paid unless and until closing the Controlled Legal Representation case (stage). This also provides perverse incentives – i.e. to close cases early rather than (as some legal advisers have done) carrying substantial unpaid debts owed by the LSC by keeping the case open because it is anticipated that more work will be necessary later.

9. The LSC has contracted with a number of legal advisers (both private firms and not for profit agencies) to provide Legal Aid. By the contracts, these legal advisers are awarded a number of 'matter starts' – that is a number of cases which they are permitted to undertake on Legal Aid. In November 2010, contracts were awarded for immigration and asylum Legal Aid, and legal advisers were required to agree to undertake a minimum number of immigration and a minimum number of asylum cases. If a legal adviser uses up their entire allocation of matter starts, they are not permitted to take on new Legal Aid cases unless granted permission to do so by the LSC. Legal advisers are also restricted in the Legal Aid cases they are permitted to take on, by reference to such matters as the location of the client and, in the case of detained clients, whether the legal adviser has a specific contract to provide Legal Aid work in the specific detention centre.

10. In 2010 and 2011, there have been significant closures of legal advisers who had been doing Legal Aid work. The two most striking events were in summer 2010 when Refugee and Migrant Justice (RMJ, formerly known as the Refugee Legal Centre) and in summer 2011 when the Immigration Advisory Service (IAS) entered administration and closed. After the closure of RMJ, the Government had insisted that RMJ's failure to cope with the financial constraints of Legal Aid was unique to RMJ and that others were coping fine. The Government also announced that IAS (one of those others) would be getting a larger 20% market share of immigration and asylum Legal Aid, so there was no need to be concerned about the loss of RMJ and its

several offices across England¹. Evidently IAS was not coping and the decision to expand its market share was not such an inspired position. However, these two not for profits are not the only legal advisers to have ceased doing Legal Aid work over this period.

11. There have long been concerns that some people are unable in practice to access Legal Aid, despite its being in law available. Some have reported on 'advice deserts' (i.e. areas of the country where there are no or insufficient providers of Legal Aid advice available), and some on poor quality work or wrong refusals of Legal Aid².

Current developments:

12. From October 2011, all Legal Aid fees are to be reduced by 10%. This increases the prospect that more legal advisers will be forced to stop, or greatly reduce, their Legal Aid work because they are unable to make it pay. For example, the Director of the Law Centres Federation has recently warned that several Law Centres will be put at risk by these cuts³. For those that continue doing Legal Aid work, the perverse incentives (discussed above) will be all the greater. Legal Aid fees in immigration and asylum had generally not been increased since 2001.

13. Meanwhile, the Legal Aid, Sentencing and Punishment of Offenders Bill is passing through Parliament. This huge Bill covers many issues relating to civil and criminal Legal Aid, civil litigation funding and the criminal justice system. Civil Legal Aid, therefore, is only one relatively small part of the Bill, and immigration and asylum Legal Aid is effectively a very small part of the Bill. However, the Bill contains provisions which, if passed, will significantly worsen the situation as regards the availability of Legal Aid.

¹ The Lord Chancellor and Secretary of State for Justice, Kenneth Clarke QC, said this in the House of Commons on 17 June 2010 – see *Hansard HC*, 17 Jun 2010 : Columns 1023, 1024, 1026 & 1028

² See *Review of quality issues in legal advice: measuring and costing quality in asylum work* (Trude/Gibbs), March 2010, published by the Information Centre about Asylum and Refugees (ICAR) and several of the reports reviewed in the ICAR report; and *At the end of the line: Restoring the integrity of the UK's asylum system*, February 2010, published by Still Human Still Here and at page 18 citing Devon Law Project, Asylum Appellate Project, second year report, 2009

³ As reported in *The Law Gazette* on 28 September 2011: *Greenwich law centre on the brink*

14. If implemented, the Bill will still provide for Legal Aid for the following:

- advice and representation for asylum claims and appeals
- advice on asylum support claims and appeals (but not representation for appeals), provided the claim/appeal is not for subsistence-only support
- advice and representation for challenges to immigration detention (e.g. bail), but it is intended that this should not extend to challenging the decision that is the cause of immigration detention (unless this relates to asylum)
- advice and representation for some judicial reviews (but see below)

15. If implemented, the Bill will mean that Legal Aid is not available for the following:

- non-asylum immigration claims and appeals (this includes refugee family reunion cases, Article 8 private and family life cases and regularisation cases)
- advice and representation for some immigration judicial reviews (see below)
- most cases concerning debt, education, employment, housing and social welfare law
- many cases concerning family law

16. The following paragraphs describe some of the key concerns about the Bill and particularly its provisions concerning immigration and asylum.

17. When fixed fees were introduced, it was said that legal advisers would be able to make these arrangements pay by recovering what they lost on a time-consuming, complex case on more straightforward cases. Last year, legal advisers were required to commit to taking on immigration and asylum cases in order to be awarded Legal Aid contracts in this area. However, the Bill intends to remove all (or nearly all) immigration work from Legal Aid. The ability to trade off complex cases against straightforward cases will be much reduced, and at a time when the level of the fixed fee will have been reduced by 10%. This will add to the pressures on legal advisers, and to the perverse

incentives discussed above and is likely to lead to increased concerns about the availability and quality of legal advice and representation. More legal advisers may choose to stop doing this work. There is a risk that the better legal advisers will be particularly under pressure, and that those struggling to provide a good service will struggle more while those providing a poor service may thrive. It is important to note that, since immigration and asylum advice is regulated by criminal law, unlike in other areas of law, generalist advice agencies and community groups will not be able to lawfully fill any gap left by Legal Aid unless they are prepared and able to satisfy requirements of the Office of the Immigration Services Commissioner (by demonstrating sufficient knowledge and expertise across a range of immigration and asylum work)⁴.

18. For those detained, the proposal that Legal Aid should be restricted to challenging detention (e.g. by a bail application) unless the person is also pursuing an asylum claim or appeal is problematic. If Legal Aid is not available to address the underlying immigration problem that is the cause of detention, it may be that any challenge to detention is effectively toothless – i.e. if someone cannot show that his or her removal would be unlawful, he or she may well be unable to show that he or she should be released from detention. Alternatively, if someone is able to successfully challenge detention and get bail, if he or she is then unable to progress his or her immigration case without Legal Aid there is a real risk that the person will simply end up back in detention at a later date.

19. Legal Aid would generally not be available in removal or deportation cases. Unless an asylum claim is made, appeals against removal or deportation would be excluded from Legal Aid. Legal Aid would be available for a judicial review challenge against removal or deportation – but not if removal directions had been made within the last 12 months or there had been an appeal or opportunity to appeal within that period. Unless the UK Border Agency delayed long in a removal or deportation, this would mean that in many cases there would be no Legal Aid at any stage (including judicial review) to

⁴ Further information on the Office of the Immigration Services Commissioner and the regulation of immigration and asylum advice is available at www.oisc.gov.uk

challenge the legality of the UK Border Agency's decision to remove or deport. While asylum claims would be the exception, cases brought only on Article 8 grounds (i.e. cases relating to private and family life, such as cases where the removal would separate someone from partner or children in the UK) would be excluded from Legal Aid.

20. The exclusions from Legal Aid would affect all in the same way, regardless of any particular vulnerability to being unable to adequately pursue a claim or appeal without legal advice or representation. Children would be excluded in the same way as adults. Victims of torture or trafficking would be excluded in the same way as others. The disabled, illiterate, non-English speaking and mentally ill would be excluded in the same way as others. While the Government suggests that immigration cases are not especially complex, the reality is that much immigration law is very complex and evidential requirements are themselves often complicated and demanding. While the Government says that tribunals can assist those without legal representation, the reality is that neither tribunal nor court judges are able to decide cases on anything but the evidence that is put before them and they have no power to seek out evidence when it is not presented.
21. Other individual cases, where Legal Aid would be excluded and which have caused particular concern, are refugee family reunion cases and immigration claims brought by victims of domestic violence.
22. For all cases where Legal Aid is excluded, it will be excluded for all stages the case might reach – including appeals to the Upper Tribunal and higher courts. These appeals are restricted to points of law, but for those who cannot afford a lawyer the Government intends that they must deal with points of law by themselves. This will include when the Government, e.g. the UK Border Agency, appeals against a decision allowing someone's appeal. So, for example, where someone succeeds in their appeal before an immigration judge, the UK Border Agency may pursue an appeal (to the Upper Tribunal, to the Court of Appeal, even to the Supreme Court). The UK Border Agency will

certainly be legally represented, but Legal Aid will not be available at any of these stages.

23. The Government also intends to introduce a 'mandatory telephone gateway' for Legal Aid. This would mean that to get Legal Aid (in those limited cases where the Bill would still provide for it), a person would be required to telephone and, by giving information over the telephone, show that he or she was entitled to Legal Aid advice or assistance. If successful, in many cases, the advice that would then be given would be limited to telephone advice. The Government has made clear that it accepts that asylum advice cannot properly be given over the telephone. It has also said that it will trial the gateway in four areas first (debt, special education needs, discrimination and community care law).

Influencing current developments:

24. The Legal Aid, Sentencing and Punishment of Offenders Bill is currently being considered by Parliament. However, because it covers so many areas, it is proving difficult to ensure that important Legal Aid issues are properly considered, or even considered at all. The more Members of Parliament are caused to think that people (particularly people and organisations in their constituencies) are concerned and will be affected, the greater the chance of getting issues considered – and making some improvements to this Bill.

25. So far, the Government has made one concession. It has been pressured by many individuals and organisations about the situation of migrant victims of domestic violence. It has indicated that some change will be made to keep Legal Aid available for claims under the domestic violence immigration rule. This shows that pressure can make a difference.

26. There are various options for taking action that can contribute to the pressure to make improvements in the Bill, such as:

- individuals or groups can write to their Member of Parliament
- individuals or groups can arrange to see their Member of Parliament (e.g. at his or her constituency surgery)

- individuals or groups can contribute to events (parliamentary meetings, rallies etc. organised by others – see e.g. the Justice for All campaign at <http://www.justice-for-all.org.uk/>)
- individuals or groups can contribute their experiences (e.g. case studies) to others' providing briefings or statements on the effect of the Bill

27. ILPA can provide assistance to organisations, concerned with immigration and asylum Legal Aid, who wish to take action regarding this Bill. This is something that participants in the discussion on 6th October 2011 may want to consider further.

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