ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

30 March 2012

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Legal Aid Reform Team
Ministry of Justice

Dear Sir/Madam

Re: Process for obtaining Excluded Cases Funding

In March, you wrote to ILPA about proposals as to the process for obtaining funding under what is now clause 10 of the Legal Aid, Sentencing and Punishment of Offenders Bill.

This letter is ILPA's response to your proposals, equality impact assessment and invitation to comment. I am sorry that due to pressure of work we have not been able to provide a detailed response to your proposals and equality impact assessment within the timeframe, but we set out some over-riding concerns in this letter.

We have read the response of the Advice Services Alliance and are in broad agreement with the concerns that it raises.

Equality Impact Assessment

In both your covering letter and the assessment, you refer to the objective "[to] *foster good relations between different groups*" to which due regard must be had under section 149(1)(c) of the Equality Act 2010:

> *We have given careful consideration to this objective and do not believe that the proposals should make its attainment more difficult. As part of the overall package of legal aid reform the Government has specifically protected discrimination claims in all areas of civil legal aid, demonstrating its commitment to the principles of equality and to the combating of societal prejudices.*

Ministers have explained the intention and design of the scheme envisaged by clause 10 as follows:

> *The position in the Bill is that exceptional funding should be granted only where it is required by law; that is that denying legal aid would risk a breach of an individual's rights under EU* [European Union] *law or the ECHR* [European Convention on Human Rights]. *Case law has been consistent: that immigration cases do not... involve such a determination and, as such, exceptional funding would not be available.* (*per* Lord Wallace of Tankerness, *Hansard* HL, 18 Jan 2012: Column 668)

While immigration legal aid is not a matter of concern solely for minority race and religious groups, such groups are disproportionately represented among those in need of immigration advice and services for which legal aid is currently provided and for which it will no longer be provided under the provisions of Schedule 1 to the Bill. Migrant community organisations, many of which are and/or are made up of, of minority race and/or religious groups, are very likely adversely to be affected as a result of the effect upon the communities they serve. People may turn to community organisations for advice and assistance in situations where those organisations groups will be unable to help because they are not regulated to give advice and provide services in relation to immigration reason under the Immigration and Asylum Act 1999. The problems for community groups are exacerbated by the shortage of advisers providing free advice to whom they can refer cases. There are very few not-for-profit agencies permitted to do the necessary work beyond level 1 of the Immigration Services

Commissioner's scheme[1] and these are likely to be the only source of free representation aside a small amount of *pro bono* work by solicitors and barristers. The Ministry of Justice will be aware of such concerns given the responses to its original consultation *Proposals for the reform of legal aid in England and Wales*[2] from migrant community organisations such as Al-Hasaniya Moroccan Women's Centre and Midaye Somali Development Centre, along with responses from the Migrant and Refugee Communities Forum and the Migrants' Rights Network.

The devising and implementing of a scheme which sets out to exclude all immigration cases, however complex and whatever the age, language difficulties, learning difficulties, mental or physical illnesses or disabilities of the individual in need of advice will have a disproportionate effect on members of minority ethnic and religious groups and on individuals with protected characteristics under the Equality Act 2010 in need of such advice. It will affect those who by reason of a protected characteristic struggle to understand immigration law and proceedings and to represent themselves in such proceedings. It will affect those who strive to assist them, with a disproportionate effect on migrant community organisations as we and others have suggested. It can be expected to be viewed by many of those disproportionately affected as unjust and mistreatment by society of them and can do nothing to "*encourage* [those persons] *to participate in public life or in any other activity in which participation by such persons is low*" (section 149(3)(c) of the Equality Act 2010). In the circumstances, we cannot accept that you have given "*careful consideration*" to this particular objective; or that the conclusion reached is sustainable.

The effect of the intended approach to clause 10 will be compounded by the very serious risks that the general removal of immigration from legal aid scope will result in:

- significant numbers of persons with good cases to remain in the UK or be reunited in the UK with their family overseas being unable to substantiate their claims because they cannot afford advice and representation;
- the enforced separation, possibly permanently, of such families leading to entrenched isolation and exclusion of those members left alone/behind in the UK;
- a search for alternative advice with
    - some persons falling prey to the incompetent and/or unscrupulous who may hold themselves out as advisers and whom the regulation of immigration advice under the Immigration and Asylum Act 1999 had been intended to exclude;
    - some persons facing exploitation and engaging in work that is high risk to earn money to pay a lawyer.

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The isolation and exclusion of individuals and groups can do nothing to "*tackle prejudice*" or "*promote understanding*" (section 149(5) of the Equality Act 2010). It can be expected to have the reverse effect.

Similar concerns apply in relation to the objective to "*advance equality of opportunity between different groups*" to which due regard must be had under section 149(1)(b) of the Equality Act 2010.

There is no particular consideration of the intended exclusion of immigration cases from exceptional funding in the equality impact assessment. This is in itself a significant omission , which indicates that the assessment is not adequate or complete. This should be corrected.

Clause 10 – the test and its implementation

Article 6 of the European Convention on Human Rights has been interpreted in relation to "*the determination of civil rights and obligations*" not to include immigration proceedings. The leading judgment in Strasbourg has for some years been *Maaouia v France* (2001) 33 EHRR 42. However, even in that case, there was a powerful dissenting joint opinion (of two of the judges) and three concurring opinions (joined by five of the judges) indicating that the views of the court had, at least for some of the judges, moved on since the time of the earlier

[1] See the lists on www.oisc.gov.uk
[2] Ministry of Justice, Cm 7967, November 2010.

rulings on which the majority relied. In 2001, therefore, the judges of the court were not in agreement as to whether immigration proceedings were or where not within the scope of Article 6. Five indicated that certain immigration proceedings might be, whereas others might not. Two were satisfied that they were. We question, therefore, whether the Government is correct that Article 6 does exclude immigration cases and/or whether the Strasbourg court would so find if such a question were to be raised before it now.

We do not accept that the Government is correct that clause 10 is restricted, even insofar as it relates to the European Convention on Human Rights, to Article 6. In *Airey v Ireland* (1979) 2 EHRR 305, the Strasbourg court did not limit its finding of violation of the Convention by the failure to provide legal aid to the applicant to Article 6. The failure by Ireland to make access to the court "*effective*", by reason of Ms Airey's being unable to afford legal advice or representation in a case concerning her private and family life was held to be a breach of Article 8. As such, we do not accept that the Government's intention that clause 10 exclude immigration cases by way of its limitation to Article 6 is correct.

There will also be circumstances in which failure to make funding available would breach enforceable EU rights, for example under European free movement law, but also under the Charter of Fundamental Rights of the European Union.

In the circumstances, in addition to our concerns at the failure of the equalities impact assessment to address the matters to which we have drawn attention, we are also concerned that the assessment is based on false premises as to the number and type of cases for which exceptional cases funding will be required.

To consider one group for whom there may be particularly strong grounds for exceptional cases funding: that the number of separated children with non-asylum immigration problems, including those who have formerly claimed and been refused asylum, and those who have been abandoned in the UK, is likely to be substantial. It is likely to be considerably larger than has been appreciated to date. We refer you to our letter of 15 March 2012 to the Advocate General for Scotland, the Rt Hon the Lord Wallace of Tankerness QC, following the debate at House of Lords Report, a copy of which accompanies this letter.

More generally, given that immigration advice and services are regulated and there are few not-for-profit service providers, who are likely to be the main or only source of those giving free advice, who are within the Office of the Immigration Services Commissioner scheme at levels 2 or 3 (further information is given in the letter to Lord Wallace), it is likely to be that case that no alternative source of immigration advice and representation is available to many of those who cannot afford to pay for it.

Final observations

We add to the general concerns expressed by the Advice Services Alliance in its response that ,among the many difficulties we and they anticipate with what is proposed, the problem of the serious prejudice to individuals if administrative and/or judicial proceedings are not stayed while exceptional funding applications are being pursued and determined is of particular significance. This does not appear to have been considered in the proposals or the equalities impact assessment. This concern is likely to be compounded in immigration matters by reason of the very short timescales in immigration appeals,[3] the handling by the UK Border Agency of certain immigration proceedings and the potential complexity of the unresolved matters of statutory interpretation to which we have referred.

Yours sincerely,

Alison Harvey
General Secretary
ILPA

[3] See The Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI2005/230 (L.1)) and The Tribunal Procedure (Upper Tribunal) Rules 2008 – SI 2698/2008.