

## **Update to cuts/changes to legal aid for immigration advice:**

1. This note accompanies a discussion at the Ealing Advice Forum on 16<sup>th</sup> May at Perceval House, West London concerning the ongoing changes to legal aid provision for immigration and asylum.
2. A key development informing this discussion is the enactment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on 1<sup>st</sup> May. It is intended that the Act's legal aid provisions will be brought into effect in April 2013. Between now and then, the Legal Services Commission will be conducting further tender rounds for legal aid contracts in various areas, including 'immigration and asylum'. There are, therefore, three immediate matters of concern:
  - a. For what kinds of advice and representation will legal aid be available from April 2013?
  - b. Who will be undertaking legal aid work from April 2013?
  - c. In the absence of legal aid, from whom will advice and representation be available from April 2013?
3. While the focus here is April 2013, it is not to be forgotten that it is already the case that some have difficulty in finding competent advice and representation; and many advice providers are facing other financial constraints, including cuts in local authority funding.

### ***For what kinds of advice and representation will legal aid be available from April 2013?***

4. The focus here is immigration and asylum. However, the legal aid cuts will affect many areas of civil legal aid. Areas in which legal aid will be largely excluded include welfare benefits (save for appeals on points of law to the Upper Tribunal, Court of

Appeal or Supreme Court),<sup>1</sup> housing (save for certain matters such as eviction, possession orders, certain homelessness provisions and certain matters relating to risk to health or safety in rented accommodation), employment (save as to equalities or discrimination) and debt.

5. As regards immigration and asylum, legal aid will remain available for (this is often referred to as legal aid scope):
  - a. Asylum cases (e.g. claims under the 1951 Refugee Convention, and claims under Article 3, 1950 European Convention on Human Rights (right not to be subjected to torture, inhuman or degrading treatment or punishment)) – advice and representation. [*But not for refugee family reunion cases.*]
  - b. Asylum support cases (only in relation to claims or appeals which include a claim for housing) – not for representation at appeal hearing.
  - c. Certain domestic violence related cases (where the immigration status of a migrant victim of domestic violence is dependent on his or her partner, and that partner is either a British citizen, settled person (i.e. has indefinite leave) or exercising European free movement rights) – advice and representation.
  - d. Victims of human trafficking (where the person is recognised as a victim or potential victim of trafficking via the National Referral Mechanism) – advice and representation.
  - e. Challenges to immigration detention (e.g. bail applications) – advice and representation.
  - f. Judicial review (but not if the same or substantially the same matter has been rejected on appeal or judicial review claim in the previous 12 months; and

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<sup>1</sup> The Government has also agreed to consider whether there is a way that appeals before the First-tier Tribunal (Social Entitlement Chamber), which raise points of law, can be identified so as to permit legal aid to be made available for these.

not for challenges to removal directions made following a decision to remove, or conclusion of appeal against such a decision, in the previous 12 months) – advice and representation.

6. Legal aid will not otherwise be available in immigration and asylum cases. This will particularly affect:

- a. People facing removal or deportation, where no asylum claim is made.
- b. People with claims under Article 8 of the 1950 European Convention on Human Rights (right to respect for private and family life).
- c. Children in non-asylum immigration proceedings, including separated children applying to extend a grant of discretionary leave (but not or no longer making an asylum claim) and abandoned children needing to regularise their stay in the UK.

*[d. Refugees (and those granted humanitarian protection) seeking refugee family reunion.]*

7. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (section 10) includes provision for exceptional cases funding in certain circumstances where a case is out of legal aid scope but exceptionally requires legal aid because of the particular needs of the individual. However, the Government has indicated that this funding will not be available in immigration cases. Thus, a person's age, mental or physical health or disability, detention or imprisonment, lack of English or other disadvantage will not, according to the Government's intentions, be relevant to whether legal aid should be available in a case which does not fall within legal aid scope.

***Who will be undertaking legal aid work from April 2013?***

8. The answer remains unknown. Those who wish to do so will be required to bid this year for a legal aid contract. Indeed, first, they are to be required to apply for pre-qualification – a process which is about to begin. Questions that arise include – Who will decide to bid? How will bids be assessed? Will such assessment include any effective measure or criterion regarding quality? Will those who bid receive sufficient volume of work (matter starts) to make accepting a contract sustainable?
9. Successive changes to legal aid provision over the past decade have seen several good quality providers fall away – whether choosing to reduce or end their legal aid work, or not being awarded any or any sufficient legal aid contact, or finding the financial constraints unsustainable.

***In the absence of legal aid, from whom will advice and representation be available from April 2013?***

10. Immigration advice and representation is regulated in a way in which other areas are not. The Immigration and Asylum Act 1999 established that regulatory regime, which makes it a criminal offence to provide immigration advice or services in the course of a business (whether or not for profit) unless the provider is regulated (whether as part of a designated professional body, e.g. solicitors; or by the Office of the Immigration Services Commissioner (OISC)). The OISC scheme is structured into three levels – level 1 (basic), level 2 (casework) and level 3 (tribunal advocacy).
11. Citizens Advice Bureaux (CABx) have a general exemption at level 1. However, there are relatively few level 2 not-for-profit providers. Level 2 is required to do work on removals and deportations, claims outside the rules (such as Article 8 cases), and the cases of overstayers and illegal entrants. Level 3 is required to represent at a tribunal appeal hearing. Unless there is a very substantial shift in relation to regulation and the not-for-profit sector, this sector will not be able (and not be permitted) to mitigate the loss of legal aid for non-asylum immigration cases.

Indeed, the interest of many in the not-for-profit sector remains asylum, making it even less likely that this sector will mitigate the loss of legal aid.

12. The Government has suggested that social workers can substitute for lawyers in separated children's non-asylum cases, and indicated that it will consider with OISC whether social workers can be exempted (perhaps in the same way as CABx). There has been much criticism of this suggestion. However, local authorities may find themselves obligated to obtain and pay for legal advice and representation for separated children. If so, there is a risk that the cost of this exceeds the savings to the legal aid budget, as legal advice and representation may not be available at legal aid rates.
13. It may be that generalist advice agencies and migrant community organisations are put under increased pressure. This may be because individuals, who cannot afford to pay for legal advice, come to these agencies and organisations with immigration problems, for which they can no longer obtain assistance elsewhere. This may also be because problems, such as welfare benefits and housing, are often complicated by the person's immigration status, and assistance in relation to that is no longer available. In either scenario, the agency or organisation will need to be careful to avoid offering immigration advice or services unless it is appropriately regulated so as to do this work.
14. At various times, the Government has suggested that generalist advice agencies, law centres and *pro bono* work will mitigate the loss of legal aid. It is wholly unclear how the Government envisages that these providers will be able to do so. The Government's suggestions have generally failed to acknowledge or understand the regulation of immigration advice and services, the wider financial pressure that law centres and others are under, the dependency upon legal aid of many law centres and others, or the relationship between *pro bono* work and securely funded basic advice and representation provision.
15. One source of advice and representation in every community, which is not constrained by the regulation of immigration advice and services, is the constituency

MP. Many MPs already have a substantial immigration caseload. It can be expected that such caseloads will increase.

16. Of course, just as in relation to legal aid provision, a critical issue in relation to non-legal aid advice and representation is quality. The Government insists that non-asylum immigration cases are generally straightforward. ILPA produced a one page briefing note on complexity in immigration cases for debates on the Legal Aid Bill in the House of Lords. That note is appended. As Lord Pannick QC said, on the last day of debate in the House of Lords (*Hansard* HL, 25 Apr 2012 : Column 1797):

*...the limits on the scope of legal aid imposed by Part 1 will hit hardest the weakest and most impoverished sections of our society, often on complex questions of law such as are raised by immigration law.*

#### **Concluding observations:**

17. It is difficult to present anything but a bleak prospect. However, there is a risk that such bleakness leads to paralysis or despair, a belief that there is simply nothing to be done. Many of those providing frontline services, including migrant community organisations, may not have such luxury in the face of growing demands from their communities and service users. It must be recalled that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (section 8) includes the power to reinstate legal aid in areas from which it is to be withdrawn. If pressure is to be successfully brought to bear to achieve that goal, it will be necessary that the effects of the withdrawal of legal aid do not pass in silence. These effects need to be recorded and collated, and made a part of co-ordinated, strategic and effective advocacy and influencing work. ILPA's work on legal aid advocacy has not ended with the passing of this Act.
18. On the other hand, it must be acknowledged that many service providers may struggle to cope with addressing immediate need. Moreover, some of those who will in future be excluded from legal aid may simply disappear 'off the radar'. It is highly likely that the effect of legal aid cuts will not be wholly or immediately visible. It is not uncommon for migrants, their families or friends, to now seek to pay for

immigration advice and representation in circumstances where legal aid ought to be available. The experience of those that do pay privately is mixed, and while there are several good quality immigration advisers, who only do charged work, the experience of many migrants is one of paying substantial sums of money, which they can ill-afford, for immigration advice or representation of little or no value, or which is damaging to their interests. The risk is that this continues or increases with the withdrawal of legal aid; and others may be lured or forced into dangerous or exploitative situations in seeking to secure money to pay for advice.

**Information:**

19. Please note that ILPA's information service is free. It does not provide immigration advice on individual cases, but provides written updates and short explanations of developments and aspects of immigration, asylum and nationality law, policy and practice. These are available in the 'Info service' section of the ILPA website at [www.ilpa.org.uk](http://www.ilpa.org.uk) and anyone can 'subscribe' (for free) to receive immigration updates and information sheets by email (approximately monthly).

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15 May 2012