

## LEGAL AID – PROPOSED CUTS

*“I believe that there is much in our British system of justice of which we can all be proud. Its defect has been that it has not been equally available to everyone and has depended upon the resources and advice for which one can pay. It has been said by one famous judge that justice is available to the public in the same way as the Ritz Hotel is available,\* and on the same terms.” Arthur Skeffington MP, HC Deb 26 October 2010 1954 v 531 cc 1889-98 (in a debate on the Legal Advice and Assistance Act 1949)<sup>1</sup>*

### THE CUTS PROPOSED

The Ministry of Justice is consulting on cutting the Legal Aid budget by £350 million. The consultation can be found at [www.justice.gov.uk/consultations/legal-aid-reform-151110.htm](http://www.justice.gov.uk/consultations/legal-aid-reform-151110.htm) The Immigration Law Practitioners' Association (ILPA) has expertise in immigration, asylum and nationality law and this briefing focuses on those areas. But the proposals will affect many other areas of law: housing, social welfare, family, clinical negligence. Anyone who works with people who are poor is likely to come across people affected by these cuts. There are three main ways in which changes are being made

- (i) Remove legal aid from certain types of case
- (ii) Lower the income levels below which people qualify for legal aid
- (iii) Reduce payments to legal representatives.

It is proposed to remove all legal aid for immigration (as opposed to asylum cases) cases. Legal aid would be cut for both the stage of making an application to the Home Office and any appeals against refusal. These include cases where arguments are based on the right to family and private life under Article 8 of the European Convention on Human Rights and where the person faces removal/deportation from the UK. The exceptions would be that people in immigration detention would still get legal aid to challenge their detention (although not to help with their immigration cases) and national security cases before Special Immigration Appeals Commission would still get legal aid. It is also proposed to cut legal aid from asylum support cases (applications from people seeking asylum for housing and subsistence). Cuts to other areas of legal aid will affect poor migrants and refugees, as they will affect all who are poor as will the lowering of the income levels below which people qualify for legal aid.

There are exceptions for claims for compensation against public bodies involving significant human rights issues and where a Government department has done something particularly wrong. These are stated to be for use only exceptionally. There is also mention of a more general human rights exception but it is suggested that legal aid would not be available for claims involving Article 8 (right to private and family life) including before the Immigration and Asylum Chamber of the First Tier Tribunal because, it is suggested, people can represent themselves. While it is clear that it is intended to fund cases of people who are poor and face domestic violence, it is unclear whether immigration cases involving domestic violence will be funded. Rules exist to allow those whose relationships break down because of domestic violence to remain in the UK, in an effort to ensure that people do not stay in abusive relationships because they fear removal. These rules provide essential protection.

### WHAT CAN I DO?

Lawyers, law centres and those giving advice are very concerned about the cuts but they are likely to be seen as self-interested. There is a need for the voices of those who are poor, or who work with people who are poor, to be heard.

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<sup>1</sup> US judge, Judge Sturgess *“Justice is open to everyone in the same way as the Ritz Hotel”*

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- **Respond to the consultation.** But do not wait for 14 February, send a letter with your headline concerns to the Minister soon and follow up with more details later.
- **Encourage others to respond, to ensure a range of voices are heard.** Talk to others who are, or who work with, or are concerned about, people who are poor, ensuring they understand the arguments and encouraging them to speak up. There are many perspectives – those who provide material support who are aware of the importance of advice, those who do *pro bono* work and understand why it cannot fill the gap, and those who do private work in immigration and can speak for the complexity of this area of the law with no allegation of self-interest. These voices need to be heard – but are unlikely to be raised without your encouragement.
- **Provide examples of real cases to all those who are advocating, or whom you urge to advocate, to protect legal aid.** Lawyers and advice centres do not always see people after the case has been won, other organisations may be able to tell the story of ‘what happened next’ and thus show more clearly why legal aid made a difference to a person’s life.

## ARGUMENTS AGAINST CUTTING LEGAL AID

### Legal aid is an insurance policy against abuse of power and incompetence

Legal aid is the State’s insurance policy that laws that affect poor people are put into effect in the way intended. Government departments are powerful; those who are affected by their decisions and are poor are not. Legal aid is an essential safeguard against inequality of arms and also serves to maintain scrutiny of those Government departments. This latter is about justice, but it is also about money – scrutiny is one way to try to ensure that departments spend their money doing what they should and do not waste it.

### The real cost savings lie in implementation of the “polluter pays” principle

If the Government really wants to save money then rather than looking to the legal aid budget it should look to the departments making the decisions. If a department wants to pass lots of laws or wants to change procedures, it should meet the costs of these for the legal aid budget and the court system. If it passes laws in haste, or implements new procedures, without thinking them through, it should meet the costs generated for legal aid and for the courts by those bad laws. If its poor decision-making and delay lead to challenges, it should meet the costs to the legal aid system and to the courts of those challenges. If its conduct of any litigation arising out of a case causes costs, it should meet those costs. The UK Border Agency does implement laws and procedures in haste, is notorious for its delays, and has been heavily criticised by the courts for both poor decisions and its conduct in litigation. When asked by ILPA in a freedom of information request what it spent on litigation, it replied that it did not know, and suggested we ask Treasury Solicitors (the Government solicitors) as they might have an idea.

In immigration there have been Acts of Parliament in 1993, 1996, 1999, 2002, 2005, 2006, 2007, 2008 and 2009, plus many more regulations and rule changes, many of which have been hastily devised and led to all sorts of confusion. The behaviour of the UK Border Agency has driven judges to despair. Lord Justice Ward, in the Court of Appeal in *See e.g. MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229,<sup>2</sup> said

*“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 whelk store?”*

In *Muuse v SSHD* [2010] EWCA 453<sup>3</sup> the Court of Appeal listed some of the things the UK Border Agency had done wrong in that case. There are 12 points, four of which are set out below:

<sup>2</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1229.html>

<sup>3</sup> <http://www.bailii.org/ew/cases/EWCA/Civ/2010/453.html>

- I. *The junior officials acted in an unconstitutional and arbitrary manner that resulted in the imprisonment of Mr Muuse for over three months. The outrageous nature of the conduct is exhibited partly by the way in which they treated Mr Muuse and ignored his protests that he was Dutch, partly by the manifest incompetence in which they acted throughout and partly by their failure to take the most elementary steps to check his documents which they held:*
  - i) *The actions of the junior officials who exercised the power to imprison Mr Muuse and keep him imprisoned cannot be explained on any basis other than that the officials were incompetent to exercise such powers on the assumption favourable to them (which I have made for the reasons already given) that they were not recklessly indifferent to the legality of their actions.*
  - ii) *They disobeyed the order of the court to release Mr Muuse for no reason.*
  - iii) *They did not consider the conclusive evidence they held as to his nationality – his ID card and passport – and their other records. As a Dutch national and a citizen of the EU he could not, in the circumstances, be deported.*

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*xi) Although the judge found that his detention was not the result of racial discrimination, he found that the detention to which Mr Muuse was subjected was aggravated by racist remarks such as "look at you, you are an African" and suggestions that he should go back to Africa. Treatment of this kind which is calculated to degrade and humiliate is typical of abuses which occur when power is exercised by those who are not competent to exercise that power."<sup>4</sup>*

Tackling the behaviour of Government departments would result in savings not only in immigration cases, but in cases that the Government proposes should still receive legal aid funding, asylum cases, and also in cases where people do not receive legal aid but are paying their own legal costs. The savings could be huge.

Government departments are supposed to carry out legal aid impact assessments, and assessments of the effect on the courts, when they bring in new laws and procedures, to ensure that the costs are assessed and legal aid and the courts compensated. If this were done properly it would result in a lot of money flowing into the Ministry of Justice. First, there would be an incentive to decide whether it is appropriate to bring in new laws or procedures, especially in haste, with provisions drafted in haste and the worse for that. Second, there would be an incentive to improve quality. And thirdly, it is assuredly to be hoped that the Home Office's conduct as a litigant would improve – producing savings not only for legal aid but for the courts budget. To make savings in the Ministry of Justice, go to the UK Border Agency. Ministers say that all Government departments must make cuts, but the problem is that this is happening in silos, no department is looking at savings it can make to another department's budget.

### **People's human rights will be violated**

The Government recognises in its consultation paper that immigration cases involve human rights, especially the right to family and private life (Article 8 of the European Court of Human Rights). Its only answer to this is to say that people can represent themselves at appeals. These are cases about whether people are allowed to join spouses, partners and parents; about whether people will have to leave the country in which they have lived for years, sometimes for decades, leaving close family members behind. They are cases about whether a person who has fled domestic slavery can live safely in the UK away from those who abused them. They are cases about whether a person is entitled to work and can thus support themselves or to a roof over their head and something to eat. They are cases where a wrong decision, based on a misunderstanding of the evidence, threatens to change the course of a person's whole life. The law in this area is voluminous and extremely complicated. The Supreme Court, and its predecessor, the House of Lords, whose work is confined

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<sup>4</sup> For many more examples, see [www.ilpa.org.uk/submissions/menu.html](http://www.ilpa.org.uk/submissions/menu.html), e.g. ILPA's submissions to the Joint Committee on Human Rights *Review of Government's response to judgments identifying breaches of human rights in the UK*, 22/10/2010 and *Implementation of Strasbourg Judgments and Declarations of Incompatibility*, 30/09/2010

to deciding the most complex points of law, have given more judgments on Article 8 in recent years than on almost any other area of law.

Add to this that those affected include people unfamiliar with UK laws and procedures, with very limited or no support networks in the UK, with little or no understanding of what they should be able to expect from a Government department, let alone what they get from the most labyrinthine of Government departments, the UK Border Agency. Add to this that that like any other group of people, they include those with disabilities, in profound distress, ill, elderly, young and/or with multiple difficulties in their lives and those who face racism and xenophobia. The Government says that immigration cases are about people's choices freely made. Closer examination shows that this is rarely true of those poor enough to qualify for legal aid.

### **Where will the cases go?**

Because immigration cases are such serious cases, and because the conduct of the UK Border Agency frequently leaves much to be desired, there are likely to be challenges to decisions to refuse funding. It is likely that many of these will go to court. It is the case under UK law that there is a right to challenge an administrative decision against which you have no effective appeal, before a judge in the High Court (judicial review). There are likely to be many challenges arguing that unrepresented people in these complex cases have no effective right of appeal before the Immigration and Asylum Chambers in the tribunals.

There are also concerns that people who might otherwise have relied on their immigration case will claim asylum as the only way of putting forward their arguments that they be allowed to stay. Would it not be easier, simpler and cheaper to provide legal aid in the first place so that people have an effective right of appeal and a chance of getting a final decision within a reasonable time?

### **Where will the people go?**

It is a crime to give immigration advice in the course of a business whether or not for profit unless the advisor is a solicitor, barrister, or registered with the Office of the Immigration Services Commissioner. So, deny legal aid and only those voluntary organisations registered with the Office of the Immigration Services Commissioner (OISC) will be able to help. Giving legal advice to migrants and refugees is a heavy responsibility and involves getting to grips with complex laws – many voluntary organisations will feel that registering to give immigration advice and maintaining the required standards is not something they can take on. At which point, they will not be able to assist. There is already a lot of *pro bono* work by solicitors and barristers for migrants and refugees. For example, there is already no legal aid for asylum support appeals, and many lawyers provide representation *pro bono*. Many people will go to MPs, as MPs and their caseworkers are not required to register with the OISC. There is concern that people who simply cannot manage without representation will put themselves at risk in seeking to raise money to pay for representation.

People who know little of what is supposed to happen are vulnerable to exploitation, including by those who pretend that they are qualified to give legal advice to make a profit. The best protection against bad legal advice is good legal advice, for those who cannot pay that means good legal advice funded by legal aid.

### **JUST ONE CASE** (*Name has been changed*)

Alegria lived with her husband and their child in the UK. When her son was seven, her two year probationary period for marriage came to an end. Her husband refused to support her application for settlement and left her for someone else. She was left to work to support her son and mother-in-law. She held two jobs as a cleaner. Initially an application for settlement was made on the basis of a concession relating to her child's length of residence in the UK. This was returned because no fee had been paid but was not considered properly. By this time Alegria's probationary leave as a

spouse had expired. A further application on the grounds of right to family life under Article 8 of the ECHR was made. It was refused, with no right of appeal because it was made 'out of time' and as a result she was told that she no longer had permission to work to support her family. Legal aid was granted for a judicial review of the failure to grant a right of appeal or to consider the human rights arguments. The lawyers registered Alegria's son as British. The court granted the judicial review permission to proceed and only at this point did the UK Border Agency settle, granting her Indefinite Leave to Remain. Without legal aid, Alegria and her son would not have been able to regularise their stay or remain together. She would never have been able to afford to pay for legal advice and because her situation was complex and involved High Court action, she could never have done it without legal advice.

Most of us have 'just one case' like this. Those cases need to be shared....

### **About ILPA**

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency, Ministry of Justice and other 'stakeholder' and advisory groups.

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