ILPA Briefing for the Justice Committee Evidence session with the Secretary of State for Justice re legal aid green paper

Introduction

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, and other, 'advisory groups. ILPA is a member of the Civil Contracts Consultative Group set up following the litigation between the Law Society and the Legal Services Commission and the Legal Services Commission Immigration Representative Bodies group. ILPA has also provided evidence to the Justice Committee and its predecessors on the question of legal aid as it affects immigration and asylum law.

ILPA has drawn on its published and circulated material about the cuts in preparing this briefing.

The cuts as they would affect immigration, asylum and nationality law

What would remain within the scope of legal aid?

- Asylum cases. These include claims for protection under the 1951 UN Convention relating to the status of refugees and cases where there is serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c) of the EU Qualification Directive). **We should welcome confirmation that claims based on Article 3 of the European Convention on Human Rights (prohibition on torture and inhuman or degrading treatment or punishment) remain within scope**
- Immigration detention cases (relating only to issues of detention and/or bail not a detainee's substantive immigration case)
- Cases before the Special Immigration Appeals Commission
- Public law
- Certain money claims against public authorities, for example involving breaches of human rights, abuse of power or extreme cases of negligence
- Mixed cases (i.e. part of the case is within scope of legal aid)
- Discrimination cases

What would be cut from the scope of legal aid?

- All immigration and nationality cases, including appeals to the higher courts. We note that there is an exception made in the paper for family cases involving domestic violence. **We should welcome confirmation that immigration cases involving domestic violence remain within scope.** 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.
- Certain money claims against public bodies not falling within the criteria for inclusion

- Welfare-related issues arising in immigration and asylum cases including applications for asylum support at the initial stage (there is already no legal aid for appeals to the Asylum Support Tribunal)

General proposals affecting asylum and immigration

- Eligibility thresholds will be changed – fewer people will qualify for legal aid
- Rates of funding for legal representatives will be cut
- There will be a telephone gateway which will control access to representatives providing advice and representation funded by legal aid.

Why this matters

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.

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 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.

Legal aid for immigration and asylum support cases does not support people's lifestyle choices. The immigration law applicable to persons who qualify for legal aid has little or no patience with these. Immigration legal aid is used to provide protection where otherwise people might be unable to live anywhere in the world with partners or children, or would be forced to leave the place where they grew up or have long made their home, where they are destitute, homeless or hungry, or where family members would be left in dangerous situations. These are not matters that most people, whether subject to immigration control or not, regard as lifestyle choices, but rather as the most important elements of their existence. It is used to provide redress against official mistakes, incompetence or misconduct and the effect of decisions that are in not in accordance with the law.

Matters worthy of further investigation

A 'comprehensive' spending review?

Tackling the behaviour of Government departments would result in savings not only in cases it is proposed to take out of the scope of legal aid, but in cases that the Government proposes should still receive legal aid funding and also in cases where people already do not receive legal aid but are paying their own legal costs. The savings, which would benefit individuals, could be huge. While other departments are looking to make cuts in their own budgets, we are aware of no evidence that suggests that the UK Border Agency is examining how it could take steps that would reduce expenditure in the Ministry of Justice, whether on legal aid or in the courts.

Moreover, legal aid plays an essential part in ensuring that Government departments spend money wisely, and as parliament intended.

Instead of a comprehensive spending review, we have an approach to cuts legal aid that could increase total Government expenditure, and will place all the burden of cuts on the poor.

Taking the UK Border Agency as an example, a 'polluter pays' principle, whereby the department that generates costs for the legal aid budget and for the courts, meets those costs, would tackle:

- The need for a department to consider whether it is appropriate to bring in new laws or procedures, especially in haste, with provisions drafted in haste and the worse for that.
- The quality of decision-making
- The Home Office's conduct as a litigant

This would produce savings not only in the Ministry of Justice but in the Home Office.

We should appreciate clarification from the Secretary of State as to the steps he is taking to ensure that the Ministry of Justice is in a better position to identify the need for, and demand, legal aid impact assessments and to challenge impact assessments produced by departments when these are inadequate?

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,[1] 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?"*

Moving costs around

Complex questions of immigration, asylum and nationality law will not go away but will fall to be dealt with in other parts of the system. For example:

- Detention cases often involve consideration of a deportation/removal case where the person is being detained against removal.
- People who might otherwise not have advanced a claim for asylum may do so
- It is likely that will be an increase in public law challenges (before the High Court) where otherwise the matter might have been dealt with, at less expense, before a tribunal
- Challenges to refusals to fund a case will be an area of litigation in themselves, and may prove more costly than funding the cases directly.

An oversight – a dearth of other advice options

To give immigration advice in the course of a business 'whether or not for profit' an advisor must be a solicitor, barrister, or regulated by the Office of the Immigration Services Commissioner. When ILPA raised this it appeared that it was not a matter that had been considered by the Ministry of Justice. If legal aid is cut, then unless voluntary organisations take on the responsibilities and expense of becoming regulated advisors, then those too

[1] http://www.bailii.org/ew/cases/EWCA/Civ/2009/1229.html

poor to pay will not receive assistance. Among those likely to be affected by this are MPs and their caseworkers, who are not regarded as giving advice *'in the course of a business'* and will be one of the few sources of advice on immigration left. ILPA has long strongly supported the notion of independent regulation of those giving immigration advice. But is perhaps sometimes forgotten that the greatest protection against poor advice is access to high quality advice and that protecting the pool of excellence and competence in legal representation is the first defence for clients. Those who cannot afford to pay for such advice are vulnerable to exploitation as they seek to find the necessary funds. They are also vulnerable to those giving poor quality advice.

Fallacious arguments

The Green Paper relies on some arguments that simply cannot be substantiated. It states:

The argument that these are matters of personal choice

> *"4.19 However, there is a range of other cases which can very often result from a litigant's own decisions in their personal life, for example, immigration cases resulting from decisions about living, studying or working in the United Kingdom. Where the issue is one which arises from the litigant's own personal choices, we are less likely to consider that these cases concern issues of the highest importance."*

Many of those studying or working in the UK will be excluded from legal aid because of the eligibility tests. Those who meet the current financial criteria for legal aid are likely to have extremely limited 'personal choices'. Business matters are already excluded from the scope of legal aid. As to living in the UK, these cases often concern Article 8 of the European Convention on Human Rights, the right to family and private life. They are about whether a person can be joined by a spouse, partner, child or elderly dependent relative. They are about what happens to a person when a relationship breaks down. They are about cases of children whose claims for asylum having failed, cannot be returned to their country of origin because their safety and welfare cannot be guaranteed. There are about people who face removal from a country where they have lived for many years, including since childhood.

The argument that people can represent themselves

The Green Paper states

> *"4.203 ...We recognise that there will be cases in which important issues arise, such as the right to a family life. However, individuals will generally be able to represent themselves (with the assistance of an interpreter where necessary) in tribunals that are designed to be simple to navigate."*

The Supreme Court, and its predecessor, the House of Lords, whose work is confined 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.

We recall the recent comments of Lord Justice Longmore in *AA(Nigeria) v SSHD* [2010] EWCA Civ 773:

> *"I am left perplexed and concerned how any individual whom the Rules affect (especially perhaps a student, like Mr A, who is seeking a variation of his leave to remain in the United Kingdom) can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done".* (Para 87)

The Hon Mr Justice Blake, speaking at the Annual Conference of the Office of the Immigration Services Commissioner on 6 December 2010, noted how the Tribunal had benefited from having Lord Justice Sedley, a Court of Appeal judge, sit in the tribunal including on a 'devilishly complicated' Article 8 case.[2] He observed that the immigration judges of the tribunal need competent representatives to enable them to do their task and that targeted grounds of appeal enable the tribunal to do its job better. He recalled the hierarchy of laws with which the tribunal is dealing: domestic law, the cases of the European Court of Justice and those of the European Court of Human Rights.

In his speech, Mr Justice Blake identified case management as critical. His predecessors have made the same points. The late Mr Justice Hodge, giving evidence before the Constitutional Affairs Committee, stated

> *" The AIT and its judges, whenever they have been asked, have always said that we value representation and we want as many people to be legally represented as possible, and whenever we discuss these matters with the Legal Services Commission, which we do periodically, that is entirely what we say....—the change in representation has been very much driven by the Legal Services Commission's worries about the total cost of their budget rather than anything to do with us."*[3]

Mr Justice Collins was giving evidence in that same session and stated of litigants in person *"...it makes it more difficult to give proper consideration when you do not have the evidence put before you in the form that it ought to be put."*

The tribunals may have been designed to be simple to navigate, but they are not. There is a plethora of statute law, caselaw, regulations rules and guidance, relating not only to substantive matters but also to procedure. Changes in the law are frequent, necessitating understanding of previous provisions and transitional provisions. The weight of precedent, from the European Court of Justice, the European Court of Human Rights and the Higher Courts, is heavy. It overlays a system that largely defies comprehension and is not susceptible of interpretation by application of principles of common sense. The comments of the judiciary testify to this. Lord Scott declared in *Chikwamba v Secretary of State for the Home Department* [2008] 1 WLR 1420, [2008] UKHL 40:

> *"It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it."*

The then Lord Justice Woolf in *R (Veli Tum) v Secretary of State for the Home Department* [2004] EWCA Civ 788 stated

> *"... it is important to appreciate that under s 11 of the Immigration Act 1971 a person can be admitted into this country while an application is being considered, without being regarded from the legal point of view as having entered into this country. Davis J, not unreasonably in the court below, described this as an Alice in Wonderland" situation. Although that description is appropriate, the provisions of s 11 are of value because it*

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[2] *FH (Post-flight spouses) Iran* [2010] UKUT 275 (IAC), see http://www.bailii.org/uk/cases/UKUT/IAC/2010/00275_ukut_iac_2010_fh_iran.html

[3] Oral evidence Taken before the Constitutional Affairs Committee on Tuesday 21 March 2006, see http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm

enables a person who makes a claim to enter this country not to be detained but to be released temporarily while his position is considered."

The Court of Appeal in *Lekpo-Bozua v London Borough of Hackney & Ors* [2010] EWCA Civ 909 described the provisions of domestic legislation pertaining to European free movement law as '*labyrinthine*', an expression also used by the Court of Appeal in *Kaczmarek v Secretary of State for Work & Pensions [2008] EWCA Civ 1310:*

"I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. The provisions are labyrinthine but, to cut a convoluted story short, she was a "person from abroad" pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 and, although her presence in this country was lawful – unless and until removal pursuant to regulation 21(3) of the Immigration (European Economic Area) Regulations 2000 – she did not enjoy the right to reside here at the material time because she was not a "qualified person" as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. A more comprehensive tour of the labyrinth can be found in Abdirahman"

In the influential study, Tribunals for diverse users,[4] Professor Hazel Genn and her team observed

"...there are limits to the ability of tribunals to compensate for users' difficulties in presenting their case. In some circumstances, an advocate is not only helpful to the user and the tribunal, but may be crucial to procedural and substantive fairness"

There is no legal aid for hearings before the Asylum Support Tribunal and the tribunal has expressed concern at the effect of this,[5] as has the Joint committee on Human Rights.[6] Citizens' Advice has conducted two studies of asylum support appeals. In 2007 it looked at 223 cases and found that among the 36 represented appellants, the success rate was 58 per cent, but among the 187 unrepresented appellants it was 29 per cent. For its June 2009 Evidence Briefing *Supporting justice: The case for publicly-funded legal representation before the Asylum Support Tribunal* it looked at 616 appeals and wrote

"Among all 616 appeals the success rate was 45.3 per cent. And it must be noted that, in the six-month period covered by our study, October 2008 to March 2009, the UKBA withdrew (or conceded) no fewer than 277 (27 per cent) of the 1,027 new appeals lodged with the AST, before they reached an oral hearing or paper-only decision. Indeed, including appeals conceded by the UKBA, the AST's own monthly outcome statistics show an overall success rate, in the six-month period October 2008 to March 2009, of 54.9 per cent. Such an overall success rate is strongly suggestive of poor quality (or, at least, inadequately informed) initial decision-making by the UKBA."

It looked at 115 appeals where the Asylum Support Appeals Project provided represented.

"Of these 115 appeals, 82 were allowed or remitted to the UKBA for a fresh decision – a success rate of 71.3 per cent. Including the 46 cases in which the ASAP gave advice to the appellant immediately prior to the hearing, but did not represent him or her at the hearing, the success rate among the 161 appellants who received pre-hearing advice from the ASAP,

[4] Genn, H., Lever, B. and Gray, L., DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice), January 2006

[5] See, in particular, the Asylum Support Adjudicators annual reports for 2000-01 and 2004-05

[6] Treatment of Asylum Seekers, Joint Committee on Human Rights, Tenth Report of Session 2006-07, HL 81-1, HC 60-1

or were legally represented at the hearing, was 60.9 per cent. Among the 316 oral appellants who received neither representation at the hearing nor prehearing advice from ASAP, however, the success rate was just 38.6 per cent."

On 17 November, the Chair of the Administrative Justice and Tribunals Council spoke on Radio 4's *Today* programme,[7] speaking on *Today* (R4 – see), highlighted the failure of public bodies to get decisions right first time across many areas of public decision-making. He identified that, in immigration, there was a 37% success rate on appeal; and stressed that this (and similar figures in other areas) indicated the degree to which public bodies were getting decisions wrong. He expressed concern that this was only the tip of the iceberg because there were many more decisions made by public bodies that were not brought before tribunals, many of which would be correct decisions but others he feared would be wrong but just not remedied. He also voiced concern that public bodies fail to learn the lessons of cases brought to tribunals, perhaps putting the matter right in the individual case but repeating the same mistake in other cases. All this reflects ILPA's experience.

The Committee may wish to ask the Secretary of State how justice can be delivered in these circumstances. It may wish to ask how case management can be delivered in tribunals where litigants are litigants in person.

Sustainable legal representation

The fixed fee for advising in an immigration case is £260; £459 in an asylum case. The nominal hourly rate for preparation is £58.50. That hourly rate is paid if the value of the case exceeds three times the fixed fee. If the case were to take just less than three times the fixed fee then only the fixed fee would be paid and the payment per hour would work out to just over one third of the nominal rate or around £19.50 per hour. Rates are essentially unchanged since 2001. Yet these are the rates that it is proposed to cut. For comparison Her Majesty's Court Services current Guideline Hourly Rates for 2010 for a Grade B solicitor (over four years post qualification experience) would be £242 and for Outer London for a Grade C (less than four years post qualification experience) £165.

The Legal Services Commission has said that it considers that across the immigration and asylum caseload there will be 'swings and roundabout': that legal aid fixed fees will not cover the costs of all cases, but would more than cover the costs of others.[8] It can be seen from the rates of pay above that this principle is dubious in the extreme.

We have seen nothing from the Legal Services Commission that examines the effect of removing legal aid from immigration cases not made any proposals to reassess whether it still considers that there will be 'swings and roundabouts' if practitioners do only asylum cases.

It is clear from the above that a strategy for financial survival is likely to see firms seeking to specialise either in cases of exceptional complexity that will take three times the fixed fee, or identifying a sufficient number of cases sufficiently straightforward to be brought within the fixed fee. From the outset many organisations, including ILPA, have repeatedly expressed concerns that fixed fees will lead to 'cherry-picking' of cases. That the concerns have proven founded is admirably summarised in the report *Review of quality issues in legal advice: measuring and costing asylum work* (June 2010) produced by the Information Centre for Asylum Seekers and Refugees for Refugee and Migrant Justice, the Immigration Advisory Service and Asylum Aid and the sources cited.

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[7] http://news.bbc.co.uk/today/hi/today/newsid_9197000/9197123.stm

[8] *Legal aid: the way forward* Cm 6993, Legal Services Commission and Department for Constitutional Affairs.

Other strategies for survival are to reduce the proportion of legal aid work a firm does. This is likely to be accelerated by the results of the current tender which, because of the way it was structured, has seen reputable firms fail to secure a contract and many more given a pro rata allocation of the number of case starts for which they bid. Legal aid work can only survive while there are firms not only willing, but also able to deliver it.

In various parts of the country, following the latest tender, there is no legal advice in immigration and asylum. Devon Law Centre has closed, and many of those in Plymouth now have to go as far afield as Bristol to find legal representation. In the Dover ports area no contracts have been let in asylum and immigration. The Legal Services Commission has not responded to requests to know what its contingency plans for these areas are.

There is a desperate need for the Ministry of Justice to look at how it can best support the best lawyers and advisors doing legal aid work. And the more they are able to flourish, the better value the Government gets from the legal aid budget.

The telephone advice line

The proposal is for a two- tier system in which initial contact with an 'operator' will be the diagnostic stage and the stage at which the caller is advised whether or not they are eligible for Legal Aid. The operator will route the person to the most suitable service for their circumstances, including Legal Aid specialists. Face to face advice would be available where cases are too complex to be dealt with on the phone.

ILPA is concerned that the system could work to keep people out of the legal aid to which they are entitled, or to timely assistance, because the complexity of immigration law, not to mention the imperfect understanding many applicants have of the procedures in their own cases, gives rise to a risk that the diagnosis of the case will be imperfect.

We should appreciate clarification as to whether it is the intention that people will access legal advice online and on the telephone, and if so, how this is to be regulated, especially in the area of immigration law, where to give advice on an individual case is, with regulation, a criminal offence?

We should appreciate clarification as to who is to determine the level of complexity and how and as to how it will determined that a case is not eligible for legal aid, particularly on the grounds that the case has insufficient merit?

We should appreciate clarification as to what entitlements callers will have to challenge the decision that their case is not eligible for legal aid?

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ILPA
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