

**ILPA second submission to the House of Commons Justice Select Committee
Access to Justice Inquiry****SUMMARY**

1. 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 and non-governmental organisations 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 Legal Services Commission Civil Contracts Consultative Group set up following the litigation between the Law Society and the Legal Services Commission and Immigration Representative Bodies group that sits under it. ILPA has attended Ministry of Justice meetings on the subject of legal aid and has also provided evidence to the Justice Committee and its predecessors on the question of legal aid as it affects immigration and asylum law.
2. This is ILPA's second submission to this enquiry, provided in response to the Committee's call for evidence of 22 December 2010. This response is organised under the questions posed by the Committee.
3. This evidence should be read with the following annexes:
 - Annexe A** ILPA initial response to the Ministry of Justice consultation paper with an annexe of case studies (published)
 - Annexe B** ILPA briefing on the legal aid cuts (widely circulated)
 - Annexe C** Initial evidence submitted to this enquiry, in the form of ILPA's briefing for the Committee's evidence session with the Minister on 15 December
 - Annexe D** a table of remuneration rates in immigration and asylum work prepared in the summer of 2010 for the *CMX* litigation that arose out of the closure of Refugee and Migrant Justice (submitted in evidence to the court)
 - Annexe E** Additional case studies (widely circulated)
4. In the submission that follows, ILPA answers the Committee's questions thus:
 - The proposed changes would reduce the numbers of practitioners of quality offering immigration and asylum legal aid; the money spent on legal aid would purchase less access to justice for individuals.
 - Issues raised in many immigration legal aid cases will not be resolved and injustice and breaches of the human rights of migrants and refugees and of their British/settled family members will result. ILPA highlights in particular cases that raise the question of the rights to private and family life of migrants and their family members; of persons facing removal or deportation; of persons in detention; of victims of domestic violence; of refugees seeking family reunion, and of the homeless and the destitute.
 - Where justice is secured this will be through the more costly routes of public law challenges, challenges to refusals of exceptional funding will also be the source of significant costs.

- A ‘polluter pays’ approach that looked to tackling cost drivers at source – in the UK Border Agency – would produce savings across the board, in cases funded by legal aid, those privately funded and those not funded at all.
- The evidence and knowledge base on which the Government’s proposals are based is inadequate, and perverse outcomes have not been sufficiently identified.
- The proposed telephone gateway is ill-suited to immigration and asylum cases and risks being the source of significant additional costs.
- Neither the Government’s proposals on legal aid, nor those on civil costs give sufficient priority to achieving equality of arms, or recognise the extent to which poverty, even absent other exacerbating factors, creates such inequality.
- Implementation of the proposals would result in injustice; violations of human rights; inequality of arms; reduced scrutiny of Government departments and with it reduced incentives for quality and efficiency; increased whole system costs and less value for the money that is spent; unsustainable pressures on other services, including MPs’ casework, and increased risks of exploitation of migrants and refugees denied legal aid.

SUBMISSION

What impact will the proposed changes have on the number and quality of practitioners, in all areas of law, who offer services funded by legal aid?

1. Based on experience to date ILPA anticipates:
 - a continuing reduction in the numbers of quality firms practising in legal aid asylum and (if it remain in scope) immigration law and in the proportion of legal aid work that these firms do;
 - that cuts in other areas of legal aid and to other funding streams will continue to lead to the closure of law and advice centres which do immigration and asylum alongside their other work;
 - that the number of areas of the country left without asylum and (if it remain in scope) immigration legal aid advice will continue to rise;
 - that the proposed changes will exacerbate the problems of perverse incentives built into funding structures that mean that those endeavouring to provide a high quality service to the full range of clients are under the greatest pressure;
 - that uncertainty and unpredictability as to the proposals that will be implemented and their likely effects, and the consequent inability to plan or make contingency plans will hasten departures from the field of legal aid immigration and asylum work.
2. Lawyers in private practice are likely to earn more if they switch to private rather than legal aid work. ILPA members’ concern is the effect on clients who will be left without access to representation and thus without justice. See the case studies in **Annexes A and E** which illustrate the role free legal representation played in achieving justice.
3. The years particularly since 2004 have seen many widely respected firms leave the field of legal aid immigration work. Winstanley Burgess closed its doors in 2004, while firms such as Wesley Gryk solicitors and Bates Wells and Braithwaite left legal aid work. When Wilkin Chapman closed its legal aid immigration and asylum work in Hull this left the area without legal aid advice in immigration and asylum. Dexter Montague closed its immigration and asylum legal aid in Reading. Both firms continue to do private work. In June 2010 Refugee and Migrant Justice, which, at the time of its closure had 13 offices in England, some 336 staff and a caseload of c. 10,000 live cases, entered into administration. Devon Law Centre closed in October 2010. Although it had been successful in securing a contract in immigration and asylum law, failure to secure a contract in social welfare law resulted in its closure, with the results that people seeking

asylum dispersed to Plymouth now have to go to Bristol and beyond to obtain legal advice.¹

5. Immigration and asylum work is financially precarious. There is no cushion to protect firms and organisations against the effects of uncertainty or to allow for contingency planning. Unlike some other areas of civil work such as housing or family very few immigration or asylum cases proceed onto the more highly remunerated public funding certificates. The consultation proposes to cut payment for legal aid by 10%. We append at **Annexe D** a table of the remuneration rates as of June 2010, which are further discussed in **Annexe C**.
6. The Ministry of Justice intends that asylum work remain within scope, recognising
*“...the immediacy and severity of the risk to the individual...they could suffer persecution, torture or death...applicants may recently have fled persecution or torture. In these circumstances it may be difficult for them to navigate their way through the asylum process without legal assistance. In addition, applicants for asylum may be traumatised and so find it more difficult to represent themselves without legal assistance”*²
7. The notion that it suffices to leave asylum work within scope to protect it should be regarded with scepticism. ILPA has proposed to the Ministry of Justice that it examine the profits that firms are making on their legal aid work. For legal aid only firms this could be done by examining accounts filed at Companies House, for firms that do a mixture of immigration and private work it will be necessary to do further examination. If profits on legal aid work are less than 10%, and ILPA anticipates that this will be the finding, then the cuts would mean that they were not viable, even before the effect of changes in scope and the workload have been taken into account. The Legal Services Commission had envisaged that fixed fees would operate on a ‘swings and roundabouts’ basis.³ Fixed fees already create an incentive for providers to do either those cases that will qualify for exceptional funding, or to do more simple cases. There are no swings (or no roundabouts) in asylum work; there are precious few in immigration work done well. We have seen no projections of the way in which removing immigration work will affect the viability of firms doing asylum and immigration.
8. Payment regimes need urgently to be addressed. Under the new contract, disbursements can be billed every six months (often months after payment has become due as a matter of professional ethics and then only on new cases, not the thousands of ongoing cases providers already have open) but profit costs cannot be billed until a case reaches a particular stage; the timing of which is in the control not of the Legal Service Commission or of representatives, but of the UK Border Agency. This already causes tremendous problems, not least for private providers who pay partnership tax on money they have never seen, and for the Legal Services Commission which does not

¹ On 22 December 2010, The Legal Services Commission called for expressions of interest in asylum work in the City of Plymouth, and for immigration and asylum work in the Dover ports area of Kent having been unable to let contracts in either area in the last bid round. See <http://www.legalservices.gov.uk/civil/tendering/immigration.asp> ILPA has been pressing the Commission since Devon Law Centre closed on 15 October 2010 to make provision for persons seeking asylum in the city of Plymouth (contracts in the rest of Devon were let in immigration work only). We have now been informed that the Commission intends to establish some interim provision from 1 February, three and a half months after the Law Centre closed. Meanwhile, in the Dover Ports area, there are large numbers of unaccompanied children seeking asylum.

² Paragraph 4.30 of the Ministry of Justice Consultation paper.

³ See for example *Legal aid: the way forward* Cm 6993, Legal Services Commission and Department for Constitutional Affairs; Legal Services Commission, *Civil Fee Schemes – National and Regional fees* [www.legalservices.gov.uk/docs/civil_consultations/CivilFeeSchemesNationalRegional\(noMH\)_1.pdf](http://www.legalservices.gov.uk/docs/civil_consultations/CivilFeeSchemesNationalRegional(noMH)_1.pdf)

know, beyond the broadest brush calculations, what it owes. Asylum cases generally take longer than immigration cases (and both take longer than cases in other categories of civil law) and the problems will be exacerbated if only asylum remains in scope. The Government's intention to preserve asylum cases within scope will be thwarted if there are not lawyers of high quality willing and able to continue doing such work.

9. The latest tender, 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.
10. The perception that legal aid lawyers are well-paid is erroneous. One ILPA member, managing partner of a legal aid firm outside London, who has some 20 years experience in this field, told *The Guardian* newspaper that he earns £42,000 a year.⁴ Another member, in a very similar position with similar experience, takes home £2,403 per month. A junior barrister, practising in immigration and asylum, made a profit of £16,118 last year after meeting expenses. We have set out remuneration rates in asylum and immigration, and contrasted them with Her Majesty's Court Service Guideline Rates, in **Annexe C**; nominal hourly rates under fixed fees (£58.50) are c. 35% of the guideline rates for a solicitor with less than four years post qualification experience (£165) and can fall as low as 12 % of those rates (£19.50). Meanwhile, given the time taken by preparation for advocacy and at the hearings themselves, junior barristers are similarly poorly remunerated, and as a consequence the junior bar, which is essential to the development of the higher court advocates of the future, is at risk.
11. We have highlighted (**see Annexes A and C**) that the current funding system creates perverse incentives that encourage firms to 'cherry-pick'; to seek to specialise either in cases of exceptional complexity that will take three times the fixed fee (which are then paid at hourly rates), or identifying a sufficient number of cases sufficiently straightforward to be brought within the fixed fee.⁵ Fixed fees, in and of themselves, provide perverse incentives to do less work on a case and thus have the potential to drive down quality.
12. ILPA's concern is that as income in the sector is diminished further still, provision will continue to decline and a critical point will be reached at which the number of providers who remain in the sector simply cannot meet even the level of demand for their services that the Legal Services Commission is prepared to fund. ILPA already has significant concerns from the experience of our members that there is unmet need. There is no guarantee that a future loss or losses equivalent to that of Refugee and Migrant Justice will be absorbed by the sector.
13. In the Ministry of Justice's Equalities Impact Assessment it is estimated that the proposal to expand the current specialist Community Legal Advice telephone helpline and to make this the single access point for legal aid advice and referral to other practitioners will reduce income for private practices by 75% and for not for profit organisations by 85%. The effect of this on firms and organisations could mean the closure of many. There is no estimate of the costs of expanding the current telephone helpline to cover all initial requests for advice and help.

⁴ *The rich will reap none of the pain and all of the gain of Kenneth Clarke's legal aid cuts*, George Monbiot, *The Guardian* 10 January 2010. Available online at www.guardian.co.uk/commentisfree/2011/jan/10/legal-aid-cuts-fat-cats-lawyers The comments below the article illustrate that many of the newspapers' readers believe that legal aid lawyers earn high rates of pay.

⁵ *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.

The Government predicts that there will be 500,00 (sic.) fewer cases in the civil courts as a result of its proposed reforms. Which cases will these be and how will the issues they involve be resolved?

14. Immigration cases cannot be resolved through mediation. They involve either applications to Government departments or actions instigated by Government departments. If an application is refused or an action taken, the UK Border Agency is likely to stand by that decision unless and until it is held to be unlawful (and sometimes, perusal of the caselaw illustrates, even then).
15. ILPA's primary concern is that the issues these cases involve will not be resolved and that people will be removed or deported from the UK in breach of their and their settled/British family members' human rights; that victims of domestic violence will remain in abusive relationships, that family members of refugees will remain in the country of origin in danger, that homelessness and destitution will go unrelieved, including in circumstances that breach Article 3 of the European convention on Human Rights, and that the UK will be in breach of its obligations under human rights law, European free movement law and international instruments, including the Council of Europe Convention on Action Against Trafficking in Human Beings.
16. ILPA is concerned that many meritorious cases, including cases where the client is under constraint or duress (for example domestic violence and trafficking cases) will not get beyond the 'telephone gateway', within the timescales necessary, or at all, in asylum (and, if they remain in scope immigration and asylum support) cases and that existing referral systems, from for example non-Governmental organisations, that function well, will be lost.
17. Effective triage in asylum and immigration matters, whether face to face or by telephone requires high levels of skills, legal knowledge and experience, cultural awareness and sensitivity and being alert to linguistic difficulties. There is considerable potential for misunderstanding even when a client does speak English, although not as a first language and it would be difficult to identify the true nature of the problem with which a client presents without sight of documents whose import the client may not be able to comprehend. It is also necessary to move quickly given the immediacy of need and the timescales in immigration, asylum and support cases. It appears to ILPA that very significant additional costs could be incurred in the passage of cases, where they succeed in passing, through the gateway.
18. The proposal to expand the telephone advice service lacks details and the Committee should seek further information about the proposed funding of such a service and the quality standards in the specifications.
19. The Ministry of Justice has confirmed to ILPA it intends to cut funding for all immigration cases, including cases won by immigrants and appealed by the Home Office to the Upper Tribunal and higher courts, while observing that, as now, it is possible for any case to apply for funding on an exceptional basis. The Ministry has confirmed to ILPA that the cases cut would include refugee family reunion cases (the Home Office having confirmed in a recent meeting that 66% of appeals against decisions in refugee family reunion cases are allowed) and also immigration cases involving domestic violence, despite the more general exception for domestic violence cases in the consultation. The Chief Inspector of the UK Border Agency commented in his 2010 report on the entry clearance operation in Abu Dhabi and Islamabad:

"It also concerned me that senior UK Border Agency managers were dismissive of determinations made by immigration judges to allow appeals. This is far too

complacent, and the Agency should discover why, at the time of my inspection, it was losing half of its appeals.”⁶

20. The consultation paper is either ill-informed or disingenuous in stating that in cases involving the right to private and family life under Article 8 of the European Convention on Human Rights,⁷ people will be able to represent themselves in tribunals designed to be easy to navigate. **As set out in Annexes A, C and E** the complexity of the legal and evidential matters has resulted in many of these cases going all the way to the Supreme Court.
21. Our system is adversarial and as such there is only so much that an immigration judge can properly do to assist an unrepresented appellant without compromising judicial independence especially when, as is frequently the case, the Home Office does not send a representative to the hearing. Overstepping the mark will result in onward appeals, and decrease respect for the immigration judiciary. An inquisitorial system is enormously expensive. An immigration judge, without witness statements before him/her, would need to take a large number of family member witnesses through oral evidence in chief, with no witness statements to save time. In addition, an immigration judge is dependent upon the evidence put before him/her: if DNA evidence is required to prove a family relationship then the judge can at best adjourn for such evidence to be obtained, which will be of no avail if the appellant is unable to afford to obtain this evidence or to ensure that it is put before the Court.
22. Cases may involve a child or young person who claimed asylum, which was refused, was given leave to 17 ½ because no arrangements can be made for their safety and welfare on return, and now wishes to apply to remain on the basis of Article 8. They may involve children facing deportation as family members whose interests are not, or are not wholly, aligned with those of the parent facing deportation. Such children and young people are not in a position to represent themselves before the UK Border Agency, Tribunal and Courts.
23. The consultation paper states of immigration detention:

“...the issue at stake – the appellant’s liberty – is extremely important. We do not consider that there are sufficient alternative forms of advice or assistance, or alternative sources of funding, in relation to these issues to justify the removal of legal aid. Nor do we consider that these cases are ones in which the individual could be expected to resolve the issue themselves.”⁸

But in many cases the challenge to the detention will depend on the progress made with the substantive case, for example if removal is not imminent because the person has instigated a challenge to his/her removal. People deprived of their liberty and without funds are in no position to progress their substantive case unaided. The professional ethical dilemmas for a representative who identifies the need to progress the substantive case to make the case for bail are manifest.

24 As to those who are able to instruct legal representatives, the Consultation paper proposes

“...a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the European Convention on Human Rights)”⁹

⁶ Chief Inspector UK Border Agency An inspection of entry clearance in Abu Dhabi and Islamabad, January – May 2010, published 4 November 2010. The extract is from the foreword.

⁷ Paragraph 4.203 of the Ministry of Justice Consultation paper.

⁸ Paragraph 4.83

⁹ Consultation paper question 4 and *passim*.

24. In immigration cases ILPA foresees numerous challenges to refusals of funding in the High Court because the cases will properly fall within this exception. As well as an increase in the numbers of unrepresented appellants in the Tribunal, ILPA considers that there will be an increase of applications to the High Court to review the refusal of funding and substantive decisions. The gravity of the issues at stake is such that the public law jurisdiction of the High Court will be engaged. For the simpler, quicker more direct way of resolving the case by an appeal to the relevant chambers of the Tribunals will be substituted an indirect and more costly route for those who manage to access it. Delays and attendant costs (such as those of meeting an applicant's accommodation and subsistence costs for a more lengthy period) may fall on the UK Border Agency.
25. In family cases, there is also the prospect that family members will bring public law challenges to the breaches of their own human rights, because the family member facing removal/deportation cannot do so in the Tribunal.
26. A reduction in the number of immigration appeals is one possibility, but another is a fairly static number of immigration appeals accompanied by a significant rise in the number of unrepresented appellants (litigants in person) before the Tribunal and indeed unrepresented claimants before the Administrative Court. In a removal case, a person who cannot afford representation or the fee to lodge an appeal might nevertheless at the last minute seek the intervention of the High Court to prevent his or her removal. Creating disincentives - such as lack of free representation and having to pay appeal fees – for individuals subject to immigration control to follow the appropriate avenues of challenge at the right time will in ILPA's view inevitably create costs elsewhere in the system, not least of which the Administrative Court. See **Annexe C** for ILPA's comments on the effects: be they injustices or costs of having unrepresented appellants before the Immigration and Asylum chambers of the Tribunals. We urge the Committee to call evidence from both the immigration judges of the First Tier and Upper Tier Tribunal, and also representatives of the Asylum Support Tribunal, a jurisdiction in which there is currently legal aid for preparation of cases but not for representation at appeal hearings
27. Legal aid is only available to those who meet the means and merits tests for representation. It is suggested in the consultation paper that some immigration cases involve matters of "a free and personal choice." This is true, but such applicants generally do not satisfy the means test for legal aid if they have the funds required to prove they can maintain and accommodate themselves as required by the relevant paragraphs of the immigration rules. Some cases have no or low prospects of success. Such cases do not satisfy the merits test for legal aid (the test for controlled legal representation at appeal is that prospects of success are 50% or more). The stated rationale for cutting legal aid in immigration is based on a case profile of cases that legal aid does not currently fund.

What action could the Government be taking on legal aid that is not included in the proposals (for example, on Very High Cost Cases)?

28. ILPA has repeatedly advocated a 'polluter pays' principle, as set out in **Annexes A to C**. The volume and speed, indeed haste, of changes to law and processes in immigration and asylum, along with the implementation of laws and processes whose legality can be identified as dubious from the outset, combines with the gravity of the issues at stake to produce a substantive amount of litigation. It is ILPA members' experience that it is often necessary to resort to Judicial Review or the threat of Judicial Review to obtain a legally coherent decision from the Agency, sometimes to obtain any response at all after substantive delays. The quality of the UK Border Agency's decision making and its

conduct of litigation drive up costs for the legal aid budget, and indeed for the courts. These costs affect cases remaining within the scope of legal aid, and those privately funded, as well as those in areas it is proposed to cut. See **Annexes A to C and E** for examples.

29. There are savings to be made to the legal aid budget, but they are to be made by changing the conduct of the UK Border Agency. Absent the scrutiny that legal aid cases provide, that conduct is likely to deteriorate.
30. In advocating for a 'polluter pays' principle, ILPA is not simply advocating that costs be moved around. The aspiration must be that if the UK Border Agency bears the costs of its actions, it will endeavour to make improvements be it in deciding whether it is appropriate to bring in new laws or procedures, and in the quality and legality of those introduced; in quality or in the way it conducts cases. The principle forms part of a notion of tackling problems and cost drivers at source that should be part of any 'comprehensive' spending review.
31. ILPA's experience of the consultation to date suggests that the Ministry of Justice does not have a detailed knowledge of immigration and asylum, of the legal aid system, or of the sector. What has been learned in past consultations and enquiries, including those carried out by the Justice Committee and its predecessors, is not sufficiently understood. The Ministry's evidence base for its proposals and impact assessments is not adequate.

Do the proposals to implement the Jackson report recommendations on civil court funding and costs adequately reflect the contents of that report?

32. The proposals to implement the Jackson report appear to ILPA to give greater prominence to the proposals designed to protect defendants than to those designed, and against a very different legal aid background, to protect claimants and appellants. Neither the Government consultation paper on legal aid, nor on civil costs, gives sufficient prominence to ensuring equality of arms, nor significant recognition to the extent to which poverty, absent other exacerbating factors, in and of itself creates such inequality. ILPA will be responding to the consultation on these proposals and will forward a copy of its response to the Committee.

What are the implications of the Government's proposals?

33. See **Annexes A to C and E**. We highlight the following:
 - **Injustice and violations of human rights.** In immigration cases this will, as described above and in the Annexes, result in grave violations of human rights.
 - **Inequality of arms.** Legal aid is an essential safeguard against inequality of arms and also serves to maintain scrutiny of Government departments. Removing legal aid removes scrutiny and with it incentives for departments who escape challenge to pass better laws and make better quality decisions. This 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.
 - **Increased whole system costs,** resulting from the inefficiencies arising from lack of scrutiny described above and also costs in the Courts and Tribunals. Some costs will arise from unrepresented appellants, others from cases being litigated in the High Court rather than before the Tribunal, others from litigation over legal aid funding refusals in areas where fundamental rights are at stake. Ministers in the Ministry of Justice have

said 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. There may also, as the Ministry of Justice has already identified, be a displacement of immigration cases onto asylum cases, where people who would be at risk on return but could resolve their difficulties through an immigration route, see no choice but to put forward their claim for international protection.

- **Less value for the money that is spent.** Incentives for practitioners committed to work of high quality to remain in legal aid, or continue to do a substantial amount of work in legal aid, will be reduced. The sums invested in legal aid will purchase less, pound for pound, than before. Unrepresented appellants will take the place of representatives able to identify the issues on which a case turns and present them to the courts. Litigation will be displaced onto refusals of funding, or public law challenges in the High Court where matters would otherwise have been resolved before Tribunals. Matters that have been inadequately addressed in one forum will be addressed in other fora where they arise (for example immigration matters in family or criminal cases) without the groundwork having been done.
- **Unsustainable pressure on other services.** 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. Many people will go to MPs, as MPs and their caseworkers are not required to register with the OISC.
- **Exploitation of those denied legal aid.** 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 and may face 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.

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