Access to justice for foreign national prisoners in a post-legal aid cuts landscape:

1. This note accompanies a short workshop at the Detention Advice Service 20th anniversary conference – 'Foreign national prisoners – Meeting the challenges ahead', on Monday, 17th September 2012.

What legal aid cuts are we referring to?

2. We might first question what is meant by a 'post-legal aid cuts landscape' – i.e. when did legal aid cuts begin or with which legal aid cuts are we concerned? We have been living in a post-legal aid cuts landscape for many years. Certainly, significant cuts were made in 2004[1], 2007[2], 2011[3] and are to be made in April 2013[4]; and there were important changes to the legal aid landscape in 2010 and 2011 with the closure of the two big not-for-profit immigration advice providers, Refugee and Migrant Justice (formerly known as the Refugee Legal Centre) and the Immigration Advisory Service respectively.

3. The focus of this note will be the anticipated landscape following April 2013. However, it is important to remember that legal aid cuts do not start here, and the impact of the cuts from April 2013 will be upon a sector that is already much reduced by successive cuts in legal aid.

What do we mean by access to justice?

4. There are several court decisions, over many years, concerned with the right of access to the courts and or access to justice, of particular interest in the area of immigration is the 2010 decision of the High Court in *R (Medical Justice) v Secretary of State for the Home Department*,[5] in

[1] In April 2004, the Legal Services Commission introduced limits on how many hours could be spent on a case, and on how much could be spent on disbursements (fees for e.g. interpreting, translation, medical and other expert reports), without permission being granted by the Legal Services Commission. Note that before 2004, legal aid rates had not received over many years any inflationary lift, which itself can be seen as constituting cuts to legal aid.

[2] In October 2007, the Legal Services Commission introduced fixed fees, whereby legal aid payment for all cases (howsoever complex and/or time consuming) would be the same fixed fee, save where the case was so complex that the time required to be spent on it exceeded three times the notional period by which the fixed fee was calculated.

[3] In October 2011, the fixed fees (and related rates) were all reduced by a flat rate of 10%.

[4] This is the intended commencement date for the legal aid provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[5] [2010] EWHC 1925 (Admin)

which the High Court held that the then policy of the UK Border Agency under which certain persons were given less than 72 hours, and in some cases no, notice of their removal from the UK was unlawful by conflicting with the right of access to justice.

5. Access to justice may, however, be understood practically (albeit in any legal dispute it would be necessary to consider the jurisprudence on the right as understood by the courts). For a person to have access to justice, he or she would need to know that he or she had a potential claim to justice, to know how to go about having that claim determined and, where appropriate, enforced, and to have the means to do so. Depending on the subject matter and the characteristics and circumstances of the person, access to justice might require access to legal advice and representation; and where the subject matter is sufficiently complex or technical, and/or where the person's characteristics or circumstances sufficiently debilitating or restricted, access to legal advice and representation may be necessary for access to justice to be effective. Consider the following:
    - If I have no knowledge or understanding of my rights, my ignorance in itself is a barrier to my taking any steps to ensure my rights are respected.
    - If I am unfamiliar with legal proceedings, my ignorance of which court or tribunal I may turn to, which form I must use and when and how this must be completed (including what information is relevant to include, and how this needs to be presented) is again a barrier to my taking steps to ensure my rights are respected.
    - If I am not free or equipped to investigate the law relevant to my circumstances, or to investigate and obtain the evidence that may be relevant, my incapacity is a barrier to my taking steps to ensure my rights are respected.

The circumstances of foreign national prisoners:

6. Access to justice for foreign national prisoners facing deportation is, in practical terms, constrained by such factors as:
    - The complexity of immigration law and procedures.
    - The time limits, and procedural hurdles, involved in bringing appeals or judicial review claims.

- Their deprivation of liberty, and isolation – which in some cases may be a product of both deprivation of liberty and restricted ties to a settled community.
- Any mental ill health – whether as a result of prolonged and uncertain detention, or factors other than their detention but likely compounded by it.
- The isolation of many prisons, and the impact of being transferred between prisons and/or immigration removal centres.
- The degree of availability, accessibility and attendance of any legal adviser or representative – and the quality of such adviser or representative.

Legal aid provision after April 2013:

7. The legal aid provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 are to be commenced in April 2013. The key aspects of those provisions relevant to foreign national prisoners facing deportation are:
    - Legal aid will generally not be available for immigration – including preparing, presenting and engaging on a claim/case before the UK Border Agency; and any appeal against a negative outcome in doing so. This will generally include deportation cases.
    - Legal aid will be available for asylum claims – both before the UK Border Agency and on appeal.
    - Legal aid will be available for judicial review claims, but generally not if the judicial review claim is substantially the same as a previous such claim (within the previous 12 months) or if the judicial review claim is against directions set for the person's removal (where these have been set within 12 months of notice of a decision of intention to remove or any appeal against that decision).
    - Legal aid will be available for applications for immigration bail.
    - There is separate provision to provide legal aid where to fail to do so would be a violation of either the 1950 European Convention on Human Rights or of European Union law.

8. Of successful challenges to deportation, whether by way of claim/submissions to the UK Border Agency or on appeal, many are

brought on Article 8 (the right to private and family life) grounds; and where the person is a European national or the family member of a European national, a number succeed on European Union law grounds (which introduce greater protections to anyone exercising European free movement rights against deportation). Many such cases require extensive evidence – e.g. witness statements of family, friends and other social contacts; medical, social work and other expert reports; probation reports and related material concerning risk of reoffending etc.

9. Article 8 cases are not within the compass of 'asylum', and hence Article 8 immigration cases will not on their face fall within the scope of legal aid from April 2013. This is the same whether a person is facing deportation, removal or simply in the UK in need of regularising (or extending) his or her immigration status. This is the same whether a person is at liberty or is detained, whether in prison or an immigration removal centre. Whereas there may be some cases where there is an alternative claim under Article 3 (right not to be subjected to torture, inhuman or degrading treatment) or a claim to refugee status, and there may be some cases where the Article 8 claim may be re-categorised or presented as an Article 3 claim, the prospect is that from April 2013, a foreign national prisoner facing deportation with e.g. long residence and/or family in the UK and hence a potential Article 8 claim will not be eligible for legal aid.[6]

10. There are essentially four possible options for a foreign national prisoner (or his or her family/friends) in the absence of legal aid, none of which is likely to provide a satisfactory answer in many or most cases:

    - <u>Represent himself/herself without legal assistance:</u> Those without legal advice and representation have considerable hurdles to overcome in understanding what is or is not relevant; what evidence can be obtained, from where and how, and paying for it; dealing with procedural and related matters, such as understanding what needs to be included on an appeal form, complying with tribunal directions, obtaining

[6] A recent Legal Services Commission policy statement on 'transition between the legal aid scheme under the Access to Justice Act 1999 (AJA 1999) to that under Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) indicates that legal aid matters validly and effectively started before 1 April 2013 may continue to be funded for some period under the current legal aid scheme.

suitable directions for disclosure of information and evidence; and identifying grounds of appeal.

- Pay for such legal assistance as he or she may be able to afford: Those paying for legal assistance may have difficulty in picking an legal adviser of adequate quality, and there are many cases in which individuals do not understand how protracted legal proceedings may become and for what they have paid and may yet be expected to pay. A feature in some appeals where the appellant is paying for legal assistance is the poor quality of the evidence, resulting from the limited funds that the appellant is able to pay.

- Obtain free legal assistance (whether from a *pro bono* lawyer or charitable provider): Immigration advice is regulated, so those other than practising solicitors, barristers or legal executives who are not within the OISC[7] scheme and at the right level in that scheme, are not permitted to advise or make representations to the UK Border Agency or a tribunal or court.

- Not challenge his or her deportation: Whether through isolation and hopelessness, lack of understanding and sheer helplessness, it may be that many facing deportation will simply do nothing. The phenomenon that has grown over recent years of cases where immigration detention post-sentence extends beyond a year may continue to grow if foreign national prisoners either cannot or do not know how to take steps to obtain legal advice and/or establish any claim they may have against deportation.

What options may be open to legal aid lawyers to avoid this bleak choice?

11. Questions to be asked by lawyers include:

- Is there alternative direct funding available or might indirect funding be available through partnership working (e.g. a local

[7] Office of the Immigration Services Commissioner

NGO has funding to support foreign national prisoners and uses some of that funding to buy legal services)?

- Is the proposed legal aid scheme open to challenge? What is called in the Act 'exceptional funding' is available where not to fund would *be* a breach of the 1950 European Convention on Human Rights or European Union law. Note that in a majority decision in *Airey v Ireland* (Application no. 6289/73) [1979] ECHR 3 (9 October 1979), the European Court of Human Rights held (5-2) that the failure to provide legal aid to the applicant, a victim of domestic violence, in connection with her family proceedings was a breach of Article 6; and (4-3) that this failure was also a breach of Article 8. Whereas current caselaw holds that immigration is not within the scope of Article 6, either that may be subject to challenge[8] or it may be possible to rely directly on a breach of Article 8 (i.e. that the denial of legal aid denies the applicant an effective Article 8 remedy). Such challenges are likely to be stronger in the cases of those with mental health difficulties.

- Is there useful work that can be done on legal aid that would assist with a deportation case? There will continue to be legal aid for challenging immigration detention. What work that is relevant to preparing and presenting such a challenge may additionally be of value in preparing and presenting a challenge to deportation? Note, however, that the Legal Services Commission's recent policy statement on 'connected matters' is unhelpful: "*7. ...After considering how to exercise this power we have concluded that there are very limited circumstances in which we would want excluded matters to be funded because of their connection with matters described in Part 1 of Schedule 1.*[9] *A general rule along the lines of the existing mixed cases rule risks being too wide and allowing substantial numbers of out-of-scope matters to be funded, and would therefore be contrary to our intentions to focus limited legal aid resources on to the priority cases set out in Part 1 of Schedule 1 to the Act.*"

[8] Note the dissenting opinions in *Maaouia v France* (Application no. 39652/98) [2000] ECHR 755 (5 October 2000)

[9] i.e those matters that are included for legal aid funding under the Act

- What scope is there for judicial review (where legal aid is generally to remain)? Judicial review is usually not available if there is an alternative remedy (e.g. a right of appeal). However, if that remedy is ineffective without legal aid (or other legal assistance), it may be possible to seek the exercise of the High Court's discretion. Alternatively, there may be distinct judicial review challenges – e.g. seeking to require the UK Border Agency to undertake (and pay for) evidence gathering so as to comply with its duties under Article 8 and/or (where there are children affected) Article 3 of the 1989 UN Convention on the Rights of the Child.

What steps can foreign national prisoners take, and how can others support them, in the face of all this?

12. It is clear that there are currently profound difficulties facing foreign national prisoners seeking to obtain legal advice and representation. The situation is set to get more difficult. Meanwhile, some of the steps that may be taken to improve the chances of a foreign national prisoner to secure access to justice are:

    - <u>Subject Access Requests:</u> Many foreign national prisoners may not have all their relevant immigration papers, and in any event there is likely to be information on the UK Border Agency (Criminal Casework Directorate) file that has not been made available to them. A Subject Access Request is a relatively inexpensive means of obtaining a copy of the UK Border Agency file (sometimes with items redacted or other discrete information withheld). Note, however, that in some instances a Subject Access Request may need to be repeated if significant time has passed since the UK Border Agency disclosed papers.

    - <u>Other evidence gathering/retaining evidence:</u> Other sources of evidence may include correspondence from family while in prison, prison records relating to health, behaviour and (family) visits, and probation reports. A foreign national prisoner may have difficulty both in working out what evidence is available and in getting it. However, the more that can be done in this regard, the more may be available to a lawyer, which may help

persuade a lawyer to take on the case (by being able to assess the merits of the case) and to reduce the amount of time he or she must spend doing work for which he or she will either have to charge or not be paid.

- Keeping up pressure for the return of legal aid: All who are concerned as to the predicament of foreign national prisoners in seeking to access justice should consider what they may do (e.g. whether in recording and sharing experiences, addressing concerns internally with their Agency and/or in directing concerns to their MP) to highlight the impact of the loss of legal aid.

13. It is necessary to reflect that seeking to assist foreign national prisoners to 'do it yourself' is itself fraught with dangers. Understanding what evidence is relevant and how it may be used can be complex and often demands experience of immigration, and tribunal and court proceedings (particularly where apparent, though possible explicable, discrepancies may be used to undermine a person's claim, even when seemingly minor). Immigration law is also complex. Indeed, major changes to the Immigration Rules in recent months have made it more complex still, and even before these changes the Court of Appeal (subsequently endorsed by the Supreme Court) had cautioned that "*the frequent changes of the law in the immigration field and the changes of Home Office policy guidance which are almost impossible for lawyers to keep up with, let alone ordinary people*" subjected litigants and judges to "*a whirlwind in which it is very difficult to pause for the reflection which should accompany sound judgment.*"[10]

Appended to this note are three ILPA information sheets relating to deportation. These and others are (or will shortly) be available on the ILPA website at: http://www.ilpa.org.uk/pages/info-service.html

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[10] *DP (United States of America) v Secretary of State for the Home Department* [2012] EWCA Civ 365; and see observations of the judges in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.