

ILPA information sheet

Information sheets provide general information only, accurate as at the date of the information sheet. Law, policy and practice may change over time.

ILPA members listed in the directory at www.ilpa.org.uk provide legal advice on individual cases. ILPA does not do so.

The ILPA information service is funded by the Joseph Rowntree Charitable Trust.

An archive of information sheets is available at www.ilpa.org.uk/infoservice.html

Sarah Myerscough ILPA Legal Officer 020-7490 1553 sarah.myerscough@ilpa.org.uk

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

Legal Aid 13 – Update

21 December 2012

The Legal Aid Sentencing and Punishment of Offenders Act 2012 came into force on 1 May 2012. The new legal aid provisions will come into force in 1 April 2013. The Act constitutes a significant change in legal aid funding with severe restriction of legal aid. Most non- asylum immigration work is out of scope, including children's cases.

The Ministry of Justice has published a number of draft specifications, regulations and policy statements to implement the Act. These may be amended further. As yet no one knows how the provisions under the Act and supporting regulations will work in practice and much is speculation.

Cases for which there will still be legal aid (set out in Schedule 1, Part 1.)

- **Asylum**

Asylum cases will still get legal aid they are defined as claims under

1. the 1951 Refugee Convention;
2. Articles 2 and 3 of the European Convention on Human Rights;
3. the Temporary Protection Directive (Council Directive 2001/55/EC of 20 July 2001);
4. the Qualification Directive) Council Directive 2004/83/EC of 29 April 2004).

- **Challenges to Immigration Detention**

Legal aid for bail, temporary release or temporary admission, including challenges to conditions applied on release. There is not legal aid for the detainee's substantive immigration application.

- **Victims of Domestic Violence**

Applications for Indefinite Leave to Remain under the domestic violence immigration rule and for European residence permits on the grounds of retained rights of residence arising from domestic violence. The Government intends that this will only include people with leave under the immigration rules as partners/spouses who have suffered domestic violence, not children or other family members who have suffered domestic violence.

- **Victims of Trafficking**

Legal aid will be available for an application for leave to enter or remain for someone who is a victim of trafficking. However the person must show that there has been a conclusive determination under the "National Referral Mechanism" that they are a victim of trafficking or that there is a 'reasonable grounds determination' that they are a victim and there has been no conclusive determination to say that they are not. A victim of trafficking is not therefore entitled to legal aid before going to the authorities, unless they begin their case as an asylum case. However if they never claim asylum, legal costs paid will be restricted to £100 (paragraph 8.80(a)(ii) of the immigration specification).

- **Special Immigration Appeals Commission**

All proceedings before the Commission.

- **Asylum Support**

There will be legal aid for asylum support cases where accommodation and subsistence are sought. Cases where only subsistence is sought will no longer be within the scope of legal aid. However as now, legal aid will not be available for representation before the First-tier Tribunal (asylum support).

- **Judicial Review**

There will be legal aid for judicial review in all areas of law, however there are some exclusions in immigration cases. Where there has been an appeal hearing or determination on the same, or substantially the same, issue within 12 months and the decision was not in favour of the appellant, legal aid will not be available. Similarly where an appeal against removal has been decided within 12 months of judicial review being sought against removal, legal aid will not be available.

Exclusions

All other immigration-related matters will be excluded from the scope of legal aid. There are no provisions to include children specifically and in immigration cases if an adult is out of scope, a child will be also. Thus, for example cases based solely on Article 8 of the European Convention on Human Rights, challenges to deportation, including following criminal conviction, where there is no asylum claim, and entry clearance applications and appeals. There are no provisions to provide legal aid funding where people have mental health or other problems or for those in immigration detention.

Mixed Cases

The Ministry of Justice has declared in its policy that it does not intend to recreate the previous policy of funding work on matters outside the scope of legal aid when it is part of the same case and incidental to work being done on the part of the case that is funded by legal aid. Many practical problems are likely to arise from this and if and how it will work in practice remains to be seen.

Exceptional Cases

There is a provision to grant legal aid in exceptional cases where failure to provide legal aid would amount to a breach of a person's human rights. The government's view has been that immigration cases will not qualify for this funding, on the basis of established European caselaw [*Maaouia v France* 39652/98[2000] ECHR 455 (5 October 2000) that the right to a fair trial (Article 6(1) of the European Convention on Human Rights) does not cover immigration cases. It is likely that there will be a range of challenges to the notion that immigration does not qualify for exceptional funding. However, even for cases that clearly can obtain funding on an exceptional basis, it is unclear how the arguments that the case should be funded will themselves be funded.

Further updates will be available on this topic as is necessary. Please see the information service on our website. www.ilpa.org.uk