IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

30 May 2013

The Lord Low
The Low Commission
c/o Legal Action Group
242 Pentonville Road
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By email to sogilvie@lag.org.uk

Dear Lord Low

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members 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 through disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government bodies, including UK Border Agency consultative and advisory groups among others.

This response is to The Low Commission's Context Paper on Asylum and Immigration. As you are aware, we have all been overtaken by the Government's Transforming Legal Aid: Toward a credible and efficient system consultation. This response is therefore not lengthy but attempts to introduce some of the ILPA documents that may be of use.

We have structured our response to the Commission's Context Paper as follows, dealing with both the current (as of 1 April 2013 position) and proposals:

A. Supplementary information and views on:

I. Asylum and Immigration
II. Legal Aid
III. Regulation of Advice
IV. Tribunal Appeals

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V. Judicial Review

B. Response to the discussion part of the paper:

I. Comments on the matters for discussion
II. Other matters

Supplementary information and views

I Asylum and Immigration

The Commission should revisit and review the Ministry of Justice position[1] that 'immigration cases' are a matter of 'personal choices' and the Ministry of Justice decision to remove immigration cases from the scope of legal aid.

Those immigration applicants who would satisfy the means tests for legal aid are making applications/claims relying on family, private life and long residence. Such applicants may be on the poverty line and/or in receipt of benefits and/or ill-equipped to navigate the application and/or appeal process unaided.

'Personal choices'

Many immigration cases do not involve 'personal choices' but include:

- whether people are allowed to join (entry clearance cases) or remain with (removal and deportation cases) spouses, partners, children and parents;
- whether people will have to leave the UK where they have lived for years, sometimes for decades (removal and deportation cases, including of family members of those facing removal or deportation), often as a result of someone else's decision, for example that of a parent or former spouse or partner, including cases in which they will be leaving behind close family members who are British or settled in the UK;
- whether a person who has fled domestic slavery can live safely in the UK away from those who abused them;
- what happens to a person (including a child) when a relationship breaks down;
- what happens to children whose claims for asylum have failed and who do not have a claim for international protection but cannot be returned to their country of origin because their safety and welfare cannot be guaranteed;

[1] Set out in the Ministry of Justice December 2011 consultation paper "Proposals for the reform of Legal Aid in England and Wales.

- what happens to young people who as children have been allowed to remain in the UK (sometimes for many years) when they turn 18;
- whether a person should be deported from the UK following conviction having served their sentence and in some cases having been settled in the UK over many years;
- what happens to people who thought they were in the UK lawfully and turn out not to be, and to people who cannot prove their immigration status and/or who have a claim to British citizenship.

A complex area of law and practice

Many of the types of case set out above engage Article 8 of the European Convention on Human Rights. The interpretation of this Article in immigration cases has been the subject of considerable jurisprudence emanating from the higher courts[2]. It was the subject of extremely controversial changes to the immigration rules in July 2012[3], which have subsequently been the subject of decisions of the Upper Tribunal[4] and are likely to be the subject of judgments in the higher courts. The Government has indicated that, having failed to achieve its aim of confining Article 8 by amendment to the immigration rules, it will bring forward primary legislation on the subject. The immigration rules are complex and in many instances, including the "general grounds for refusal"[5] which deal with matters such as whether a person has told the truth or presented false documents, involve judgement and the exercise of discretion by a decision-maker. Further complexity is added by the statutory duty to have due regard to the need to safeguard and promote the welfare of children under section 55 of Borders, Citizenship and Immigration Act 2009, which has itself been the subject of a decision by the Supreme Court[6]. The Home Office has very extensive powers, for example, to refuse entry, forcibly to remove and powers of entry, search and detention. The impact of adverse decisions is profound, for example, causing families to be separated.

The Government makes frequent changes to the immigration laws, rules and practice, often at very short notice and necessitating detailed transitional provisions. For example, since April 2012, thirteen StatementS of Changes in Immigration Rules have been laid before Parliament – in the majority of cases coming into effect within one month of being laid and often within much shorter timescales. These have

[2] See for example *Huang v SSHD, Kashmiri v SSHD* [2007] UKHL 11, *Beoku-Betts* [2008] UKHL 39, *Chikwamba* [2008] UKHL 40 and *EB (Kosovo)* [2008] UKHL 41.
[3] HC 194, laid June 2012, into force July 2012. See further below.
[4] See MF *(***Article 8** – *new rules) Nigeria* [2012] UKUT 00393(IAC) and *Izuazu (***Article 8** – *new rules) Nigeria* [2013] UKUT 45 (IAC).
[5] Immigration Rules, HC 395, Part 9.
[6] *ZH (Tanzania) v SSHD* [2011] UKSC 4.

included far reaching changes to the provisions relating to family and private life applications/claims as follows:

Statement of Changes in Immigration Rules – HC194 (June 2012)

- changed the routes for those applying for leave to enter or remain on the basis of their family relationship with a British citizen or a person settled in the UK.
- changed the routes for those applying for leave to enter or remain as the post-flight family member of a person with refugee leave or humanitarian protection.
- provided a basis for considering immigration family and private life cases in compliance with Article 8 of the European Convention on Human Rights (the right to respect for private and family life).
- introduced a route for migrants to qualify for leave to remain on the basis of their private life in the UK and at the same time abolish the 14-year long residence route to settlement for those in the UK unlawfully.

Statement of Changes in Immigration Rules – HC565 (September 2012)

- made further changes to the family and private life rules.

Statement of Changes in Immigration Rules – HC760 (November 2012)

- made further changes to the family and private life rules.

Statement of Changes in Immigration Rules – HC820 (December 2012)

- made further changes to the family and private life rules.

Statement of Changes in Immigration Rules – HC1039 (March 2013)

- changed the provisions relating to long residence.
- further changed the Immigration Rules relating to family and private life.
- changed the provisions relating to the requirements necessary for granting discretionary leave to unaccompanied asylum seeking children
- changed the Immigration Rules to provide for a person to apply to be recognised as
- stateless and to be granted leave to remain in the UK in that capacity.

It is indicative of the complexity of the Immigration Rules that since HC 194[7], which purported to bring all applications/claims engaging Article 8 of the European Convention on Human Rights within the Immigration Rules, there have been five further StatementS of Changes amending the rules on family and private life claims.

[7] Laid June 2012, into effect July 2012.

There are also frequent relevant judgments that have a direct and important impact on immigration cases. For example, in the past few months there have been tribunal cases on the precise scope of European Union free movement law[8], the application of the right to respect for private and family life[9], English language responses for spouses[10], cases on the best interests of the child[11], as well as on various procedural matters[12].

HC1039 introduced rules[13] relating to stateless persons in compliance with the Government's international convention obligations. These Rules appear simple in format but this cloaks a myriad of complexity as to who is or is not 'stateless'. A prospective applicant is faced with assessing whether they are stateless according to the definition set out in the 1954 UN Convention Relating to the Status of Stateless Persons, gathering information (for example about nationality law in their country of birth/heritage) and providing evidence in support of such an application.

II Legal Aid

ILPA considers access to legal advice and representation essential in ensuring effective navigation of the complex Immigration Rules and UK Border Agency procedures, including evidential requirements.

ILPA has written in detail about the need for immigration advice and how it should be funded, most comprehensively in our February 2011 response to the Ministry of Justice on its proposals for change in legal aid, now implemented through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Legal Aid Agency regulations and contract changes[14].

[8] See for example *Seye (Chen children; employment)* [2013] UKUT 00178 (IAC), Zubair (EEA regs: self-employed persons) [2013] UKUT 00196(IAC*); Ahmed (Amos; Zambrano; reg 15A(3)(c) 2006 EEA Regs)* [2013] UKUT 00089 (IAC), *Bee and another (permanent/derived rights of residence)* [2013] UKUT 00083 (IAC).

[9] *Izuazu (Article 8 – new rules)* [2013] UKUT 45 (IAC).

[10] *R (Bibi & Anor) v Secretary of State for the Home Department [2013] EWCA Civ 322.*

[11] *Mundeba (s.55 and para 297(i)(f))* [2013] UKUT 00088(IAC).

[12] See for example *EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia* [2013] UKUT 00143(IAC), *Syed (curtailment of leave – notice)* [2013] UKUT 00144(IAC).

[13] Paragraphs 400ff of HC 395.

[14] Available at http://www.ilpa.org.uk/data/resources/4121/11.02.503.pdf . See also ILPA's June 2011 briefing for the House of Commons' second reading of the Legal Aid, Sentencing and Punishment of Offenders Bill, available at http://www.ilpa.org.uk/data/resources/13410/11.06.26-LASPO-Bill-Second-Reading.pdf.

ILPA's has published its initial views[15] in response to the current Ministry of Justice consultation *Transforming legal aid*: *towards a credible and efficient system*[16]*.* We should be happy to make our final response available to the Commission.

The rule of law

The result of successive changes in legal aid scope, funding and contract/tendering regime and the proposals as set out in the Ministry of Justice consultation *Transforming Legal Aid*[17] will be that persons who have a good case, with excellent prospects of success and which may protect fundamental rights and entitlements and/or engage their human right to respect for private and family life, will not be able to bring their case because they cannot pay.

Background to legal aid provision

It is important to see the changes introduced in April 2013 and the proposed changes to legal aid against the background to immigration and asylum legal aid service provision.

The 2007 Legal Services Commission (now the Legal Aid Agency) tenders were predicated on providers making economies of scale. Fixed fees were set at very low rates in immigration and asylum, remuneration arguably bearing even less relation to work done than in other areas of legal aid. The 2010 tenders required practitioners in immigration and asylum to have a mixed immigration and asylum practice. The criteria to differentiate between bids were clumsy. The criteria incentivised over-bidding. Those who scored more highly (by dint of such important indicators of quality as sticking a stamp on an envelope containing an accreditation application and posting it to the Law Society) received all the matter starts they asked for. Those who scored less well saw the remaining matter starts divided between them, leaving many with fewer matter starts than they needed to be viable.

Some stopped providing legal aid altogether; some did very much less and very much more private work. Two major national providers - Refugee and Migrant Justice and the Immigration Advisory Service – went into administration. By no means all of the 'matter starts' lost at the point of these closures were redistributed to other providers.

Recent developments

In the 2013 tenders, immigration (non-asylum work) was largely out of scope. The tenders failed to differentiate between those bidding on the basis of quality and

[15] Available at http://www.ilpa.org.uk/data/resources/17792/13.05.14-Transforming-legal-aid.pdf . A summary is available at http://www.ilpa.org.uk/data/resources/17778/13.04.26-IPA-note-on-Transforming-Legal-Aidpdf.pdf

[16] Ministry of Justice, 9 April 2013.

[17] *Op.cit.*

many solicitors scored the same number of points and thus the available matter starts were divided between them on a lots system. In Manchester and London solicitors received some 100 matter starts per office, in Birmingham some 106. Only a few firms, those doing big national security cases or those who do a very small amount of legal aid compared to private work, were allocated all the matter starts they need/requested. Some firms have been able to cushion the blow, but only to a limited extent, by having more than one office. Most see, or saw until the *Transforming Legal Aid* consultation was produced, judicial review as an important part of any survival strategy.

There are in any event fears that not all those who have bid successfully will survive. Work in progress has long been a problem. Fees are paid when the case reaches a certain stage, but it can take a considerable time to reach that stage because immigration and asylum cases last so long and because of the time taken by the Home Office to reach a decision, as evidenced by its notorious backlogs. While bail and trafficking case remain nominally in scope, as do cases involving survivors of domestic violence and exceptional cases under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2013, it is difficult to envisage a provider trying to eke out 100 matter starts preferring those cases paid on a fixed fee basis to an asylum case so large and so complex that it will be remunerated at an hourly rate.

Because of transitional provisions the bar has yet to feel the full effects of the 1 April 2013 changes, which are in any event mitigated for the less junior because so far judicial review has largely remained within scope to date. That is now proposed to change.

Many legal aid immigration practitioners, solicitors, barristers, and not for profit organisations already do a lot of work for free for their own clients. Some private firms do *pro bono* work for individuals, others do not. The area is disbursement-heavy, which is a complication for those wishing to work *pro bono*. Another complication is the very short timescales within which emerging gaps in funding must be plugged. There is some grant funding not for profit organisations although quite a lot is for one-off or generic advice. It has to date focused on asylum cases but some funders are beginning to consider (non-asylum) immigration. Trust for London's Strategic Legal Fund will fund private firms/counsel, but only for interventions and pre-litigation research.

Many advice agencies, whether supported by legal aid or not, are facing very substantial funding cuts, and several have closed already. The services these agencies provide stretch across a wide range of social welfare concerns, which are being very much affected by the legal aid cuts that took effect from 1 April 2013. There will be pressures in respect of what non-legal aid funding remains to address areas other than immigration. Advice agencies may not be in a position to meet the

requirements of regulation (at any, or at a higher, level) in relation to immigration; and there is no similar requirement for regulation in other areas of welfare law. Local authority funding for advice rarely includes immigration. Although legal aid does still remain for asylum advice, it will be difficult for firms and agencies to continue with the small amount of funding and matter starts they have been allocated for asylum advice and representation alone. There thus is a real prospect that for many there will be no source of immigration advice or services remaining save asking for assistance from the constituency MP or advice and assistance given by family and friends which is not advice or services "in the course of a business, whether or not for profit"[18]

Current proposals

We append ILPA's initial response to the Ministry of Justice consultation *Transforming Legal Aid: delivering a more credible and efficient system*[19].

The main proposals which will further limit access to justice are:

- a residence test for civil legal aid claimants;
- cuts to legal aid for judicial review; and
- amendments to the civil merits test to prevent the funding of any cases with less than a 50% chance of success.

The proposed changes will deny legal protection to poor litigants and so directly undermine the rule of law[20].

The residence test

All legal aid providers will be required to carry out the following residence test:

The individual applying for civil legal aid must:

(i) be "lawfully resident" in the UK (etc.) at the date of the application for civil legal aid; and

(ii) be or have been "lawfully resident" in the UK (etc.) continuously for 12 months.

[18] Immigration and Asylum Act 1999, section 84.
[19] *Op.cit*.
[20] *The Rule of Law*, Lord Bingham, Allen Lane 2010, page 88

Persons seeking asylum are exempt from the residence test. However, on the grant of leave to remain (e.g. as a refugee or person given humanitarian protection) an asylum seeker becomes "lawfully resident" and therefore although on-going civil legal aid funding will continue, the 12-month lawful residence test will apply to any post-grant application for funding. An asylum seeker whose claim is rejected and has exhausted all rights of appeal ceases to qualify for legal aid under the exception and funding will cease. There is a lack of clarity as to how fresh claims for asylum will work. On the face of the consultation paper it would appear that only where a fresh claim for asylum has been "made" would they (again) benefit from the asylum seeker exception and that they do not qualify for legal aid to make that fresh claim.

Judicial Review

Legal Aid providers will only be paid for work carried out on an application for permission to apply for judicial review (including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if the Court grants permission. The work would be "at risk."

Legal Aid (subject to the residence test) would continue to be paid, as now, to investigate the strength of a claim and to engage in pre-action correspondence aimed at avoiding proceedings under Legal Help or Investigative Representation funding. Where a permission application was made the claimant would technically continue to be in receipt of legal aid for the permission stage of the case, and so would continue to benefit from cost protection, and would therefore not be personally at risk of paying costs if the permission application were unsuccessful. The successful Legal Aid provider could seek to recover their costs either as part of a settlement between the parties or through a costs order from the court.

Reasonable disbursements, such as expert fees and court fees, which arise in preparing the permission application, would continue to be paid, even if permission was not granted by the Court.

Merits test

Cases must generally have at least a 50% chance of success to receive legal aid funding for full representation (i.e. must have a moderate or better prospects of success). However, at the moment, there are certain housing or family cases, which receive funding with borderline prospects of success and in other cases funding will be available if there is a borderline prospect of success and the case has special features: it is of significant wider public interest or overwhelming importance to the individual. Funding may also be granted in public law claims, claims against public authorities and certain immigration and family claims which have these special features or if the substance of the case relates to a breach of human rights. It is proposed to abolish all borderline funding in including in asylum cases assessed as having 'borderline' prospects of success.

Other proposals

Cuts to legal Aid for prisoners will affect foreign national prisoners including the mentally ill. Those detained pursuant to administrative immigration powers will not be able to challenge 'categorisation' (e.g. those deemed to be a 'national security risk' being held in high security facilities) or the use of force or isolation, or the transfer to centres which deny/frustrate access to their family.

Barristers' fees will be cut to the level paid to other advocates. The justification given is to harmonise fees but raising the payments, which have not risen since 2001, for all, is not considered.

There will be cuts to payments for immigration and asylum cases in the Upper Tribunal. The justification given is that there was originally a higher rate for these cases because they used to be 'at risk' (see comments on judicial review above) and now that only the asking the Upper Tribunal for permission to appeal stage is at risk, the uplift will be removed. This ignores the way the uplift has masked the low underlying payment by compensating for such underpayment.

Expert fees will be reduced by 20%.

These proposals compound the problems set out above, for example, faced by those facing removal or deportation whose challenges are based on rights to respect for private and family life, rather than asylum claims and also exclude others from access to legally aided advice and representation, including:

- trafficked persons, separated children, survivors of domestic violence and detainees;
- trafficked persons who do not have a claim for asylum (the latter is about risk on return, not what has been suffered in the past); and
- those whose claims for asylum have failed, but who cannot be removed. There will be no Legal Aid to assist such persons to make further representations (including a fresh claim for asylum), a claim for damages for false imprisonment, and/or challenge decisions denying support and accommodation.

III Regulation of Advice

There is a dearth of alternatives for those who cannot afford to pay for legal advice. As the Commission highlights, the area of immigration advice is different from others in that those giving immigration advice must be regulated. It is consequently difficult

for other local agencies to pick up immigration advice work if they do not have the resources to qualify for OISC regulation. Citizens Advice Bureaux are regulated en masse at the lowest level of OISC advice, but few of them do more than give very basic information or 'signposting'.

ILPA supports the regulation of immigration advice given the complexity of the law in this area and the risks of getting it wrong. However, regulation needs to be of a high standard for the benefits of barring the incompetent/venial from giving advice to outweigh the restriction on sources of advice. ILPA considers that level one, the entry level, of the Office of the Immigration Services Commissioner's regulatory scheme, could usefully be changed. At the moment a simple entry test is all that is required to give advice and provide representation on a very wide range of matters, including all areas of family immigration and instances where a person is not lawfully present in the UK. It should be harder to qualify to do this type of work. But at the same time it would be helpful to carve out of level one an entry level of work to enable advice agencies wishing to provide very basic services to qualify to do so. We should advocate for a very narrow range of services at this entry level.

IV Tribunal Appeals

ILPA has responded to the Ministry of Justice consultation on fee remissions in the First-tier Tribunal (Immigration and Asylum Chamber)[21]. ILPA advocated that appellants appealing to the First-tier Tribunal (Immigration and Asylum Chamber) should benefit from the same fee remission system as operates for other courts and tribunals, but with special and additional protection to take into account their circumstances, in particular the position of those outside the jurisdiction and not in receipt of UK benefits, etc. Our proposals were not accepted and the Government's position did not change as a result of the consultation but we have presented them again, addressing the points made in the Government response to the consultation in our response to the Ministry of Justice consultation on fee remissions in the (other) Courts and Tribunals[22].

ILPA's concerns as set out above and in our responses to Government consultations are relevant to appeals to the Immigration and Asylum Chambers of the Tribunals Service (and to cases before the High Court and onward appeals to the Court of Appeal and Supreme Court). Simply, the proposed changes will deny legal protection to poor litigants and so directly undermine the rule of law.

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[21] Submitted 8 January 2013. Available at http://www.ilpa.org.uk/resource/17063/13.01.28-ilpas-response-to-the-ministry-of-justice-consultation-fee-remissions-in-the-first-tier-tri

[22] Submitted 15 April 2013. Available at http://www.ilpa.org.uk/resources.php/17861/fee-remission-in-the-courts-and-tribunals-ilpa-response-15-april-2013.

ILPA is unclear about the source of the statistics in the Commission's Context Paper and is thus not able to ascertain whether, for example, the 'appeals upheld' are final determinations (for example, having passed through the Upper Tribunal and/or the Court of Appeal and remittal). Further, the statistics do not include the (increasing) number of decisions withdrawn by the Secretary of State, including 'at the door of the court'. Statistics on appeals will be affected by the coming into force of section 52 of the Crime and Courts Act 2013 with effect from 25 June 2013[23], which means that there will be no right of appeal against the refusal of a family visit visa, the source of a significant number of appeals before the First-tier Tribunal.

Discussion points

What are likely to be the wider implications of the lack of advice available on immigration issues?

Access to legal aid contributes to ensuring access to justice and to the maintenance of the rule of law, including for separated families, refugees refused naturalisation, separated children and many others. It affects the British citizen and settled family members of those endeavouring to remain in the UK. Persons under immigration control may have restrictions placed on the work that they can do and have no way of obtaining money that they could save to pay for legal representation. Some will be unable to read the legal documents that they receive because of a lack of English language skills or lack of knowledge that would enable them to place what they read in context. Generalist advisors commit a criminal offence if they seek to assist them in the course of a business whether or not profit under the terms of section 84 of the Immigration and Asylum Act 1999. Thus the likelihood is that persons will be unable to assert their rights or regularise their situation. Some will go underground and be lost to view, vulnerable to exploitation and abuse and with families and individuals under pressure, they will become hidden from those services that could assist and support them.

What are the advantages and disadvantages of […] different* [fee-charging] *approaches?

The advantage is that the schemes and projects referred to do may assist those of limited means who cannot afford to pay for legal representation at commercial rates but can pay something. The disadvantage is that they will not assist those who cannot afford to pay. A further disadvantage is the risk that they change the ethos of law centres. Many went into this area of law to assist those too poor to pay for legal representation, not to charge them.

[23] The Crime and Courts Act 2013 (Commencement No.1 and Transitional and Saving Provision) Order 2013, SI 2013/1042 (C.44).

How does [the complexity of the law] ***this correlate with the government's assertion that, due to the user friendly nature of tribunals, individuals should be able to navigate their case without legal assistance?***

There is no correlation. The user friendly nature of tribunals becomes a myth as soon as a body of case law develops; precedents are rarely accessible to a lay person who, even if s/he obtains them, is not well-placed to identify the ratio of the decision and apply it to the facts in a different case. In an area such as immigration where precedents are emerging from regional and national courts on a weekly basis the notion that a person could manage their case without assistance is a myth. This a point that judges have highlighted[24]:

An immigration judge cannot resolve all problems by taking an "inquisitorial" approach. There are fundamental differences between inquisitorial and adversarial systems. In contrast to a judge or tribunal judge in an inquisitorial system, an immigration judge must make do with the evidence before him/her, and cannot instruct that it be produced. The appellant must make his/her case and if the case is not made out on the evidence, for example if s/he does not have the means to obtain relevant expert evidence, the appeal will fail. Furthermore, the Home Office is represented by a Presenting Officer trained in an adversarial system.

To what extent is it fair to refuse funding for advice and representation in these cases of such complexity?

It is not. That a person may have good grounds to assert a right against the State or to resist State action and be unable to do so because they are poor offends against the principle of equality before the law and access to justice. The unfairness is all the more acute when limits are placed upon the person's ability to work or to access funds that might be used to amass savings to pay for representation. Lord Bingham in his book *The Rule of Law*[25] included legal aid within his sixth[26] principle of the rule of law, that the State must provide the means of:

> "…resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve."

What can be done to make the Immigration Rules more accessible to unrepresented and unadvised users?

The immigration rules are consolidated and displayed on the Home Office website, although sometimes with a delay when a new Statement of Changes is published.

[24] See e.g. the comments of Lord Justice Longmore in *AA(Nigeria) v SSHD* [2010]EWCA 773.
[25] *Op cit.*
[26] The fifth principle in the November 2006 paper on which the book is based.

Hard copy versions take the form of statements of changes, incomprehensible to most readers. To access the immigration rules it is necessary:

- To have internet access
- To read English
- To be able to understand the language of the rules. This is no mean feat given the plethora of appendices and the complexity of transitional provisions in particular.

But this presupposes that unrepresented and unadvised users know to hunt for the rules in the first place. Applicants will not necessarily go looking for what lies behind guidance on the Home Office website and what is printed on the application form and accompanying notes.

Many rules are very difficult to understand or interpret without consulting the applicable accompanying Home Office guidance, which is very difficult for a person not familiar with it to locate. This is particularly true of the so-called “modernised guidance”.

Consolidation primary legislation and a clearer, more purposive set of rules with sensible requirements that are directly relevant to whether a person should be given leave or not, without complex transitional provisions, that were applied clearly and fairly by the Home Office so that it was possible to understand which requirement of the rules one had not met and why, would make life easier for appellants, legal representatives, Home Office caseworkers, tribunal judges and judges. But it may be easier to achieve a restoration of legal aid than to achieve that.

What are likely to be the wider implications of the lack of advice available on immigration issues?

As stated above, the likelihood is that persons will be unable to assert their rights, including their most fundamental rights, or to regularise their situation. Some will go underground and be lost to view, vulnerable to exploitation and abuse and with families and individuals under pressure, they will become hidden from those services that could assist and support them. The Home Office’s exercise of its many and various powers in the area of immigration will be subject to less scrutiny and problems of arbitrary and unfair decision making will be exacerbated.

Funding will be available for help and representation in relation to immigration detention. However, funding will not be available to challenge the administrative decisions upon which detention is founded. Is this distinction viable?

Yes and no. It is possible to make the distinction and identify which work is being done for the bail hearing and which to challenge the administrative decision. With the 1 April 2013 changes to scope many lawyers are keeping separate files in mixed cases. However, the distinction is not logical. For example, the Home Office may assert that a person cannot be released because they will abscond if released and plead in evidence the person's weak claim. Work to demonstrate that the person has a strong case is thus relevant to the bail hearing. In ILPA's view a legal representative could perfectly properly do this work in the context of the bail hearing, where it would be in scope. But the legal representative could equally well do this work in the context of the challenge to removal (out of scope). The work that could be done in the context of the bail application is unlikely to stretch to representing the person at their substantive appeal, save in very special circumstances, and thus the legal services commission gets a limited return on its investment in this work.

In the government's consultation on proposals for the reform of legal aid, it was asserted that while asylum seekers are likely to be particularly vulnerable and traumatised, those involved in immigration cases are not likely to be particularly vulnerable, will not find the issues complex and will be able to represent themselves. To what extent is this general distinction between immigration and asylum applicants reflected in reality?

The word" vulnerable", without any identification of that which a person is vulnerable to, is now so overused as to be essentially devoid of content or context. In its work in refugee camps, UNHCR uses the expression "the most vulnerable," which has a little more content. In these current xenophobic times it is arguable that any poor (and those who satisfy the means test for legal aid are poor) migrant is "vulnerable."

As to trauma, this can arise from a variety of causes. Where it arises from ill-treatment, not everyone who has been forced to flee or has suffered persecution claims asylum. Some have other options open to them, to join family members, to work or to study for example. The 1951 Convention relating to the Status of Refugees and protection under Article 3 of the European Convention on Human Rights look forward to the risk on return, not backward to past suffering. Thus, there is no neat distinction between the mental and physical health of those who make a claim for asylum and those who do not, save insofar as the UK's punitive asylum system, with less than subsistence levels of support, isolation, insecurity, detention and the denial of work or meaningful occupation affect physical and mental health[27].

[27] See ILPA's and other organisations' responses to the Joint Committee on Human Rights' enquiry and the report of that enquiry: *The Treatment of Asylum-seekers* 10th report of session 2006-2007, HL Paper 81, HC 60, 22 March 2007.

One example is that not all those trafficked for domestic slavery will have claims for asylum although many have been subject to ill-treatment and abuse.

What steps can be taken to improve the quality of Home Office decision-making?

ILPA has repeatedly advocated the "polluter pays" approach[28], urging the government to tackle the causes of costs in the system. The long-standing impulse to legislate frequently and badly in this field, leaving immigration law extremely complex, has also been cause of costs as has the Agency's approach to, and conduct of, litigation. The costs to, for example, court time and resources, generated by these factors will not disappear even if legal aid does so. The Home Secretary decided to bring the UK Border Agency back within the Home Office because "…the performance of what remains of UKBA is still not good enough."[29] Legal challenges contribute to scrutiny and without such challenges there is a risk that standards and quality will fall.

If the Home Office were made to bear the costs of its actions (and, very often, its inaction) this would be an incentive to make improvements, which could reduce the whole system costs. Any government plans to reduce costs which purport to be "comprehensive" should take account of the true costs and of costs drivers. With the cuts to legal aid, not only will individuals be deprived of access to justice, but an environment where there is encouragement or opportunity to maintain conduct that drives up costs, affecting all cases, not only those within the scope of legal aid, will be maintained.

Is there a role that advice agencies can play in this process?

Those agencies that provide representation can litigate and thus secure judgments from the tribunals and courts that require the Home Office to apply the law and otherwise conduct itself differently. To do so depends upon the availability of legal aid.

Yours sincerely

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[28] See for example ILPA's response to the Ministry of Justice consultation *Proposals for the Reform of Legal Aid in England and Wales, op. cit.* and ILPA's briefings on the Legal Aid, Sentencing and Punishment of Offenders Bill 2012, available at http://www.ilpa.org.uk/pages/legal-aid-sentencing-and-punishment-of-offenders-bill-2011.html.

[29] *Hansard* HC 26 Mar 2013 : Column 1500, per the Home Secretary.