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Medical Justice response to *Transforming legal aid Consultation paper*

Medical Justice is a charity with particular expertise concerning those subjected to administrative detention in the UK under immigration powers, and how detention affects the health and healthcare of those detained under these powers including those detained having served time in prison, asylum-seekers in the detained fast track system, and those detained for removal from the UK having been refused asylum or on other grounds. In this response, we address, under discrete headings and in the order they appear in the consultation paper, those questions in respect of which we have relevant experience and expertise. Accordingly, that we do not offer a response to any specific question is no indication that we endorse the proposal or proposals to which it relates.

Q1 Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria?

No: We do not agree with the proposed restrictions on criminal legal aid for prison law matters.

The consultation document distinguishes treatment, sentencing and disciplinary matters (paragraphs 3.17-3.19), proposing that legal aid be excluded from the former and restricted (beyond means and merits) in relation to the other two. The basis for the proposals is said to be that the prisoner complaints, probation complaints and prisoner disciplinary procedures systems are suitable and effective means to the resolution of treatment, sentencing and disciplinary matters which are to be removed from legal aid scope.

The number of persons held in prison under immigration powers is not clearly recorded. However, as at August 2012, Her Majesty's Inspector of Prisons (HMIP) reported that there were about 600 such prisoners.[1] As regards the total number of foreign nationals in prison, the Justice website states that foreign nationals constitute more than 14% of the UK's prison population and adds there are "*a huge range of nationalities and languages to be considered alongside the cultural and religious diversity that the foreign nationals already bring.*"[2] As there recognised, practice and provision for this group is not uniform throughout the prison estate, which in part reflects that the number of foreign national prisoners in any particular prison is not constant, and whereas some have large foreign national populations others have small and/or intermittent populations; and the nationality and language of these prisoners is inevitably very far from constant or predictable. However, it is correctly identified on the website that "*immigration status, staying in contact with family, language difficulties and resettlement*" are among the especially difficult challenges faced by foreign nationals in prison. HMIP has made similar observations on many occasions, and has also highlighted the especial vulnerability of foreign nationals in prison to distress caused by uncertainty, often prolonged, as to their future and prospects for release. In December 2012, HMIP and the Chief Inspector of Borders and Immigration (CIBI) jointly reported on serious inadequacies in the handling of cases of foreign national prisoners and former prisoners held under immigration powers by the UK Border Agency (UKBA).[3]

In the circumstances, we are opposed to the proposals for restricting access to legal aid for prison law matters because we do not consider that the prisoner complaints, probation complaints and prisoner disciplinary

[1] See paragraph 2.1, *The effectiveness and impact of immigration detention casework: joint thematic review by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration*, December 2012
[2] See http://www.justice.gov.uk/offenders/types-of-offender/foreign
[3] *Op cit*

procedures systems are sufficient for the needs of prisoners who do not speak English, are unfamiliar with procedures such as those operating in UK prisons and are disproportionately isolated. We do not suggest that all foreign national prisoners meet such a description, nor that no British citizen prisoners do so. Nonetheless, many foreign nationals in prison have especial difficulties in understanding what is happening to them and what are their entitlements, in accessing any legal assistance or other advice and support and in maintaining any contact with family or any other community contacts. Their circumstances are such that they may be seriously disadvantaged in being able to make effective use of internal procedures, particularly if unassisted, and especially susceptible to various of the matters it is suggested these procedures will be adequate to address. Such concerns are recognised by HMIP in his November 2011 report on HMP Wormwood Scrubs,[4] yet it is necessary to recall that HMP Wormwood Scrubs has a substantial foreign national population and is located in London. Even at HMP Wormwood Scrubs, HMIP reported that inadequate or no translation and interpretation services were used for many foreign national prisoners, with staff often relying on other prisoners to mitigate this deficit.[5] That has major problems concerning both confidentiality and differences (perhaps not recognised by staff) of language and dialect. Many other prisons are far more isolated, have much smaller and variable foreign national populations, and are accordingly even less well placed to recognise and attend to foreign nationals' particular needs. On the other hand, decisions about matters such as categorization, separation and transfer can be of enormous significance to foreign nationals, in particular where access to family may be dependent on such decisions.

These concerns are compounded by the longstanding and widely-raised complaint that foreign nationals' treatment by prison and probation authorities is frequently compromised by inadequacy and delay on the part of UKBA.[6] Thus, entitlements (such as re-categorisation, transfer, access to rehabilitation programmes and planning for release) to which foreign nationals may otherwise be entitled are effectively denied them by an unwillingness among prison and probation authorities to make relevant decisions pending a decision by UKBA as to whether deportation proceedings are to be initiated or continued. In such cases, internal procedures will provide little, if anything, of meaning or effect for this group of prisoners if seeking to challenge such decisions or failure to make such decisions by prison and probation authorities – even assuming they are aware of these procedures and sufficiently confident to make use of them.

Q4 Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK?

No: We disagree with the proposed restriction on legal aid on those grounds.

As a starting point, we do not consider the strength of a person's connection with the UK is a relevant concern when considering eligibility for legal aid to protect the person against excessive, arbitrary of otherwise unlawful action by UK authorities, e.g. in the exercise of immigration detention or removal powers.

In April 2013, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 took effect. By this Act, the Government severely restricted civil legal aid to what it was prepared to accept to be those limited areas of civil law where claimants and appellants could not be expected to secure justice for themselves without legal aid and which concerned matters of the utmost importance (e.g. loss of life or liberty, and excessive, arbitrary or otherwise unlawful exercise of state power). At Committee stage of the Bill, the Minister of State for Legal Aid, Lord McNally reasserted the Government's stated position as having:

> "*…prioritised funding so that civil legal services as set out in Part 1 of Schedule 1 will be available in the highest priority cases; for example, where a person's life or liberty is at stake, where they are at risk of serious physical harm or immediate loss of their home, or where children may be taken into care.*"[7]

We consider this restriction of civil legal aid itself was excessive and unjust. To now propose that for any group eligibility for civil legal aid should be curtailed even beyond this is wholly unacceptable.

4 See Report of an unannounced full follow-up inspection of HMP Wormwood Scrubs, 20-14 June 2011 by HM Chief Inspector of Prisons

5 Op cit, see e.g. HP26 & paragraph 3.18

6 Op cit, see e.g. paragraph 4.31

7 Hansard HL, 16 Jan 2012 : Column 349

Before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 passed the House of Lords, there was extensive debate and concern expressed about the absence of any statement of principle committing the Lord Chancellor to protecting access to justice and over the power contained in now section 9 of the Act to permit the Government to remove or further restrict areas from civil legal aid scope. The Minister of State for Legal Aid, Lord McNally gave the following assurance regarding the power to vary the services for which civil legal aid is available under section 9(2) of the Act:

> "*The power to vary a service allows us to amend the existing services within* [Schedule 1] *where they need to be altered, but without the need to omit a service and then add a new service.*"[8]

By way of example, he explained that an amendment to the Immigration (European Economic Area) Regulations 2006, which rendered unworkable the intention behind paragraph 31 of Schedule 1, Part 1 could be addressed by variation rather than omitting paragraph 31 and adding a new provision. He went on to assure, in relation to amendments then under discussion, that it was not the Government's intention to reduce categories in which civil legal aid would be available. Earlier, he had assured the House in rejecting the need for a statement of principle as pressed by Lords on all benches that:

> "*…there is no question as to what services might be funded, they are in the Bill for all to see. Consequently, the amendment based on Section 4(1) of the Access to Justice Act is not appropriate.*"[9]

The proposal, including for reasons elaborated below, is inconsistent with the various assurances given to Parliament about the Government's intentions and commitments. However, the consultation document takes no account of the assurances, and is written as if in complete ignorance of the way in which civil legal aid was restricted in the very same month as the consultation document was published by the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The consultation document singularly fails to identify just who are the people to whom and what are their circumstances in which this proposal if implemented would apply. Paragraphs 3.45 to 3.47 are banal in the extreme, and grossly misleading. These paragraphs state that civil legal aid generally concerns the law of England and Wales and there is no nationality or residency restriction on accessing it. But, as from April 2013, the law to which civil legal aid applies is, as outlined above, far more restricted. It is not clear from the consultation document that those responsible for this proposal even understand what are the areas of law for which civil legal aid remains available. The impact assessment at paragraph 5.3.1 of Annex K merely identifies that those who do not satisfy the proposed residency test would be affected by no longer receiving civil legal aid. No assessment of who these people are and what their circumstances would be is attempted.

That those responsible for this proposal do not understand what they are proposing seems confirmed by the response to a Parliamentary Question given by the Lord Chancellor (*Hansard* 21 May 2013 : Column 1042). Asked about how the proposed residency test would affect "*victims of human trafficking, unaccompanied child immigrants and victims of domestic violence*", the Lord Chancellor suggested assistance could be provided by way of exceptional legal aid funding. That appears to be a reference to exceptional funding under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. If so, it is misconceived. Firstly, the Government has previously stressed that it does not consider immigration matters to fall within the scope of that measure.[10] Secondly, as regards cases for which civil legal aid would be available but for the proposed residency test, section 10 cannot provide assistance. This is because section 10(1) expressly states that it only applies to services not within Schedule 1, Part 1. Thus civil legal aid that Parliament expressly intended should remain available for these and other foreign nationals when enacting the Legal Aid, Sentencing and Punishment of Offenders Act 2012 would be removed without remedy or recourse to the exceptional funding regime established under that Act.

Our concern is primarily with people in detention, but also with people who may be detained e.g. because of adequate handling of their immigration case.

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8 Hansard HL, 27 Mar 2012 : Column 1253

9 Hansard HL, 5 Mar 2012 : Column 1569

10 See (per Lord Wallace of Tankerness) Hansard HL, 18 Jan 2012 : Column 668 (in response to Baroness Gale); see also Hansard HL, 12 Mar 2012 : Column 129

In 2010, in proposing the changes that have now been implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Government said of applications for temporary admission or release, bail, judicial review and *habeas corpus* in relation to detention under the immigration powers:

> "*…the issue at stake – the appellant's liberty – is extremely important. We do not consider 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 by themselves.*"[11]

That assessment was correct then, and is correct now. Moreover, it was on the basis of assessment such as this that the Government persuaded a highly reluctant and critical Parliament to permit the severe restriction of civil legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Paragraphs 25 to 27 of Schedule 1, Part 1 to that Act would be largely rendered redundant by the current proposal. That was clearly not Parliament's intention barely one year ago in passing that Act, and while no evaluation has yet been undertaken of the impact of the Act the Government is now proposing to severely restrict the application of the limited provisions for civil legal aid then retained.

Those who are subjected to immigration detention are generally those who have been unable to resolve their immigration status e.g. by way of application to the Home Office (UK Border Agency as was) or on appeal against a refusal of their application. This includes those, mostly women and children, applying for leave to remain on grounds relating to their being victims of domestic violence or human trafficking. Certain immigration cases concerning these two groups were also identified by the Government as ones in which these victims could not secure justice without legal aid and where the dangers facing these victims were so serious as to demand the retention of legal aid. Yet paragraphs 29 and 32 of Schedule 1, Part 1 would also be largely rendered redundant (especially the latter concerning victims of trafficking) by the current proposal. Again that is clearly not what Parliament intended.

A critical issue in securing bail for immigration detainees, including refused asylum-seekers, is access to accommodation. This, concerning immediate homelessness, was also identified by the Government as of the utmost importance in forcing through the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Yet paragraph 31 of Schedule 1, Part 1 to the Act would be rendered largely redundant by the current proposal, which preserves eligibility for asylum-seekers but only until their claim is finally resolved. Thus detention in several cases would continue by reason of the inability of a detainee to secure accommodation.

In 2010, the Government explained its position as:

> "*We consider that cases where state agents are alleged to have abused their position of power, significantly breached human rights, or are alleged to have been responsible for negligent acts or omissions falling very far below the required standard of care have an importance beyond a simple money claim. We consider that these cases are an important means to hold public authorities to account and to ensure that state power is not misused… the determining factor* [for retaining legal aid] *is the role of such cases in ensuring the power of public authorities is not misused…*"[12]

We are all too aware of abuse of power and acts or omissions falling well below an appropriate standard of care on the part of the immigration authorities and subcontractors exercising immigration powers, particularly in relation to detention and removals. By way of example, in 2012 we published our report on the rule 35 process, which is intended to protect detained torture survivors (and others whose mental or physical health means they are ordinarily to be regarded as unsuitable for detention) by providing a means by which they may be quickly identified as torture survivors or as suffering from mental or physical ill-health and considered for release. We found "*systemic failures on the part of* [the UK Border Agency] *and its contractors to follow statutory law and provisions…* [and] *instances of racism and serious clinical breaches*".[13] We also there identified disregard by the Home Office of previous critical recommendations and findings: "*Independent inspectorates, official bodies and NGOs have made repeated recommendations to no substantive effect. There have also been numerous reported*

11 See paragraph 4.83, Ministry of Justice consultation: Proposals for the reform of legal aid in England and Wales.
12 Op cit, paragraph 4.53
13 See "The Second Torture": The immigration detention of torture survivors, Medical Justice, 2012, p100

cases, where Judges have condemned the Home Office for failing in its duties and departing from its published policies…". Indeed, the Home Office has previously been exposed for implementing unlawful, secret policies in relation to detention.[14] In May 2013, the High Court has confirmed many of our findings in ruling several torture survivors to have been subjected to unlawful detention.[15]

The appropriate means to save public funds in such cases is not to deny or inhibit those subjected to unlawful, arbitrary or abusive action by the state or its agents. Rather, pressure should be brought to bear to ensure that the Home Office conforms to its legal obligations and ensures its agents, including contractors, do so. Access to legal representation, and thereby to the courts, supported by legal aid, continues to prove vital to the securing of justice to individuals and the exposure of state abuse and unlawfulness in this area.

We focus on detention because this is our area of concern. We do not intend any suggestion that the proposal would be justified in relation to matters unconnected with detention. This is a thoroughly bad proposal, which would cause substantial injustice to those generally least likely to be able to secure justice for themselves and most vulnerable to excessive and arbitrary treatment by state authorities, especially the immigration authorities.

> Example of a case that would be excluded from legal aid funding under the new proposals ;
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> UK Border Agency admitted unlawfully detaining Mr KM for 8 months, having refused his asylum claim, and having disbelieved his claimed nationality. Indeed, UKBA apologised to him. It was not disputed that they tried to remove Mr KM a number of times, including an instance whereby escorts damaged his arm, necessitating a plaster cast for a number of weeks, after UKBA resumed attempts to remove him. UKBA later accepted that Mr KM is a national of the country he claimed to be a national of, and a judge upheld his fresh asylum claim. The costs of detention, the removal escorts employed by UKBA's contractor, and plane tickets were considerable, and compensation payment is in discussion. Mr KM would not get legal aid under the new proposals. UKBA and the escorts would likely not have been held to account, and as such, the potential risk of reoccurrence could be increased.

In presenting this proposal, the consultation document includes a suggestion that civil legal aid may encourage foreign nationals to bring disputes in the UK (paragraph 3.44). No evidence or analysis is presented to support this vague allegation. Considering what little has been left within scope for civil legal aid since April 2013, and the reasons why, the allegation would seem manifestly baseless. Certainly, in our experience, foreign nationals do not come in any number to the UK in order to secure the advantage of being detained so as to access legal aid to challenge their detention. The same might be said of such matters as homelessness and destitution, domestic violence and sexual and other exploitation.

Q5 Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or onward permission to appeal to the Court of Appeal, if permission is granted by the Court (but that reasonable disbursement should be payable in any event)?

No: We disagree with the proposed restriction on payment for judicial review work; though agree that reasonable disbursements should be payable.

We have emphasised (as previously has the Government) the importance of judicial review in holding the state to account in response to Question 4 (above). We do not repeat those observations, which are of equal relevance to this proposal.

The civil credibility impact assessment identifies the following as key assumptions:

- That the cases where a legal aid provider refuses to take on a judicial review case will likely be cases that the court would in any case have found to be unarguable.

14 See R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245
15 See R (EO & Ors) v Secretary of State for the Home Department [2013] EWHC 1236 (Admin)

- That there is a risk of increased requests for an oral hearing or onward appeal against refusal of permission.

We accept the second assumption but not the first. The consultation document presents statistics concerning the granting of legal aid in judicial review cases during 2011-12. At this time, save for those providers permitted to exercise devolved powers in emergency situations (even then a full application was required to be sent to the Legal Services Commission within five working days), grants of legal aid for this work were made by the Legal Services Commission. Thus, the Commission identified 4074 cases in that year as meriting legal aid.

In any event, the consultation document presents a misconceived argument in drawing analogy with the permission application stage in the immigration and asylum appeal process. The circumstances in these appeals are fundamentally different to the circumstances in judicial review cases. When considering whether or not to draft an application for permission to appeal against a decision of the First-tier Tribunal (Immigration and Asylum Chamber), a legal representative typically will be familiar with the case and relevant papers. Save where there is delay obtaining case-papers from a previous representative or only incomplete papers are obtained (which might well be the case if the appellant was previously without representation), the person considering and drafting grounds for appeal can be expected to be fully informed as to the issues arising for those grounds. This is far from the case in judicial review proceedings, where (and even in the face of pre-action letters, further requests for disclosure and case management directions from the court), the Home Office is regularly at fault in failing to disclose relevant information (including the basis for defending the claim) until late in the day.[16]

In the circumstances, the proposal could be expected to have a chilling effect on legal representatives unwilling to bring even strongly arguable claims for fear that work (far more extensive than involved in most permission applications to the Upper Tribunal) may ultimately be unremunerated. If so, excessive, arbitrary and otherwise unlawful action by the state (including immigration authorities and contractors) will be unchecked, causing serious injustice to individuals and families (including British citizens) and establishing a culture of impunity in which further such abuses will be implicitly encouraged.

The dangers involved are revealed by cases (there are far too many to attempt a comprehensive list) such as that in which the Home Office (or its agents): (i) continued the unlawful detention for removal to Somalia of a Dutch national whose passport the Home Office held on file but ignored for several months;[17] (ii) maintained (for over two years) an unlawful and secret detention policy;[18] (iii) applied an unlawful policy (though the substance of such policy had no application in the particular case) to remove a refugee to his country of origin where he was at risk of persecution;[19] (iv) continued the unlawful detention of children in contravention of its statutory duty to have regard to their welfare;[20] (v) continued the unlawful detention of torture survivors having failed to give effect to its policy in respect of Rule 35 of the Detention Centre Rules 2001 intended to safeguard torture survivors from continued detention;[21] (vi) operated unlawful policy on the use of force on pregnant women and children in detention;[22] and (vii) continued the detention of mentally-ill persons in circumstances violating the prohibition on torture, inhuman or degrading treatment and in one case (as found by the judge) with "*callous indifference*" to the man's suffering.[23]

These are far from isolated examples, and this proposal should be abandoned. Instead, Government should aim to save public funds by increasing effort to expose and discourage unlawful and harmful activity by state agents

16 Perhaps the most egregious examples of this are highlighted in the judgment of Davis J in R (Abdi & Ors) v Secretary of State for the Home Department [2008] EWHC 3166 (Admin), which records how the Home Office maintained a secret policy on detention over a period of about two years and failed to disclose its operation of this policy to claimants, courts or its own Counsel in individual claims brought against detention. However, examples of delay in disclosing relevant material (or simply ignoring pre-action letters, requests or directions for disclosure) are legion.

17 See R (Muuse) v Secretary of State for the Home Department [2010] EWCA Civ 453

18 See R (Lumba) v Secretary of State for the Home Department [2012] 1 AC 245

19 See R (N) v Secretary of State for the Home Department [2009] EWHC 878 (Admin)

20 See R (Suppiah & Ors) v Secretary of State for the Home Department [2011] EWHC 2 (Admin)

21 See R (EO & Ors) v Secretary of State for the Home Department [2013] EHWC (Admin) 1236

22 See R (Chen & Ors) v Secretary of State for the Home Department CO/1119/2013

23 See R (S) v Secretary of State for the Home Department [2011] EWHC 2120 (Admin), R (BA) v Secretary of State for the Home Department [2011] EWHC 2748 (Admin) and R (HA(Nigeria)) v Secretary of State for the Home Department [2012] EWHC 979 (Admin).

rather than reducing the means by which individuals may protect themselves against this by which such activity is most likely to be discouraged saving further individuals from similar mistreatment. Even now, abusive, harmful and callous treatment is suffered by detainees for extended periods without the intervention or awareness of the courts. For example, Harmondsworth Independent Monitoring Board in its Annual Report for 2012 identified that the holding in near continuous segregation at Harmondsworth and previous Immigration Removal Centres a detainee with mental and behavioural problems. This proposal (and that addressed by Question 4) would exacerbate the likelihood of others suffering in this and related ways. The need for increased, not reduced, scrutiny of immigration detention is tragically confirmed by the fact of their having been two deaths in immigration detention in 2013, and seventeen such deaths since 2000, of which we are aware – not including deaths in the process of removal, such as that of Jimmy Mubenga. His death raises wider concerns of relevance to this consultation, since the facts of his case (his strong connections to the UK through his wife and children) at least raise the spectre that inadequacy in legal aid provision was a direct cause to his being detained and suffering the distress of a forced removal, which ultimately led to his death.

Q6 Do you agree with the proposal that legal aid should be removed for all cases assessed as having 'borderline' prospects of success?

No: We disagree with the proposal to remove the 'borderline' category within the legal aid merits assessment.

The civil credibility impact assessment states that: "*…it is expected that there will be an increase in public confidence in the legal aid system resulting from the removal of borderline cases from receiving civil legal aid.*" This expectation is misconceived. We are particularly familiar with the situation of many refused asylum-seekers, whose appeals are pursued with no or inadequate legal representation including in (but not limited to) the detained fast track process. All too frequently, more careful consideration at a later date reveals that an asylum claim that has been concluded to lack merit is shown to have substance.

Among the reasons for erroneous merits assessments of insufficient merits are (i) inadequate time spent by legal representatives with (particularly detained) clients leading to non-disclosure of sensitive information such as a history of torture, domestic violence or other sexual abuse; (ii) failure to identify and/or obtain medical evidence to substantiate that the claimant is a torture survivor or suffers from mental ill-health which may explain difficulties in presenting his or her account; and/or (iii) lack of familiarity with relevant country information, including where this may identify changed circumstances or distinguishing features from current country guidance issued by the Upper Tribunal (Immigration and Asylum Chamber). These are often compounded by inadequate interpreting; and confusion, mistrust and mental ill-health affecting many asylum-seekers, which requires careful and time-consuming effort on the part of legal representatives to gain trust and understanding (effort which is often not provided, and if provided unremunerated under current legal aid arrangements).

The result is considerable harm to asylum-seekers and expense to the state caused by delay in properly addressing the substance of claims and detention of refused asylum-seekers in circumstances where it is necessary to reconsider claims at a later date. This does not promote public confidence, but undermines it. The Ministry presents no evidence to suggest that the removal of the borderline category will reduce the number of unsuccessful appeals pursued under legal aid funding rather than, as would be consistent with what we have generally witnessed over recent years, increasing the number of appellants left without legal representation in circumstances where the substance of their claims has been inadequately assessed and is inadequately presented leading to the need for further claims and litigation in the future. In asylum cases, which concern risks of execution, torture and other serious harms, removing the borderline category, if it reduces grants of legal aid, will likely increase the risk that asylum-seekers with good claims are wrongly returned to countries where they will suffer such harms.

Q32 Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished?

No: We disagree with the proposal to remove the uplift in these cases.

We have seen in draft the response of the Immigration Law Practitioners' Association (ILPA), and agree with their submissions. As we have indicated in response to Question 6 (above), we are especially concerned with the

number of asylum-seekers who are inadequately represented or not represented, particularly at appeal, and the consequences for this in terms of detention, removal and the need for fresh claims and litigation.

At the consultation meeting hosted by the Ministry of Justice at Park Crescent Conference Centre on 23 May 2013, the Ministry representatives were asked about the quality of advice and representation from legal aid providers. The response indicated that the Ministry did not consider itself or the Legal Aid Agency to have a primary responsibility for ensuring the quality of legal aid provision, and indeed it was expressly suggested that quality was irrelevant to the consultation. We fundamentally disagree. Moreover, quality is necessarily linked to the level of remuneration. For reasons more fully explained by ILPA, we oppose this proposal, which would exacerbate the already significant challenge to the sustainability of legal aid providers' practice of any adequate quality.

Q33 Do you agree with the proposal that fees paid to experts should be reduced by 20%?

No: We disagree with the proposal to reduce experts' fees.

The civil fees impact assessment sets out no evidence or analysis to suggest that the Ministry is able to establish a baseline in relation to expert fee rates immigration and asylum, nor draw appropriate comparison with expert fees in other areas of law. We further note that:

- The ability of the Upper Tribunal (Immigration and Asylum Chamber) to issue sustainable and effective country guidance is often dependent on appellants' ability to present expert witnesses.
- More could be done to reduce expenditure on expert fees if the Home Office ceased its practice of needlessly challenging all aspects of credibility and near invariable failure to accept an individual's claim to have suffered torture. Such practice means that expert evidence is frequently needed even in cases where the evidence presented by the asylum-seeker is on its face strongly supportive of his or her claim.

In the circumstances, there is no sound basis for risking that asylum claims and challenges to detention are unsuccessful (or not brought where they should) because of unavailability of a relevant expert or inadequacies in cheaper expert reports.

Q34 Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?

Q35 Do you agree that we have correctly identified the extent of impacts under these proposals?

No and No: We do not agree that the range or extent of these proposals' impact has been correctly identified.

The equalities impact assessment is especially poor. For example, in relation to the proposed residency test, both the main body of the consultation document and the equalities impact assessment at Annex K fail to identify the types of person and cases which, from April 2013, remain eligible for civil legal aid. The impact assessment blandly states that 'clients' will be affected by no longer receiving civil legal aid (paragraph 5.3.1). We refer to our response to Question 4 (above). The impact of this proposal is effectively left not assessed; and we do not consider it appropriate for responders to be left to carry out impact assessment for the Government in such circumstances. The assessment in relation to other proposals is hardly any better.

As regards those proposals, in respect of which we have answered consultation questions, we have pointed in our response to particular questions to relevant factors that ought to be considered in undertaking a meaningful and effective impact assessment.

Q36 Are there forms of mitigation in relation to impacts that we have not considered?

We disagree with the implication that the proposed measures are appropriate and that the sole or key issue is one of mitigation.

Effort should instead be directed to reforming Home Office conduct which so frequently necessitates litigation and extends its length.

It should be recalled (as we have highlighted in this response, particularly in relation to Questions 4 & 5) that the restriction of civil legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has been expressly on the basis that civil legal aid would thereby be limited to what was necessary to ensure justice having regard to the seriousness of the issue involved and the capacity for those affected to secure justice without legal aid. In the circumstances, proposals to restrict eligibility still further are clearly unwarranted.