Legal Aid Transformation next steps, 5 September 2013

Overview from Alison Harvey, ILPA, 5 September 2013

For the Government response to the consultation see
https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps

ILPA's response to the consultation can be read at
http://www.ilpa.org.uk/resources.php/18039/transforming-legal-aid-ilpas-response-as-submitted-to-the-ministry-of-justice-on-3-june-2013

You do need to look at the annexes and well as the main response to get the details. I have summarised those matters of most relevance to immigration, asylum and nationality law below. I have not dealt with the criminal law proposals where the Government has moved considerably.

What can I do?

There is general consensus that action at local, constituency level, is needed to raise interest in the effect of the civil proposals to a level where the debate can be heard. This will happen where people:

- Write to or visit local MPs (or if you deliver legal aid, ask them to visit you). Do not forget consistency caseworkers to explain the effect of the proposals
- Write to local newspapers to explain the effects of the proposals. Again, if you deliver legal aid they may wish to visit you.
- Discuss the proposals with local groups and organisations who discuss them in their turn.
- Provide information about the effect of the proposals on twitter feeds, email lists, blogs, magazines etc. that can be used to tell people about the changes.

Those who are not involved in the delivery of legal aid can be seen to be involved in the debate from an informed but disinterested perspective which can be helpful.

The proposals as they now stand

Cuts to legal aid for prison law

The big change from the original proposals is that the Government has agreed that people will be able to bid for a stand-alone prison law contract instead of having to bid for a big criminal contract as well. The Government says at Annexe B

> *"…those providers wishing to apply to deliver only prison law and/or appeals and reviews services should not be prohibited from doing so. … the criminal legal aid contract should be structured in such a way to enable providers to apply to deliver prison law and/or appeals and reviews services only."*

It is intended to start procurement early in 2014, with contracts to come into force from spring 2015. However, changes to the scope of prison law will be made before then.

The scope of prison law will be cut drastically although the Government has modified the original proposal so that legal aid will remain for proceedings before the Parole Board where the Boards has the power to direct release. "Sentence calculation matters" will remain within the scope of legal aid. Changes will be implemented by amendments to secondary legislation and contract amendments later in 2013.

The Residence Test

- There have been some modifications to the proposal that people wishing to claim any civil legal aid (not just immigration) will have to prove to their lawyers that they are living in the United Kingdom lawfully, and have been for at least 12 months with lawyers having to decide whether or not a person is lawfully resident in the UK. The modified proposal is to be brought in by changes to secondary legislation in early 2014.

The modifications are:

- The Government has decided that babies under 12 months old will continue to be eligible for legal aid despite not having12 months' lawful residence. However, they will still need to be lawfully resident.

- The Government is sticking with the proposal that asylum-seekers will continue to be exempt from the residence test until their case has been decided and any appeals finally concluded. The original proposals were unclear on what would happen with "fresh claims" (claims for asylum made from a person still in the UK after an earlier (often years earlier) claim was refused and ILPA put forward detailed arguments about why these should continue to be funded. It appears that we were heard. At Annexe B to the response the Government says

> *118 …we proposed an exception for asylum seekers, because of the particular vulnerability of this group. As set out in the consultation paper, by asylum seeker we mean any person claiming rights described in paragraph 30(1) of Part 1 of Schedule 1 to LASPO. Such a person would continue to be able to get legal aid to help with making their claim for asylum, including preparing and submitting a fresh claim. Where the Home Office decides that their further submissions do not amount to a fresh claim, legal aid would continue to be available in respect of a judicial review of that decision (subject to means and merits).*

- The original proposal was that once an asylum seeker is granted leave to stay in the UK, they will no longer qualify under the exception for asylum seekers. ILPA argued that this was contrary to the 1951 UN Convention Relating to the status of Refugees which states:

> *Article 16*
> …
> *2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance….*
> …

This appears to have been partially persuasive. "Successful asylum seekers" will continue to be eligible for legal aid. Annexe B says

> *…the continuous 12 month period of lawful residence required under the second limb of the test should, in the case of an asylum seeker who is successful in their asylum claim, [*will*] begin from the date they submitted their asylum claim, rather than the date when that claim for asylum is accepted. However, as previously proposed, where an asylum seeker has been unsuccessful in their asylum claim and their appeal rights had been rejected, they would no longer benefit from the asylum seeker exception to the residence test.*

This is counter-intuitive. A person with an overwhelmingly strong case for recognition as a refugee, recognised almost immediately, would be kept out of their rights under Article 16 for nearly a year subsequent to recognition, whereas a person who succeeds after numerous appeals might never cease to be eligible for legal aid. Remember – this is eligibility for legal aid for any civil mater within scope: family, housing etc.

- A change is that the residence test will not apply to "categories of case which broadly relate to an individual's liberty, where the individual is particularly vulnerable or where the case relates to the protection of children". This illustrates the power of the case study and individual example. It will protect some people. But experience to date teaches that when a group is protected, a particular individual's right to be identified as a member of that group is more often questioned. This "carve out" approach brings its own troubles. The lucky few are identified in paragraph 125 of Annexe B:

> *"125. …there are further limited circumstances where applicants for civil legal aid on certain matters of law (as set out in Schedule 1 to LASPO) would not be required to meet the residence test. The test will not apply to the following categories of case (which broadly relate to an individual's liberty, or where the individual is particularly vulnerable or where the case relates to the protection of children):*
>
> *<u>Detention cases</u> (paragraph 5* [mental capacity act challenges]*, 20* [habeas corpus]*, 25* [immigration detention]*, 26* [temporary admission] *and 27* [challenges to release conditions from immigration detention] *(and challenges to the lawfulness of detention by way of judicial*

review under paragraph 19) of Part 1 of Schedule 1 to LASPO) [civil claims are not included in this list – paragraph 21 abuse of power; paragraph 22, breaches of the European Court of Human Rights)

Victims of trafficking (paragraph 32 of Part 1 of Schedule 1 to LASPO), v

victims of domestic violence and forced marriage (paragraphs 11, 12, 13, 16, 28 and 29 of Part 1 of Schedule 1 to LASPO);

Protection of children cases (paragraphs 1, 3 [Exceptions to the residence test for cases under paragraph 3 of Part 1 of Schedule 1 to LASPO would only apply for cases where the abuse took place at a time when the individual was a child], 9 [Exceptions to the residence test for cases under paragraph 9 of Part 1 of Schedule 1 to LASPO would only apply to cases under the inherent jurisdiction of the High Court in relation to children], 10, 15 and 23 of Part 1 of Schedule 1 to LASPO); and

Special Immigration Appeals Commission (paragraph 24 of Part 1 of Schedule 1 to LASPO).

At paragraph 12 of Annexe B the Government goes on to say

"126.We will also make limited exceptions for certain judicial review cases for individuals to continue to access legal aid to judicially review certifications by the Home Office under sections 94 [Appeal from within the United Kingdom: unfounded asylum or human rights claim] and 96 [Earlier right of appeal] of the Nationality, Immigration and Asylum Act 2002"

- A further change is that short breaks in residence (up to 30 days in aggregate) will be permitted with the 12 months residence treated as continuous. The Government says at Annexe B

  "In applying the test, we also intend that "continuous" should bear its natural meaning, so that significant breaks in residence would not satisfy the "continuous" requirement. However, we consider it would be appropriate and proportionate to allow for short breaks in residence. We therefore intend that a break of up to 30 days in lawful residence (whether taken as a single break or several shorter breaks) would not breach the requirement for 12 months of previous residence to be continuous."

The Government says at Annexe B

"In applying the residence test, our intention is that "lawfully resident" should bear its natural meaning. That is that the individual has a right to reside lawfully in the UK and is exercising that right, whether that be for work, study, settlement or any other reason. Further details on how this will be demonstrated for the purposes of the test will be described in secondary legislation and guidance as appropriate so that the requirements are clear and providers will be clear on what is required of them. .. It is our intention that the test will be objective and not overly onerous to administer. Where it is established that an individual who has passed the test was not, in fact, lawfully resident at the time of making their application for civil legal aid, then legal aid funding would cease. Providers would not face a further penalty

or loss of funding in these situations, presuming they acted in accordance with their legal and contractual obligations. Providers would of course be required to adhere to their existing contractual, legal and professional duties when applying the test."

At paragraph 130 of Annexe B the Government says of evidence.

> *"We have considered whether, in exceptional circumstances signed statements should be accepted where evidence cannot be provided, potentially due to the particular circumstances of the claimant. …allowing for signed statements to be made would dilute the effectiveness of the test as a genuine means of preventing non-residents from obtaining civil legal aid. A system of signed statements (even in only exceptional circumstances) would result in increased administrative costs to the LAA. On balance, we therefore consider that signed statements should not be allowed. As set out above, the legislation and guidance which introduces the test will provide further details on the forms of acceptable evidence."*

Judicial Review

The first stage in applying to the High Court for judicial review is to apply to the High Court for permission to bring the judicial review. It was proposed that work done for the permission stage would only be paid if permission were granted. The Government intends to modify this proposal. The proposed change is to introduce a discretion to permit the Legal Aid Agency to pay providers in certain cases concluding prior to a permission decision without a costs order or agreement. In ILPA's view this is unlikely to address concerns about the inequality of arms and how this affects whether the case concludes at all. There is also the question of the frequency with which discretion will be exercised.

A paper is to be published The Government says in Annexe B *"We intend to further consult on this further proposal and the criteria which would be used to determine whether or not a discretionary payment is made. We will set out further details of this proposal shortly in a separate paper."*

Merits test

Certain cases currently receive funding if there is a less 50% chance of success, i.e. the prospects of success are borderline, but the case is a family or housing case of a certain type or the case has special features (for example it is of significant wider public interest or overwhelming importance to the individual). The Government is sticking to abolishing funding for cases, including asylum cases, with only borderline prospects of success.

Barristers' fees in the Tribunals will be cut

The proposal will be implemented unchanged. It is very disappointing that the Law Society and some solicitors' groups supported the proposal: now no one, barrister or solicitor, will be paid at viable rates. Changed to be implemented by secondary legislation later in 2013.

Upper Tribunal rates of payment in cases before the Immigration and asylum chamber will be cut

The Government is sticking to its proposal to remove the “uplift” in such cases and it does not accept that the uplift has masked low rates of pay, so it will not be lifting those rates either. Change to be implemented later in 2013.

Expert fees will be reduced by 20%.

The Government will implement this proposal but has decided that rates payable to experts in areas where recent changes have been made to address "market supply issues" will not be changed. Current fees paid to interpreters in London will be retained and outside London, rates paid to interpreters will not fall below those paid by the Crown Prosecution Service.