Response of the Immigration Law Practitioners' Association to the Solicitors Regulation Authority consultation on file retention

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 disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office, and other consultative and advisory groups.

We are grateful to the Solicitors' Regulation Authority for giving us extra time to submit this response.

ILPA has experience, on which we draw for this response, of file retention by solicitors and by persons regulated by the Office of the Immigration Services Commissioner. Our primary concern is with the retention of files in immigration, asylum and nationality cases but we trust that some of our observations based on our experience will be of more general application.

1. **Do you agree with the proposal?**

We do not agree with the proposal to change the period of retention of immigration files from seven years from the date of intervention to seven years from the last action on the file.

Nor do we agree with the proposal, insofar as it affects immigration cases, to change the periods for which birth and marriage certificates and passports are retained.

In general, we accept that there may be scope in some cases to reduce retention periods and consider that the approach outlined in the consultation of looking at matters by area of law and type of document is a sensible one. Practitioners in a particular area are likely to be best placed to advise on the appropriate periods.

2. **Your views on alternative ways of managing the costs associated with file retention having regard to**
   - **Intervened practitioners being liable to pay the cost of intervention; and**
   - **The Compensation Fund being applied to cover costs, charges or expenses incurred following a decision to intervene in a solicitor's practice/authorised body**

ILPA • Lindsey House • 40/42 Charterhouse Street • London EC1M 6JN •Tel: 020 7251 8383 • Fax: 020 7251 8384
EMail: info@ilpa.org.uk Website: www.ilpa.org.uk

We agree that, as identified in the consultation paper (page 16ff), it is frequently the case that archives are not managed effectively. Firms and organisations may retain large numbers of files for longer than prescribed periods, sometimes for good reason, sometimes because they have not given the matter consideration and sometimes because the costs associated with identifying the subset of files that can be destroyed is much greater than the cost of continuing to store them until there is no possibility that any file within a cohort is not old enough to be destroyed. Records that could identify the last action on the file may be missing or incomplete. It is not infrequently the case that records may be unreliable – while the number of files for which there is an error in the record may be small, once it is known that there are errors in some records the firm cannot destroy files with confidence.

It has also been our experience that individual client care letters have in some cases committed to the storage of files for a longer period than that required by the Solicitors Regulation Authority or the Office of the Immigration Services Commissioner. It is not always easy to identify without inspecting the files which files are affected.

In the case of immigration files, this leads us to consider that a proposal to calculate the period with reference to the last action on the file will in a significant number of cases not be workable or cost effective.

However, in addition, we consider that seven years from the last action on the file is not likely to be sufficient in a significantly large number of immigration cases, such that it would not be a sensible proposal.

There are many reasons why an immigration file may suddenly wake up. A client with limited leave may need to apply for an extension, settlement, or nationality, several years after the original application was decided. A client may have no leave but no removal action has been taken against them for years, then suddenly it is proposed to remove them from the UK and representatives are instructed to examine whether removal can be challenged. Or a client may make a subsequent application to which the papers in the former application are relevant. We are happy to go into more detail if required, but provide the following examples:

- The earliest point at which most persons can naturalise as British citizens is five or six years from a grant of leave in response to an application. Some persons must have leave continuously for 20 years before they apply. This is without regard to those who do not apply as soon as they can. An example of where an earlier application may be relevant: the Home Office refuse to naturalise a person as a British citizen because, they say, evidence of involvement with opposition groups given during an asylum application proves that the person is not of good character. There may then be a dispute about the information and evidence in the asylum application.
- A child born in the UK can register as a British citizen after living for 10 years here, subject to consideration of periods of absence and character. Immigration history is relevant to both heads.
- A person's immigration applications can be refused during a period of up to 10 years on the grounds that they used deception in a previous application. Whether an innocent mistake was made or whether deception was used is frequently a matter of dispute.

- Home Office delays and backlogs are notorious. The Home Office had intended to decide all applications for asylum made before March 2007 by July 2011. It failed to do this. Applications remain outstanding. In some cases where it did decide the applications, rather than grant the person indefinite leave to remain (settlement), it granted limited leave of three years. Many of those cases have now reached the end of the three year period, so that it is necessary to apply for further leave. The Home Office report that some 60% of those eligible to, and needing to, apply for further leave at the end of the three years have not done so. At the moment no one has an explanation for this but one of the explanations that has been suggested is that many were cases previously held by Refugee and Migrant Justice or the Immigration Advisory Service (both of which have ceased operating after entering administration).

As to documents such as birth and marriage certificates and passports:

- Refugees are assumed not to be able to approach their country of origin for passports, etc. This will also be the case for many persons with humanitarian protection. Approaches may put them or family members at risk, in the country of origin and / or the country of refuge. Approaches may also be held to be evidence that they do not stand in need of international protection.
- Other persons may not be at risk in approaching their country of origin for passports, copies of birth certificates, etc. but may find that this is a very difficult procedure. In some countries, records are poor. In others, you need to be present on the territory to get anywhere with your request. Delays are common.
- Whether a person is a British citizen or is entitled to register as a British citizen depends upon a combination of place of birth and the nationality or immigration status of parents, with other factors such as legitimacy (and in cases on birth on board ship, the flag under which the ship sailed) also being relevant. Given the legacy of empire, status tracing is not uncommon. Records, particularly where, for example, they held at an embassy or consulate overseas, may be impossible to retrieve. An extraordinary amount is held, but by no means everything. Status tracing has particular importance in cases where a person would otherwise be stateless.

3. Are there any consequences, risk and/or benefits which have not been outlined?

ILPA's interest in the question of the storage of files when OISC registered organisations close is longstanding. We raised it in our August 2009 response to the 2009 UK Border Agency consultation on the oversight of the immigration advice sector in November 2009 *http://www.ilpa.org.uk/resource/15943/uk-border-agency-ukba-oversight-of-the-immigration-advice-sector.-consultation-response.-november-20*

We discussed the matter with the Immigration Services Commissioner.

We raised the matter with both the Legal Services Board and the Legal Services Commission and wrote to the Commissioner about these communications on 8 March 2011. That letter is attached hereto. See also ILPA's response to the Legal Services Board's consultation on the regulation of immigration advice and services of 24 May 2012,

available at http://www.ilpa.org.uk/resource/15464/ilpa-response-to-the-legal-services-board-consultation-on-the-regulation-of-immigration-advice-and-s

Codes 86 and 87 of the OISC Code of Standards require that (i) client records must be retained for at least six years and (ii) a client's records must be made accessible to the client upon their request. These support the requirements that advisors act in their clients' best interests (Code 9) and to act objectively and fairly with respect to the client (Code 13 (b)).

We expressed concern about the risks and prejudice to clients, not to mention the additional expense of having the new advisor start again from scratch, an expense to be borne by the (former) Legal Services Commission or by the client.

ILPA's experience of the problems surrounding file retention was dramatically increased by its exposure to the effects of two very large voluntary sector organisations providing immigration advice going into administration.

The first organisation was Refugee and Migrant Justice, which went into administration on 16 June 2010. The second was the Immigration Advisory Service, which went into administration on 11 July 2011. In neither case was there an intervention but some of the problems that arose are very similar to those that can arise following an intervention. Both did work funded by legal aid; Refugee and Migrant Justice did entirely legal aid work.

Refugee and Migrant Justice carried out a very high profile campaign to attempt to prevent closure before going into administration and there continued to be a lot of publicity after 16 June 2010. The question of who should meet the costs of storage of files in the archive was the subject of argument between the administrators, BDO Stoy Haywood and the Legal Services Commission. As to files not yet archived, it took a long time to get a system off the ground. In theory clients could obtain their files, in practice this was very difficult. The administrators retained a skeleton staff packing up files and creating records of them for a period of weeks. All this time there was hope that perhaps a rescue plan would be formed but the Legal Services Commission indicated that there were no live contracts to novate.

In the end the Legal Services Commission arranged a system of bulk transfers of files. Files were transferred to other legal aid lawyers but the transfer was only perfected when the client instructed that firm. If the client instructed a different firm, that firm was supposed to be able to call for the file from the firm that had it following the bulk transfer.

ILPA members' experience was that the bulk transfers of Refugee and Migrant Justice's files were extremely problematic and many files remain unclaimed. There were many cases where it would appear that the client did not know where their file went. Members who tried to obtain Refugee and Migrant Justice's files after the formal wind down and obtain their files from the administrators report never having received them and having to ask the UK Border Agency for a copy the file as the only means of obtaining this. Some very complex and specialist cases went to firms with no experience of this type of work.

The smoothest transfers of Refugee and Migrant Justice's files were:

i) those effected by the staff with direct contact with the firm subsequently instructed by the client (including but not limited to cases where staff moved to that firm);

ii) those where the client sought to instruct new reps who were then able to speak to staff and establish information about the file and then accept instructions, obtain authority and get the file sent to them at once.

One reason for the limited number of such transfers was that there was uncertainty about the numbers of new matter starts that were available to support such transfers.

In the end many firms found they were holding onto files transferred but where they had never been instructed by the client, unclear as to what their responsibilities for file retention were (given that they had no client). Lawyers who have subsequently picked up Refugee and Migrant Justice' clients have often been unable to trace the file. Both the courts and the Home Office were extremely helpful in providing such documents as they held to ensure that cases were not hindered but their assistance did not make good the problems arising in all cases.

The Immigration Advisory Service closed without warning over a weekend and the premises were sealed. Staff had minimal access to the premises after that date. Strenuous efforts were made to learn the lessons from Refugee and Migrant Justice. ILPA members held a meeting on 14 July 2011 and made the following recommendations, based on experience of the Refugee and Migrant Justice's closure.

> ***3.ix Storage of files***
> *We understand that the costs of file storage in relation to the Refugee and Migrant Justice administration are extremely large, even exclusive of the costs incurred by those firms to whom files were transferred but never claimed. On the latter, members have commented "It was such a time of chaos, highly possible, clients never got letters, never understood what was going on, etc."*
> *There has often been a need to obtain already archived files relating to previous matters, especially if they were files that were recently closed. It was (and remains) in the words of one member "virtually impossible" to get Refugee and Migrant Justice's papers or files from the administrator. In some cases, members attempting to obtain files were told that the storage company was exercising a lien over them. In other members were told that they must pay £75 for the file to the storage company.*
> *ILPA has brought to the attention of the Legal Services Board, the Legal Services Commission and the Office of the Immigration Services Commissioner the difficulties that arise because the Office of the Immigration Services Commissioner does not play role similar to that played by the Solicitors Regulation Authority when a solicitors' firm closes down. See recommendations to regulators below.*
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> **…**
> ***RECOMMENDATIONS TO REGULATORS***
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> *That thousands of clients can be left unrepresented without regulatory oversight we find impossible to comprehend.*
> …
> *The Office of the Immigration Services Commissioner as the regulator of IAS caseworkers has responsibility to see that the obligations imposed on OISC regulated caseworkers are fulfilled and should be asked to undertake this work. We are aware, and both ILPA and the Legal Services Commission have made representations to the Legal Services Board, and being in correspondence with the Office of the Immigration Services Commissioner about*

the lacunae as to the storage and retrieval of files held by OISC regulated organisations that close/are closed so that there is no means of ensuring that obligations as to the storage of files are honoured. This lacuna must be closed immediately and regulatory responsibilities assumed by the appropriate body.

At the meeting of creditors of the Immigration Advisory Service, ILPA, itself a creditor, asked the joint administrators what they were going to do about the storage of closed files in the Immigration Advisory Service archive which, because they are closed, would not be transferred to new providers. The joint administrators indicated that they were exploring all options, up to and including making an application to the court for directions to destroy the files. ILPA made known to the Joint Administrators its objections to this and asked to be informed when any such application was made.

ILPA asked to be joined to the application at a Directions hearing in January 2013. Mr Registrar Baister, who reserved the case to himself, joined ILPA to the application and protected it from costs liability. The Registrar also joined The Law Society, Solicitors Regulation Authority (there was a solicitors" unit in the Immigration Advisory Service) and the Office of the Immigration Services Commissioner (OISC). ILPA was in correspondence with the Solicitors Regulation Authority at the time. The Solicitors Regulation Authority did not take any active part in the proceedings.

We learned from the Administrators at that time that:

- c. 1200-1300 files were archived when IAS closed;
- the archive contained a further 110,000-150,000 files;
- in the five months since IAS closed, 210 requests for archived files were received. In 47 instances the administrators were not able to identify the client and in 18 there was a suggestion that original documents were on the file;
- historically, 1000-3000 files were retrieved from storage each year.

The Registrar expressed his concern that a client's file could be destroyed, saying that the public interest lies in the files being retained. However, he highlighted the difference between private and public law proceedings, explaining that if there were insufficient funds in the administration, then retention of the files may not be possible. At that time, clients' requests for files were not being met, as the Joint Administrators would not retrieve files for fear of triggering demands for payment of outstanding fees from the storage companies. The Joint Administrators also identified that the records of stored files were incomplete.

The Immigration Services Commissioner wrote to ILPA on 22 December 2011 saying:

"…current legislation gives the OISC no jurisdiction over client files once an organisation ceases to be regulated by my Office. When an organisation leaves the OISC scheme we provide clear instructions that it should arrange for its client files to be transferred to another approved advice provider. Unfortunately, once an organisation is outside of my scheme, I have no powers of enforcement. The OISC ceased to regulate the Immigration Advisory Service on 2nd August 2011.

I continue to have discussions with the Home Office /UKBA about introducing changes to the 1999 Act including on this issue and hopefully a suitable legislative vehicle will be found

during this Parliament. While I appreciate your concerns about this issue generally and specifically in relation to this former OISC regulated body, given the limits of the legislation, I do not feel that I have any standing in this matter and therefore can do anything further.

No changes have been made. An Immigration Bill making changes to the OISC scheme is currently before parliament, but no changes are proposed. We bring these matters to the Solicitors' Regulation Authority's attention not because it has any responsibility for OISC files but because what has happened with OISC cases illustrates what can go wrong if there is no adequate system of file retention.

We met with the administrators to discuss possible solutions and the upshot of those decisions was put before the Court. As a result, the registrar directed that the IAS files be retained for a three-month period during which clients can request retrieval, and any retrieval requests received so far which have not yet been dealt with should be dealt with as soon as practicable.

The registrar made directions on a number of points in relation to how the three-month retrieval period should be conducted. The administrators had suggested that all retrieval requests should be dealt with at the end of the three-month period and had also suggested that all requests for retrieval should be accompanied by a client's IAS reference number and address as used by the IAS. The registrar, however, was sympathetic to ILPA's position and directed that files should be retrieved as soon as practicable, in the case of urgent requests for files, and at the end of the three-month period in all other cases. The file request form which was agreed with the administrators asked persons submitting requests to provide certain information, but the processing of retrieval requests was not contingent on provision of an IAS reference number.

With regard to a proposed six-year retrieval period, the registrar was firmly of the view that there were insufficient funds. Given the registrar's position, we did not pursue our six-year proposals.

The registrar made some very sympathetic comments about the importance of ensuring that people who are have ongoing immigration proceedings or face removal from the jurisdiction have access to their documents.

ILPA was able to publicise the retrieval period. The tribunal publicised the information and the Home Office even provided a link to ILPA's website where details of the retrieval period were posted. A notice was posted on the administrator's website but also on the old IAS website (the domain name was sold and the successor organisation agreed to host a page). The legal Aid Agency provided a link from its website. In the event, not everyone got their files because some storage companies refused to release any files without payment, but many people did benefit from the retrieval period.

In the light of these experiences we highlight that:

- The proper archiving and storage of files is a pre-requisite for an effective system of file retention but it will often not be achieved. If those who operated the system are not there to assist it is even more difficult. File retention policies that depend on a

perfect system of archiving (such as knowing the exact date of the last action on the file, or the storage period specified in client care letters are unlikely to work, particularly where, as in an intervention or a firm going into administration, things happen suddenly.

- Simple systems of archiving provide the best support for file retention.
- It appears that it was in cases of files archived at the moment of closure that there was the greatest danger of original documents being on an archived file.
- It is always easier if the file follows the client – so that they are held and the client can call for their file.
- The most disruption is often caused to those whose cases are live and the subject of tight deadlines when an intervention takes place/a firm closes. It is vital that there is clear information for a person turning up at an office and that they can very quickly retrieve the file. Once files start to be moved around, the chances of their being reunited with their rightful owners decrease.
- Where a firm is holding a file pending someone being instructed by the client whose file it is, that firm needs to be clear on its obligations to retain the file if it is never claimed.
- A retrieval period can be an effective tool and can help to keep storage costs down. Telling other lawyers working in the field is an excellent way to get the message out. Depending on the firm's caseload it may be possible to identify Government bodies, the Legal Aid Agency but also other Government departments, who can work with regulators to publicise retrieval. For as long as a website is live it is a useful and cheap tool for publicity. There is quite a bit that can be done without very much work and standard form documents can facilitate this.

Adrian Berry
Chair
ILPA