ILPA briefing for the House of Lords debate on the Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2013 Monday 20 January 2014 (dinner break business)

The Immigration Law Practitioners' (ILPA) Association is a charity and 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, including Ministry of Justice and Legal Aid Agency, and other consultative and advisory groups.

The *Civil Credibility Impact Assessment*[1] that accompanied the Government's *Transforming Legal Aid*[2] proposals, said of the removal of funding for borderline cases that the following assumption had been made:

> *Civil legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution (e.g. resolve the issue themselves or pay privately to resolve the issue).*

Those who can afford to pay privately are not eligible for legal aid. As to the rest, the assumption, for which no evidence is provided nor argument proffered, is that legal aid makes no difference; that legal representation makes no difference.

The 21st report of the Secondary Legislation Scrutiny Committee[3] took issue with this assumption. The Committee drew attention to the nature of borderline cases being that they tend to turn on a 'disputed point of law'[4]. It highlighted regulation 5(d) which defines borderline:

> *"…borderline, which means that the case is not "unclear" but that it is not possible, by reason of disputed law, fact or expert evidence, to*
> *(i) decide that the chance of obtaining a successful outcome is 50% or more; or*
> *(ii) classify the prospects as poor;*

They are cases where lawyers' arguments are likely to carry the day and where a lay person is immediately at a disadvantage. The Committee said:

> *Previously dispute over law or expert evidence was grounds for including a weaker case in the scope of legal aid and enabling someone to obtain better advice, now such cases are to be excluded from support. The House may wish to ask the Minister to clarify how the policy will work in practice.*[5]

[1] *Transforming Legal Aid: Scope, Eligibility and Merits (Civil Legal Aid)* IA No MOJ194, 9 April 2013.
[2] *Transforming Legal Aid: delivering a more credible and efficient system,* 5 September 2013.
[3] HL Paper 87, 12 December 2013 *Draft Civil Legal Aid (Merits Criteria) (Amendment) Regulations, REACH Enforcement (Amendment) Regulations, Correspondences on Legal Aid Sis.*
[4] *Op.cit.*,, para 5.
[5] Op.cit., para 6.

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When these regulations were debated in the House of Commons' First Delegated Legislation Committee on *Tuesday* 14 January 2014, this the Minister, Mr Vara, conspicuously failed to do.

The Minister had no answer to the contention that there was a risk of a bias in the development of the law that would favour the Government[6]. The Government can take a chance on running a borderline case. We recall the 4 June 2013 open letter of Treasury Counsel, the lawyers who act for the Government, to the Attorney General about judicial review, where they stated:

> *When advising government departments in public law cases, as when advising claimants, it is often difficult or impossible to say more than that there is a reasonable defence to a claim but that the outcome is hard to predict. This is so despite the fact that, especially in the early stages, the defendant is likely to have more information to enable it to assess the merits of a claim , Indeed most of us have had experience of being instructed to defend government decisions despite advising that the prospects of doing so are considerably below 50%. Sometimes we will have been proven wrong. No one has ever suggested that, in such cases, government bodies should be barred from defending a claim for judicial review*

The Minister's only reply to criticism was to suggest that the cases cited as examples of borderline cases were not in reality borderline:

> *Many of the cases to which he refers were strong in their own right. I am confident that where there is what might be described as a "borderline case"—which might be a test case—the likelihood is that the arguments presented at the outset would be of a sufficiently strong nature to make the likelihood of success more than 50%.*
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> *…the Lords' Secondary Legislation Scrutiny Committee...spoke of the need for existing borderline case criteria to continue, to allow for test cases or necessary interpretation of the law, but I simply repeat my point. Where there are such cases, it is likely that the evidence will be strong and there will not be an issue of their being borderline cases in their own right.*[7]

This repeats a fallacy first aired in the *Transforming Legal Aid* consultation paper. At paragraph 3.88 of the consultation paper a right of appeal to an Independent Funding Adjudicator was identified as a safeguard in cases affected by the proposal to removing funding for borderline cases. Not so. If borderline cases are no longer within scope then such a right of appeal will not assist those whose cases have quite properly been identified as having borderline prospects of success.

It is no answer to criticism of the removal of funding for borderline cases to argue about which cases are and are not borderline. It is from borderline cases that funding is being removed.
In any event, the argument as the Minister deployed it, was quite simply wrong. He had just been presented[8] with the evidence of Richard Drabble QC giving examples such as the case of Edison[9] where Court of Appeal and the House of Lords had both preferred the Government's case, splitting two to one and three to two respectively and *Anufrijeva*[10] where Court of Appeal held that it was bound by earlier authority to decide against the

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[6] See col 11.
[7] Col 11.
[8] Col 9.
[9] R*(Edison Ex Power Limited) v Central Valuation Officer et anor*, [2003] UKHL 20
[10] *R(Anufrieva) v SSHD* [2003] UKHL 36.

claimant but the House of Lords, split four to one, decided in her favour[11]. It is thus no answer to say, as did the Minister, that these cases would not be regarded as borderline. The person failing to regard them as such would, on the evidence, be wrong.

The *Transforming Legal Aid* consultation claimed to set out proposals for a more 'credible,' but the Government's arguments for abolishing payment in borderline cases fail that test.
One set of arguments appeared to have been binned as "not credible" in advance of the Commons' debate. It is noteworthy that, following the Joint Committee on Human Right's report[12], the Minister, Mr Vara, did not attempt to rely on the argument that the Lord Chancellor had advanced in evidence to the Committee, that the cases could be funded under the "Exceptional funding" scheme. The Committee said

> *236. We were told in evidence by the Government that only cases that could be considered exceptional on their merits were funded as borderline cases, meaning that such cases could fall within the exceptional funding scheme criteria. However, the problems with exceptional funding that we identified in the previous chapter means that the Government cannot rely upon section 10 as currently operating in order to meet its obligations to provide practical and effective access to justice.*

The Committee had found that:

> *142. The evidence we have received, when taken together with the lack of a procedure to grant emergency funding, failure to exempt children and those who lack capacity, and lack of training provided to LAA employees who are assessing these cases, strongly suggests that the scheme is not working as intended. In our opinion this is borne out by the number of grants of exceptional funding. We therefore conclude that the Government cannot rely upon the scheme as it currently operates in order to avoid breaches of access to justice rights.*

The figures the Ministry of Justice had presented to it showed a mere 746 applications for exceptional funding and a meagre 15 grants. ILPA wholeheartedly concurs with the Joint Committee's analysis. Those lawyers who are prepared to do the "at risk" work involved in applying for exceptional funding are increasingly disheartened by the soul-destroying work of spending many hours putting together a lengthy and detailed exceptional funding application knowing that it has almost no prospects of success. When we ask Ministry of Justice officials in meetings whether they are alarmed that the number of applications falls so far short of the estimates of 5000 - 7000 presented to parliament during the passage of the Legal Aid, Sentencing and Punishment of Offenders of Act 2012 they tell us that that was only an estimate. No alarm bells appear to be ringing at the Ministry despite only 233 applications having been received in the first three months of the scheme. There are fears that the low success rate will cause the figures to fall even further.

The cases funded where the prospects of success were borderline are a very particular class of case, cases of overwhelming importance to the individual which are likely to involve substantial injustice or suffering[13]. In immigration they were specifically identified as cases involving a breach of rights under the European Convention on Human Rights[14].

The Joint Committee on Human Rights in its Seventh Report stated

> *225. Since this is already an exceptional category of funding, available only in relation to high priority cases which have a significant wider public interest, or which have a significant impact on the*

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[11] Col 10.
[12] Seventh Report from the Joint Committee on Human Rights Implications for access to justice of the Government's proposals to reform legal aid, HL Paper 100, HC 766
[13] *Civil Legal Aid (Merits* Criteria**)** *Regulations 2013, SI 2013/104.*
[14] *Ibid*., regulations 43 and 60.

individual concerned in areas such as asylum or housing, this proposal is very likely to affect the ability of individuals to secure effective access to court in relation to human rights claims. Indeed, the Government, in its response to the consultation, recognises that the proposal will have an impact in cases which have important consequences for the individuals concerned"

The final sentences refers to paragraph 193 of *Transforming Legal Aid: next steps*[15].

As the Minister, Mr Vara acknowledged in the House of Commons, the change will only affect whether the legal aid fund pays for some 100 cases[16]. The number of cases, the number of people's lives, likely to be affected by the decision is likely to be very much greater. The Joint Committee on Human Rights suggested that the Government's removing cases with borderline prospects of success from scope was disproportionate[17].

The interpretation paragraph[18] of the *Civil Legal Aid* (*Merits Criteria*) *Regulations 2013* defined "case with overwhelming importance to the individual" as follows:

> *"case with overwhelming importance to the individual" means a case which is not primarily a claim for damages or other sum of money and which relates to one or more of the following–*
>
> *(a) the life, liberty or physical safety of the individual or a member of that individual's family (an individual is a member of another individual's family if the requirements of section 10(6) are met); or*
>
> *(b) the immediate risk that the individual may become homeless;*

Other cases were

- cases of significant wider public interest/ of overwhelming importance to the individual and in immigration, cases involving a breach of rights under the European Convention on Human Rights[19];
- investigative help in public law cases[20];
- housing possession cases[21];
- public law children cases[22];
- domestic violence family cases[23];
- cases where breaches of international treaties relating to children are alleged[24] .

It is frequently impossible fairly to judge the merits of a case before it has been prepared, which is why the borderline category is important. Problems in immigration and asylum are exacerbated by the "country guidance" cases in the Upper Tribunal that, purporting to judge of the factual situation in a country, go out of date in a way that legal precedents do not. The low standard of proof in asylum cases[25] makes it difficult to use examples from other areas of the law as to whether a case is borderline.

Under the previous contracts (there is no equivalent under the current contract) Chapter 29 of the previous Immigration Funding Code made clear that when an unaccompanied child had a right of

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[15] Ministry of Justice, 5 September 2013.
[16] Col 11.
[17] Op.cit. para 237.
[18] Paragraph 2.
[19] *Ibid*., regulations 43 and 60.
[20] *Ibid*., regulation 56.
[21] *Ibid*., regulation 61.
[22] *Ibid*., regulation 66.
[23] *Ibid*., regulation 67.
[24] *Ibid*., regulation 68.
[25] *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958).

appeal on asylum grounds and *prima facie* came with the 1951 Convention Relating to the Status of Refugees or the European Convention on Human Rights then the child would be considered to meet the merits test to at least the borderline level. There is no equivalent test under the current contract but our experience of the operation of the previous contract leads us to fear that abolition of the category may put separated refugee children at particular risk.

ILPA highlighted at the time of the *Transforming Legal Aid* consultation that there are no figures whatsoever in the consultation paper that look at the success rates in these cases. We suggested that the Committee the Ministry of Justice to provide these figures. That was not done and as far as we are aware it has still not been done.

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