

**Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014  
(SI 2014/607) ILPA submission to the Secondary Legislation Scrutiny  
Committee**

1. The Immigration Law Practitioners' Association (ILPA) is a registered 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 committees, including Home Office, and other consultative and advisory groups. ILPA commented on the proposals that became these regulations in its responses to the Ministry of Justice consultations *Transforming Legal Aid*<sup>1</sup> and *Transforming Legal Aid: next steps*<sup>2</sup>.
2. The Regulations are due to come into force on 22 April 2014. They are subject to the negative procedure and it is extremely unlikely that any prayer against them would be heard before that date, especially given the dates of recess (9 April House of Lords, 10 April House of Commons). We are concerned at the timescale to implement these provisions and the lack of scrutiny over their formulation when they will make it harder for individuals to obtain legal aid for judicial review, despite Parliament having made specific exceptions to protect legal aid for judicial review in the Legal Aid, Sentencing and Punishment of Offenders Act 2012<sup>3</sup>.
3. Moreover, given that the effect of these regulations is likely to be that individuals will not be able to obtain representation funded by legal aid for judicial review, and in light of the importance given to judicial review in the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, there is a case that these Regulations should have been made or accompanied by an order laid under section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which would have been subject to the affirmative procedure. In the light of this, it is all the more desirable that any prayer against the regulations be heard before they come into force.
4. We highlight three areas of the regulations in particular: pre issue work, interim relief and discretionary criteria.

**Pre-issue work**

5. There is a lack of clarity in the drafting of the Regulations. They are silent as to payment for work done before a claim is issued, e.g. investigation, pre-action correspondence and

---

<sup>1</sup> See <http://www.ilpa.org.uk/resource/18039/transforming-legal-aid-ilpas-response-as-submitted-to-the-ministry-of-justice-on-3-june-2013>

<sup>2</sup> See <http://www.ilpa.org.uk/resource/25527/ilpa-response-to-ministry-of-justice-consultation-transforming-legal-aid-next-steps-31-october-2013>

<sup>3</sup> See Schedule 1 to that Act, Part 1, paragraph 19.

instructing counsel. These steps can avoid the need to go to court if a claim can be resolved without litigation. There was express provision to safeguard payments for this work in the Government's September consultation paper on judicial review:

*119. The proposal would only apply to issued proceedings. **Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the prospects and strength of a claim (including advice from Counsel on the merits of the claim) and to engage in pre-action correspondence aimed at avoiding proceedings under the Pre- Action Protocol for Judicial Review. In addition, payment for work carried out on an application for interim relief in accordance with Part 25 of the Civil Procedure Rules would not be at risk, regardless of whether the provider is ultimately paid in relation to the substantive judicial review claim. Reasonable disbursements, such as expert fees and court fees (but not Counsel's fees), which arise in preparing the permission application, would continue to be paid, even if permission were not granted by the court.***<sup>4</sup> **[our emphasis]**

6. Clause 5A(3)(c) of the Regulations defines an 'application for judicial review' as being an application made or treated as having been made in accordance with Part 54 of the Civil Procedure Rules. While this appears to indicate that pre-issue work is excluded from the work "at risk" it is desirable that this be made clear on the face of secondary legislation. The Regulations as drafted fail specifically to define the work they cover to exclude all pre-issue steps and fail to state that they do not apply to work prior to a "decision" to issue proceedings.

## **Interim relief**

7. The Government also made specific assurances in the September consultation that work on "interim relief" in judicial review cases would not be subject to the "at risk" payment scheme.<sup>5</sup>
8. The Regulations as drafted do not give effect to these assurances. They do not state that any work on an application for interim relief will not be caught by the scope of the non-payment provisions in clause 5A. Part 54 of the Civil Procedure Rules expressly refers to the making of interim relief applications within judicial review proceedings. Applications for interim relief are usually (but not always) made at the same time as proceedings for judicial review are issued, and the basis of the application forms part and parcel of the grounds for judicial review. There is no separate application under Part 25 of the Civil Procedure Rules.
9. Applications for interim relief are used in a number of situations, for example, when an individual is in detention or facing removal from the United Kingdom and needs an urgent decision on a claim, or to secure accommodation for families when a local authority disputes their duty to provide housing. The Government has repeatedly stated that people facing threats to their liberty, personal safety and the security of their housing will continue to be eligible for legal aid provision. As such, applications for interim relief that are used precisely to protect these individuals must be protected.

---

<sup>4</sup> Ministry of Justice, Judicial Review – Proposals for further reform, September 2013.

<sup>5</sup> Ministry of Justice, Judicial Review – Proposals for further reform, September 2013, paragraph 119.

## Discretionary criteria

10. We are concerned by the wide discretion that the Regulations allow for the Lord Chancellor to determine the reasonableness of payment in any given case. The Regulations are not sufficiently tightly drawn to give certainty and to ensure that meritorious cases that are arguable at the point of issue but do not secure a positive decision on permission can still attract payment.
11. The impact of wide discretionary powers on access to justice can already been seen in the operation of the “exceptional” case funding scheme set up under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to make provision for legal aid in cases that would otherwise be excluded. In 2013 there was a 3% success rate for all applications made, including those for legal aid for inquests, and a 1.22% success rate for non-inquest related applications. Only three applications in immigration work were granted out of a total of 187<sup>6</sup>. The number of applications made under this scheme falls far below the Government’s predictions at the time of the passage of the Act. The application process is time-consuming and there is no payment for undertaking the work to secure a positive decision. Legal representatives are increasingly asking “what is the point?” in making such applications. The discretionary payment provisions in the Regulations have similar potential to dissuade providers from undertaking work for which they are likely to conclude that they have little chance of being paid, even if a case may have merit. The senior judiciary set out concerns about a discretionary payment scheme in their response to the consultation:

*24. The government proposes that providers will never be paid for work by the Legal Aid Agency for claims brought if permission is refused. The senior judiciary is concerned about the chilling effect that this is likely to have on providers accessing the court in cases which they reasonably assess will satisfy the test for permission, but in relation to which they cannot be sure that permission will be given.<sup>7</sup>*

12. These Regulations have considerable significance for a large group of individuals who will be unable to fund claims against public bodies on their own. The “chilling effect identified by the senior judiciary means that these are not simply regulations about remuneration for representatives but about whether judicial review is in practice available to those needing to challenge unlawful action by the State.

Adrian Berry  
Chair, ILPA  
23 March 2014

---

<sup>6</sup> Exceptional Case Funding Application and Determination Statistics: April-December 2013, 13.03.14,p.3 and p.5 [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/289183/exceptional-case-funding-statistics-apr-13-dec\\_13.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289183/exceptional-case-funding-statistics-apr-13-dec_13.pdf)

<sup>7</sup>Response of the senior judiciary to the Ministry of Justice’s consultation entitled ‘Judicial Review: Proposals for Further Reform’, November 1, 2013 [www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf)