ILPA submission to the Justice Select Committee for its enquiry: Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

Executive Summary

i) This response from the Immigration Law Practitioners' Association addresses all questions posed by the Committee with the exception of question six. There are three annexes: case studies, a Home Office letter on complexity, statistics and a recent ILPA submission.

ii) We identify immigration law as an area where the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has had particularly pronounced effects and persons under immigration control and their family members as persons particularly affected. Within this group we highlight, with case examples, cases concerning Commonwealth citizens, refugee family reunion, deportation, destitution, children and young people and compensation claims by trafficked persons.

iii) The overall effects of the act in the area we summarise as having reduced access to justice. Lawyers are squeezing in "just one more case" *pro bono* in a manner that has cushioned the effects of the Act so far, but is not sustainable, alone and particularly taken with the effects of the *Transforming Legal Aid* changes. Clients are at risk of exploitation to raise the money to pay for legal representation, not limited to, but including, exploitation by unscrupulous advisors. Those in detention or with physical and mental health problems simply have no means to pay and go represented. Many at liberty disappear and cease to try to resolve their status.

iv) Legal Aid Agency statistics show that the number of legal aid asylum and immigration cases has dropped significantly. We question whether the money spent on legal aid is buying what it used to. Costs of legal representation have shifted onto local authorities and onto applicants. Local authorities also pick up indirect costs for example the costs of having to continue to support a person.

v) The fall in cases funded by legal aid has not been mirrored by a fall in cases before the courts. One possible explanation is a rise in litigants in person. Insufficient accommodation is made for litigants in person by courts and tribunals.

vi) Information on civil legal aid is inadequate and apt to give persons and those trying to help them the impression that they do not qualify when they do.

vii) Survivors of domestic violence with immigration cases are, in significant numbers failing to obtain legal aid.

viii) Exceptional cases funding is not operating effectively. Numbers of applications are vastly lower than estimated at the time of the passage of the Act. Successful applications are very few and this has the effect of discouraging further applications. Applications take an enormous amount of time and those who have been refused include children, persons without capacity and persons given permission to appeal by the Court of Appeal.

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Evidence of the Immigration Law Practitioners' Association to the Justice Select Committee for its enquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

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, including Ministry of Justice, and other, consultative and advisory groups.

2. The Legal Aid Agency collects copious data from immigration practitioners. It is in a position to provide all the quantitative data the Committee could want or need. In this submission we concentrate on qualitative evidence from ILPA members.

1. What have been the overall effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 changes on access to justice? Are there any particular areas of law or categories of potential litigants which have seen particularly pronounced effects?

3. Immigration law has seen particularly pronounced effects due to its complexity, the gravity of the matters at stake and the cumulative effect of legal aid changes over the years[1].

4. Persons under immigration control have seen particularly pronounced effects, because of cuts to legal aid for immigration but also because their cases in other areas of law such as community care and family law tend to be particularly complex and to involve the most fundamental of entitlements. They have fewer rights and entitlements than British citizens or settled persons but the rule of law in theory protects, and should protect in practice, such entitlements as they do have without discrimination. Some of those affected have a criminal conviction and we include a number of case examples that other organisations did not consider sufficiently engaging to put before the Committee. A criminal conviction should not put a person beyond the reach of the rule of law.

5. Among persons under immigration control we highlight the following, which are also relevant to question four, with further examples provided in **Annex 1**.

Those with strong family connections but limited resources including Commonwealth citizens who have been in the UK for years

6. Refugee family reunion cases, discussed below, are a subset of these cases, but concerns go wider.

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[1] See ILPA's Response re: Question from Lord Warner during Joint Committee on the Draft Modern Slavery Bill evidence session 11 March 2014, 28 April 2014, annexed hereto.

Mr DP (grandfather who has been in the UK for 50 years)
Mr DP is a Sri Lankan who came to the UK in 1964 from what was then Ceylon. He went to school in the UK and has worked continuously in the UK since the age of 16. His last job was for a London borough council but his work was contracted out and his employment transfers under the Transfer of Undertakings (Protection of Employment) Regulations. His employers want proof of his status. He does not have it. He got some poor advice and put in an application for settlement. He was suspended from work. He receives very limited benefits. He is in rent arrears and has many debts. He has five British children and a number of grandchildren. His MP wrote to the Home Office. Mr C then received a letter from Capita on behalf of the Home Office telling him to leave. A law centre has seen him at its outreach sessions and told him what to do but he just cannot understand. It is likely that Mr DP had indefinite leave to enter but in any case, he would have indefinite leave to remain as he was present in the UK as at 1 January 1973, when a new Immigration Act came in, which regularised people's stay in the UK provided they had been in the UK for a certain time. He is angry and frustrated and resistant to the notion that he must prove his entitlement to be in the UK. He has since been diagnosed with cancer. The Law Centre solicitor says "Of course we will help, but there's a limit before we go under."

Mr I
Failed Iraqi asylum seeker granted Discretionary Leave in 2010 on the basis of his relationship with his disabled wife who is a British citizen. Returned to the lawyers who had assisted him to make an application to extend this leave but it is now out of scope. The lawyers explained that there was no legal for the article 8 aspect of claim. They did the work pro bono.

Refugees seeking reunion with family members who are outside the UK, often in situations of comparable danger to those the principal fled

7. We refer you to the submission of the Greater Manchester Immigration Aid Unit (an ILPA member) to this enquiry for further details on family reunion cases.

Mr N (refugee from Afghanistan)
The wife and children of a Mr N, a recognised refugee from Afghanistan, were refused entry clearance under the refugee family reunion rules as there was no evidence of the relationship. Mr N is in receipt of job-seekers allowance. The Entry Clearance officer did not arrange DNA tests despite there being provision for this. To challenge the decision with any prospect of success Mr N would need to pay for the DNA test for his wife and two children as well as paying the appeal fees, let alone solicitors' fees.

"…the removal of refugee family reunion applications from legal aid scope…is a major concern for Asylum Aid in terms of our ability to help our clients finally move on from the persecution they have suffered by reuniting them with their families as well as helping to ensure their family members are not at risk of further harm in their counties of origin. … Asylum Aid has partnered with Red Cross to provide this service for a limited number of beneficiaries and to use the evidence generated to make the case as to why legal aid should be reinstated. It was therefore a great shock to discover that the Legal Aid Agency has used the presence of this work as a justification for not approving exceptional funding applications for family reunion cases."

Trafficked persons seeking compensation in the civil courts and under employment law

8. These cases are eligible for legal aid to meet the UK's obligations under Article 15(2) of the Council of Europe Convention on Action against Trafficking in Human Beings. However,

under the Legal Aid Agency's Standard Civil Contract[2] these cases can only be brought in the "Miscellaneous" category. Each organisation with a legal aid contract can bring no more than five cases of any type, not just trafficking cases, in this category. Thus it is very difficult for trafficked persons to find someone to represent them in such cases.

Deportations

9. Legal representatives highlight those facing deportation and their family members as among the hardest hit.

> **Mr A**
> Mr A has been in the UK since he was a child and has indefinite leave to remain. He is in prison and has received a notice of liability to deportation. He is a care leaver but the local authority is refusing to pay for his legal advice and he cannot afford to pay. He has raised no asylum ("protection") ground that would justify legal aid; the reasons why he wants to stay are out of scope for advice in legal aid. He has filled in a deportation questionnaire by himself but has not submitted sufficient evidence. He has two children of his own and should provide evidence about their lives and ties to the UK as well as letters of support from friends and family members, and his excellent record in prison. The strength of his case against deportation will also be relevant when it comes to deciding on his eligibility for release on Home Detention Curfew. If a decision is made to deport him it will be necessary for the local authority to pay and their failure to do so can be made the subject of a judicial review save that if Mr A's leave is revoked he will fail any residence test.

"… their cases are often very expensive because their cases involve gathering evidence and taking statements from the family connections."

Young people/children who have previously claimed asylum, but are making applications for further leave to remain

As I have said before, in cases where children are involved our intention is, where possible, to provide legal aid. Lord McNally HL Report 7 July 2011, col 345

10. Here local authorities are required to pick up the tab for the non-asylum (which may be the only) aspects of the case. Some local authorities step up to this responsibility; in other cases it has taken threat of litigation to persuade them to do so. Ministers repeatedly stated that such young people will qualify for legal aid as persons seeking asylum because they failed to understand that while the child came to the UK seeking asylum, their circumstances may have changed or their asylum case may never been strong but after years in the UK they may have a strong case under article 8 of the European Convention on Human Rights. See ILPA's exchange of March 2012 with the Lord Wallace of Saltaire QC[3]. The assumption was made during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 that social workers would provide assistance but when, subsequent to the passage of the

[2] See *Category Definitions* therein.
[3] ILPA letter of 15 March 2012, response of the Lord Wallace of 25 March 2012, available at http://www.ilpa.org.uk/resource/14384/ilpa-to-the-rt-hon-lord-wallace-of-tankerness-qc-of-15-march-2012-re-legal-aid-sentencing-and-punish

Act, all parties agreed that that was not possible, the decision not to provide legal aid to children was not revisited[4].

Mr A
Mr A came to the UK as an unaccompanied minor seeking asylum, and had been in the care of the Local Authority since he arrived. His application for asylum was refused but on appeal he was given Discretionary Leave to Remain, on the basis of his private life in the UK. He had a lot of evidence regarding the strength of his connections, as although he had no family he was doing very well at school and had a lot of support from the school for his appeal. He must now apply to extend his leave. He is a "Care Leaver" now because he is over the age of 20. He is currently in receipt of benefits, although he has worked before and is actively seeking work. He had hoped to attend university, and continue his studies but cannot do so because his immigration status prevents him from accessing student finance. He is having to pay privately for his extension of leave application, as there are no protection issues to raise and his application will rely primarily on his private life. The Local Authority will not pay, although he is currently on benefits. He has had to borrow the money from friends, to pay for the application, as with his limited means he is only covering the cost of his daily expenses.

Mr C
Mr C was born in 1996 and is a national of Bangladesh. He arrived in the UK in 2007 as an 11 year old child. He claimed asylum a year later. This was refused as was discretionary leave. His appeal failed. He remained in the UK. Social services placed him with his current foster carer and continued to support him through his education. He has achieved awards recognising his academic achievements and has had to turn down job offers from leading media because of his lack of immigration status.

An application for leave to remain outside of the rules based on his family and private life in the UK was made in 2011. That application remained outstanding and judicial review proceedings were issued in January 2014. Outside of those proceedings the Secretary if State finally determined his application in March 2014, refusing him leave to remain. He has a right of appeal. His asylum case does not meet the merits test for public funding.. He continues in education, continues to be supported by social services and remains with the same foster carer with whom he has established family life. Social Services are paying the costs of his legal advice with Mr C paying a contribution.

The destitute (including persons seeking asylum)

11. Resolving a person's immigration status is often the key to resolving their destitution. There is funding for legal aid for housing applications where a person is at risk of homelessness and applications for support from destitute asylum-seekers where the person is seeking accommodation and support, but not for other housing applications, applications for asylum support only, and not for appeals. Although claims for asylum remain within scope, persons seeking asylum are affected by the restrictions on legal aid for their support.

[4] See the discussion in ILPA's 26 October 2012 evidence to the Joint Committee on Human Rights for its enquiry into the human rights of separated migrant children, in response to question 10, available at http://www.ilpa.org.uk/resources.php/16028/ilpa-submission-to-the-joint-committee-on-human-rights-for-its-inquiry-into-separated-children-26-oc and the annexes thereto.

R

R is 10. She and her mother were effectively homeless. Her mother arranged for R to sleep on the sofa at various people's houses. She stayed at a different house each night of the week but the mother was only able to arrange a place to sleep for five nights a week. On average they would sleep 'rough' at Paddington station twice a week. This situation had continued for about three years before a law centre took on the case under a funded project because there is no legal aid. The immigration lawyer at the law centre prepared an application for leave to remain to the Home Office for the family and on the basis that the application had gone in social services agreed to accommodate the mother and child. ILPA holds a copy of the two page letter R wrote to her lawyers. She says (for reasons of space we have not reproduced her perfect paragraphs, but the spelling and grammar are her own).

*"It all began on the 28th May 2013 when the government put a smile on my face and changed me to a normal child….My mum's phone was ringing and the message read …"the B & B is room [***] at [***] Straight away who should arrange a time to meet you at the property. Regards…."… My mum was so happy and she told me to press the bell so we could get off the bus. We got off the bus and took another heading to that address. I was very excited when we got into the room. The reason I was so happy was because homelessness has caused a lot of confusion in my life. My life has changed, I am now safe and secured, I am able to keep all my belongings like my uniform, books and shoes…I am able to relax after school and prepare fully for the next day, no more bad moods in the morning. I am able to do my homework…I am able to play my violin whenever I feel like it…Amazingly, I am always feeling strong and healthy all the time…I am now having an identity by proofing my address in the surgery. I am my mum are now having a G.P. which has helped reduce the high blood pressure that has been affecting her when we were homeless….I am well organised, responsible and prayerful now…I can now pray all the time for those people who came to my aid…I am using this opportunity to thank *** Council especially *** who provided urgent accommodation for me and my mum,. I also thank Southwark Law Centre especially Charlene and Amy that really pitied for my situation and gave me urgent attention. I appreciate their efforts…Finally I am using this space to apologise for being rude to my mum by shouting at her all time when we were homeless…"*

> *"…we are seeing lots of single mothers who could make Ruiz Zambrano[5] or private life applications relating to their children but have no one to do those... They come to us destitute and needing section 17 Children Act support for them and their children but they can't get that without an application being made to the Home Office and there is no legal aid for that."*

12. See **Annex 1** for more examples of these and other types of cases. Outside the Immigration law context, members with mixed practices highlight prison law as an area of particular concern.

13. As to the overall effect of the Act, when ILPA members considered this question what poured out were examples of the effect upon clients. See Annex 1 for case studies. Overall, access to justice has been reduced. What emerges from the case studies is a picture of lawyers squeezing in "just one more case" *pro bono*. The responses are peppered with lawyers' reflections that they cannot keep doing this and expect their firms or organisations

[5] *Ruiz Zambrano* (C-34/09), European Court of Justice.

to survive. This suggests that the full effects of the Act have yet to be felt. The *Transforming Legal Aid*[6] changes, including the residence test proposed for 4 August 2014[7] will accelerate the pace of demand on pro bono assistance.

> *"…restricting payment for judicial review applications in cases that are settled pre-permission and the removal of funding for borderline cases… has made it more difficult to get legal representation for judicial reviews and to hold the government to account for its poor practice."*

14. See also the response to question four below. ILPA's evidence to the Public Bill Committee considering the Criminal Justice and Courts Bill[8] details the anticipated increase in judicial reviews as a result of the Immigration Bill and the apparent contradictions between what the Home Office is doing and what the Ministry of Justice is doing. It is relevant to this enquiry.

15. In immigration cases raising Article 8 of the European Convention on Human Rights it is now standard to get a letter in the following terms:

> *Your case raises issues related to the European Convention on Human Rights which are complex in nature. As such it falls outside our normal service standards for deciding leave to remain applications. Please be assured that we will make a decision on your case as quickly as possible.*

16. An example of such a letter in the case of a father's application to remain with his child is appended as Annexe 2 (a separate document). The wording reflects the Home Office's settled position. Home Office officials have told ILPA that when the Ministry of Justice came to talk to them when it undertook the consultation that preceded the Legal Aid, Sentencing and Punishment of Offenders Act 2012, they told the Ministry that immigration law was complex. The Parliamentary Under-Secretary of State in the Home Office, Lord Taylor of Holbeach, told the House of Lords "I agree with my noble friend that no area is more complex than the whole business of the Immigration Rules and the procedures surrounding them"[9].

17. The Home Secretary, abolishing the UK Border Agency in March 2012 said "The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies, …"[10]

18. There is no basis in fact for the statement in the consultation that preceded the Act:

> *86. The Government's view is that, in general, individuals in immigration cases should be capable of dealing with their immigration application and should not require a lawyer. Tribunals are designed to be accessible to users. Interpreters are provided free of charge. … whilst it is*

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[6] *Transforming Legal Aid: delivering a more credible and efficient system,* Ministry of Justice, 10 April 2013, see https://consult.justice.gov.uk/digital-communications/transforming-legal-aid . See ILPA's 3 June 2013 response to the consultation at http://www.ilpa.org.uk/resource/18039/transforming-legal-aid-ilpas-response-as-submitted-to-the-ministry-of-justice-on-3-june-2013 and see ILPA's 30 September 2013 submission to the Joint Committee on Human Rights for its enquiry into the implications for access to justice
of the Government's proposed legal aid changes available at http://www.ilpa.org.uk/resources.php/21039/ilpa-evidence-to-the-joint-committee-on-human-rights-enquiry-into-the-implications-for-access-to-jus

[7] See draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014.

[8] ILPA 21 March 2014 see http://www.ilpa.org.uk/resources.php/26056/criminal-justice-and-courts-bill-ilpa-evidence-to-the-public-bill-committee-21-march-2014

[9] Lord Taylor of Holbeach in response to Lord Lester of Herne Hill, Hansard, HL Report, 12 December 2012. For the judiciary's comments on the complexity of immigration law see ***

[10] HC Report 26 March 2013, col 1500ff.

true that immigration law can be complex, it is not generally the case that an appellant will need to argue points of law or have any knowledge of the law. Immigration cases are generally about whether the facts of a particular case meet the immigration rules, and a significant amount of guidance is produced by UKBA and others to explain what these rules are, and how they apply.[11]

19. We invite the Committee to peruse the Home Office guidance on family cases, for example the 77-page Immigration Directorate Instruction on Appendix FM of the Immigration Rules[12] and consider whether it finds them comprehensible. It covers three extremely complex cases of the Court of Justice of the European Union[13], Supreme Court[14] and High Court[15] as well as interpretation of the European Convention on Human Rights.

20. Some of those who cannot do without advice and representation and cannot get it for free suffer exploitation in their attempts to pay for it. They may suffer exploitation at the hands of exploitative employers, whether the work itself be legal or illegal. They may use the money earned to pay for excellent legal advice, or for bad advice. Or they may be exploited by advisors.

"… we do an outreach session… every week and we see how much people are suffering not being able to regularise and I have also seen the most appalling applications made by unscrupulous advisers e.g. an application for Ghanaian family with two children to meet the rules having been here for over seven years, but no mention of individual circumstances or s. 55 [duty upon the Home Office to safeguard and promote the welfare of children]. *Refused and then the solicitors put in an appeal when there is no right of appeal. They asked for more money to put in the appeal. The family borrowed £1000.*

I also see families who are being told that they should lodge (often hopeless) fresh claims for asylum rather than apply within the immigration rules because there is legal aid for the former and not for the latter. This is a reflection on some immigration advisors."

21. Others, including detainees, the mentally ill, the sick and those caring for small children are in no position to find the money, particularly given that application fees, court fees and disbursements must all be paid aside any attempt to meet legal fees. People are simply dropping out of sight.

"People who are in (often low paid) work and want to vary or extend extant leave are terrified of getting the form wrong or not sending sufficient evidence because they fear that the Home Office will seize their, often considerable, fees. I recently spoke to a woman who would be paying over £2,000 in application fees. She would have been eligible for Legal Aid in the past and would have been confident that her form was complete and all documents ready before she paid the considerable sum to the Home Office. Under ancient, now forgotten, Legal Aid provisions she could have got 30 minutes advice on whether the form was completed properly and all documents present at minimal cost to the tax payer and considerable savings to the Home Office in administration costs."

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[11] Ministry of Justice: *Reform of Legal Aid in England and Wales: the Government Response*, June 2011, page 133, paragraph 86.
[12] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/292096/Overarch_Family_1__1_.pdf
[13] *Ruiz Zambrano* (C-34/09).
[14] *Alvi* [2012] UKSC 33.
[15] *R(Nagre) v SSHD* [2013] EWHC 720 (Admin).

"While a significant proportion of this client group have managed to scrape together (over time) sufficient funds to pay privately for some help, an equally significant proportion have simply disappeared. Yes, they still ring and ask for an appointment, but when informed about the changes to legal aid, they say they will need to "think about it" and never call back. The concern is that these clients, already living under the radar because of their lack of status, simply disappear without a chance of obtaining even the most basic advice about their options." [16]

2. What are the identifiable trends in overall numbers of legally-aided civil law cases being brought since April 2013 in comparison with previous periods, and what are the reasons for those trends?

22. We are provided with statistics on "new matter starts" used by the Legal Aid Agency at the Civil Contracts consultative group. The latest handed out for the meeting on 10 March 2014, are appended hereto as **Annex 3** (a separate document). Unfortunately the statistics are inaccurate. In immigration and asylum for the years 2010-2013, the same figures are repeated in the rows marked "immigration" and marked "asylum". We asked at the meeting for corrected versions as a matter of urgency and we and the Law Society have repeated that request subsequent to the meeting. We have pointed out that the figures are needed for consideration by, *inter alia*, parliamentary committees, but have been told only

   In many ways we are a victim here of speed. This data was produced without going through the various assurances processes to make sure it was accurate. We are discussing with LAA and MoJ statisticians what data should be published and when.

   As soon as I have more information I will update you.[17]

23. The figures, flawed as they are, do suggest that the number of cases has dropped significantly. We have extrapolated figures from the table.

Table of Matter Starts in Immigration and Asylum cases[18]				
Year	**2010/2011**	**2011/2012**	**2012/2013**	**2013/2014 to 1 February 2014**[19]
No. of matter starts: solicitors' firms	52,685	52,243	47,316	20,587
No. of matter starts: Not-for-profit organisations	30,768	8,862	5,550	2,397
Total matter starts	83,453	61,105	52,866	22,984

[16] *"Fig leaves and failings"*, Jo Renshaw, solicitor at Turpin Miller LLP in Oxford, *New Law Journal* , 8 April 2014, see http://www.newlawjournal.co.uk/nlj/content/fig-leaves-failings
[17] Email from Mr John Sirodcar, Head of Contract management, Legal Aid Agency, to Alison Harvey, legal Director, ILPA, 16 April 2014.
[18] Figures taken from Legal Aid Agency Report: New Matter Starts 2013/2014 provided at Civil Consultative Group meeting on 10 March 2014 (copy available from ILPA)
[19] Year to 28 February 2014.

24. As may be seen from these figures, there has been a reduction since 2010, year on year, in the number of matter starts undertaken by both solicitors' firms and not-for-profit organisations.

25. Funding is currently preserved for judicial review and unlike initial work is not limited by the number of new matter starts. However, this is expected to change if the residence test comes into force on 4 August 2014. It is unclear whether the current rise in the numbers of immigration judicial reviews is due to a rise in legally aided cases or litigants in person/paying privately. The Legal Aid Agency should be in a position to provide these figures given the reporting it requires of legal aid lawyers and we recommend that the Committee request them. See response to question five below.

3. Have the Legal Aid, Sentencing and Punishment of Offenders Act 2012 changes led to the predicted reductions in the legal aid budget? Has any evidence come to light of cost-shifting or cost escalation as a result of the changes?

26. We do not comment on the first question. As to the second, quite apart from the question of costs shifting onto other areas it is necessary to consider whether the money spent on legal aid is buying what it used to. The case studies in this response suggest that sums are going to more expensive cases, such as judicial review hearings, when previously they would have been spent on cheaper initial advice.

27. For the ordinary person or Local Authority there are new costs. Private charges are often higher than legal aid rates. Also, because people initially want to pay as little as possible and instruct lawyers to keep costs down, applications are not prepared as fully as the legal representative recommends. As a result, all too often, is that they have to proceed to appeal, by which point people realise this could be their last chance to succeed and agree to extra evidence being collected or work done, so appeals sometimes have evidence not produced before, which could have led to a different outcome at the outset.

28. Poor decision-making by the part of the Home Office, which has costs implications, continues, but now whether or not this is successfully challenged does not depend on the merits, but on the resources of the person affected by the decision.

Costs for local authorities

29. There are direct costs, of paying for legal representation, and indirect costs, for example supporting people whose cases are subject to lengthy delays.

Mr and Ms F
Mr and Ms F are parents of a British citizen child. They are being supported by the Local Authority but the local authority will not pay the fees for legal representation. Unless the family can find other funding they cannot instruct legal representatives to submit an application for leave to remain (on the basis of long residence). The Local Authority continues to spend a fortune in accommodation and support. If the lawyer had access to funding an application would be made at once. In the long term it would be cheaper.

"I am seeing a lot of cases where local authorities are having to pick up, one way or another, the consequences of the lack of immigration advice. Some of them are children leaving care, with local authorities having to fund legal advice directly. Increasingly, however (and I have one before me right now) I see cases under section 17 of the Children Act 1989 where there is an arguable Article 8 case or case under European Union law[20], the authorities have to pick up the tab for support, and the case is not being pushed because there are no immigration solicitors in play."

"In a significant number of cases I am now having to negotiate with local authorities to fund immigration representation for people who clearly have an arguable immigration case, but do not have the ability to make it themselves."

4. What effects have the Legal Aid, Sentencing and Punishment of Offenders Act 2012 changes had on (a) legal practitioners and (b) not-for-profit providers of legal advice and assistance?

30. First, the evidence from those attempting to refer cases is that immigration lawyers including in not for profits are taking on fewer cases:

"As an MP's caseworker, I have an informal list of around 20 immigration solicitors who I know are competent which I will pass on to constituents who need legal help or representation (or better legal representation than they have been getting...) … people [are] *coming back to me to say they have tried but that nobody can take on their case as they are too busy, or that the firm has stopped doing legal aid…"*

"…we don't practice immigration law at this firm but have a team specialising in immigration detention cases [for civil damages etc.]*…we speak to 'cold callers', usually from detention centres, regularly. Many of these individuals are awaiting removal or deportation but may have a right of appeal. Before the Legal Aid, Sentencing and Punishment of Offenders Act 2012, we would signpost clients who needed immigration advice to legal aid providers via the detention advice scheme* [surgeries in detention centres] *and where there is a protection claim we continue to do that. Now, for the large group of detainees who rely on Article 8 alone, there is no one to signpost them to as providers are simply unable to take on potential exceptional funding applications for non-protection claims given the huge amount of time and risk involved. There are very few detainees who have the means to pay so we are often giving very hopeless feedback to desperate individuals who have nowhere to turn and who may well have strong and compelling arguments to make on article 8 grounds, and children in the community."*

"As a legal aid practitioner, I am very conscious … that I am helping fewer people. Although I do this job because I want to help …, and I do not believe we should have a two tier justice system whereby the rich are properly represented but the poor are not, I am also conscious of the fact that if we do not make hard financial decisions, we will go out of business and will not even be able to help the few that do fall within the scope of legal aid. My workload remains primarily legal aid work, but this I am moving towards doing more private work to ensure I am helping the firm as a whole survive."

[20] *Ruiz Zambrano* (C-34/09).

31. For a splendid overview of the effect on legal aid lawyers, from a mixed legal aid practice which includes immigration work, we refer you to the recent article "Fig leaves & failings" by Jo Renshaw, a solicitor at Turpin Miller LLP in Oxford[21].

32. The charity Rights of Women runs a telephone helpline. It records:

January 2014	17 callers, six (35%) of whom not eligible for legal aid (previously eligible.)
February 2014	17 callers, six (35%) of whom not eligible for legal aid (previously eligible.)
March 2014	17 callers, six (35%) of whom not eligible for legal aid (previously eligible.)

33. The table produced in response to question two bears witness to the effects of the loss of Refugee and Migrant Justice and the Immigration Advisory Service[22] and evidences that the not for profit sector continues to be very hard hit. Not for profits have the advantage that they can try to secure some grant funding, the disadvantage that they are unlikely to be able to subsidise their legal aid with private work, although some law centres do now take private clients paying low rates.

> "*Every organisation must be able to pay its salaries and its rent. The fee income lost … must be replaced. The first casualties of the scope changes have been the law centres who suffered simultaneous cuts both to legal aid and local authority funding.*"

34. Case studies above and in Annex 1 illustrate how legal aid lawyers, including those in not for profits, are coping. In summary, they have taken on a tremendous amount of *pro bono* work, which has cushioned some clients from the effects of the Act to date, but which is unsustainable. And the effect of the residence test[23] will be a spark in a powder keg.

> *"The changes proposed in the Immigration Bill and the changes due to be implemented as a result of Transforming Legal Aid may well be the final straw for many immigration firms, whose post-Legal Aid Sentencing and Punishment of Offenders Act 2012 business plans had been built, in part, around the continuation of their judicial review practice. …if the emasculation of appeal rights set out in the Immigration Bill goes ahead, judicial review will be the only remedy for many. But the risks of taking on even the strongest of cases and the knife-edge cash flow situations many firms face may make a substantial judicial review caseload for an immigration practitioner little more than a pipe dream."*

35. The changes are also throwing up ethical dilemmas for practitioners in particular where the case of an existing client goes out of scope as the case reaches a higher stage, or the in-scope part of the case falls away. Mixed cases present particular dilemmas.

> *"I had to turn away a client who wanted to use a family member as an interpreter. The family member was to be a witness. He could not afford an independent interpreter."*

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[21] 8 April 2014, see http://www.newlawjournal.co.uk/nlj/content/fig-leaves-failings

[22] See ILPA Response re: Question from Lord Warner during Joint Committee on the Draft Modern Slavery Bill evidence session 11 March 2014, *op cit.*

[23] *Transforming Legal Aid: delivering a more credible and efficient system,* Ministry of Justice, 10 April 2013, see https://consult.justice.gov.uk/digital-communications/transforming-legal-aid . See ILPA's 3 June 2013 response to the consultation at http://www.ilpa.org.uk/resource/18039/transforming-legal-aid-ilpas-response-as-submitted-to-the-ministry-of-justice-on-3-june-2013 and see ILPA's 30 September 2013 submission to the Joint Committee on Human Rights for its enquiry into the implications for access to justice
of the Government's proposed legal aid changes available at http://www.ilpa.org.uk/resources.php/21039/ilpa-evidence-to-the-joint-committee-on-human-rights-enquiry-into-the-implications-for-access-to-jus

"At the moment I have been lucky in that minor children who have been granted Discretionary Leave on refusal of asylum and who are applying for Discretionary Leave and making a fresh asylum claim have either been taken before the March 2013 changes or do not have an article 8 case. I have up to now provided one off pro bono advice as to the lack of merits of an article 8 claim (in each case the Local Authority has agreed to pay the interpreter fee) but I am bound to come across a child with a strong article 8 claim and I do not know whether I will be able to get exceptional funding for him/her. If I cannot get it I cannot represent that child in the asylum or Article 8 matter (unless the Local Authority can be made to pay the fees for the Article 8 matter as I would be in breach of my rules of conduct since I should not be able to deal with all matters"

"…we were already doing so much pro bono work as part of our normal case load, if we do pro bono work now it feels like we are subsidising an exploitative system."

36. The lawyers in the exceptional funding case of Ms D, in **Annex 1**, say

"We are continuing to represent, without legal aid and without private funding (although the family did scrape together the Court of Appeal court fee), because this was an existing client and we are committed to acting in the best interests of her and her children and wider family, but we can an only do so up to determination of the permission stage because of the costs implications…"

37. We highlight that the effect of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on immigration lawyers go wider than those practising in legal aid. Legal aid cases contribute to the jurisprudence on which all practitioners rely.

38. Not for profits that do *not* have legal aid contracts are also affected.

"*We are a very small voluntary organisation (two part-time OISC caseworkers, one Level 3, one Level 2, not enough money for more although we could do with double the staff to deal with the workload) We have become even busier in the past year are struggling to cope with the demand for advice, and in particular, appeal representation. We are also getting many more people asking for help in other areas of law, saying that they cannot find anyone to help in employment and benefits in particular and there is nowhere local to refer them to."*

"I attend a destitution session run by a refugee organisation once a week Last year I saw a woman who has been in the UK for 13 years. Her story is complicated and has many compassionate features. Several reputable legal providers advised against an asylum claim and her immigration case was taken up by a women's group. They took a statement and made representations to the UK Border Agency in June last year. In December Serco wrote to her advising that they and the Home Office would not consider representations made by third parties and she should either get herself a lawyer or represent herself.

The women's group made a referral to the Public Law Project who attempted to get exceptional funding for her. This has been refused …She has returned to the destitution outreach almost twelve months after we first met, still desperate to try to regularise her position, terrified that Home Office… will now scoop her up and try to remove her. I may be able to get a pro bono lawyer but she probably also needs psychiatric reports and she has wasted almost 12 months. At the moment she is a long way from ever having an application … many potential litigants in person are not even able to penetrate the Home Office to begin to regularise or put their cases."

5. **What effects have the Legal Aid, Sentencing and Punishment of Offenders Act 2012 changes had on the number of cases involving litigants-in-person, and therefore on the operation of the courts? What steps have been taken by the judiciary, the legal profession, courts administration and others to mitigate any adverse effects and how effective have those steps been?**

39. The fall in cases funded by legal aid has not been mirrored by a fall in cases before the courts. One possible explanation is a rise in litigants of person, including litigants who have not had good or any advice at the initial stage.

    There has been a rapid and unprecedented rise in challenges to asylum and immigration decisions made by the Secretary of State. The number of judicial reviews received…was 69% higher in July 2013 than July 2012. The number of pre-action protocol letters has more than doubled; over 2,500 were received in July 2013 alone.[24]

40. On 17 January 2014, in a subsequent case, the Home Office reported

    "…case numbers have not abated (... in October, we saw the highest number of judicial reviews recorded (1957) and that number was not significantly lower in either November or December (1580 and approximately 1400 respectively)."[25]

41. Attitudes vary.

    "From what I have seen in the past, litigants in person in immigration matters, do not appear to be treated like litigants in person in family proceedings, as there is no attempt to balance the situation. "

42. In the case of Kumar[26] the Upper Tribunal does not reflect on the plight of unrepresented applicants, but rather gives the respondent Home Office scope to flout legal and procedural norms whilst leaving the applicant more exposed to of costs orders. We suggest that the Committee advocate research on costs outcomes. In one case, a single Lord Justice in the Court of Appeal was "troubled" by the struggles of a litigant in person. In the same case, by contrast, the legal representative reports that

    "…the Upper Tribunal was dismissive and did not attempt to grapple with two consequences of legal aid changes - the difficulty of litigants in person seeking fee remission, which delayed issuance of their applications, or making late applications (because time is lost looking for legal advice, or they do not know what they are doing)"

43. ILPA's attempts to mitigate adverse effects include securing grants, first from the Diana Princess of Wales Memorial fund then from Trust for London to provide training free at point of delivery to those working to deliver legal aid or to provide *pro bono* assistance. As part of this project we are supporting not only training for legal aid and pro bono lawyers but training on immigration for administrative staff in legal aid practices and for workers in refuges as described in response to question seven below.

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[24] *R(Jasbir Singh et ors v SSHD)* [2013] EWHC 2873 (Admin) per Hickinbottom J.

[25] *R(Kumar & Anor) v SSHD* (acknowledgement of service; Tribunal arrangements) (IJR) [2014] UKUT 104 (IAC) (26 February 2014)

[26] *R(Kumar & Anor) v SSHD* (acknowledgement of service; Tribunal arrangements) (IJR) [2014] UKUT 104 (IAC) (26 February 2014)

6. **What effects have the Legal Aid, Sentencing and Punishment of Offenders Act 2012 changes had on the take-up of mediation services and other alternative dispute resolution services, and what are the reasons for those effects**?

44. Not answered. Mediation and alternative dispute resolution are not features of immigration and asylum cases, in which the State holds all the cards.

7. **What is your view on the quality and usefulness of the available information and advice from all sources to potential litigants on civil legal aid? Do you have any comments on the operation of the mandatory telephone gateway service for people accessing advice on certain matters?**

45. It is inadequate. The web portal at https://www.gov.uk/legal-aid/overview is misleading and apt to give persons the impression that they do not qualify when they do. It is also not well suited to those trying to assist individuals, for example not for profits or MPs' caseworkers who want a list of all the legal representatives in their area doing immigration.

> "*A domestic violence organisation wrongly believed that their clients were not entitled to legal aid when some survivors of domestic violence are*"

8. **To what extent are victims of domestic violence able to satisfy the eligibility and evidential requirements for a successful legal aid application?**

46. The short answer: in significant numbers they are not. See *Evidencing domestic violence: a year on – a research report*[27] which, while focused upon family law is also relevant to those women whose immigration cases are potentially within the scope of legal aid.

47. Those with access to voluntary groups who know how to, and can, help with doing the preliminary groundwork, are having more success in reaching lawyers than those with no such access.

> *"…we have found ourselves trying to give bits and pieces of advice where we can to other agencies struggling to deal with these clients but, as with those in detention, these are rarely straightforward cases and piecemeal pro bono advice is neither an appropriate or viable way to assist.* "[28]

48. Not everyone falls within the scope of the domestic violence exception under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. We highlight survivors of domestic violence who are family members of EEA nationals but who cannot get a divorce and cannot therefore submit an application for a retained right to reside in their own right and survivors of domestic violence who are dependants of refugees.

[27] Rights of Women, Cymorth i Ferched Cymru and Women's Aid.

[28] See *Fig leaves and Failings, op cit.*

"…in the past so many may have come as the spouse of a student/person with leave as a worker, and we could have assisted them with applications outside the rules, but now we cannot"

Ms S

Ms S was the unmarried partner of a British citizen exercising rights of free movement under European Union law (in line with the case of *Surinder Singh*[29]). She has three British children. She is a survivor of domestic violence. She does not qualify under the Legal Aid Sentencing and Punishment of Offenders Act 2012 domestic violence provisions because there was no marriage. She cannot afford to pay for advice on how to apply for residence card to show has retained a right of residence under European Union law.

49. While the draft regulations[30] on the new residence test for legal aid except domestic violence from the residence test, the exception is not only subject to the problems described in *Evidencing domestic violence: a year on – a research report* but moreover does not cover applications for judicial review.

50. ILPA has provided free training, in conjunction with Rights of Women to workers in refuges for survivors of domestic violence in an attempt to encourage them to register with the Office of the Immigration Services Commissioner to give immigration advice. Without such registration they are caught by the prohibition in the Immigration and Asylum Act 1999 on giving immigration advice in the course of a business whether or not for profit.

9. Is the exceptional cases funding operating effectively?

51. No.

52. See ILPA's evidence on this point to the Joint Committee on Human Rights which is most pertinent to this enquiry[31]. Case studies are provided in that response. Examples of cases refused exceptional funding cited therein include cases of persons lacking capacity whom the official solicitor wished to assist, the case of a seven-year old child with autism, the case of a 17 year old in care in the UK since he was a young child, the case of a blind person with dementia at imminent risk of street homelessness, a family reunion case where the applicant sought to be reunited with a child she had had when very young as a result of rape, the case of a schizophrenic in detention and two pre-"reasonable grounds decision" trafficking cases. We have seen a case in which the Court of Appeal granted permission to appeal and yet the Legal Aid Agency repeatedly refused the application for exceptional funding on the grounds that the merits of the case were not strong enough.

53. See also the cases in **Annex 1**. There have been many fewer applications to the scheme than were ever envisaged[32] when the Bill that became the Legal Aid, Sentencing and

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[29] Case C-370/90, European Court of Justice.
[30] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014.
[31] ILPA Submission to the Joint Committee on Human Rights for its enquiry into the implications for access to justice of the Government's proposed legal aid changes, *op. cit.*
[32] See e.g. HL Report, 21 Nov 2011: Column 821. See also HL Report 5 Mar 2012: Column 1570.

Punishment Act 2012 was being debated. When we raise this point with Ministry of Justice officials they just say that the figures were a guess, but they were a guess made on the basis of assumptions which have proven false and fewer out of scope cases are being funded than parliament had envisaged or was prepared to pay for when it was persuaded to pass the Act.

54. Within the first nine months of the scheme a total of 1,151 applications (909 new applications and 242 applications for review of a refusal) had been received. One hundred and eighty seven were in immigration. Thirty-five resulted in grants, three of these in immigration, a success rate in immigration of 1.6%, lower than the overall average of 3.2%[33].

    "…we cannot afford to take the time to fill in the application- and client cannot afford to pay our fees for the drafting and submission of an exceptional funding application. Exceptional funding applications require time and legal knowledge. Clients do not have the necessary legal knowledge. Exceptional funding applications have to be done properly. …an exceptional funding application requires several hours of work. We cannot do them on a pro bono basis. …Our fees for making an exceptional funding application will not be much lower than the fees charged for a visa/leave to remain application. In view of the low rate of grant of exceptional funding applications why would a client run the risk of nearly doubling their costs (which will only be refunded if successful)?"

    "It takes me much longer than two hours to do an exceptional funding application, plus factor in the amount of time spent seeking a review"

    "…In our case we have done everything at risk [while waiting for an exceptional funding decision] *including our client's substantive application; I could not allow a client to suffer delay especially when it is refugee family reunion or a really compelling Article 8 case"*

    "... I have not attempted to make any applications for exceptional funding, as the whole process seems pointless, given how hard you have to work to make a successful application, and for so little reward, the fixed fee. It is not financially viable."

Adrian Berry

Chair ILPA

30 April 2014

Annexes

Annex 1 (in body of this document, below) Further case studies and evidence

Annex 2 (separate document) example of a Home Office letter identifying immigration cases involving Article 8 of the European Convention on Human Rights as complex

Annex 3 Statistics on New Matter Starts provided to the Civil Contracts consultative Group on 10 March 2014

Annex 4 (in the body of this document, below): ILPA Response re: Question from Lord Warner during Joint Committee on the Draft Modern Slavery Bill evidence session 11 March 2014, 28 April 2014

[33] Ad hoc statistical release: Legal Aid Exceptional Case Funding application and determination statistics - April 2013 to December 2013, Ministry of Justice Statistical release, 13 March 2014.

ANNEX 1 Further case studies and evidence

Commonwealth citizens who have lived in the UK for years

Mr P
Mr P is a Jamaican national, in the UK since 1963. He went to school and worked in the UK for some years and is now of pensionable age. He is unable to prove his status so all benefits have been stopped. He is in rent arrears; his utilities are being cut off as he has no money to pay the bills. He has never travelled out of UK and does not have his passport anymore. He is entitled to apply for a "No Time Limit" stamp, but he had no idea what he could do to prove he had status. Even then when a law centre was willing to help him without legal aid he faced a further hurdle as he did he could not pay the application fee because he had no money etc. Luckily a local trust agreed to fund the application fee.

Mr B
Mr B is a Jamaican national in the UK since 1974. He arrived with his brother and both were given Indefinite Leave to Enter, but Mr B has lost his passport. He went to school in the UK and has worked ever since. He was suspended from his job because unable to show what his status is. He has problems getting benefits. A law centre has given him some advice on what to put in a "No Time Limit" application, including copies of documents showing he has been in the UK continuously, a copy of his brother's passport with the No Time Limit stamp, letters from his father, etc. but the Home Office has refused his application saying the burden of proof is on him and they can't find records. He should apply to regularise. His only option is thus to clock up 20 years proven residence.

Mr C – see body of main submission.

Other cases involving family ties and/or life in the UK

Steve
"Steve" has indefinite leave to remain and wishes to bring his 12 year old niece "Rachel" to the UK. He has been the *de facto* father for the child since her biological father died at her birth. Tragically her mother died when she was little and since then she lived with Steve's children until they were granted entry to the UK in 2012. The High Court in Rachel's country granted Steve parental responsibility over Rachel. But as it is not an adoption order the High Commission does not accept that Steve is Rachel's parent. An application to bring Rachel to the UK was refused and Steve put in an appeal against this. I am helping with the appeal against the refusal.

Steve is a widower and works two part time jobs. He has two children under 18 of his own in the UK whom he has to support. He can meet the maintenance and accommodation test to bring Rachel here but his finances are still tight and he would qualify for legal aid if this was still in place.

We have secured a small amount of discretionary funding from the local council for his case and Steve is paying the remainder of our fees. The High Commission disputed the relationship between him and Rachel despite the evidence submitted and when the Entry Clearance Manager reviewed the initial refusal the relationship was the only thing in doubt that was barring a successful outcome. Steve chose to spend the money from the council towards legal fees rather than a DNA test as he thought it was more important to be represented as he does not feel able to do this himself. The barrister and I have both reduced our normal fees to fit within the funding available.

Steve's appeal hearing took place last week. Unfortunately the night before he was burgled and he was up until 2 am dealing with police enquiries. He still made it to court as his friend lent him £100 for fuel (the Tribunal is some distance away from him). His daughter took her last day of term off school to come to the hearing as a witness for Rachel. Despite all of this the case was not heard because the judge didn't get to it in time and refused to hear Steve's case before another in her list. At 3 pm Steve was

finally dismissed from court. He then had to drive back home in time to do a night shift in one of his part time jobs.

In a legal aid case we would be able to claim a small fee to reimburse the barrister for appearing at another hearing (£161). However in this case I have no money to do this. The barrister prepared the case thoroughly, and in addition to her travel time she was at court from 9 am to 3 pm and went in to speak to the judge several times and attempted to negotiate with the Home Office while she was there. To come to another court hearing will mean she attends for free as Steve simply cannot afford to pay any more money towards fees. I have asked the council for more money to give some reimbursement to the barrister for attending again but I cannot guarantee it at this point. The barrister has agreed to attend anyway because she is very kind and dedicated to clients such as Steve, but she should not be left out of pocket for a day's hard work. I do not think it is sustainable to rely on goodwill from lawyers like her. In her view there are strong arguments to put forward in the case, so it is not right that Steve should not be denied representation either.

Ms R
Ms R is a Bangladeshi national. She arrived in the UK six years ago but then fell gravely ill. She has subsequently been cared for by members of the family all of whom have either leave to remain or are British citizens. She required assistance with an application to regularise her stay in the UK and got in touch with a not for profit but they were unable ot assist her because her case is not covered by legal aid.

Ms J
Ms J came to the UK in 2002 for a visit from Jamaica with her father when she was a teenager. He then left her here with her grandparents; her father has since died and her mother and siblings are in the United States. She has been in a relationship for nine years and would like to marry her fiancée. She has never had status in the UK, although she believes that her father may have been a British citizen; it is difficult to obtain this information. She previously made an application under Article 8 in respect of the length of time she had been in the UK and her relationship with her fiancée. This was turned down with no right of appeal a few years ago and she was not sure what to do then.

She has one child in the UK, who was born as the result of a rape when she first came here. She is a carer for her grandfather who has Alzheimer's . She called an advice line run by a charity who identify that she needs to advice on an Article 8 application. She is not eligible for legal aid.

Ms M
Ms M was given discretionary leave in line with her mother when she was four. She is unsure of the basis on which she was given leave, it may have been as part of the Home Office "backlog clearance" programme as she and her mother will have been in the UK for some 14 years when her discretionary leave expires. She is now 18 years old. She would like to study at university, but will not be able to unless she can be classed as a home student. She called an advice line run by a charity who identify that she needs to apply for further discretionary leave.

Mr P
Mr P arrived in the UK from Kosovo in 202 with his partner. Both were refused asylum but through the asylum "legacy" programme his wife and their child were granted Indefinite Leave to Remain and are now British citizens. In 2010 Mr P submitted an application for leave, paying the requisite fee. Nothing has been heard since notwithstanding the intervention of his MP. He range a not for profit advice agency but it is unable to take his case as he is not eligible for legal aid.

Ms N
Ms N is from India. She called an advice line run by a charity. She came to the UK as a student in September 2010. She has made an application for leave to remain (FLR (O)) on the basis of her

relationship with a British citizen (he does not want to marry her, or to be her sponsor) and that that she is 24 weeks pregnant with his child. This was refused and she has appealed.

The appeal date is within a few days of her due date, so she wants to know how to move the date. She has no lawyer as the claim is solely based on Article 8; she does not have much money and she cannot continue studying because of the pregnancy. She is very fearful for the outcome. She is pregnant and unmarried so she does not dare contact her family in India about this, she believed her boyfriend when he said that they would get married but she is now pregnant, which means that she has brought shame on her family and will spurned if she goes back there. Her boyfriend has said that they will live together when the baby is born.

Mr M

Mr M is a British Citizen. He is the father of three young girls aged seven, four and three. Their mother died of cancer in 2012. He has health problems himself and relies on benefits including Disability Living Allowance. He recently re-married and wanted help with the Entry Clearance application for his wife. He cannot afford to pay a private solicitor but there is no legal aid for his case.

Mr D

Mr D's parents and brother all have Indefinite Leave to Remain. Mr D had previously been granted three years Discretionary Leave to Remain. He had twice attempted to submit an application for further leave to remain but had made errors in completing the application form. His leave has now expired and he is an overstayer. He called a not for profit which identified that he required assistance with making representations and/or an application to the Home Office to try and regularise to stay in the UK but was unable to assist because he was not eligible for legal aid.

Mr HA

Mr HA came to the UK in 2007 and was granted discretionary leave to remain. His visa was due to expire at the end of January 2014 but he did not know this until his boss told him. He does not know whether the Home Office wrote to tell him because he changed address and did not communicate this to the Home Office. His solicitor was at Refugee and Migrant Justice, which has since closed. He visited Hackney Migrant Centre which is working with Islington Law Centre under a grant to support pro bono work. He was given one off advice and advised to apply for an extension of leave before his leave expired so that while the application is being decided he would retain the rights and entitlements associated with his leave, including the right to work. He may be eligible for his fees for the application to be waived. He could also be eligible for a fee waiver but he was advised to try to avoid the lengthy process of applying for this and to pay for his extension if he is able to do so.

Mr JM

Mr JM is 60. He is currently staying in a hostel run by a homeless charity and has a support worker. He has a National Insurance number and has worked in the past but is currently on benefits. He is unsure when came to the UK and of his immigration status. He recently received a letter from the Job Centre asking him to sign on. He received pro bono advice from Hackney Migrant Centre and they identified that he may be a British Overseas Citizen or a Portuguese citizen and that he may have been in the UK for over 20 years. They have requested his Home Office file and when it is received, Islington Law Centre will provide him with pro bono advice.

Mrs AB

Mrs AB is an Eritrean national and a recognised refugee. She attended Hackney Migrant Centre. She had her child when she went to visit her mother in Ethiopia she was seven months pregnant and planned a one week visit. She had an accident there so that she eventually was forced to stay longer than anticipated and because of her being pregnant she could not fly back. She gave birth in Addis and stayed four months longer to breastfeed her son. Then she tried to come back with her son but has not been

able to find a way to get him a visa to come. She came back to the UK to try to get further help and is devastated that she has had to leave her son in Ethiopia. Islington Law Centre is assisting pro bono with an Entry clearance application for the baby. This has proven very time consuming as Ms AB is very difficult to work with and getting all evidence together is taking a great deal of time. So far some 96 hours have been spent endeavouring to assist her, the longest for any individual under the project.

Mrs PT

Ms PT is from Iran. She originally claimed asylum but was refused. In May 2013 she was awarded discretionary leave to remain on the basis of her private life with her husband and her carer, a recognized refugee from Iran. A condition of No Recourse to Public Funds was imposed on her leave. Mrs PT has many physical and mental health problems and is wheelchair bound. The couple live in a third floor council flat. To leave and return to the flat Mrs PT needs to get down and up again the stairs from the third floor on her bottom. The flat is full of mould and the damp has a severe effect on her asthma. Because of the 'no recourse to public funds' conditions housing need is defined solely by reference to Mr P. The only way to change the housing priority category is to change the condition on her leave to remain. Ms PT saw Hackney Migrant centre and they have arranged for a housing specialist at a local law centre to take on the case, with pro bono support from an immigration advisor at Islington Law Centre. The advisor from Islington Law Centre made submissions to get the No recourse to public funds condition lifted from Mrs. PT's status on the basis that it was unlawful. This has been refused and they are now going to have to apply for legal aid for a judicial review to challenge this decision. The council is working with them supportively. So far from 16 hours have been spent by the immigration advisor on her case and the work is not yet finished.

Refugee Family Reunion

> "*Far too complex a process for the average non-qualified person to manage let alone a newly-recognised refugee with limited language skills, limited income, and problems with trauma."*
>
> *"Since April 2013 we have had to turn away dozens of refugee family reunion cases, telling the stunned inquirers that they will either have to do it on their own or find the money for a private solicitor. I have personally provided pro-bono assistance in several such cases (particularly for existing asylum clients), but of course to stay open we really have to limit ourselves to billable work*."

Mr A

Mr A is a Syrian refugee who was recognised as a refugee within a few months of coming to the UK. He has four children and wife in Syria and is very worried about their safety. He wanted to make an application to bring them to the UK as soon as possible. A lawyer advised him about the exceptional funding scheme and that she would be prepared to make an application to assist him under this scheme. He was concerned about speed and she had to set out the likely timescale to get a result, and that no refugee family reunion applications have been granted exceptional funding, to her knowledge, so it was likely that the application would have to go the stage of a judicial review of a refusal by the Legal Aid Agency. Mr A said he did not want to pursue this route as he wanted to apply to bring his family here as soon as possible. He agreed to pay privately for my help. The firm's fixed fees for refugee family reunion are low but he could not afford to pay the fee in one go. As he was still getting asylum support when the case started the legal representative agreed to take payments by instalments so that would not have to pay the whole amount up front. He then had problems with his benefits so the legal representative has agreed not to take payment until he has enough money. The application was submitted within a few weeks and the family have now had a decision.

The family had problems submitting the applications in person. They were turned away from the visa application centre in Turkey as the children did not have lawful residence in the country. The mother had a passport which was stamped as she crossed from Syria into Turkey but as the children did not

have passports they were not stamped and had no proof of permission to be in the country. They went to the local police station and were told they had to be in Turkey for three or four months to get a residence certificate. They could not have afforded the living costs to stay there that long. The legal representative had to make representations to the Entry Clearance Manager who agreed to exercise her discretion to let the family submit their applications in these circumstances. The client could not have done this himself as he does not speak or write English and does not understand how to navigate the online communication systems. The legal representative observes

> "*Our firm could not agree to take on work for all clients in this way or we would not be able to sustain the business. However many refugees are desperate to bring family to the UK out of very difficult situations in their countries of origin and waiting until they can pay for advice is very hard, and may mean they get into debt if they must pay for an adviser up front."*

See body of submission and see also case of Mr G from Eritrea below.

Young people who had previously claimed asylum

Mr F

Mr F is a Bangladeshi national now aged 17 years old. A not for profit represented him in his application for asylum when he was 14. His application for asylum was refused but he was granted three years discretionary leave which is shortly to expire. He has now only an Article 8 claim. He is a star pupil and, in the words of his representative "… the Local Authority rave about him". Mr FH is not eligible for legal aid and any legal representation he secures will have to be paid for by the local authority.

Mr HB

Mr HB is a 22 years old Afghan national who arrived in the UK as a child in 2007. He has been granted discretionary leave to remain twice, three years each time and his second term is about to expire. He did not know how to submit the forms himself and does not have enough money to pay the Home Office fee and a private solicitor. He saw Hackney Migrant Centre who referred him to Islington Law Centre for pro bono assistance to assist him with the application to extend his stay in the UK and prevent him from becoming an overstayer with no recourse to public funds.

The destitute

Ms S

Ms S has a British baby under one. She has been in the UK since 2002, mostly as a student. She worked before the baby was born (first legally while she was a student, then unlawfully) but cannot work with the baby to look after. A relative in temporary accommodation herself lets them sleep in her room and feeds them but they could all be evicted if found out. With the help of a support organisation, she has had food bank help as many times as that is allowed. Social Services will not help without an application to the Home Office but there is no legal aid to do that. She has a reasonable chance of success although that is more likely on appeal and just putting the facts before the Home Office is not enough. She at least has proof of her baby's nationality.

T

T and her mother would have rights based on T's status as a Dutch national but her mother cannot prove this because the father is uncooperative. It is necessary to get proof through a "specific steps" order in the family court. There is no legal aid for this and T's mother has no money to pay. Even if this can be resolved, there will be no legal aid for the subsequent immigration application.

> *"The effect on me as a solicitor doing community care work is that I cannot refer any clients of mine with immigration problems to other solicitors. Their immigration status will often be integral to the work that I do for them, and consequently I spend large amounts of time trying to find somebody else to help with*

immigration matters, or seeking to point other charities in the right direction, which was something I did not need to do previously, as they would either have had an immigration solicitor when they came to me, or it was relatively easy for me with my contacts to find a one for them. The effects of this have been cushioned as I still have clients who obtained representation pre the Legal Aid, Sentencing and Punishment of Offenders Act 2012, but this cushioning is now coming to an end."

"Asylum Aid …has targeted destitute asylum seekers through outreach advice surgeries precisely because of the difficulties this client group face accessing legal aid advice and representation. We provide advice outside of legal aid in order to assess merits for further legal representation and then use this as the basis for facilitating access to legal aid.

The areas where we have had most recent success have focused on identifying routes to regularise people's insecure immigration status, as well as identifying deficiencies in government decision-making, including challenging the lawfulness of how the government's own policies and procedures are implemented. Many of these cases have until now been prioritised for representation in relation to resolving people's insecure immigration status through an immigration rather than asylum route which is work that is now outside legal aid scope. Therefore this now acts as an insurmountable barrier to accessing legal representation and with it, the loss of any hope of being able to regularise their status and overcome the plight of destitution …This will increase and prolong destitution for this client group. "

Mr C

Mr C wants to regularise his position in the UK. He is no longer eligible for Legal Aid. He had downloaded an application form but it was out of date. The forms especially the new Further Leave to Remain (FLR(0)) forms are long and complicated and given that they change regularly are difficult to find and negotiate. He was given a new one but before he could submit it – he is homeless so everything takes time - the forms had changed again. Eventually, with limited pro bono assistance, he submitted the correct form with an application for a fee waiver because he is destitute and homeless and it came back with a pro forma tick box sheet stating that he had not proved he was destitute. It has been resubmitted.

Deportation cases

KG

KG is a 23 year old Jamaican national who came to the UK in May 2008 with two other siblings to join their mother who was living in the UK. He was then 17. KG, his mother and siblings were subsequently granted Indefinite Leave to Remain. In November 2010 KG was convicted and sentenced to two years in prison for a drugs offence. KG's daughter was born whilst he was in prison but since his release the evidence was that he cared for his daughter three - four days a week and had full care of her during this time. This enabled his partner to work. In addition, KG and his partner and daughter spent the other half of the week together as a family. All of KG's family with whom he is in close contact live in the UK and he has remained dependent upon his own family for financial and emotional support despite now being a young adult. KG has been convicted only once and he pleaded guilty and accepted full responsibility for his offence. Whilst in prison KG achieved an exemplary prison record with no adjudications and was an enhanced prisoner. His risk of re-offending and risk of serious harm to the public if he did reoffend were both assessed by the probation services as low.

The Secretary of State made a deportation order against KG and he appealed against it on Article 8 grounds, particularly on the grounds of his daughter's best interests. KG sought a three-week adjournment for his appeal hearing to adduce an expert social work report regarding his family life with his partner and daughter and his daughter's best interests. The adjournment was refused on a perfunctory basis without any regard to the child's best interests. The substantive appeal was then dismissed with no proper assessment of the child's best interests. Permission was granted to appeal to the Upper Tribunal but no error of law was found. KG had been legally aided throughout this process although his appeal was predicated upon Article 8 because his case began before the Legal Aid,

Sentencing and Punishment of Offenders Act 2012 came into force. An application for permission to appeal to the Court of Appeal against the Upper Tribunal's decision was made. The case was now out of scope of legal aid under the Act. The case was pursued on a *pro bono* basis including drafting grounds of appeal and a skeleton argument for the permission stage. Permission was refused on the papers and has been renewed to an oral hearing. All work continues to be done on a pro bono basis.

Mr M

Mr M has an appeal against deportation. He has family members including minor children in the UK. He cannot afford to pay for reports from independent social worker and a report assessing his risk of re-offending.

Francesca

Francesca is from Italy and is currently serving a six month sentence. She was of good character prior to this sentence. She had lived in the UK for 21 years had acquired rights of permanent residence in the UK. She cannot be excluded from the UK unless there are "serious" public policy, security or public health grounds for such exclusion. The Home Office has apparently ignored its own policy guidance which says that caseworkers must consider length of residence in the UK and length of sentence before deciding to pursue deportation action.

Francesca cannot afford to pay for legal advice. She does not qualify for legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In the circumstances an immigration solicitor in the same firm as Francesca's prison lawyer agreed to write a letter to the Home Office *pro bono* setting out the policy they should be following. Francesca has just been released.

If Francesca had not had help she would have been held in the prison under immigration detention powers when her sentence came to an end if no decision on deportation had been reached by the Home Office. Although she could have got legally aided advice on bail at that point she would not have received free assistance to argue against deportation which would be the reason why she was in detention.

Mr V

Mr V is from Côte d'Ivoire . He has been in the UK since he was 10 years old. His partner and child are British citizens. He is subject to deportation proceedings and got in touch with a not for profit organisation seeking representation but his application is not covered by legal aid.

Michael

Michael is from Malta and is currently serving a prison sentence. He wrote to his previous criminal solicitor to say that he was under consideration for deportation and wanted some advice about this. He cannot afford to pay for help. He does not qualify for legal aid for his immigration case. He has lived in the UK for 10 years and has a four-year old daughter who is British. He wants to remain in the UK because of his child and the life he has made in the UK.
An immigration lawyer in the criminal solicitor's firm wrote to him to advise pro bono on how he could best prepare his case himself. He has good English and is literate, but he has written back with a lot more questions, which is understandable, as deportation and Home Office processes can be difficult to understand. The immigration lawyer is again replying, *pro bono*, but cannot conduct his case without some funding. As a European national who may have permanent residence in the UK he may have a realistic chance of avoiding a decision on deportation and thus avoiding an appeal if he makes representations to the Home Office now before his conditional release date and supplies enough evidence to change the decision.

Mr F

Mr F is from Somalia. He had indefinite leave to remain and has been in the UK since 1999. He is subject to deportation proceedings having received a 13-month sentence for attempted theft. He got in touch with a not for profit organisation but they were unable to assist him because the case is not covered by legal aid.

Domestic violence

Ms S

Ms S is from the United States. She came to the UK in 2006 as a visitor. She overstayed and was in a relationship; her partner (not married) repeatedly told her he would sort out her immigration status and would get her a visa but he did not do so. He was controlling and has been violent towards her, including hitting her when she was pregnant (daughter born 2007). She told him in 2010 that she wanted to separate as she was unhappy, however as she had nowhere else to go, they have remained living together.

He applied for sole residence for the child but was eventually granted a shared residence order meaning that neither parent can remove their daughter permanently without the agreement of the other or the permission of the court. The family court refused to make any further orders and said that it would not do so until Ms S's immigration status was dealt with. The family case is now stayed pending resolution of her immigration status. The father will not give permission for the child to leave the UK. They live in the same house, but separately. She cares for their daughter and he pays the bills, she is expected to pay for everything else but is unable to work. She is still subject to violence from her former partner on a daily basis.

She has a 16 year old son from a previous relationship who came to the UK with her in 2006. He is now at college and is starting to look at university, but does not any have immigration status either. She called an advice line run by a charity. No legal aid is available to either Ms S or her son; she does not fall within the domestic violence exceptions under the Act because she did not have leave as a spouse.

Ms N

Ms N is a Pakistani woman currently going through an appeal at the tribunal. Her case is now solely Article 8 so her solicitors have had to withdraw.

She met her husband in the UK when she was studying on a valid student visa in 2010. He is a British citizen. They went to Pakistan briefly to marry during the university holidays and she returned on her student visa because he would not apply for the spouse visa. He was initially supportive of her studies but became violent and controlling. His behaviour was so controlling that she was unable to continue her studies and so her student visa was curtailed. Once her visa was curtailed, the violence escalated and involved her husband, his father and brothers. She fled and called the police in May 2012. She was initially advised to make an application under the domestic violence rule although she had not had leave as a spouse. This was refused. She was then advised to claim asylum which she did. Her asylum claim was refused and she now has an upcoming appeal. Her solicitors have withdrawn funding because her asylum claim is not strong enough to reach the threshold for continued legal aid. She does not fall within the scope of the domestic violence exceptions for legal aid because she did not have leave as a spouse.

She telephoned a helpline run by a charity. She is very afraid. Her English is fluent, but she is worried that she will not understand proceedings in the tribunal if everyone else speaks fast. She has depression and is undergoing counselling as a result of the violence. She needs assistance writing her statement for the appeal hearing.

Ms D

Ms D is a Nigerian woman who was suffering domestic violence. She came as the partner of her student husband in 2007. She had a dependant's visa which expired in 2008, and her husband would not allow her to renew it. When her husband applied for Indefinite Leave to Remain for himself, he told her it was too expensive to apply for a visa for her. Her husband has been physically abusive for a long time and she secured a family law injunction this month to prevent him contacting, harassing or pestering her. She also secured an occupation order and so he has moved out of the family home. He stopped paying the rent

on the home a few months ago, although she did not know this until he moved out. The owners are now trying to evict her and the children.

They have three children together, all born in the UK but only one born whilst their Father had Indefinite Leave to Remain (and thus a British citizen). She has no money at all, and currently has no social services assistance. She is not eligible for legal aid. She called a helpline run by a charity and was advised to seek alternative advice through a Citizens Advice Bureau, or could ask social services to fund some assistance. Her literacy is limited. She does not fall within the domestic violence exception for legal aid because she does not have leave as a spouse.

Ms C

Ms C is from Nigeria. She came to the UK as a visitor in 2008 and again in 2009. The second time she overstayed and married her boyfriend who has Indefinite Leave to Remain. They are currently separated because of his violence towards her, but they have a son together who lives with her.
Her husband was violent and controlling, refused to help her apply for spouse visa because he liked to threaten to return her to Nigeria if she stood up to him. She was removed from the house by the police after someone called them over the violence. She was placed in a refuge, but the local authority in which the refuge is found are now refusing to help, saying she should return to the borough where she used to live. That borough is saying that it is too risky for her to return because of the severity of the violence. She called a helpline run by a charity. No legal aid is a available on the basis of her claim on the basis of Article 8 or on the basis of European Union law given her British citizen child. She does not fall within the domestic violence exception for legal aid because she does not have leave as a spouse.

Ms A

Ms A is a Nigerian woman whose husband is studying in London. She is in the UK as his dependant. They have two children together, both born in the UK. They have separated as a result of domestic violence. Her daughter is unwell and receiving specialist treatment as she has a health condition that affects her ability to eat and breathe. The child is being fed through a tube. Her visa is about to expire. As there is no immigration application pending, the local authority has said it will stop all funding to her and the children once her visa expires (within two weeks). No legal aid is available for her to make an application on the basis of Article 8. She does not fall within the domestic violence exception for legal aid because he husband is a student, not a British citizen or settled.

Prison law

Mr X (not an immigration case but brought to our attention by a member and we highlight it lest others do not)

Mr X was considered a very dangerous prisoner. He was beaten up very badly in prison. He suffered a head injury. He no longer has the capacity to represent himself and has become extremely docile. He remains in a category A prison, incapable of making such representations or sending in neurological reports. The Secretary of State for Justice has taken the view that he has submitted no evidence. Therefore there is a judicial review of the Secretary of State for Justice for failure to make his own enquiries while Mr X remains in a category A prison, under a very costly regime, for the foreseeable future. This is likely to involve revisiting the finding in *R (Howard League for Penal Reform and Prisoners Advice Service) v the Lord Chancellor* [2014] EWHC 709 (Admin) that the an unacceptable risk of procedural injustice was unproven.

Effect on legal lawyers, including those in not for profits

The case studies above and in the body of the submission also address this. We augment them with the following:

"I have taken on a deportation case pro bono, on which I am already instructed in the detention matter. This applicant had legal aid at first instance but between her application to the Upper Tribunal (which failed) and her application to the Court of Appeal the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came in and she was no longer in scope. She has three children from whom she will be permanently separated. We represented her in the Court of Appeal on that matter at considerable cost to this firm. Permission was refused but we now represent her in an application to revoke her deportation order (also pro bono). Taking on more of this work pro bono is completely unsustainable."
Private practice, legal aid firm, with a public law and prison law contract but no immigration law contract

"In the past year we must have had at least 12-15 clients whom we have had to help partially on a pro bono basis in relation to their article 8 fresh claims. Unfortunately we are a very small firm with a small contract but knowing the effect the changes has had we have made a decision that if there is some form of in scope funding we will do the article 8 and any other elements pro bono, but if the whole matter is out of scope or there are disbursements we cannot assist. This has been a very difficult year for us and our clients.

It would seem that the Legal Aid Agency and government do not realise how asylum fresh claims of those who have been in the UK for many years are linked to cases on their family and private rights, or how difficult it is for us as practitioners to explain and separate the funding requirements for the same. … The restrictions are not just hurting our clients, their families are suffering also whether they are in the UK or abroad. Examples:

Mr S
Failed asylum seeker from Iraq, survivor of torture, came to us to make a fresh claim following therapy with the Freedom from Torture. He had been in the UK for seven years and was in a relationship with his British partner (and subsequently wife) for four years. She was pregnant with their first child, she also had two teenage children from an earlier relationship. The work in relation to the fresh asylum claim was covered under our contract, the article 8 claim, the stronger, was done pro bono to an estimated cost of three to four hours' work and preparation.

Private practice, legal aid firm with immigration contract in the north of England

Mr G
Eritrean who had been in the UK for only three months, recognised as a refugee status, came to see us to make an application for his wife and child to make a family reunion application. We were unable to provide legal help as refugee family reunion is now out of scope. He could not speak, read or write English, and desperately needed assistance to make the online applications but we could not assist or provide pro bono work on this occasion. He was still in receipt of his NASS support when he came to see us. He had to borrow the money to pay for our services. This made us as a firm very uncomfortable.

Mrs DS
This matter was opened by us on 29 March 2013 and funding was available, if she had come two days later she would have been out of scope. It is an example of the importance of funding for article 8 matters. Mrs DS was an Angolan national who had been in the UK since 1999. She has three children, two born in Angola who are now British citizens and the youngest aged six years and nine months, born in the UK and British by birth. She was issued with deportation order following a term of imprisonment for assisting fraudulent entry to the UK. The family were granted indefinite leave to remain in 2008 as part of the "family amnesty". This leave was revoked following her conviction. Representations were made. The matter has been to the First-tier Tribunal and to the Upper Tribunal and back to the First-

tier Tribunal where we have eventually received a positive decision only for the Secretary of State to appeal once more to the Upper Tribunal.

[See also Mr I in response to question one in the body of the submission]

Mr A I
Mr AI is a Somali national who arrived in the UK at the age of 11 and is now 29. He is married with two children. He separated from his wife when he was imprisoned for grievous bodily harm and sentenced to 18 months in prison. When he completed his sentence, he was detained in an immigration removal centre for two years. His indefinite leave to remain in the UK was revoked. A deportation order signed for removal to Somalia (not Moghadishu). He claimed asylum. We were able to get legal aid to act for him in this matter. However, all of the work in relation to his family and private life has been done pro bono. This must have amounted to at least five hours work between us and the barrister. His appeal failed and there was no funding to make further appeal. He has an electronic tag and is accommodated by the Home Office ("NASS" accommodation) 250 miles away from his ex-wife and children. He had not seen the children for over two years during his detention. He was advised to obtain the services of a family lawyer to re-establish contact with the children. This was also advice given to him by the First-tier Tribunal judge. However he is not entitled to Legal Help for the family matter as there is no violence or child abuse; he is on NASS support vouchers and is not able to afford legal representation or even the court fee to make a contact application to the family court. As such his article 8 claim before the First-tier Tribunal was significantly weakened as this went to a willingness on his behalf to re-establish contact with his children."

"*In our team, the private immigration work has come through the door, but we are still shielded from the full impact of the scope changes by the pre-Legal Aid, Sentencing and Punishment of Offenders Act 2012 case load we are carrying. I suspect that the effect of the Act on a firm like ours will be staggered over several years as pre- Legal Aid, Sentencing and Punishment of Offenders Act 2012 work gets gradually finalised and billed."*

"…we are for profit provider but with an ethos of providing legal advice to our community. Ninety per cent of our clients were legally aided. There has been a huge shift in that number. In immigration/asylum my legally aided clients are now just over 50% of my work. …Our community could not afford our fees if we were to charge our full private rates. the question is do we charge clients according to their means (which could be seen as unfair by those who have the means to pay – why should they subsidise those who would have in the past be eligible for legal help? It is not their concerns if others cannot afford to pay a lawyer.) Or do we charge a medium rate and exclude most persons from our community? Can we survive if we charge lower fixed fee rates (client still has additional expenses: interpreter fees/photocopying costs /application fees/appeal fees)? I had to turn away a client who wanted to use a family member as an interpreter/ family member was to be a witness/ he could not afford an independent interpreter."

> *"…we are getting more cases referred to us which would be very straightforward if there was an immigration application outstanding (and which often would not therefore attract a negative decision from the local authority thus leading to the referral in the first place), but as there is not, they become far more complicated, and take up far more time."* Community care lawyer in a not for profit specialising in cases with an immigration element

Exceptional funding

"Exceptional Case Funding is currently a waste of time as the prospects of success are far too low for it to be worth the while of the immigration solicitors to make an application on an at risk basis."

"Sadly, publication of the figures is likely to lead to even fewer applications for exceptional funding being made and thereby lead to a further spontaneous contraction of publicly funded work. "

Exceptional funding has been mentioned in cases described above, *passim*. In addition:

Ms D

Ms D was an existing client of a legal aid firm who need to appeal to the Court of Appeal from a decision of the Upper Tribunal, which dismissed her appeal against deportation and refused permission to appeal. She had diagnosed mental health problems which psychiatrists described as treatable and which were being treated in the UK. Having lived in the UK since childhood, most of her family was in the UK. She had two children, born in the UK and British Citizens, with whom she was in touch regularly, while they were in the care of other family members.

Five experts and the family (including those currently looking after the children) agreed that it was in the best interests of the children to maintain regular contact with their mother.

The children and other supportive family members were not separately represented. The application, supported by counsel, was based on the impact on the family as a whole. The Upper Tribunal gave insufficient reasons for dismissing the concurrent opinion of the five experts and all family members attending the appeal.

The Legal Aid Agency rejected the exceptional funding application on the basis that article 6 of the European Convention on Human Rights did not attach to immigration. It also suggested that, as she had the benefit of legal advice at earlier stages, she could manage before the Court of Appeal. The Court of Appeal has not yet determined the question.

Mr L

Mr L was not a previous client of the firm. His previous solicitors had to withdraw when the Upper Tribunal dismissed his appeal against deportation in 2013, because the matter was no longer within the scope of legal aid. He was of limited education, but was literate in English. He was detained and, in detention, without legal advice, he sought to make an application to appeal to the Court of Appeal, albeit out of time. His application included a reasoned application to extend time. With help from his partner (mother of three of his six British Citizen children by two long-term relationships – not separately represented) he did manage to lodge his application in the Civil Appeals Office. He applied for exemption from the fee, for which he met the criteria, but as a result issuance of his application was delayed for more than two months because the fee exemption application had to be processed first.

The Home Office wished to remove him, declining to delay removal while the Court of Appeal considered the lodged application, which would in effect pre-empt the application to the Court of Appeal. A legal aid firm became involved in a judicial review application on the limited issue of whether it was lawful for the Home Office to remove him, pre-empting that Court of Appeal decision, while his application was before the Court of Appeal held up because of the antecedent fee remission application (applications which will be on the increase with loss of legal aid and increase in litigants in person).

While, in the judicial review application, the Upper Tribunal refused an interim injunction to stay removal, meanwhile, in the Court of Appeal, the fee exemption application was approved and his proceedings were formally issued. A single Lord Justice considering the litigant in person application for permission to appeal stayed pre-emptive removal, queried flaws in the decision-making which the unrepresented applicant had not specified, on which he invited submissions from the Secretary of State and directed that there should be an oral hearing at which the question of whether to grant permission could properly be considered. He indicated on the face of the interim order that he was "troubled" by questions arising. In the light of the directions and the prospect of an oral hearing at which the respondent would be represented and would make submissions to address legal queries raised by the Court of Appeal, an application for exceptional funding was submitted in the belief that, if a Lord Justice

of Appeal was of the view that a hearing was necessary to determine whether to grant or refuse permission to appeal, this would be a case in which exceptional funding was likely to be granted.

The application for exceptional funding was refused on the grounds that the determination of the appeal did not involve an issue for which there would be a breach of article 6 if he were not represented and he had had some advice in the past and could get by on that. At the Court of Appeal hearing, the Home Office was represented by counsel, who conceded that part of the decision-making was legally wrong, but argued that overall it made no difference and persuaded the Court not to give permission to appeal. The litigant in person did not understand enough to report back in detail on what had happened.

In the two rejected exceptional funding cases described above, although the clearest reason for rejection was that Article 6 does not attach to immigration cases[34], the Legal Aid Agency wrote lengthy justification of rejection – in both cases after requesting further information from the past – giving the impression that considerable resources are devoted to rejecting applications, money that would be better spent on advice and representation for individuals.

Ms LM

M LM was a European national facing deportation. Her child had been taken into the care of social services. She had little English and no family or friends to assist with funding. She had remained in prison after completion of a sentence because she had no address to which she could be released. The background facts were harrowing. Hours of *pro bono* work and responses to multiple requests for further information from the Legal Aid Agency ended with a refusal of exceptional funding. The lawyers who made the application comment "We felt strongly that if this case did not succeed, then no immigration case could."

This is in part due to its complexity, in part to its not being covered by Article 6 of the European Convention on Human Rights because of settled case law of the European Court of Human Rights that immigration cases are not about civil rights and obligations.

[34] *Maouiaa v France* Application 39652/98 [2000] ECHR 455 (5 October 2000).

ANNEX 4

ILPA Response re Questions from Lord Warner during Joint Committee on the Draft Modern Slavery Bill evidence session 11 March 2014

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 provided written evidence to the Joint Committee on the Draft Modern Slavery Bill and oral evidence on 11 March 2014. In the course of giving evidence ILPA agreed to write in to address questions from Lord Warner as follows:

Lord Warner: The contracts under LASPO have now been in effect nearly a year.

- *What has been the effect on the supply side, in the sense that the legal aid contracts with firms suggested that they would take a smaller number of cases?*
- *What is your view of what has actually happened in the legal aid funded firms themselves?*
- *Have they simply cut out a lot of trafficking work?*
- *Are they doing it pro bono?*
- *What has happened on that supply of legal services side?*

What has been the effect on the supply side, in the sense that the legal aid contracts with firms suggested that they would take a smaller number of cases?

The number of 'matter starts' has been reduced significantly in recent years. Matter starts limit the number of cases that can be taken on at the initial stage. A 'matter start' is essentially one case (for example an asylum application and – if applicable – a related appeal to the Tribunal); the amount of work needed for a case will vary according to how complex it is and whether the matter requires an appeal or not. Most solicitors' firms now receive an allocation of just 100 matter starts for asylum and immigration work, whereas previously they were able to take on as much of this work as they had capacity for (subject to means and merit testing).

The table overleaf illustrates the reduction in the number of matter starts used over the past four years.

Table of Matter Starts in Immigration and Asylum cases[35]				
Year	**2010/2011**	**2011/2012**	**2012/2013**	**2013/2014[36]**
No. of matter starts: solicitors' firms	52,685	52,243	47,316	20,587
No. of matter starts: Not-for-profit organisations	30,768	8,862	5,550	2,397
Total matter starts	83,453	61,105	52,866	22,984

As may be seen from these figures, there has been a reduction since 2010, year on year, in the number of matter starts undertaken by both solicitors' firms and not-for-profit organisations. The current total number of immigration and asylum cases funded by legal aid is just over a quarter of what it was in 2010. There has been a 72.5% reduction in legally-aided immigration and asylum cases.

As many firms now only have some 100 matter starts for asylum and immigration work (including trafficking cases), individuals must persuade a solicitor to take on their case, rather than another, as part of this limited quota. Prospective clients are thus in competition with each other to a certain degree. Law firms, under financial pressure because of extensive legal aid cuts (described further below), must prioritise those cases which are likely to involve the most work[37]: thus a trafficking case with no asylum element would be likely to lose out to a complex asylum case. Once a firm's quota is reached, they will have to turn away any further cases, no matter how great the trafficked person's need for representation.

At present, judicial review work in trafficking cases is still funded by legal aid. However this is set to change with the introduction of a residence test in August 2014. The residence test will deny legal aid to anyone who cannot satisfy the terms of the test, which are that: (a) the person is currently lawfully resident in the UK; and (b) at some point previously the person was lawfully in the UK for a period of 12 months. Although the immigration matters of trafficked persons (defined by reference to successful identification by the National Referral Mechanism) will be exempt from this new barrier to legal aid, judicial reviews are not. Thus if the Home Office unlawfully fails to identify someone as a victim of trafficking under the National Referral Mechanism process, the person affected will have no means of redress.

Matter start allocations do not affect the volume of higher appeals and judicial reviews that a firm can do. The Legal Aid Agency does not provide data that would allow the number of judicial reviews in trafficking cases that are funded to be disaggregated.

[35] Figures taken from Legal Aid Agency Report: New Matter Starts 2013/2014 provided at Civil Consultative Group meeting on 10 March 2014 (copy available from ILPA)

[36] Year to 28 February 2014

[37] This is because of the introduction of fixed fees in 2007 (explained further below) which mean that an hourly rate will only be paid if the case involves three times the amount of work represented by the fixed fee for that type of case. This incentivises solicitors to take on the most complex cases, as these are the ones likely to pay most, something that the Constitutional Affairs Committee warned against at the time, see Third Report of Session 2006-2007, HC 223-I, 01 May 2007 at para. 76.

What is your view of what has actually happened in the legal aid funded firms themselves?

The context is important here – the reduction in matter starts has exacerbated the impact of prior cuts to legal aid provision; there have been successive cuts from 2004 onwards. The major changes are as follows:

In **2004** strict controls were put on the amount of time remunerated that a lawyer could spend on a legal aid case; prior to this a legal aid lawyer did as much work as an individual case required. Cost limits, which could only be exceeded with the Legal Services Commission's authority, were introduced for most immigration work. Legal Help was withdrawn for attendance at most UK Border Agency interviews.

In **2007** fees were fixed, so that the legal aid lawyer is paid the same fee no matter how much work the case involved. Only if a case requires three times the cost of an average case (taken to be the nominal value represented by the fixed fee) is an hourly rate paid ("an escape fee").

Fixed fees have remained in place ever since (they have not been raised in line with inflation, so in real terms legal aid remuneration has dropped each year since[38]).

In **2010** the Legal Services Commission (now the Legal Aid Agency) awarded contracts for legal aid work to fewer firms than before, with a preference for contracting with larger providers and a minimum contract size. Ranking of bids, on dubious criteria meant that some firms, including some very good firms, did not get a contract at all[39]. Some firms stopped doing the work entirely either because they did not bid for contracts or because they were not awarded them. Many firms reduced the amount of legal aid work they undertook, either because they were awarded very small contracts or because they increased the volume of their private work to remain viable. Some not-for-profit legal aid providers closed (e.g. Devon Law Centre, which while it was awarded an immigration contract, was not awarded a social welfare contract and therefore had to close). "Advice deserts" opened up in different parts of the country. One of the largest national providers of asylum and immigration law services, Refugee and Migrant Justice, a not-for-profit organisation, could not make the new system pay and was forced to close[40].

A further large casualty in the sector occurred in **2011** with the closure of the not for profit Immigration Advisory Service[41]. This opened up new advice deserts in different parts of the country. In October 2011 fixed fees in immigration cases were cut by 10% across the board, putting further pressure on firms and on members of the Bar[42] doing legal aid work[43].

In April **2013** the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* took effect. This Act removed the vast majority of immigration cases from the scope of legal aid, leaving only asylum and cases under Article 2 (right to life) and Article 3 (freedom from torture, inhuman and degrading treatment) of the European Convention on Human Rights. It is not possible to quantify the impact that the removal of immigration cases from scope upon trafficked persons; we are however aware of cases where a background of trafficking only came to light during the course of another immigration matter after the individual was able to build up trust in their legal advisor over a period of time.

[38] The fees were also cut by 10% across the board in 2011

[39] See ILPA's evidence to the Low Commission, 30 May 2013: http://www.ilpa.org.uk/resource/18002/ilpas-submission-in-response-to-the-low-commissions-context-paper-on-asylum-and-immigration-30-may-2

[40] Refugee and Migrant Justice closed in June 2010, with an estimated 10,000 clients at that time. Some but by no means all, found other representation.

[41] The Immigration Advisory Service closed in July 2011, with more than 10,000 live cases on its books. Again, not all clients found other representation.

[42] Fees for Counsel were reduced by 10% by way of the Community Legal Service (Funding) (Amendment No.2) Order 2011

[43] Barristers' fees were also cut by 10% at this time – they were subjected to fixed fees in the same way solicitors were in 2007.

The other impact of the 2012 Act was that successful identification by the National Referral Mechanism became the gateway to legal assistance despite the fact that in our experience it is very often the case that individuals require legal representation successfully to navigate the National Referral Mechanism. They also require advice as to whether it is in their best interests to approach the Home Office in the first place – many trafficked persons are understandably intimidated from attending the public body responsible for immigration enforcement and with good reason: they could be liable to detention and immediate removal if the Home Office does not consider there are reasonable grounds to believe they may have been trafficked.

It is in this context that new contracts were brought in with effect from April **2013**. Firms were allocated 100 'matter starts' per office for immigration (by now mainly asylum and those cases remaining in scope) legal help: that is, cases at the initial stages. For many this forced a drastic reduction of this type of legal aid work. Overall less than a third of the amount of matter starts that immigration firms bid for were awarded.

The impact of these cuts, viewed cumulatively, is that there are fewer specialist immigration legal aid providers (firms and not-for-profit organisations such as law centres) operating and those that continue to do this type of work are now forced to do a mixture of private and legal aid work in order to survive financially. Members of the Bar specialising in legal aid work have also suffered as a result of the cuts: one high profile casualty occurred in September 2013: the closure of Tooks Chambers (of Michael Mansfield QC), a leading human rights barrister chambers (which specialised in immigration work, among other areas) that was badly hit by the legal aid cuts[44].

Have [*firms*] simply cut out a lot of trafficking work?

Yes. As described above, a person with a trafficking case is essentially in competition with other individuals who have cases within the scope of legal aid: the Legal Aid Agency has created a financial incentive for firms to prioritise the largest, most complex cases when filling their allocation of matter starts for the year. Trafficking work has suffered as a result (except for trafficking cases which will involve large volumes of work, for example where there is a complex asylum element). Because the National Referral Mechanism is now the gateway to legal aid, any work done by a solicitor on a trafficking case prior to a successful conclusive grounds decision is not remunerated; it must be done for free. This makes trafficking cases less attractive to take on.

Trafficking work also encompasses, importantly, compensation claims brought against traffickers[45]. Many immigration lawyers do not undertake these cases: they are time- consuming and highly specialist in nature, and to make practice in the area viable one must do a regular amount of these cases, to be able to stay up to date in the area. Importantly, compensation cases are not funded as part of the 100 matter start quota for immigration/asylum matters. Instead, they are categorised as miscellaneous matters. Under the new contracts brought in in April 2013, firms and not-for-profit organisations have been allocated just five "miscellaneous" matter starts per office. This means that firms and charities that used to specialise in this work are now being hindered from doing so in two ways: they are no longer able to take on as many cases as they have capacity for and they have an insufficient volume of cases to be able to maintain their specialism in the area in future. The likely result of that is that those few firms that are doing this type of work will in future cease to do so.

Are they doing it pro bono?

[44] *Leading civil rights lawyers Tooks Chambers closes, blaming legal aid cuts,* The Independent, 23 September 2013, available at: http://www.independent.co.uk/news/uk/home-news/leading-civil-rights-lawyers-tooks-chambers-closes-blaming-legal-aid-cuts-8835371.html

[45] These claims were left in scope by the Legal Aid, Sentencing and Punishment of Offenders Act 2012: s. 32(3) of Schedule 1.

It is common for lawyers in the legal aid sector to do *pro bono* work as a matter of course in their day to day practice – for example by doing extra work on a legal aid case even though they have already exceeded the number of hours nominally represented by the fixed fee. *Pro bono* work is done as a matter of course by many immigration solicitors. Thus cut in legal aid cases means a cut in *pro bono* work done overall.

Since the advent of the recent cuts to the legal aid budget, legal aid lawyers (of whom fewer are in practice) are under more pressure than ever before to do *pro bono* work. Lawyers are faced with requests for assistance from people who have important immigration matters that used to be within the scope of legal aid, and now are not: for example a father whose deportation will separate him from his child, in likely breach of his, and the child's rights to family life. The pressure to do *pro bono* work is particularly strong where a person has a "mixed" case, that is, where part of their case is within the scope of legal aid, but part of it is not[46]. We are aware of trafficking cases where initial (i.e. pre 'reasonable grounds' decision) work has been done completely *pro bono* by immigration lawyers. Since the advent of fixed fees it has been, and continues to be, the case that the work done on most trafficking cases exceeds the number of hours for which the legal aid lawyers are remunerated. However in the last year, it has become much less financially viable for legal aid solicitors to do *pro bono* work, as the reduction in fees has meant that more (billable) hours need to be worked in any event, for firms to stay afloat.

In terms of *pro bono* work by non-legal aid lawyers, such as commercial law firms: we are not aware of any work being done by such firms in trafficking cases. This is because trafficking cases are highly specialist and demanding; lawyers who are not specialists are for good reason reluctant to "dabble" in this area[47].

What has happened on that supply of legal services side?

The changes have affected the supply of legal services to trafficked persons in a number of ways. In summary:

(a) **Loss of legal aid providers**: see above. There are fewer legal aid lawyers practising and, of those that remain, many now have to do a greater proportion of private work and/or have less capacity in general to undertake legal aid work. It is thus more difficult for a trafficked person to find a legal aid lawyer who can take on their case.

(b) **Loss of expertise:** this is something that is difficult to quantify. As above, the sector is experiencing a loss of expertise will be difficult or impossible to replace. New talent is harder to recruit in the legal aid sector as in the current climate of uncertainty solicitors' firms and barristers' chambers cannot guarantee that sufficient work will exist in future for new lawyers to develop a practise in the area and there are fewer legal aid training contracts and pupillages available. Trafficking cases are complex and require substantial legal expertise to ensure that they are handled correctly and sensitively. Trafficked persons are likely to in future find it much more difficult to find a lawyer who is a specialist in dealing with trafficking cases.

(c) **Lawyers have less time to spend on cases**: A solicitor has less time to spend one-on-one with each client. Trafficked persons may not disclose past experiences until a relationship of trust and confidence has been built up with legal representation. The reduction in solicitor time both for those trafficked persons in receipt of legal aid and those paying privately means that it is far less likely that trafficked persons will make those disclosures, even if they do manage to see a

[46] For example a case where the removal of a person would be in breach of their rights under the Refugee Convention (in scope) and their right to family life under Article 8 of the European Convention on Human Rights (out of scope).
[47] See the article by Paul Yates, head of London pro bono at Freshfields Bruckhaus Derringer on this topic, published on the Legal Voice website, 18 November 2013 http://www.legalvoice.org.uk/2013/11/19/pro-bono-filling-the-gap/

solicitor (for example for an asylum case). Lawyers are a key source of identification of victims of trafficking. Although not first responders, we, in common with health workers, may be the first professional to identify a trafficked person and make appropriate onward referrals. The cuts to legal aid have meant that this important avenue of identification of victims has been narrowed.

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