

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 cases¹

Year	2010/2011	2011/2012	2012/2013	2013/2014²
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 work³: 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.

¹ 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)

² Year to 28 February 2014

³ 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 since⁴).

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 all⁵. 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 close⁶.

A further large casualty in the sector occurred in **2011** with the closure of the not for profit Immigration Advisory Service⁷. 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 Bar⁸ doing legal aid work⁹.

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

⁴ The fees were also cut by 10% across the board in 2011

⁵ See ILPA's evidence to the Low Commission, 30 May 2013: <http://www.ilpa.org.uk/resource/18002/ilpa-submission-in-response-to-the-low-commissions-context-paper-on-asylum-and-immigration-30-may-2>

⁶ 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.

⁷ 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.

⁸ Fees for Counsel were reduced by 10% by way of the Community Legal Service (Funding) (Amendment No.2) Order 2011

⁹ Barristers' fees were also cut by 10% at this time – they were subjected to fixed fees in the same way solicitors were in 2007.

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.

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 cuts¹⁰.

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 traffickers¹¹. 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.

¹⁰Leading 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>

¹¹ These claims were left in scope by the Legal Aid, Sentencing and Punishment of Offenders Act 2012: s. 32(3) of Schedule I.

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?

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 not¹². 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 area¹³.

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

¹² 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).

¹³ 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/>

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 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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