ILPA briefing for the motion in the name of the Lord Pannick for debate on Wednesday 7 May 2014 to regret that the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 (SI 2014/607) make the duty of the Lord Chancellor to provide legal aid in judicial review cases dependent on the court granting permission to proceed

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 and other consultative and advisory groups.

ILPA responded to the Ministry of Justice consultation *Transforming Legal Aid* in which the proposals that have led to the regulations were first mooted and provided evidence on the results of that consultation to the Joint Committee on Human Rights[1]. ILPA provided evidence to the House of Lords Secondary Legislation Scrutiny Committee on the Regulations for its 37th report[2], in which the Committee scrutinised the regulations.

What the regulations do

The effect of the regulations is that the Lord Chancellor must not pay solicitors and barristers for their work in making an application for permission for judicial review, where that application is issued, unless permission is given by the court, or the case concludes before a permission decision but the Lord Chancellor considers that, in the circumstances of the case, it is reasonable to pay. He must take into account, in particular, why the legal aid practitioner did not obtain a costs order or costs agreement, the extent to which, and why, the outcome sought was obtained and the strength of the application for permission at the time it was issued. Reasonable disbursements such as payments to experts and court fees will continue to be paid.

There is transitional protection for applications made before 22 April 2014 when the instrument came into force and for applications made on or after that date but relating to a case where legal aid has been provided for licensed work as a result of an application made before that date and the legal aid certificate covers both sets of proceedings.

ILPA' concerns about the regulations

We are concerned at the timescale to implement these provisions and the lack of scrutiny over their formulation when they will make it harder for individuals to obtain legal aid for judicial

[1] ILPA evidence to the Joint Committee on Human Rights' enquiry into the implications for access to justice of the Government's proposed legal aid changes 30 September 2013, see 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

[2] 37th Report - Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 37th Report - Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 HL Paper 157, Published 27 March 2014 available at http://www.publications.parliament.uk/pa/ld201314/ldselect/ldsecleg/157/15702.htm

review, despite Parliament having made specific exceptions to protect legal aid for judicial review in the Legal Aid, Sentencing and Punishment of Offenders Act 2012[3].

Legislative basis

Given that the effect of these regulations is likely to be that individuals will not be able to obtain representation funded by legal aid for judicial review, and in light of the importance given to judicial review in the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, there is a case that these Regulations should have been made or accompanied by an order laid under section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which would have been subject to the affirmative procedure.

Lack of clarity

There is a lack of clarity in the Regulations. They do not set out clearly where the boundary lies between initial work that will be paid for and work that is at risk. They do not set out clearly where the boundary lies an application for interim relief, which will be paid for, and the making of the application which will be at risk. Applications for interim relief are usually (but not always) made at the same time as proceedings for judicial review are issued, and the basis of the application forms part and parcel of the grounds for judicial review. There is no separate application under Part 25 of the Civil Procedure Rules. They are used, for example, when an individual is in detention or facing removal from the United Kingdom and needs an urgent decision on a claim, or to secure accommodation for families when a local authority disputes their duty to provide housing.

The Regulations afford the Lord Chancellor a broad discretion to determine the reasonableness of payment in any given case. They are not sufficiently tightly drawn to give certainty and to ensure that meritorious cases that are arguable at the point of issue but do not secure a positive decision on permission will still attract payment.

The impact of wide discretionary powers on access to justice can already been seen in the operation of the "exceptional" case funding scheme set up under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to make provision for legal aid in cases that would otherwise be excluded. In 2013 there was a 3% success rate for all applications made, including those for legal aid for inquests, and a 1.22% success rate for non-inquest related applications. Only three applications in immigration work were granted out of a total of 187[4]. The number of applications made under this scheme falls far below the Government's predictions at the time of the passage of the Act. The application process is time-consuming and there is no payment for undertaking the work to secure a positive decision. Legal representatives are increasingly asking "what is the point?" in making such applications. The discretionary payment provisions in the Regulations have similar potential to dissuade providers from undertaking work for which they are likely to conclude that they have little chance of being paid, even if a case may have merit.

The Secondary Legislation Scrutiny Committee records:

> "*…In this very sensitive area MOJ should have explained better how the revised payment system will function. …It… seems likely that providers who are uncertain about whether they will get paid for their work will not put themselves forward to test the grey areas of the law.* …***using figures for 2012-13 MOJ states that these changes would definitely have***

[3] See Schedule 1 to that Act, Part 1, paragraph 19.

[4] Exceptional Case Funding Application and Determination Statistics: April-December 2013, 13.03.14,p.3 and p.5 www.gov.uk/government/uploads/system/uploads/attachment_data/file/289183/exceptional-case-funding-statistics-apr-13-dec_13.pdf

> ***removed legal aid from 20% of cases (751) and that up to 69% of the total cases (2,483) might have been affected. That the MOJ itself cannot state with any certainty how many cases would receive a discretionary payment starkly underlines the concerns expressed in the submissions received...***
>
> ***…***
>
> ***As a minimum the MOJ should, before the legislation comes into effect, provide urgent clarification of exactly what work will, and will not, be paid for and how the Legal Aid Agency will exercise its discretion over payment.***
>
> ***…***
>
> ***20…In particular there is doubt as to where exactly the boundary lies between what is the initial investigation which can be paid and what is "civil legal services consisting of making that application" which must not be paid.***
>
> *21… the Explanatory Memorandum says guidance is not being prepared specifically on this instrument but the LAA is providing training for legal aid practitioners. Paragraph 9.1 goes on to say "There is no need for public guidance on these changes as they apply only to remuneration paid to legal aid practitioners". We hope what MOJ means by that is that no separate guidance for the public is required, rather than whatever interpretive guidance the LAA issue will not be published, as publication of guidance that may influence its decisions forms part of the transparency and accountability that the LAA, like any public authority, owes the public.* ***We share the view that while it is essential that there is published unambiguous guidance on how LAA intends to use its funding discretion, it would be preferable to have a clearer definition set out in the Regulations themselves.***"[5]

The request has not been acted upon. The scant guidance that has been published[6] gives no more substantive information than the Explanatory Note to the regulations. More could be said. For example the government stated in the 2013 consultation:

> *119. The proposal would only apply to issued proceedings. Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the prospects and strength of a claim (including advice from Counsel on the merits of the claim) and to engage in pre-action correspondence aimed at avoiding proceedings under the Pre- Action Protocol for Judicial Review. In addition, payment for work carried out on an application for interim relief in accordance with Part 25 of the Civil Procedure Rules would not be at risk, regardless of whether the provider is ultimately paid in relation to the substantive judicial review claim. Reasonable disbursements, such as expert fees and court fees (but not Counsel's fees), which arise in preparing the permission application, would continue to be paid, even if permission were not granted by the court.*[7]

We invite peers to ask the Minister to:

- **Explain why the Agency did not follow the recommendations of the Secondary Legislation Scrutiny Committee and publish unambiguous guidance before the regulations came into force?**
- **Withdraw the regulations and undertake not to reissue them unless and until**

---

[5] *Op. cit.,*

[6] See http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/judicial-review-discretion-pro-forma-completion-guidance.pdf

[7] Ministry of Justice, Judicial Review – Proposals for further reform, September 2013.

    a. **He can provide an accurate estimate of the number of cases to be affected can be provided;**
    b. **He has established whether or not clearer definitions can be formulated?**
- **If not, to confirm that the he will:**
    a. **Provide detailed and precise predictions of the number of cases to be affected and the date by which this will be done?**
    b. **Publish unambiguous guidance as a matter of urgency and give an undertaking as to the date by which it will be published?**

The regulations in context

The Secondary Legislation Scrutiny Committee said

> ***"The House should be provided with a better overview of the cumulative effect of the various changes proposed to the judicial review system."***

Recent years have seen the number of judicial review applications in immigration and asylum cases increase as a result of the Home Office removing rights of appeal against its decisions and making unlawful decisions in individual cases.

On 15 February 2010 immigration appeals were transferred to the unified tribunals system. Prior to transfer, applications for reconsideration of a Home Office decision were considered initially by the Asylum and Immigration Tribunal, but, if rejected, could be renewed on the papers for reconsideration by a High Court Judge. Since transfer, applications for permission to appeal from the First-tier Tribunal are considered first by that Tribunal and then, if refused, may be renewed to the Upper Tribunal. While it is in principle possible to seek judicial review of a refusal of permission to appeal by the Upper Tribunal, the grounds on which judicial review may be sought are very limited: *R (Cart) v Upper Tribunal* [2011] UKSC 28. These changes to the appeal structure ought to have led to a reduction in appeals requiring High Court supervision.

On 17 October 2011 "fresh claim" judicial reviews transferred to the Upper Tribunal. These are cases where a person makes a subsequent asylum claim and the Home Office does not accept that a new matter is raised and declines to treat the claim as a "fresh" claim for asylum. There is no right of appeal against this decision. Of the 77% of judicial review applications issued in 2010 which concerned immigration or asylum issues it is likely that a significant proportion were fresh claim judicial reviews. Then in November 2013, under powers taken in the Crime and Courts Act 2013, a much wider range of immigration and asylum judicial reviews were transferred to the Upper Tribunal[8]. Many of these concern challenges to certificates that remove rights of appeal.

Before the effect of these measures in reducing judicial review or judicial review in the High Court could be felt, the Immigration Bill was published with sweeping proposals to remove rights of appeal. Many judicial review cases brought before the Upper Tribunal in the future will simply be against Home Office decisions where there might previously have been a right of appeal to the Tribunals. It is said in the Appeals Impact Assessment produced for the Immigration Bill, which has its third reading in the Lords on 6 May 2014, that displacement onto judicial review resulting from the abolition of appeal rights in immigration cases cannot be quantified and therefore costs cannot be estimated. But the "sensitivity analysis" in the

[8] See the 21 August 2013 Direction of the Lord Chief Justice at http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice%20Directions/Tribunals/lcj-direction-jr-iac-21-08-2013.pdf

assessment models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission. This appears to be an under estimate, since the calculation that produces it takes as its starting point the number of appeals allowed by the Immigration and Asylum Chamber of the First-tier Tribunal, rather than the total number of appeals started. Even with the erroneous basis of calculation, we should be looking at an extraordinary increase. In 2011 there were 8,711 immigration and asylum judicial reviews[9] *in toto* and only 4,630 reached the stage of a decision on permission. Judicial reviews cost more than appeals, costs can be sought from the other party, and damages may be claimed. Even as the Lord Chancellor protests that there are too many judicial reviews[10] the Home Office moves to increase the number.

As to legal aid, under Part 1 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012, legal aid remains available for judicial review save in immigration cases where there has been an appeal hearing or determination on the same, or substantially the same, issue within 12 months and the decision was not in favour of the appellant. Similarly, legal id is not available where an appeal against removal has been decided within 12 months of judicial review being sought against removal.

The proposed residence test will deny legal aid for judicial review in any area of law to persons not lawfully resident at the time of their application for legal aid and who cannot in addition show 12 months lawful residence at some time in the past. There are exceptions for persons seeking asylum, for persons granted international protection. Protections for trafficked persons and for survivors of domestic violence do not extend to judicial review[11]. There is no protection save that babies under 12 months old need not show the full 12 months lawful residence. Legal aid for judicial review may thus be denied to persons at risk of a breach of Articles 2, 3, 4 and 8 of the European Convention on Human rights Convention, read alone and with Article 13, the right to a remedy, with the attendant risk of violating positive obligations to trafficked persons as set out in cases such as *Silladin v France (Application no. 73316/01)* and *Rantsev v. Cyprus and Russia*, (Application. no. 25965/04).

Challenges to refusals of funding are themselves brought by way of judicial review which would be subject to the residence test. Thus justice would be hermetically sealed against those subject to the test giving rise to a risk of breaches of Article 13 read with the rights in question[12].

We invite peers to ask

- **Why, at a time when it is intended to reduce the number of judicial reviews, are measures being taken in the immigration Bill that could lead to initial work on over 5000 additional judicial reviews and over 1000 proceedings to a full hearing?**
- **If the intention is to reduce unmeritorious judicial reviews why is there not proposed to be exceptions from the residence test for judicial reviews for trafficked persons and survivors of domestic violence, when they will benefit from exceptions in other areas of law?**

[9] See *Unpacking JR statistics*, V. Bondy and M. Sunkin 30.4.13 for the Public Law Project, available at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf
[10] *Judicial Review: proposals for further reform*, Ministry of Justice 6 September 2013.
[11] Paragraphs 73 and 77 respectively of ILPA's evidence.
[12] Paragraph 28 of ILPA's response.

"These changes aim to save between £1-3 million from the Legal Aid budget but the Committee was concerned that savings in this area will simply transfer costs to another area[13]."

There is a perverse incentive for claimants to seek permission at the earliest possible stage, as soon as pre-action protocol time limits are up. There are risks of increased litigation and of increased costs.

There is a perverse incentive for defendants to refuse to settle at the pre-action stage. If a defendant knows that a claimant's case is publicly funded then there may be a risk, and in the case of the Home Office our experience suggests there is definitely a risk, that instead of responding in a timely manner to a pre-action letter, thereby avoiding costs to the court and the defendant government department, the defendant may decide to 'wait and see' whether the claimant, or more accurately the claimant's representative, is willing to take the risk of issuing the claim. Pre-action letters very often go unanswered, or else all that is received is a standard, two-line acknowledgement letter from the Judicial Review Unit at the Home Office. Acknowledgment of service is often the first time lawyers for a defendant examine the case in detail and consider whether settlement is desirable[14]. Acknowledgment of service is supposed to take place 21 days after the application for permission has been filed and all the work necessary for that completed but there have been consistent, egregious failures of the Home Office to respond to pre-action protocol letters in immigration cases in a timely manner or at all or to acknowledge service within the time limits set by the court[15].

The Home Office normally requires that when persons are being removed by charter flight then before it will stay a removal[16] an injunction must be obtained from the court, including in cases stayed behind a test case, for example a case testing the safety of return to a particular country. An injunction is also sometimes required in other cases as well. Proceedings must be issued to obtain injunctive relief, although if the test case settled it extremely likely that the case will not proceed to a permission hearing. Test cases have been seen as efficient case management by the courts that designate them as such. They can keep court costs down. But if there is no prospect of being paid in a case that will be stayed behind a test case, despite having done work on an injunction, then it is unlikely that legal representatives will agree to act in these cases.

This problem arises in other areas of law, for example community care or housing cases where the injunctive relief may take the form of accommodating a person or providing services. The Court will order injunctive relief if satisfied that a strong prima facie case is made out[17], a higher test that the arguability threshold that applies in permission applications. For this reason, where injunctive relief is ordered, the Home Office or local authority will frequently change its mind about the initial decision. Such cases will not proceed to a permission hearing because there is nothing left about which to argue except costs. If costs are awarded, this will be at *inter*

---

[13] Secondary Legislation Scrutiny Committee, 37th Report Op cit.

[14] Bondy, V and Sunkin, M (2009) *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* http://www.publiclawproject.org.uk/documents/TheDynamicsofJudicialReviewLitigation.pdf (Accessed 27 May 2013.)

[15] *R(Bahta & Ors) v SSHD & Ors* [2011] EWCA Civ 895; *R (Jasbir Singh) v SSHD* [2013] EWHC 2873 (Admin); *R(Jasbir Singh et ors v SSHD)* [2013] EWHC 2873 (Admin); *R(Kumar & Anor) v SSHD* (acknowledgement of service; Tribunal arrangements) (IJR) [2014] UKUT 104 (IAC) (26 February 2014)

[16] UK Border Agency Enforcement Instructions and Guidance, Chapter 60: **2**.4 Charter Flights Claimants being removed by charter flight (with special arrangements) who wish to legally challenge their removal are normally required to seek injunctive relief as a JR application will not usually result in deferral of removal.

[17] *De Falco v Crawley BC* [1981] 1 QB 406.

partes rates. Costs awarded by a court may be higher than those agreed between the parties where the case settles. We recall that Lord Justice Jackson had proposed that one way costs shifting be introduced in judicial review cases so that where a defendant settled the case after the claim had been issued then, subject to the claimant having complied with the pre-action protocol, the defendant should normally pay the claimant's costs[18].

We have particular concerns about the effects of insulating the Home Office in the exercise of immigration functions from challenge given consistently poor management, service delivery and decision-making. The Minister responsible for the erstwhile UK Border Agency, the Rt. Hon. Theresa May MP, described the agency as 'closed, secretive and defensive' in announcing to Parliament on 26th March 2013[19] her intention to abolish the Agency. She described it as a 'troubled' agency whose performance was 'not good enough' and said it would take years to fix.

If clients cannot find qualified, expert legal aid providers to take on their judicial review cases, it cannot be assumed that those claims will simply not be brought. In immigration and asylum cases in particular the issues at stake concern fundamental rights and it is no exaggeration to say that in some such cases matters of life or death are at stake. They may bring claims themselves, or through exploitative, unlawful work or debt bondage pay, including paying a less expert provider.

There is a real risk the effect of the regulations will be to individuals who have suffered a wrong at the hands of the State the opportunity to seek redress through judicial review.

We invite peers to ask

- **What consideration has been given to the risks associated with the exploitation of persons endeavouring to pay for their judicial review?**
- **What work is being done to address concerns expressed by the Courts about the Home Office's conduct as a litigant?**

For further information please get in touch with Alison Harvey, Legal Director, alison.harvey@ilpa.org.uk, 0207 251 8383.

[18] *Review of Civil Litigation Costs,: final report,* Lord Justice Jackson, December 2009, Chapter 30, paragraph 5.1.
[19] HC Report 26 March 2013, col 1500ff.