ILPA Evidence to the National Audit Office: Legal Aid

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

We are aware that the National Audit Office has considered our evidence of 30 April 2014 to the Justice Select Committee on legal aid. Therefore we have simply identified which paragraphs of that response, which is available at http://www.ilpa.org.uk/resource/26291/ilpa-submission-to-the-justice-select-committee-enquiry-into-the-impact-of-changes-to-civil-legal-ai, are relevant to which question.

Will total costs reduce in line with the Ministry of Justice's combined impact assessment for the changes to civil legal aid?

We identify no reason why they should do so.

The key assumptions on which the assessment is based are stated therein to be:

- *The market for legal aid provision can absorb the reduction in provider revenue and that there are no other changes in provider behaviour.*
- *Legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution.* [1]

No evidence is proffered for either assumption and we do not accept either as they are applied to immigration.

As to the first, it is unclear what "The market for legal aid provision can absorb the reduction in provider revenue" means but we have taken it to mean that there are still sufficient firms willing to do the volume of work now available for the price that is now being paid for it. The volume of work has, on the Legal Aid Agency's figures, reduced by 45%.[2] Thus the size of the immigration legal aid market could have contracted by 45% and this statement would hold good.

[1] Ministry of Justice Impact Assessment Cumulative Legal Aid Reforms, https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documents/latimpactassessment.pdf

[2] The Legal Aid Agency's statistics for 2013-2014, published on 24 June 2014, show a 45% drop in immigration cases in 2013-2014, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328901/legal-aid-statistics-2013-14.pdf (accessed 19 July 2014).

It is the case that the Legal Aid Agency received sufficient bids in most geographic areas for the 2013 contracts. It is also the case that there have been departures of firms and barristers chambers from the area of immigration legal aid.

Fixed fees have remained in place since 2007 and have not been increased in line with inflation. In October 2011 fixed fees in immigration cases were cut by 10% across the board, affecting firms and members of the Bar[3] doing legal aid work. Thus cuts in rates can be compared with the profit margins shown in the published accounts of legal aid firms. The Legal Aid Agency says that at each successive tender providers have cried wolf and that it continues to be able to let its contracts. This headline approach does not consider the composition of the market.

The assumption that there are no other changes in provider behaviour does not tally with such qualitative evidence as we have. Our response to the Justice Select Committee details the observations of providers (see e.g. paragraph 16). We identify the following from qualitative evidence, including discussions with providers and with representatives of organisations which do not give legal advice but support clients/would–be clients, as well as inquiries received by the ILPA Secretariat and by members:

- Some providers, with the very limited number of case starts at their disposal, endeavor to take on only cases that are likely to reach the escape fee (i.e. the most complex cases)[4]. Persons with cases such as bail cases, while these remain within the scope of legal aid, struggle to find representation on legal aid.
- Providers who are prepared to use all their matter starts cannot obtain more while there are unused matter starts left in their procurement area. Time is wasted trying to find out who has these matter starts and refer cases to them. The Legal Aid Agency has been asked at the Civil Contracts Consultative Group whether it can ensure that such information is available. See also paragraph 8 of our evidence to the Justice Select Committee. We have repeatedly urged the Legal Services Commission/Legal Aid Agency, over this and previous contracts, to investigate those not using their matter starts and, where there is no good reason for this, or where the provider is not going to use the matter starts, to claw them back. The Agency has powers to do this but as far as we are aware has not attempted to use them in immigration. Without such action on the part of the Agency, the whole procurement area marches at the pace of the person using up matter starts most slowly.
- Features of the payment structure affect provider behaviour. For example, in human trafficking cases, 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 "reasonable grounds" (i.e. initial) decision is not remunerated. This makes trafficking cases less attractive to take on and work is in our experience increasingly concentrated within a few specialist firms. However, this creates its own problems as detailed in ILPA's *Response re Questions from Lord Warner during Joint Committee on the Draft Modern Slavery Bill evidence session 11*

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

[4] This is because of the introduction of fixed fees in 2007 which means 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.

March 2014.[5] Trafficking work encompasses, compensation claims brought against traffickers[6]. These cases require specialists. Compensation cases are not funded as part of the c.100 matter start quota for immigration/asylum matters. Instead, they are categorised as miscellaneous matters. Under the new contracts introduced in April 2013, firms and not-for-profit organisations have been allocated just five "miscellaneous" matter starts per office. Thus there is concentration of work on human trafficking, but at the same time restriction on pursuing the full range of this work. See ILPA's evidence to the Justice Select Committee paragraph 8.

- Many providers are doing a greater proportion of private work to legal aid work. A number of law centres and other not for profits have changed their constitutions to take on private clients. For the most part private work will be in immigration, legal aid work in asylum or in specialist areas of immigration (trafficking, national security, domestic violence) less likely to be done as part of private practice. Thus expertise gained doing private cases is less likely to inform legal aid work than was the case when general immigration was within the scope of legal aid.
- Some providers have focused more of their practice on judicial review.
- Some providers have found a judicial review challenge to a problem that, were legal aid available, they would have attempted to deal with in another way, for example dealing directly with the Home Office.
- Under a system of legal aid provision where an area of law is excluded from legal aid unless expressly included, providers are risk adverse. For fear of not being paid, they turn away cases that may be within the scope of legal aid, but where this is uncertain. When we put it to the Legal Aid Agency at the Civil Contracts Consultative Group that the Agency should be as concerned if legal aid were not funding the things it is supposed to fund as if it is funding things it is not meant to, Mr Sirdocar for the Agency, again with reference to the National Audit Office, indicated a preference for the former situation.
- Similarly, the changes to funding for judicial review cases[7] mean that providers are reluctant to take on cases (most cases) where they consider that they should succeed but cannot be sure that they will and thus cannot be sure that their work will be paid for. The senior judiciary has warned about the "chilling effect" that could arise from removing the guarantee of payment in legal aid cases. The Ministry of Justice ignored the judiciary's proposal for judges to have control of decision making in discretionary payment system[8].

Provider behaviour is also affected by uncertainty and a high level of change, which makes medium to long term planning for a sustainable business difficult if not impossible. See our response to question 5 below.

In our evidence to the Justice Select Committee[9] in April 2014 we detailed flaws in the Legal Aid Agency's published figures on matter starts. It took until the Civil Contracts Consultative Group meeting of 12 May 2014 to get the excel spreadsheet corrected so that asylum and immigration cases were no longer double-counted. Unfortunately when these amendments were made to the

[5] Annexed to our evidence to the justice select committee and published by the Committee but a separate document.

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

[7] Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 (SI 2014/607).

[8] See http://www.judiciary.gov.uk/Resources/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf - paras 24-26, accessed 19 February 2014.

[9] Paragraph 22-23

rows in the body of the sheet, they did not affect the totals at the bottom of the columns. These do not appear to have changed automatically when figures in the rows above were altered. They remained wrong. We pointed that out to the Legal Aid Agency at the meeting and finally received corrected figures by email on 20 May 2014 with the following message:

> *…the correct report for new matter starts is attached - please note that these figures released in early May are not the final figures that will be officially released in the annual statistics release and are supplied as management information only.*

We do not have confidence in the Legal Aid Agency's figures and we are dubious as to whether the Agency can have such confidence.

We nonetheless extracted figures from those provided to us at the Legal Aid Agency's Civil Contract's consultative group and presented them, with the appropriate health warnings, for ILPA's *Response re Questions from Lord Warner during Joint Committee on the Draft Modern Slavery Bill evidence session 11 March 2014*[10] and to the Justice Select Committee (paragraph 23 of our evidence.

As may be seen from the figures in that table, there has been a reduction year on year, in the number of matter starts undertaken by both solicitors' firms and not-for-profit organisations. The trend continues as set out in the Legal Aid Agency's statistics for 2013-2014, published on 24 June 2014[11].

We identify no grounds for the assertion that persons will continue to achieve the same outcomes from non-legally aided means of resolution as discussed in response to the question below.

Are the outcomes for individuals in line with the Ministry of Justice's expectations?

No.

See answer to questions 3, 4 and 8 below and see ILPA's evidence to the Justice Select Committee paragraphs 15 to 19.

Are the changes to civil legal aid likely to ensure long term value for money in civil legal aid?

No.

Quite apart from the question of costs shifting onto other areas, whether of the legal system, of the system of central or local government or onto not to profit agencies and private individuals, it is necessary to consider whether the money spent on legal aid is buying what it used to. See

[10] While this was annexed to our evidence to the Justice Select Committee and published by the Committee, it was a separate document and we have not treated it as included within the National Audit Office's statement that we need not repeat our evidence to the Committee. If the Office has considered this evidence it can skip these parts of the submission.

[11] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328901/legal-aid-statistics-2013-14.pdf (accessed 19 July 2014).

further "*Fig Leaves and Failings"* Jo Renshaw, solicitor at Turpin Miller LLP, *New Law Journal* 8 April 2014.

See the comments in response to the first question above changes in provider behaviour and in response to the second question about the lack of choice of provider. Fixed fees, for example, most disadvantage the conscientious lawyer who does not take on only the simplest cases nor only the cases that will reach the escape threshold but instead takes the full range of cases, doing the amount of work that each case requires, no less and no more.
An element of an efficient system of legal aid provision is to provide an open door advice service making it possible to identify some of the cases where need is greatest and where people, can be given a realistic assessment of whether they have a case, the nature of that case and their eligibility for legal aid. Legal aid has not funded such drop-in services for many years. In some cases under the fixed fee system it was necessary to take on a case to get to the stage that would otherwise have been achieved in such a drop in. Meanwhile some not for profits maintained these services, with the assistance of grant or other funding. Some still maintain some drop in services[12] but the number of organisations that do and the number of drop ins they offer appears to continue to fall.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 has made the structure of legal aid provision a more complex matter than before including because areas and sub-areas of law are excluded unless expressly included. Establishing evidence of means is more complex and we have seen third party support, such as accommodation, withdrawn by friends and family of potential legal aid clients who became distressed at the level of enquiry into their own affairs. Had the residence test between introduced it would have introduced a further level of complexity and we have written at length, for example in our evidence to the Ministry of Justice[13] and to the Joint Committee on Human Rights[14], based on our experience as immigration lawyers and with schemes such as employer and university checking, on just how complex such a scheme would be in practice.

We cannot overstate the time that is spent by providers reading the copious documentation produced by the Legal Aid Agency, haggling with the Legal Aid Agency and reporting to the Agency, Very often the National Audit Office's name is taken in vain as justification for this, with not having its accounts qualified again arguably an objective that ranks higher with the Agency than any other. Those law centres and not for profits that have taken on private work alongside legal aid work repeatedly express their astonishment at how much they can get done when not having to deal with the Agency. Increasingly, time that used to be spent working pro bono on fixed fee cases is spent dealing with the Agency.

Considerable time is spent within the Agency on what appears to be unproductive work. We take the example of exceptional case funding. Refusals of exceptional case funding have frequently been extremely detailed and lengthy documents. We have seen refusals of exceptional case funding for immigration cases before the Court of Appeal, where it is not in dispute that the

[12] See e.g. Bury Law Centre, Avon and Bristol Law Centre
[13] Transforming legal aid: delivering a more credible and efficient system, Ministry, ILPA final submission to the Ministry of Justice., 3 June 2013, available at http://www.ilpa.org.uk/resources.php/18039/transforming-legalaid-ilpas-response-as-submitted-to-the-ministry-of-justice-on-3-june-2013

[14]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

appellant cannot pay for legal representation and where the Court of Appeal itself has granted permission to appeal. These have included cases conceded by the Secretary of State for the Home Office.

Experience of attempts to resolve matters at an institutional level is similar and we urge the National Audit Office to study the minutes of the Civil Contracts Consultative Group as well as email and other written communications with that group between meetings over a period of years to observe how long matters take to be addressed, and then resolved or for explanations to be provided of certain requirements and consideration given to changing them. We should be happy to make our own correspondence available. We take just one example, that of Conditional Fee Arrangements.

One reason to refuse legal aid is that there is an alternative means of funding the work available. One example of such an alternative would be a conditional fee arrangement funded by After the Event insurance.

We and others became concerned that while a number of practitioners had provided the Agency, at its request, with evidence that After the Event insurance was not available for particular types of case, for example immigration judicial reviews with no damages element, only in the case of those who had provided the evidence was it being accepted that After the Event insurance was not available, although the statements of insurers were in broad and general terms. The Law Society wrote to the Legal Aid Agency about this on 28 August 2013, providing detailed evidence including emails from insurers, provided by ILPA. The matter was discussed at the 9 September 2013 Civil Contracts Consultative Group. When we first raised the matter this was rejected. It was not accepted that After the Event insurance was not available. It was argued that the refusals of the insurers were not such as to indicate the general availability of After the Event insurance and were highly specific. We did not accept either argument.

We were asked to provide evidence. We did. It could not be confirmed at the March 2014 meeting that ILPA's evidence sent in early January had been received, although this was confirmed subsequent to the meeting. A survey of providers was prepared. Response rate was at first low, but all the representative bodies sitting on the Civil Contracts Consultative Group urged members to respond and in the end the consultation in the end received a total of 80 responses from individual providers. We have been invited to a meeting on 12 August, 2014; nearly a year after the matter was first raised, to consider this evidence. In the meantime, lengthy disputes between the Agency and providers have been ongoing and in cases where representatives have not been prepared to get involved in such disputes, funding has been refused. It continues meanwhile to be the case that some providers are refused legal aid on the basis that the case is suitable for a conditional fee arrangement.

Much time is spent by voluntary sector organisations and officials, including for example social workers and foreign national offender managers in prisons, trying to find legal aid lawyers, often without success.

See our response to the Justice Select Committee paragraphs 26 to 28.

Detailed issues for consideration

The impact of the changes on civil court proceedings

See our evidence to the Justice Select Committee at paragraphs 39 to 42.

Mixed cases present particular difficulties: where one part of the case is funded by legal aid and other, related, matters are not. The court can thus be faced with an advocate having to withdraw part way through a hearing because they are not instructe4, and with evidence on one part of a case, but none on the other because the client cannot afford to pay for it.

N, aged 18
N has two convictions for robbery. These are for stealing £12 in cash and a mobile phone form two younger boys. He pleaded guilty and was sentenced to 18 months in prison. A decision to deport him was served. He is from an Iranian family that has converted to Christianity and he claimed asylum on this basis. The strength of this case for legal aid purposes has been assessed as borderline. Client came to UK aged eight. Mother is a survivor of domestic violence at hands of his father. She suffers from seizures- about two to three a week as a result of a television having been dropped on her head and is on medication. She has been diagnosed as suffering post-traumatic stress disorder.

Client was twice refused bail because the police say that he is a gang member. He was been held in prison in immigration detention for some six months at the time of his appeal hearing. The day before the hearing the Home Office Presenting Officer served a 300 page police "Operation Nexus" bundle which addresses the question of whether he is a gang member. His lawyers sought an adjournment on the day, which was granted. They applied for exceptional funding on basis that Article 8 of the European Convention on Human Rights is now a significant matter such that the lawyers could not longer deal with the human rights aspect of the case pro bono. Three police officers will need to be cross-examined and also the mother, who is by the standards of any court a "vulnerable witness". Disbursements need to be incurred for a risk of reoffending assessment. The application for exceptional funding was turned down on the basis that the client could represent himself. A review of the refusal of Exceptional funding was turned down. A letter before claim was issued, challenging the refusal of exceptional funding. The Tribunal adjourned the appeal to allow the judicial review to proceed. The lawyer wrote

" As a lawyer I have felt as though my hands have been tied due to lack of funds. We have a young offender detained, a very traumatised parent and no funding to properly challenge this appeal. There is simply no way that my client can argue his corner."

It is anticipated that the number of immigration judicial reviews will rise. It is said in the Appeals Impact Assessment produced for the Bill that became the Immigration Act 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 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[15] *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

[15] 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

This follows the trend of recent years that has seen the number of judicial review applications in immigration and asylum cases increase as a result of Home Office action in removing rights of appeal against its decisions and in making unlawful decisions in individual cases. While immigration and asylum judicial reviews make up a significant proportion of judicial reviews, it does not follow that these cases are brought as an abuse or delaying tactic[16]. Other factors contribute. The absence of rights of appeal against many immigration decisions already forces many migrants to use judicial review as a port of first (rather than last) resort when seeking to challenge an unlawful Home Office decision. Changes to the Immigration Rules also have an effect. Many applications for leave to remain made on family and private life grounds under the Immigration Rules (as amended in July 2012) have been refused without a right of appeal. The quality of many of these refusals has been poor, leading to a need to use the only legal remedy available, an application for judicial review. It has also been necessary for many applicants to challenge the rejection of applications for want of a fee. In addition, unreasonable delay in Home Office decision-making or the incorrect application of a 'no recourse to public funds' condition on a grant of leave has led to further challenges by way of judicial review. Any increase judicial review in these classes of case is squarely the fault of the Home Office.

In the Ministry of Justice statistical report released on 25 June 2013, data was provided showing that in cases of civil representation for immigration and nationality, 70% of cases where proceedings were issued had a benefit to the client[17]. This figure will include claims issued in the Court of Appeal and Supreme Court as well as the High Court.

The Courts and Tribunals dealing with immigration cases face a number of challenges which are exacerbated by the loss of legal aid. These include:

- The conduct of the Home Office Agency as a litigant*:*
- The consistently poor management, service delivery and decision-making of the former UK Border Agency. For just one example, refer to the Independent Chief Inspector of Borders and Immigration's report on his inspection of the handling of legacy asylum and migration cases by the UK Border Agency[18];
- The consistent failure of the Home Office to respond to pre-action protocol letters in immigration cases in a timely manner or at all and to acknowledge service within the time limits set by the court[19];

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[16] Paragraphs 28, 29, Consultation Paper CP25/2012.

[17] Legal Aid Statistics in England and Wales, Legal Services Commission 2012-2013, Ministry of Justice Statistics Bulletin, 25 June 2013, Table 14: Civil Representation Outcomes (page 41).

[18] Published 22 November 2012; available at http://icinspector.independent.gov.uk/wp-content/uploads/2012/11/UK-Border-Agencys-handling-of-legacy-asylum-and-migration-cases-22.11.2012.pdf In his foreword, the Chief Inspector observed that '*I have commented previously about the importance of effective governance during major business change initiatives. I was therefore disappointed to find that a lack of governance was again a contributory factor in what turned out to be an extremely disjointed and inadequately planned transfer of work. Such was the inefficiency of this operation that at one point over 150 boxes of post, including correspondence from applicants, MPs and their legal representatives, lay unopened in a room in Liverpool.*
I found that a considerable number of cases dealt with by this new unit fell within CRD criteria but had not been progressed by CRD. Furthermore, an examination of controlled archive cases showed that the security checks – which the Agency stated were being done on these cases – had not been undertaken routinely or consistently since April 2011. I also found that no thorough comparison of data from controlled archive cases was undertaken with other government departments or financial institutions in order to trace applicants until April 2012. This was unacceptable and at odds with the assurances given to the Home Affairs Select Committee that 124,000 cases were only archived after 'exhaustive checks' to trace the applicant had been made.'

[19] *R(Bahta & Ors) v SSHD & Ors* [2011] EWCA Civ 895; *R (Jasbir Singh) v SSHD* [2013] EWHC 2873 (Admin).

- The practice of the Home Office in serving non-appealable immigration decisions at the same time as or after detention and service of removal directions, leading to urgent applications for judicial review with little or no time for compliance with pre-action protocol procedures (see the evidence cited by Silber J in *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin) at paragraphs 50-54);
- The consistent failure of Home Office to abide by court decisions, for example the refusal of the former UK Border Agency to grant permission to work to asylum seekers with outstanding 'fresh claims' in line with the Court of Appeal's decision in *R (ZO (Somalia)) v SSHD* [2009] EWCA 442, pending the appeal to the Supreme Court, despite the fact that there was no stay of the Court of Appeal's order (see *Bahta*[20]);
- The delay in amending rules and/or guidance to caseworkers to implement such decisions, for example such as occurred following the decision of the Court of Justice of the European Union in *Ruiz Zambrano* (Case C-34/09);
- The refusal to stay like cases pending test case litigation save in cases where judicial reviews are actually issued (as has occurred for example in litigation about the safety of removal under the Dublin Regulation to Greece and Italy).

The complexity of immigration law and the frequency of change. There have been seven Acts of Parliament in this field since 2002; in 2012 alone there were nine statements of changes in the Immigration Rules and ten judgments were handed down by the Supreme Court in immigration-related cases. Lord Taylor of Holbeach, in the debate on the Crime and Courts Bill 2012, observed:

> *"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."*[21]

The importance of what is at stake in immigration and asylum cases. These cases were described by Lord Avebury in debate on the Crime and Courts Bill in July 2012 as 'the most sensitive of cases.'[22]

The complexity of appeal rights. Described by Lord Hope in *BA (Nigeria)* [2009] UKSC 7 as an "elaborate system". The removal of appeal rights through frequent legislative amendment.

On 15 February 2010 immigration appeals were transferred to the unified tribunals system. Prior to transfer, applicants who wished to challenge an initial decision by the Asylum and Immigration Tribunal could apply for reconsideration pursuant to s 103A of the Nationality Immigration and Asylum Act 2002. Applications for reconsideration 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.

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[20] R(*Bahta & Ors) v SSHD & Ors* [2011] EWCA Civ 895.

[21] Lord Taylor of Holbeach in response to Lord Lester of Herne Hill, Hansard, HL Report, 12 December 2012: Column 1087; for examples of judicial comment on the complexity of immigration law, see the examples cited at pp. 16-17 of ILPA's response to the Ministry's Green Paper: Legal Aid Reforms, available at: http://www.ilpa.org.uk/data/resources/4121/11.02.503.pdf

[22] *Hansard*, HL Report, 2 July 2012, Columns 497-498.

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[23]. Many of these concern challenges to certificates that remove rights of appeal. Further, as a result of the removal of rights of appeal in the Immigration Act 2012 it is likely that 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 (one legal remedy taking the place of another).

Prompt and detailed acknowledgements of service and early provision of all relevant information can result in a matter being resolved before it reaches the courts but this is less likely when appellants are unrepresented.

The Government continues to miss opportunities for early settlement of claims by its failure to provide instructions to its own lawyers and allow them to keep to deadlines for acknowledgment of service. In the recent case of *Kadyamarunga v SSSHD* [2014] EWHC 301 (Admin) (14 February 2014) Mr Justice Green stated at para 20:

> *…it is now more or less a notorious fact that the Defendant is overwhelmed by both applications for leave to remain and disputes over such decisions this is not in and of itself an excuse for not complying with the procedural rules governing judicial reviews. I acknowledge that lawyers acting for the Defendant (both in-house and external) may be under considerable strain in cases of this sort. However, it is not acceptable for the internal problems of the Defendant or her advisors to be visited upon the judicial system.*[24]

The impact of the changes on the third sector

By third sector we understand not for profit non-Governmental organisations. ILPA's membership includes a number of such organisations, some of which give legal advice, including on legal aid (e.g. law centres, charities) some of which do not, but have a substantial interest in the law in this area. We also work with non-member third sector organisations.

See ILPA's evidence to the Justice Select Committee paragraphs 30 to 38.

We have described above some of the effects upon third sector organisations that provide legal advice and representation. As described above, many law centres have changed their constitutions to allow them to take on paying clients as well. This provides an important service to those clients who may be able to pay modest fees, or to pay if payment can be staggered, some of whom would previously have been eligible for legal aid, others of whom would previously have

[23] 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

[24] http://www.bailii.org/ew/cases/EWHC/Admin/2014/301.html

failed the means test but not been able to afford commercial rates. However, there are a very significant number of persons who are not assisted by these services .

We are seeing many third sector organisations attempt to assist clients and to demonstrate the effect of the cuts to legal aid (see response to justice Select Committee paragraph 6. Third sector organisations have been angry when the Legal Aid Agency has used their efforts as a justification for removing funding (see evidence to Justice Select Committee paragraph 7, 13).

Some third sector organisations are considering whether they will have to seek regulation by the Office of the Immigration Services Commissioner not so that they can provide a full caseworking service but so that they can give some assistance in an emergency to persons with whom they are working who do not have a lawyer. ILPA and Rights of Women have provided training to workers in refuges working with survivors of domestic violence who are considering this step (while some survivors of domestic violence qualify for legal aid for their immigration cases far from all are eligible. See ILPA's evidence to the Justice Select Committee paragraphs 46 to 50). For generalist organisations, who do not work solely with persons under immigration control, it represents a significant commitment in terms of time, energy and staff resources and diverts fundraising efforts. However, it cannot be dismissed out of hand when the organisation's main work is inhibited because persons are in limbo unable to resolve their immigration problems. For example, a refuge may not be able to secure funding to provide accommodation to a survivor of violence who does not fall within statutory concessions such as the Destitute Domestic Violence concession, and does not yet have leave to remain in the UK.

The impact on third sector organisations that do not give advice has also been enormous. Previously many of these played a role in referring clients to lawyers. See our evidence to the Justice Select Committee paragraphs 18 to 21. Third sector organisations are working with people exploited, detained and mentally ill who are in limbo because there is no way of resolving an underlying immigration problem. See also our evidence to the Justice Select Committee at paragraphs 30 to 38.

Although we are not asked about it, we also highlight the costs for local authorities as detailed in our evidence to the Justice Select Committee at paragraphs 10 and 26 to 29. If a person's immigration status cannot be resolved, they may remain an emergency case for a local authority, rather than being able to work or to secure mainstream State support. Local authorities may also be directly responsible for legal costs.

During debates on the Bill that became the Legal Aid, Sentencing and Punishment of Offenders Act 2012, when it came to separated children given leave to 18, it was plain that Ministers did not understand that while they may have made asylum claims in the past, they will not necessarily qualify for legal aid when making their applications at age 17 ½. It seems to have been assumed that because they had once made an asylum claim, they would continue to qualify as persons seeking asylum. If no legal aid is available then the costs of legal advice and representation for these children must be met by local authorities supporting the children, paying private rates. One member made an attempt to cost this for us:

> *As an example, for an application for further leave on the basis of Article 8 made before a child's leave expires at age 17.5, which is refused by the Home Office and appealed, private legal fees might typically be:*
>
> *Application: 5 hours at £150/hour*
>
> *Appeal: 28 hours at £150/hour*

Appeal: 8 hours by counsel at £150/hour
Disbursements: medical/expert report £1250
Total: £7400

Where a local authority is unwilling to step up to its responsibilities in this regard, there is also the cost of a judicial review challenge to this.

Increased costs to local authorities. This appears contrary to the "New burdens" doctrine[25]. Following a round table on 13 February 2014 the Department for Communities and Local Government will carry out a New Burdens Assessment to assess the impact of central government policy changes on the "No Recourse to Public Funds" (a condition of immigration leave to remain in many categories" service provision by local authorities[26] and the National Audit Office may find it useful to cross reference this work.

See evidence to Justice select committee paragraphs 10 and 11 re inter alia increased costs to local authorities and to Home Office support budget.

The extent to which individuals who are still eligible for civil legal aid are accessing the help available, including:

Mediation

This question is outside ILPA's expertise; mediation is not used in immigration and asylum cases where the imbalance of power is stark.

As to family law more generally cases in family law of persons under immigration control tend to be particularly complex. For example we have seen evidence that would establish a person's entitlement to remain in the UK under EU law made a bargaining counter in divorce negotiations, thus exacerbating existing inequalities. Questions of the custody of children are more complex where one parent is struggling to establish their entitlement to remain. See also ILPA evidence to the Justice Select Committee paragraph 4.

Exceptional Case Funding

See our evidence to the Justice Select Committee paragraphs 51 to 54.

The National Audit Office should take steps to ensure that it has the opportunity to peruse the evidence (for the applicants and for the Ministry of Justice) that was presented in G*udanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin).

On 1 July 2013 ILPA and others met with the Exceptional Cases Team. We were told target times had been met on all cases. This we queried because it was not our experience. Shortly

[25] See the 20 June 2011 Written Ministerial Statement from , Robert Neill MP, Parliamentary Under-Secretary of State for Communities and Local publishing *"The New Burdens Doctrine, Guidance for Government Departments"*. *Hansard* HC 20 Jun 2011 : Column 1WS available at: http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110620/wmstext/110620m0001.htm . The document is at *http://www.communities.gov.uk/publications/localgovernment/newburdens2011* (both links accessed 19 July 2014).

[26] See http://www.nrpfnetwork.org.uk/policy/Pages/default.aspx.

afterwards, a member sent an email to the Exceptional Funding Team at the Legal Aid Agency setting out six cases in which the Agency had missed either the 20-day turnaround time for Exceptional Funding applications or the 10 day turnaround time for applications for internal reviews of refusal (those cases were stated by the lawyers to be urgent, e.g. imminent removal or imminent hearing date).

The Legal Aid Agency responded by listing the internal target deadlines that had been assigned to each of my cases. In all of those cases the internal deadline exceeded the 20 or 10 day deadline by a fairly long way (up to eight days). None of the urgent cases had an internal deadline that was different from that given to the non-urgent cases. The email concluded that, all applications were within their target completion date. Those deadlines did not accord with the published policy.

Support for housing issues

See paragraph 1 of and Annex 1 to, ILPA's evidence to the Justice Select Committee. ILPA is a member of the Housing and Immigration Group, an informal group of lawyers who deal with the intersection of housing and social welfare law and immigration law. Immigration status increasingly affects entitlements to social assistance and the law, which is contained in European Directives, statute, statutory instruments and a substantial body of case law, is difficult for a non-specialist to navigate. Many immigration and housing lawyers struggle with the law as it affects this group.

While as a matter of law anyone can attempt to assist with a housing problem, as soon as this involves providing immigration advice or services, for example diagnosing a person's specific immigration status and package of immigration rights, it is a criminal offence to give the advice in the course of a business whether or not for profit unless one is a barrister, solicitor or regulated by the Office of the immigration Services Commissioner[27]. Thus there is less advice from generalist advice agencies than there would be for others shut out from housing legal aid.

All too often the result is that the problem is either not resolved, or resolve through judicial review.

Support for prisoners

Some 1000 beds in the prison estate are now made available to the Home Office, which uses them to hold those detained at the end of their sentences under Immigration Act powers. Some prisons hold high concentrations of foreign nationals, others only a very small number. Many prisoners will not qualify for legal aid for their immigration case, because it is out of scope. However, all should be getting advice on bail and other matters remaining in scope.

We highlight the effect upon foreign national prisoners and ex-offenders held in prison at the end of their criminal sentence under Immigration Act powers. Detention under immigration act powers is without limit of time and without any oversight of the courts; the detainee only appears before a court or tribunal if s/he is able to instigate this. Detention under Immigration Act powers is frequently lengthy, not infrequently for years[28]. Family members, for example of those whose

[27] Immigration Act 1999 s 84.

[28] See *The effectiveness and impact of immigration detention casework: A joint thematic review,* Her Majesty's Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, December 2012, available at http://www.justice.gov.uk/downloads/publications/inspectorate-

claims for asylum have failed, who are likely to be subsisting on non-cash support under section 4 of the Immigration and Asylum Act 1999, have difficulties in visiting at all, so the location of the detained person may result in isolation from the family and breaches of the Home Office duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of the child, whether the detainee's child be a person under immigration control, settled or a British citizen.

Legal aid is currently only available for 'treatment' cases where it is 'practically impossible' for the prisoner to use the prison complaints system[29]. The Legal Aid Agency must give prior authority in such cases and we understand that in 2011, prior authority was granted in only 11 cases. This appears to provide rigorous control on expenditure and to ensure that legal aid is used in cases where a prisoner does not have other means of redress. That a costs saving might result is far from evident, The Prisons and Probation Ombudsman budget for 2011-2012 was close to six million pounds and some 5,000 complaints were resolved.

Home Office concerns about the risk of absconding affect prison categorisation of foreign nationals. Access to rehabilitation programmes[30] and/or planning for release are affected by presumptions that the person will be removed at the end of the sentence, however strong the case against this may be and however unlikely it is in any event that a decision on return will rapidly be resolved. The proposals would cut legal aid for matters such as categorisation, segregation, dangerous and severe personality disorder referrals and assessments, and resettlement matters. These matters are all of relevance to the outcome of any parole hearing: it avails little that parole remains in scope if the evidence relevant to consideration of release is not there to put before the Parole Board.

The then Chief Inspector of Prisons, Dame Anne Owers, said in her foreword to her Inspectorate's 2006 report *Foreign National Prisoners: A thematic review*[31]*:*

> *The third essential building block of provision is to ensure that all foreign nationals are prepared for their eventual removal or release. All of them need to know, as early as possible in sentence, whether or not it is proposed to deport or remove them. They need to have access to appropriate regimes: not only to reduce the risk of reoffending, wherever they are released, but also because safety, security and decency within prisons depend upon prisoners having access to purposeful activity.*

Section 134 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amends section 22 of the Criminal Justice Act 2003. It allows for "foreign offender conditions" to be attached to a conditional caution. The cautions are imposed with the objects of bringing about the departure of the offender from the United Kingdom and/or ensuring that the offender does not return for a period of time. A conditional caution can only be given if the five requirements set out in section 23 of the Criminal Justice Act 2003 are met. Immigration advice is likely to be necessary for the person to understand the effects of the caution and thus for the condition precedent to the giving

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reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf (accessed 28 May 2013).

[29] See Annexe B to the consultation paper.

[30] See Bail for Immigration Detainees' February 2013 submission to the Ministry of Justice consultation *Transforming rehabilitation: a revolution in the way in which we manage offenders 2013*, available at http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html (accessed 28 May 2013).

[31] Her Majesty's Inspectorate of Prisons, July 2006.

of a caution set out in section 23 (4) of the 2003 Act: "that the authorised person explains the effect of the conditional caution to the offender," to be met. Similarly with the requirement in the accompanying code to explain the implications of accepting the conditional caution[32].

We are particularly concerned for those with mental health problems. The Government has four times in two years been found guilty of breaches of Article 3 of the European Convention on Human Rights for its treatment of foreign national ex-offenders with mental health problems, although the worse problems have consistently occurred in immigration removal centres rather than within the prison estate (see for example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) and *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin)).

The Legal Aid Agency has recently (c. end June) and without warning moved John Facey and Stuart Hollands, two most experienced staff members in the field of detention under immigration act powers persons, off this work entirely. Since then we have not been able to get answers out of the Agency about matters about immigration related to prisons or removal centres.

We continue to chase the note of a meeting the Legal Aid Agency held with representatives providing legal advice in immigration removal centres, bodies such as ILPA and the Home Office on 2 May 2014. Since 16 June we have been asking the Agency to respond to concerns we have raised, alerted by the Equalities and MBU manager at HMP Styal, a woman's prison in Lancashire, about the lack of legal advice and representation on immigration for women detained there. Again, despite chasing, we have nothing although we have identified members who would be willing to assist the Agency if it were prepared to fund surgeries there.

At the beginning of the year, it had been announced that HMP the Verne, on Portland Island in Dorset, would become an immigration removal centre. Pending its formal designation, the Verne was none the less used, as a prison, to house 100% foreign nationals. The Legal Aid Agency indicated that it would provide legal surgeries there, as it does in other immigration removal centres, when it became an immigration removal centre. However it was not prepared to such surgeries while the Verne remained a prison. The charity Detention Action visited The Verne and told ILPA

> *"The majority of detainees we have met in the Verne are unrepresented and it is proving difficult to find solicitors willing to take on even strong cases. There are few if any firms within the local area and despite our efforts to engage representatives from further afield the travel distance and lack of a Detention Duty Advice Scheme [the surgeries] set up have led to our having very little success.*
> *Of the 42 people we have supported in the Verne so far only 15 have had legal representation. The majority of these have been served with deportation orders but have received no legal advice on their right to appeal or how to go about doing so. Of these we have met two recognised refugees who were unable to make in time deportation appeals due to their lack of access to such advice.*
> *We are greatly concerned at the length of time many the Verne detainees have been held for. Around half of those we have met have been detained for at least 6 months while two have been for over 18 months."*

[32] For further information see ILPA's 1 November 2012 response to the Ministry of Justice consultation on the draft code for conditional cautions, available at http://www.ilpa.org.uk/data/resources/16088/12.11.01-ILPA-to-MOJ-conditional-cautions-1-Nov-2012.pdf

We and others continued to protest the lack of legal advice at The Verne. Eventually on 12 June the Agency announced that it would fund surgeries in The Verne until its reclassification (scheduled for September) and that these would commence within a few weeks of the announcement.

The quality of support still available under civil legal aid

See above.

As set out in ILPA's evidence to the Justice Select Committee, legal aid pays for less and less with every passing change. The work that good legal aid lawyers in immigration are doing to maintain a high level of service to their clients is extraordinary. It comes at considerable personal cost.

See ILPA's evidence tot the Justice select Committee at paragraph 21.

Whether the approach taken by the Legal Aid Agency, including the fees paid, for civil legal aid is likely to result in a sustainable market in the long term

No it is not. The Legal Aid Agency gets less for its money with every passing year.
The bureaucracy and administration involved in running a legal practice means in too many cases the main reasons for undertaking cases on legal aid rather than *pro bono* are for costs protection for the client and to cover disbursements. These considerations aside it would be more profitable to save the time spent dealing with the Agency and devote it to private work.
See ILPA's evidence to the Justice Select Committee at paragraph 13.

There are fewer legal aid lawyers practising in immigration and, of those that remain, many now have to do a greater proportion of private work 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.

Provider behaviour is also affected by uncertainty and a high level of change, which makes medium to long term planning for a sustainable business difficult if not impossible. 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. Ranking of bids, on dubious criteria, which included putting a stamp on an envelope and making an application to the Law Society for accreditation at the highest level in immigration, regardless of the outcome of that application, meant that some very good firms did not get a contract at all[33]. Matters starts were unevenly distributed between firms, with those who had ranked sufficiently highly on the criteria getting all the matter starts they had asked for. Some got more than they really wanted, because they had assumed that they would only get a percentage of what they bid for and bid high. Others, further down in the ranking, got only a small proportion of the matter starts for which they had bid. It was required that all firms do both immigration and asylum[34]; previously

[33] 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
[34] Save in Devon other than the city of Plymouth. In rural Devon attempts were made to let immigration only contracts.

some had specialised in just immigration or just asylum. Refugee and Migrant Justice, a large not-for-profit organisation went into administration during the course of the tender.

In the event, in immigration and asylum size was not a receipe for survival and in 2011 the Immigration Advisory Service, the remaining large not for profit in immigration, went into administration.

New contracts brought in with effect from April 2013. The criteria for obtaining a contract in immigration and asylum were easier to meet than those in the 2010 tender. The Legal Aid Agency gave contracts to firms it had rejected in 2010. Matter starts were shared equally between those awarded contracts where, as was the case in most areas, supply exceeded demand. In, for example, the North West and London the result was an allocation of some 100 matter starts per office. Those who had viewed growth as the means to survive under the 2010 contracts found that is was not the solution in 2013. Similarly those who had adopted a mixed asylum and immigration practice in 2010, in 2013 found that under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and thus the 2013 tender, the majority of work was in asylum and that "matter starts" no longer distinguished immigration and asylum cases.

Firms who calculated that a legal aid contract remained viable did so in part on the basis that they could continue to do higher court work, including judicial review. But only days after the contracts had come into effect, the *Transforming Legal Aid* consultation[35] was announced by the Ministry of Justice, including a residence test that would have put an end to legal aid funding for a very significant number of judicial review cases in immigration and asylum. It was the conclusion of most providers that this test would be found to be *ultra vires* the parent Act and discriminatory, as indeed it has been by the High Court in *R(Public Law Project) v SSJ* [2014] EWHC 2365 (Admin). But that judgment is subject to appeal. Similarly, most providers consider that the plain terms of the Act mean that refugee family reunion cases remain in scope, as indeed they have been found to be by the High Court in G*udanaviciene & Ors v Director of Legal Aid Casework & Anor* [2014] EWHC 1840 (Admin). But that judgment is subject to appeal. Levels of uncertainty are thus very high even before one takes into account the rapid pace of change of immigration law.

The interaction between early action from the third sector and future civil legal aid cases

We do not understand what is meant by "early action". We have taken it to mean intervening other than legal advice and representation to deal with a problem before it becomes a matter to be dealt with by those authorised to give immigration advice. Thus we do not address here those voluntary organisations that do provide legal advice and representation, including funded by the Legal Aid Agency.

In immigration there are only limited opportunities to avoid a case becoming a matter for those authorised to give immigration advice[36]. Persons under immigration control require leave to enter or remain, for which they must apply to the Home Office. They must make applications for

[35] *Transforming Legal Aid, proposals for the further reform of legal aid in England and Wales,* Ministry of Justice 9 July 2014. See https://www.gov.uk/government/consultations/transforming-legal-aid-delivering-a-more-credible-and-efficient-system (accessed 19 July 2014).
[36] Immigration Act 21999, s 84.

further leave. Persons who are not qualified and who are acting "in the course of a business whether or not for profit" cannot, on pain of criminal sanctions, to assist them[37].

Where people are apprehended or action is taken to remove or deport them by the Home Office they will require legal assistance.

What voluntary organisations can do is to get people to lawyers in time to avoid a problem or prevent it from becoming worse than it might otherwise be. For example, it is much simpler to apply for further leave before leave has expired than ask for further leave once one is an overstayer. It is much simpler to appeal in-time than out of time.

In the case of support, where there is no prohibition on acting, voluntary sector organisations do considerable work. However, as we set out in our evidence to the Ministry of Justice even before the passage of the Legal Aid Sentencing and Punishment of Offenders Act 2012[38], all too often, to make that excellent work tell, it is necessary to provide it to a lawyer doing illegal aid work. There, when the voluntary sector organisation has done it6s work well, the case can be resolved speedily. We extract one example from our earlier evidence:

Case of N

N was seven months pregnant and had been street homeless and sleeping inside a church and on a park bench for two months. She was waiting for the UK Border Agency's decision on whether it would accept her fresh claim for asylum as such. She had become street homeless after the person with whom she had been living had asked her to leave. A voluntary sector organisation had assisted her to apply for section 4 support. At the time when she saw legal aid lawyers, the application had been outstanding for 14 days, during which time N continued to be sleeping in the church and outside. The UK Border Agency refused to say when a decision would be made and therefore the voluntary sector organisation referred her to legal aid lawyers. The lawyers assisted N under the Legal Help Scheme and sent the UK Border Agency a letter before claim threatening judicial review due to the delay in making a decision on N's section 4 application. She was provided with section 4 accommodation that day. The lawyers also ensured she was provided with accommodation in London in accordance with the asylum support policy bulletin on dispersal and pregnancy, a matter which the voluntary sector organisation had not identified in the original application.

Voluntary organisations provide considerable support to lawyers. They assist clients to ar4rice at appointments with lawyers on time and carrying papers. They assist with the practical problems of communicating with a client who has no fixed home, no telephone and no money to travel to the office. They make themselves available to reassure the client where otherwise the client would turn to the lawyer. They assist in gathering evidence. They sort out matters such as registering with a doctor, which may be necessary preliminaries to obtaining medical evidence. Some provide food to the clients. We would struggle very much without them.

[37] Ibid.
[38]

The impact of other funding cuts on the ability of the third sector to provide early action

See above for our assumption as to the meaning of early action. Voluntary sector organisations, including migrant and refugee organisations, have lost considerable amounts of local authority grant funding and assistance in kind.

The Home Office has also changed its contracts with voluntary organisations. For example assistance with Assisted Voluntary Return is no longer provided in immigration removal centres. The new Home Office Consolidated Advisory Service contract, which includes the Consolidated Asylum Support Application Service, which has been let to the charity Migrant Help, with Children's Services provided by the Refugee Council children's Panel, is considerably more restrictive than it used to be. For example Migrant Help do not assist with detailed grounds of appeal to the Asylum Support Tribunal as its predecessors, which included the Refugee council and Refugee Action, used to do. Part of that contract is stated by the Home Office to be about ensuring that those seeking asylum understand the process, including their responsibilities. This provides useful background information that can speed the work of lawyers representing a client in his/her asylum claim and the more restricted services do have a knock-on effect on the work of asylum lawyers.

The outcomes secured by those no longer eligible for civil legal aid

As described above, the Ministry of Justice's stated expectation was that "Legal aid claimants are assumed to continue to achieve the same case outcomes from non-legally aided means of resolution." [39]

See our evidence to the Justice select committee paragraph 18 to 21.

At the initial stage, where the limitation in matter starts bites, 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. Matter start allocation limits how many cases solicitors can take on and clients and those assisting them to find a lawyer must follow the matter starts, including in cases where they do not have confidence in the provider.

Those who secure an excellent legal aid lawyer nonetheless secure a lawyer who is likely to have less time to devote to their case because s/he is working to tighter margins. Other clients may secure a legal aid lawyer but nonetheless not secure the level of service that they would have obtained had they been able to go to the legal aid lawyer of their choice.

We also emphasise that a significant number of persons are not securing free legal representation at all. Some are paying.

Some do not pay because they have no means to pay and, often, as persons under immigration control no means of obtaining money: they are not eligible for benefits and in some cases get no cash support (for example failed asylum seekers supported by local authorities at the end of the process) or get so little that there is no possibility of their saving any money and they do not have permission to work. Others pay for excellent legal representation, but have earned the money to

[39] Ministry of Justice Impact Assessment Cumulative Legal Aid Reforms, https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps/supporting_documentsn/latimpactassessment.pdf

pay through cruel and exploitative, often unlawful work. Or they may be paying highly inflated rates, for, including harmful advice. It is the most isolated, with mental and physical health problems and practical barriers to going out and earning money, whether lawfully or unlawfully, who are most likely to go wholly without any form of representation. See ILPA's evidence to the Justice Select Committee paragaphs 20 to 21.

Case study: X

X arrives at our drop in with a person whom we assume is her friend. The friend turns out to be her support worker from the charity who house X. X has been in care since she was 11. She has serious behavioural problems, record of offending and has Special Education Needs requirements.

X shows me a plastic bag in which she says are all the documents she has that "explain her life ". I have a look and see that her discretionary leave to remain is due to expire in five days. She tells me that she wants me to show her how to complete the application form for an extension of her leave. She doesn't know there is a Home Office fee. Her papers also disclose possible civil judgments against her. She also says she is "slow" and is dyslexic. Her support worker tells me she needs help with everyday things such as shopping, cleaning her room at the hostel and organising herself. She has been excluded from educational institutions. X is tearful when I ask her about her past. She is a victim of sexual abuse. Her emotional intelligence is that of a 1-2 year old.

A solicitor had made her initial application for Discretionary Leave to remain. When I ask her why she had not gone back to that solicitor she says she was told there was no legal aid. Her support worker says that they have been trying for months to see a solicitor. I call X's previous solicitor hoping they would see her on a pro bono basis given that they are aware of X's background. They say sorry "no legal aid and not enough time ".

X begs me to help her as does her support worker. I explain there is no legal aid for the application. She tells me she can pay me and that a friend can help her pay the Home Office fee.

As explained above, those who are not securing free legal representation, include those whose cases are likely to be within the scope of legal aid but where there is doubt. At the Civil Contracts Consultative Group our sister organisation, the Housing Law Practitioners' Association, requested guidance clarifying an ambiguity on a matter where practitioners' were turning clients away because they could not be confident that matters were within scope. The response from the Agency, reiterated at the 14 July 2014 meeting, was that its lawyers had advised that no further guidance should be issue.

Outcomes are hugely important, but they are not the whole story. A person who has paid for excellent representation but has done so by undertaking harmful and exploitative work does not walk away unscathed. The process of asserting and proving an immigration case, not only for a survivor of torture, of domestic violence, of human trafficking but also for a child, or from a person separated from family members, or from the education or work that they wish to pursue, may do harm, including harm whose effects last beyond a grant of leave. Good representatives work to mitigate this and often contribute to supporting a person's sense of hope and of dignity.

The advice available for individuals no longer eligible for civil legal aid

See above. In immigration this is of necessity private, paid advice or pro bono advice by persons regulated to provide immigration advice as otherwise, the prohibition on provision of such advice, ;providing it would be a criminal offence.

MPs and their caseworking staff also provide assistance. ILPA trains MPs staff on immigration law and we are aware that no only are they seeing high levels of cases but they cannot move them on. Previously they would have tried to get the person with a substantive problem to a legal representative of whom they had a good opinion. Now increasingly they cannot and the person comes back again and again.

The accessibility of alternatives to civil legal aid

We summarise these as

- Paid legal representation
- Legal representation provided pro bono public
- Assistance that is given other than "in the course of a business whether or not for profit" (because it is a criminal offence to give advice on immigration in the curse of a business whether or not for profit unless one is a barrister, solicitor or regulated by the Office of the Immigration Services Commissioner (Immigration Act 1999, s 84) therefore there is no question of lay advice being given other than by friends and family etc. in a wholly informal manner etc.

See evidence to the Justice select committee at paragraphs 10 and 29 on cases for which local authorities are paying and paragraphs 30 to 38. See also above.

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. Because p*ro bono* work is done as a matter of course by many immigration solicitors, a cut in legal aid cases means a cut in *pro bono* work done overall.

Legal aid and others 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[40]. We are aware of trafficking cases where initial (i.e. pre 'reasonable grounds' decision) work has been done *pro bono* by immigration lawyers.

In terms of *pro bono* work by non-legal aid lawyers, such as commercial law firms: As to pro bono work by , for example, city immigration firms, we refer you to Sthe ee the article by Paul

[40] 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).

Yates, head of London pro bono at Freshfields Bruckhaus Derringer on this topic, published on the Legal Voice website, 18 November 2013[41].

Please see in addition the following (hyperlinks or link to website given)

ILPA Briefing on the on the residence test: The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 for the debate on 9 July 2014 on the regret motion in the name of the Lord Beecham and for the vote on 21 July 2014 as part of the affirmative procedure,

ILPA briefing for 1 July Fifth Delegated Legislation Committee scrutiny of the Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 Second and full briefing

ILPA Preliminary Briefing to the House of Commons Fifth Delegated Legislation Committee for its consideration of the Draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Schedule 1) Order 2014 on 1 July 2014

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

ILPA Briefings on the Criminal Justice and Courts bill http://www.ilpa.org.uk/pages/briefings-on-the-criminal-justice-and-courts-bill-2014.html

ILPA submission to the Justice Select Committee enquiry into the Impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, 30 April 2014

ILPA briefing for Immigration bill, House of Lords report, including Legal aid 7 April 2014, http://www.ilpa.org.uk/resources.php/26117/ilpa-briefing-immigration-bill-house-of-lords-report-day-3-7-april-2014-child-trafficking-descent-th

ILPA submission to the Secondary Legislation Scrutiny Committee on the Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014 (SI 2014/607), 23 March 2014

ILPA evidence to Joint Committee on the draft Modern Slavery Bill, 12 February 2014

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

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
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

[41]See http://www.legalvoice.org.uk/2013/11/19/pro-bono-filling-the-gap/ (accessed 19 July 2014)

ILPA Briefing for the House of Lords' debate on the Motion to regret the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, 17 July 2013, available at http://www.ilpa.org.uk/resources.php/18389/briefingfor-the-house-of-lords-debate-on-the-motion-to-regret-the-civil-legal-aid-financial-resourc

ILPA briefing for House of Lords debate Effect of cuts in legal aid funding on the justice system in England and Wales , 11 July 2013, available at http://www.ilpa.org.uk/resources.php/18321/ilpa-briefing-for-the-houseof-lords-debate-effect-of-cuts-in-legal-aid-funding-on-the-justice-syste

ILPA briefing for the backbench debate on legal aid in the names of Sarah Teather MP, David Lamy MP and David Davis MP, 27 June 2013, http://www.ilpa.org.uk/resource/18202/ilpa-briefing-for-house-of-commonsbackbench-debate-on-legal-aid-27-june-2013?action=resource&id=18202

Transforming legal aid: delivering a more credible and efficient system, Ministry, ILPA final submission to the Ministry of Justice., 3 June 2013, available at http://www.ilpa.org.uk/resources.php/18039/transforming-legalaid-ilpas-response-as-submitted-to-the-ministry-of-justice-on-3-june-2013

ILPA Submission to the Low Commission on the future of advice and legal support in response to its context paper on asylum and immigration, 30 May 2013 available at http://www.ilpa.org.uk/resources.php/18002/ilpas-submission-in-response-to-the-low-commissions-contextpaper-on-asylum-and-immigration-30-may-2

Transforming legal aid: delivering a more credible and efficient system, Ministry of Justice, ILPA's initial comments 29 April 2013, available at http://www.ilpa.org.uk/resource/17792/transforming-legal-aiddelivering-a-more-credible-and-efficient-system-ministry-of-justice-ilpas-ini

ILPA briefings on the Legal Aid, Sentencing and Punishment of Offenders Bill 2011, available at http://www.ilpa.org.uk/pages/legal-aid-sentencing-and-punishment-of-offenders-bill-2011.html

ILPA Submission to Justice Select Committee (access to justice) 24 January 2011, with Annexes (A) initial response to Ministry of Justice consultation, (B) briefing on legal aid proposed cuts, (C) initial submission to Justice Select Committee, (D) remuneration rates and (E) case studies, 24 January 2011

ILPA response the Ministry of Justice consultation (Proposals for reform of Legal Aid in England and Wales) with Annexes: 1 Case studies, 2 Compendium of higher court Article 8 cases, 3 Remuneration rates, 14 February 2011

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