ILPA Further Evidence to the Justice Select Committee: 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.

ILPA provided written evidence to the Committee for this enquiry on 30 April 2014. This is available at http://www.ilpa.org.uk/resources.php/26291/ilpa-submission-to-the-justice-select-committee-enquiry-into-the-impact-of-changes-to-civil-legal-ai This further submission is made subsequent to Carita Thomas's giving oral evidence to the Committee for ILPA on 21 October 2014. We are grateful for the opportunity to make further comments.

National Audit Office report

ILPA provided evidence[1] to the National Audit Office for its inquiry *Implementing Reforms to Civil Legal Aid.* We invite the Committee to consider ILPA's evidence to the National Audit Office, which postdates that given to the Committee. ILPA's evidence includes two specific updates. The first pertains to the Legal Aid Agency's published figures on matter starts:

> *In our evidence to the Justice Select Committee[2] 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 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:*
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> > *…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 also provided an update on numbers of matter starts used. There has been a reduction year on year, in the number of matter starts undertaken by both solicitors' firms and not-for-profit organizations. The trend continues as set out in the Legal Aid Agency's statistics for 2013-2014, published on 24 June 2014.[3]

[1] On 21 July 2014, see http://www.ilpa.org.uk/resource/29091/ilpa-evidence-to-national-audit-office-legal-aid-21-july-2014

[2] Paragraphs 22-23.

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

The ensuing report from the National Audit Office[4] observed that the Ministry of Justice did not know if all those eligible for legal aid could access it and that this was important as in civil law there is no alternative provision if a provider of legal aid cannot take a case. In immigration this has a particular impact as advisers must have appropriate regulation to advise without committing a criminal offence.[5] The National Audit Office highlighted that there are already areas of the country without active providers of legal aid. Its conclusions are in line with ILPA's evidence to the Committee. It records in its summary of findings:

> *6. The reforms have the potential to create additional costs, both to the Ministry and wider government. … we estimate the additional cost to HM Courts & Tribunals Service at £3 million per year, plus direct costs to the Ministry of approximately £400,000. The Ministry has committed to approximately £2 million for additional support for litigants in person over the next 2 years. There may also be costs to the wider public sector if people whose problems could have been resolved by legal aid-funded advice suffer adverse consequences to their health and wellbeing as a result of no longer having access to legal aid (paragraphs 1.17 to 1.34).*
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> *7. The Ministry did not estimate the scale of most of the wider costs of the reforms – even those that it would have to pay – because it did not have a good understanding of how people would respond to the changes or what costs or benefits may arise. The Ministry recognised that the reforms might result in wider costs, including to HM Courts & Tribunals Service, but it did not estimate the scale of most of them. Not quantifying these 'hidden' costs risks overstating the impact of the reforms (paragraph 1.17).*
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> …
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> *17 In implementing the reforms, the Ministry did not think through the impact of the changes on the wider system early enough. It is only now taking steps to understand how and why people who are eligible access civil legal aid. The Ministry needs to improve its understanding of the impact of the reforms on the ability of providers to meet demand for services. Without this, implementation of the reforms to civil legal aid cannot be said to have delivered better overall value for money for the taxpayer.*

Exceptional funding

In our evidence to the Committee we detailed problems with the Exceptional Funding regime. One member describes a case where she had applied for exceptional funding and been refused, after 13 hours spent on preparing the application. The regime was the subject of a successful legal challenge in *R (Gudanaviciene & Others) v Director of Legal Aid Casework & the Lord Chancellor* [2014] EWHC 1840 (Admin). The Director of Legal Aid casework has appealed and judgment is pending. In his judgment handed down on 13 June 2014, Collins J allowed claims brought by six individuals challenging the refusal of legal aid applications under the exceptional funding scheme. We strongly recommend that the Committee peruse the evidence (for the applicants and for the Ministry of Justice) that was presented in the cases.

All six cases were immigration cases. In all the cases, the refusal of exceptional case funding was found to be unlawful. The facts of the cases provide an insight into the sorts of applicants who

[4] HC 784 Session 2014-15 20 November 2014, paras 3.19-3.26: http://www.nao.org.uk/wp-content/uploads/2014/11/Implementing-reforms-to-civil-legal-aid1.pdf

[5] Immigration and Asylum Act 1999 part 5.

have become litigants in person, many of whom will not even manage to become applicants for exceptional funding. The following are just some of the litigants.

Ms Gudanaviciene ('TG')

Ms Gudanaviciene is a national of Lithuania pursuing an appeal against deportation. She was sentenced to 18 months imprisonment for wounding with intent after she stabbed her abusive violent husband with a kitchen knife. She has a two-year old daughter currently in foster care. She relied on Article 47 of the Charter of Fundamental Rights of the European Union, which provides that legal aid shall be provided in so far as necessary to ensure effective access to justice. Ms Gudanaviciene was living in a safe house for survivors of domestic violence and wished to be reunited with her daughter. The judge said in her case,

> *The reasons for refusal set out in the 26 July 2013 letter [from the Legal Aid Agency] are in my view thoroughly unsatisfactory. It is said that the issues are not complex and the tribunal 'will take account of the relevant case law and legislation, including EU law and the facts of the case'. But the test under Regulation 21(5)(c) is key and it will be necessary to produce evidence … it is difficult to follow how without assistance the claimant can be expected to obtain the necessary evidence, let alone make representations on the issue. … The suggestions in the refusal letter that "any further evidence in respect of your client's family or criminal case is accessible by your client and can be submitted to the First Tier Tribunal for their consideration" and "Your client can with the assistance of an interpreter, further address any question of the First Tier Tribunal and provide further factual information towards the proportionality of the decision to deport" are little short of absurd.*

IS

IS is from Nigeria. He is blind and lacks legal capacity, i.e. he does not have sufficient understanding of his situation to conduct his case or to instruct a legal representative to do so. The Official Solicitor was willing to assist IS, but needed a legal representative with whom to work. The refusal of Exceptional Funding was challenged *inter alia* on the grounds that it was in breach of Article 8 of the European Convention on Human Rights, IS's rights to private and family life. This challenge was successful. IS has also made a claim against the local authority in relation to homelessness. The case was that he was unable to look after himself and lived a flat infested with rodents and cockroaches and survived by begging.

B

B is an Iranian refugee who sought family reunion with her husband and 16-year-old son whom she had left behind in Iran when she fled. Both had been arrested by the authorities in Iran subsequent to her departure and interrogated as to her whereabouts. They had been ill-treated. They had gone into hiding and fled to Turkey where they were living without any status. The judge said

> *…there are cases, and I am satisfied that this is one, in which an extremely vulnerable individual is faced with a difficult situation in relation to her son..*

Ms Edgehill

Ms Edgehill is a Jamaican national with four children. Her challenge to refusal of leave was proceeding to the Court of Appeal. The judge held:

> *There can be no doubt that the claimant was entirely unable to argue her appeal in person. Success was by no means certain, albeit probable…*

The judge commented:

> *…it is said that proceedings before the First Tier Tribunal "are not complex either in law or procedure". That observation I find remarkable and it suggests that the author has never had experience of observing appeals before the First Tier Tribunal. The reality is, having regard both to the possibility of difficulties in dealing with contentious factual matters and, in immigration law which is taking up a substantial part of the Court of Appeal's caseload, there can be considerable complexity.*

It was held in B's case that contrary to the views of the Legal Aid Agency and of Ministers during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the way the Act is written means that Refugee Family Reunion remains within the scope of legal aid. This is being appealed but the Legal Agency agreed that in the meantime it would fund such cases and would not seek to claw the funding back were its appeal successful. However, it proved both tardy and laconic in providing further clarification, despite ILPA's chasing. It was not until 17 October that ILPA received a reply to a letter of 8 August 2014, itself asking for clarification of an earlier response, asking, *inter alia,* whether additional matter starts would be made available to practitioners for the family reunion cases they took on. The matter start allocation had been based on an assumption that the cases were out of scope. Had the cases been funded under exceptional funding, additional matter starts would have been available. The response said that practitioners should ask their contract manager. It also set out that all work is expected to cease forthwith if the Court of Appeal gives judgment in favour of the Director of Legal Aid casework, an approach that would, if implemented, raise enormous ethical problems for the lawyer with conduct of the case. Were work to stop the effect on a survivor of persecution who had anticipated being reunited with his/her family could be very harsh indeed.

The effect of the delay and of the equivocal and unhelpful responses is to make many practitioners very cautious about taking on these cases. Those that are doing so risk being overwhelmed with requests for assistance.

Current developments in practice

We described in our written evidence how lawyers were squeezing in "just one more case" *pro bono* in a manner that has cushioned the effects of the Act but is not sustainable. Payment up front to lawyers would assist with cash flow, as asylum and immigration cases have a long life span before payment is made. Squeezing in just one more case continues, but not everyone has carried on. Since giving oral evidence we have heard from two members who are giving up their legal aid contracts as they can no longer afford to carry on with this work. One said:

> *I've also given notice to the LAA to end our legal aid contract. It's a real shame, asylum work is what got me into this area of law, but it is too difficult to administer and finance a legal aid contract for a very small practice such as ours.*

Practitioners and voluntary organisations with whom we are in touch describe frustration and despair at having to tell persons in desperate need of assistance, with complex and difficult immigration cases that they are unable to tackle alone, that they are not eligible for legal aid.

Clients are at risk of exploitation to raise the money to pay for legal representation. Those in detention or with physical and mental health problems simply have no means to pay and go unrepresented. Many at liberty disappear and cease to try to resolve their status.

Cost shifting

In our written evidence we highlighted potential risks for someone who chose to pay for advice and how this phenomenon is hard to quantify. The Ministry of Justice has commissioned a study into the impact of litigants in person on family courts in November 2012 which was completed in September 2013 and remains unpublished.[6] As to the report promised by Ministers during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to look at the effect of removing legal aid from immigration appeals, ILPA representatives have taken part in a number of interviews for this research. We have been promised, after expressing concern at the perfunctory nature of an interview, that the Ministry of Justice would come back to us to discuss our views of explanations for their findings, and this is awaited. The Ministry considers that its task is limited to reviewing the effects of the withdrawal of legal aid from immigration only. That is not how we understood its task and the cases in *Guadavicience* are just a handful of illustrations of why an approach that concentrated solely on the higher courts would be inadequate. We recommend that the Committee asks for a progress report on the review and for plans for future work.

In *Farquharson (removal – proof of conduct)* [2013] UKUT 146(IAC) The Upper Tribunal, including the President Mr Justice Blake commented on the importance of legal aid in cases involving allegations of criminal behaviour to justify removal from the country where the Home Office relied on detailed information about alleged behaviour recorded in CRIS (Crime Recording Information System) reports. The Tribunal said:

> *"… it is important that legal representation should be available in such cases. The appellant told us that his reading ability is not great. He was able to read back parts of his statement to us to our satisfaction, but absorbing the detail in the CRIS reports would undoubtedly have been a challenge without professional assistance. The appellant will also have been disadvantaged by a long period of pre-appeal detention. We hope that legal aid is granted readily in such cases whatever the apparent weight of the case against him. Without it there is a very real risk that his common law right to a fair hearing will be undermined."*

A member describes the sorts of evidence under consideration in such a case

> *"…police evidence … – often non-conviction evidence/intelligence/allegations supported by witness statements from one or more police officers who will attend the hearing to give evidence, as well as all the underlying police records, CRIS reports etc."*

A member gives an example of how an appellant experiences a case in the Upper Tribunal, which turns on whether the First-tier Tribunal has made an error of law:

> *"I also work at the University of Law on the Trainee Litigation Programme. We do work there with trainee solicitors on cases involving bail and deportation and Article 8. Last month I went to the Upper Tribunal on one of our cases on which we had succeeded before the First-tier*

[6] http://www.legalfutures.co.uk/latest-news/now-moj-sits-litigants-person-report-year

Tribunal … and which HO had appealed. They had permission. The hearing before the UT took 1.5 hours. There were legal submissions from HO and our Counsel (pro bono). The client just sat and listened. Home Office appeal dismissed. Client looked at me at the end and said " I had no idea what was going on until the Judge told me that I was being given a chance ". There was simply no way that a lay client could have proceeded with that case alone."

Problems begin way before a hearing. A member observes that immigration lawyers

"…spend a lot of our time advising people they don't have merits to pursue a case. Legal aid allows us to do that and follows best practice. "

A member summarised their experience:

"...[litigants in person] are more likely to be refused, with long running cases/overstaying/ absconding. Represented clients dealt with quicker, legally residing quicker…integrate better and not socially excluded. Socially excluded persons increase costs due to the consequential effects of being so excluded."

Another member provided an example of how a client is funding representation:

"Not for profit advisers and support workers have told me about increased numbers of people coming to them unable to pay for legal advice or find the help they need in the not for profit sector as they are so stretched. One former victim of trafficking tried to pay for immigration advice herself as she was in receipt of an income based benefit. The matter was so important to her that she didn't care about the debt or how she got the money. She began starving herself and turning off electricity and gas to save money. The support worker told me she was concerned as someone who is desperate may turn to techniques they have known previously such as prostitution. For anyone on benefits or a low wage with no other option to get money, they can endanger their welfare by taking on unsustainable loans."

Litigants have to contribute more to the cost of cases but there is little that representatives can do to remedy this apart from offering their own work at low rates, which does not solve the problem of additional costs that can be vital to a case, for example, disbursements incurred to obtain medical records or a medical report and causes professional indemnity insurers to express concerns at whether the case can be run properly. Members summarise their experiences of recent months:

"Clients with limited funds are having to choose between having an expert report and having a barrister."

"The clients I have who earn low incomes or who clean offices and toilets at night to feed and clothe their kids are the ones who try and pay but then run out of funds. I have represented sex workers who do their jobs to pay me and are destitute. I have clients who work extra shifts to pay me."

Acquiring funds may also be looked on askance by the Legal Aid Agency, which then queries why such methods could not be used to pay for that part of the case remaining within scope.

Not everyone unable to obtain legal aid will re-emerge as a litigant in person and people are dropping out of sight. We should suggest that an investigation be conducted which looks not

just at litigants in person but also at those who do not make it to the stage of commencing or continuing litigation, not just at the higher courts but at all levels of a case.

Mixed cases, where one part of the case is within scope, one part without, present particular dilemmas. Members explain:

> *"… it feels like having one hand tied behind your back. I feel now that I would rather not do a case if it is a mixed case. … Everything is linked in what we do in this field. You cannot be prescriptive or tick boxing or even structured because of what we are dealing with. This also relates to equality of arms; if the Home Office can produce swathes of evidence from the police … then why are there no funds to be able to challenge that evidence. "*

> *"… acting pro bono on the part of the case that is out of scope but there are limits to what that can achieve e.g. where witness statements or expert reports are needed which are solely relevant to Article 8. This can have a particularly detrimental impact on dependent children whose best interests may not be properly evidenced before the Tribunal in the absence of funding to investigate and secure evidence about their circumstances and the impact of them leaving the UK/departure of a parent."*

The need to ascertain the views of the child in such circumstances was underlined by the Supreme Court in *ZH (Tanzania*) [2011] UKSC 4.

A member comments

> "*Affects our reputation with clients and third parties where we only undertake work in-scope and leave the client to undertake the remainder work themselves*."

The cumulative effect of the new measures is to strike at the relationship of trust and confidence between lawyer and client. In recent seminars and discussions with NGOs and persons under immigration control, including at the Birmingham "Sanctuary Summit" in November it is apparent that many, not uninformed, persons think legal aid lawyers work for the Home Office, especially in detention centres. Too often people who are out of scope do not understand this and instead assume a lawyer is just not prepared to fight for them. Lawyers' time pressure, as they try to husband the time paid for by the fixed fee to work on the case, is seen as lack of caring about client and lack of willingness to understand the case even when the lawyer is plainly doing many more hours than those supposed to be covered by the fixed fee. Grilling on level and evidence of means is perceived as intrusive, and, where the client falls outside the means test, such questioning is seen just as a ruse to find out how much the client can pay. Persons who fail the merits test think it is the lawyer, rather than the Legal Aid Agency, who thinks their case poor. No doubt there are some bad or over cautious calls by some lawyers and people do go on to pay privately and win, but we are concerned at the extent to which all legal aid lawyers are getting tainted with the same brush and in particular that this causes clients to see a private lawyer as inherently more desirable. The same concerns arise where only a part of a case is funded by legal aid.

Summary

The purpose of the Legal Aid, Sentencing and Punishment of Offenders Act 2014 was summarised in the case of *R(PLP) v The Lord Chancellor* [2014] EWHC 2365 (Admin) (under

appeal as being "to allocate civil legal aid to those in the greatest need." It has always been a fiction that the removal of legal aid from immigration cases is in line with that purpose. Parliament has limited the rights and entitlements of migrants, refugees and those exercising rights of free movement. But while they may have fewer rights, those are not intended to be lesser rights. If legal aid is needed to vindicate those rights it should be available. It is not. It was not when ILPA gave written evidence to the Committee in April, or when it gave oral evidence. It is not now.

The exceptional funding regime has been proven inadequate to bridge the gap between being within the scope of legal aid and needing legal aid to vindicate rights and entitlements. But in immigration that gap is so wide that it does not appear to us efficient or just to deal with it through a case by case "exceptional" mechanism. It is not efficient because it involves dealing with applications on a case by case basis. It is not just because, even if the exceptional funding mechanism were working, too many persons will be unaware of this possibility or unable to find someone to assist them in making an exceptional funding application. It is for these reasons that we suggest that the solution is to bring immigration matters within scope.

Pending any wider review of the restoration of legal aid for immigration matters there is a need as a matter of urgency to address the provision of legal aid to vindicate rights under Article 8 of the European Convention on Human Rights. This we highlighted in our written evidence. One aspect of this is that there are individuals, British citizens and settled persons, wishing to sponsor family members to settle in the UK who do not have to meet a high financial threshold to do so and thus will meet the means test for legal aid. For example: persons in persons in receipt of disability benefits or those wishing to sponsor elderly dependent relatives or to sponsor a child where the parent is not also applying to enter the UK do not have to satisfy high financial tests and are likely to be eligible for legal aid.

We should be pleased to assist the Committee with any further evidence as required.

ILPA
1 December 2014