ILPA Response
to Department of Justice Northern Ireland Consultation Document
Scope of Civil 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 of 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 has commented on changes of the last few years to legal aid in England and Wales which have many similarities to the present consultation document. We have annexed a list of our papers to this response at **Annex 1**. We have also observed the effects of the cuts in England and Wales and we include evidence of this in the aspiration that Northern Ireland can learn from the mistakes made in that jurisdiction. Case studies are annexed at **Annex 2**.

14.2 Questions

Q1. Do you agree with the strategic considerations the Department took into account when drawing up these policy options? Do you think there are other considerations the Department should have taken into account?

We do not consider that the description of the strategic considerations, the ways in which they have been applied and the resultant proposals for cuts can be squared with the evidence. We consider that the strategic considerations listed, properly understood, militate against the removal of immigration cases from scope.

'the importance of the issue'

The requirements of the immigration rules mean that where cases involving work and study remain within scope, it will be rare that the individual will meet the means test for legal aid. This is also true for all but the poorest applicants in family immigration cases; in very many cases governed by the immigration rules, where the applicant is required to show as a minimum that they will have adequate accommodation and support in the UK without recourse to public funds,[1] the applicant will not be eligible for legal aid.

Immigration cases are cases where the individual faces intervention from the State or seeks to hold the State to account. The Home Office has very extensive powers: for example to refuse

[1] HC 395, *passim*. For the definition of public funds see HC 395 paragraph 6ff, as amended.

entry, forcibly to remove, not to mention powers of entry, search and detention. Immigration cases concern, *inter alia*:

- whether people are allowed to join (entry clearance cases) or remain with (removal and deportation cases) spouses, partners, children and parents;
- whether people will have to leave the UK where they have lived for years, sometimes for decades (removal and deportation cases, including of family members of those facing removal or deportation), often as a result of someone else's decision, for example that of a parent or former spouse or partner, including cases in which they will be leaving close family members (who may be British) behind;
- whether a person who has fled domestic slavery can live safely in the UK away from those who abused them;
- what happens to a person (including a child) when a relationship breaks down, including as a result of domestic violence;
- what happens to children whose claims for asylum have failed and who cannot be returned to their country of origin because their safety and welfare cannot be guaranteed;
- what happens to young people who as children have been allowed to remain in the UK, sometimes for many years, when they turn 18.
- whether a person should be deported from the UK following conviction despite having served their sentence and in some cases having been settled over many years;
- what happens to people who thought they were in the UK lawfully and turn out not to be, and to people who cannot prove their immigration status whether a person has a claim to British citizenship.

We have set out examples of these scenarios, including examples of effects to cuts to legal aid in England and Wales in **Annex 2**.

Asylum support cases concern life, physical safety and homelessness. They are about whether a person is entitled to a roof over their head and something to eat or will be left destitute, homeless and hungry. The test of eligibility for asylum support is imminent destitution.[2] The courts have highlighted that in such cases Article 3 of the European Convention on Human Rights may be engaged.[3]

We have set out examples in **Annex 2**, from which we extract the following:

> *X is from Zimbabwe. He submitted a fresh claim for asylum in 2005. Further representations have been made since; the most recent substantive expert evidence was submitted 2009, to which no reference was made in a decision more than six months later.*
>
> *X lived with a friend until summer 2010 but that friend could no longer support him and he became homeless and destitute. He lodged an application for 'section 4' support (support for persons whose application for asylum has failed) by himself which was refused. His appeal was dismissed on the basis that he was an asylum-seeker as he had*

[2] Immigration and Asylum Act 1999, section 95.
[3] See for example the *Limbuela* case [2005] UKHL 66.

further representations outstanding (the Secretary of State had not dealt with the most recent representations in her most recent decision). He came to a legal representative who applied for 'section 95' support, support for persons with an outstanding application. This was refused as the Home Office records were incorrect, showing no further representations outstanding. The representative gave notice that a judicial review of the refusal would be sought. The Home Office then considered the application properly and granted 'section 95' support.

In family immigration cases the result of State intervention is likely to be the disintegration of the family unit through separation across national borders, in circumstances where, if a person is administratively removed they will have no automatic entitlement to return. A person who is deported rather than removed will be prevented by the deportation order from returning to the UK for many years.

The Supreme Court has highlighted the importance of ensuring that the views of children are adequately represented in such cases in *ZH (Tanzania) v SSHD* [2011] UKSC 4. To deny funding in immigration cases involving the separation of families is inconsistent with the stated strategic aim "the importance of the issue".

Examples of cases where families face separation are set out in **Annex 2**. When "the importance of the issue" is assessed that should lead to the conclusion that funding for cases about Article 8 European Convention on Human Rights – the right to respect for private and family life – must remain within scope.

The crux of the test for cases under Article 8 of the European Convention on Human Rights is whether the proposed interference with the right to private and family life is reasonable and proportionate. Thorough-going knowledge of the established and developing principles in domestic and European jurisprudence is essential to do justice to these cases. Only where the interference with the rights of the individual is disproportionate and unreasonable, i.e. where it goes beyond mere matters of personal choice, can the case succeed. Matters of private and family life are matters that most people, whether subject to immigration control or not, regard as the most important elements of their existence.

Where rights to family life, affecting the applicant and family members, including those British and settled, are at issue, the consequences of wrong decisions in these areas can be hugely significant, long lasting or sometime irremediable.

Compensation claims in the immigration context, for example against public authorities for unlawful detention or assault/injury in an immigration context, raise questions of the utmost gravity, of breaches of the UK's domestic and international obligations and lack of accountability for breaches of human rights and unlawful and unconstitutional action by officials. We recall the comments of judges in some of the cases:

"That may or may not be good politics: but it is deplorable practice , especially when it is seen that almost from day one the new unpublished policy was perceived in virtually all quarters within the department to be at least legally "vulnerable" and in some quarters positively to be untenable and legally invalid...

First, anxiety was being expressed within the Home Office almost from the outset as to the lawfulness of the new policy. Second, there is an almost consistent appreciation of the legal need to publish the new policy in the light of the then published different policy. Third, difficulty in understanding and formulating what the new policy actually was repeatedly expressed in a number of quarters.... Fifth, the new policy was only eventually published, as effectively conceded by Mr Wood, on 9 September 2008 – and that because the true position, so far as it was understood, had become revealed in the Ashori and then Lumba litigation. R (Abdi & Ors) v SSHD [*2008] EWHC 3166 (Admin)…*'

"72. There are a number of factors that show that the unlawful imprisonment of Mr Muuse in this case was not merely unconstitutional but an arbitrary exercise of executive power which was outrageous. It called for the award of exemplary damages by way of punishment, to deter and to vindicate the strength of the law.

73. The junior officials acted in an unconstitutional and arbitrary manner that resulted in the imprisonment of Mr Muuse for over three months. The outrageous nature of the conduct is exhibited partly by the way in which they treated Mr Muuse and ignored his protests that he was Dutch, partly by the manifest incompetence in which they acted throughout and partly by their failure to take the most elementary steps to check his documents which they held:

> *i) The actions of the junior officials who exercised the power to imprison Mr Muuse and keep him imprisoned cannot be explained on any basis other than that the officials were incompetent to exercise such powers on the assumption favourable to ... that they were not recklessly indifferent to the legality of their actions.*
>
> *ii) They disobeyed the order of the court to release Mr Muuse for no reason.*
>
> *iii) They did not consider the conclusive evidence they held as to his nationality...*
>
> *iv) Even if they thought there was a power to deport, they made no enquiries to determine whether detention was necessary pending deportation. It was for the Home Office to justify this, as no person should be deprived of his liberty without proper enquiry. No effort was made to ascertain that his wife and family lived in the UK and no explanation has been given for the failure to do so.*
>
> *v) No proper examination was made of the grounds for deportation; his detention was simply ordered without even the Notice of Detention being issued for over a month. No explanation of this illegal and arbitrary act has been given.*
>
> *vi) They gave him no reasons in writing of his detention until 1 or 3 November 2006.*
>
> *vii) They threatened him with deportation to Somalia – a state which they knew was a failed state.*
>
> *viii) They failed to look at the evidence in their possession even when it was pointed out to them.*

ix) They failed to accord him the necessary time to appeal.

x) They did not revoke the Deportation Order when they were sent copies of the documents. This failure is again unexplained. Instead, the officials detained him for a further month without any possible justification.

xi) Although the judge found that his detention was not the result of racial discrimination, he found that the detention to which Mr Muuse was subjected was aggravated by racist remarks such as "look at you, you are an African" and suggestions that he should go back to Africa. Treatment of this kind which is calculated to degrade and humiliate is typical of abuses which occur when power is exercised by those who are not competent to exercise that power. "Muuse v SSHD [2010] EWCA Civ 453

'litigant's ability to present own case'

The law in the area of immigration is voluminous and extremely complicated as described below. Those affected include people unfamiliar with UK laws and procedures, many with very limited or no support networks in the UK, with little or no understanding of what would constitute a correct application of the law, or a correct procedure. In many cases English will not be the litigant's first language. These difficulties for applicants, in the absence of advice from a qualified specialist, would be compounded by the Home Office's regularly producing decisions which are wrong and many of which are inconsistent with the decided case law. Hence the high success rate on appeal. The former Chief Inspector of Borders and Immigration in his report *An Inspection of Entry Clearance in Abu Dhabi and Islamabad,* of an inspection carried out from January to May 2010,[4] observed in relation to Abu Dhabi that *"...at the time of the inspection, one in every two appeals was allowed.*

If an applicant who cannot afford legal advice has to try to appeal against a decision, by UK Visas and Immigration in the UK, or a British diplomatic post abroad in entry clearance cases, how can they be expected to do so if, as may happen, the decision letter itself contains incorrect statements of the law or provides limited or incorrect information on rights of appeal when and how these can be exercised? For example, in some cases where the only rights of appeal are on the grounds of human rights or race discrimination, a person may be told that they have no right of appeal and not sent an appeal form.

Understanding what should happen is all the more difficult given the delays that have beset the Home Office's decision-making and the far from infrequent occasions on which policies or regulations introduced by the Agency have been found to be unlawful by the domestic and international courts.[5] Published policies are frequently withdrawn from official websites with

[4] Report published 4 November 2010, available at http://icinspector.independent.gov.uk/wp-content/uploads/2010/11/An-inspection-of-entry-clearance-in-Abu-Dhabi-and-Islamabad1.pdf

[5] See, for example, *R (Baiai et ors) v SSHD* [2008] UKHL 53; *Metock v UK* (European Court of Justice, C-127/08); *Pankina et ors v SSHD* [2010] EWCA Civ 719; *ZN (Afghanistan) and others v Entry Clearance Officer* [2010] UKSC 21, all of which have necessitated changes to the law and/or immigration rules.

long periods during which there is no guidance. This leaves applicants ill-placed to understand and assert their rights and entitlements.

If it is proposed that, as in England and Wales, those detained will get assistance to apply for bail but not with their substantive immigration case, this ignores the realities of their situation. Those detained are less able to gather evidence for their case themselves, and to meet the procedural requirements of the tribunals and courts than others. The strength of the substantive application may be a key factor in a bail application.

See further:

Academic papers

Adler, M. (2009), Self-representation, just outcomes and fair procedures in tribunal hearings: some inferences from recently completed research (unpublished).

Adler, M,. "*Do Citizens Need Representation When They Challenge The Welfare State*?" Paper presented to Norwegian Social Security Conference, Oslo, 3-4 December 2009, available online at http://www.nova.no/asset/3913/1/3913_1.pdf

Adler, M., and J Gulland, (2003), *Tribunal Users' Experiences, Perceptions and Expectations: A Literature Review* University of Edinburgh, November 2003, Commissioned by the Lord Chancellor's Department and published by the Council on Tribunals. Available online at http://www.council-on-tribunals.gov.uk/docs/other_adler(2).pdf

Citizen's Advice, *Supporting Justice*, Citizens' Advice Evidence Briefing, 17 June 2009 . *Studies the available data on litigants in person before the Asylum Support Tribunal*. Available online at http://www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/evidence_reports/er_immigrationassylum/supporting_justice.htm

Craig, S., M Fletcher and K Goodall, *Challenging asylum and immigration tribunal decisions in Scotland - an evaluation of onward appeals and reconsiderations,* ISBN 978-0-085261-836-3, available online at *https://dspace.gla.ac.uk/bitstream/1905/763/3/Nuffield+RESEARCH+DOCUMENTOCT08.pdf*

Genn, H., Lever, B. and Gray, L., *Tribunals for diverse users*, DCA research series 01/06, Department for Constitutional Affairs January 2006.

Genn, H, and L A Gray (2005) *Court of Appeal Permission to Appeal Shadow Exercise ,*available online at http://212.137.36.113/cms/files/PTAFinalReportMarch20051.pdf

Genn, H., "Tribunals and Informal Justice' (1993) 56 MLR 393 (Volume on Dispute Resolution. Civil Justice and Its Alternatives)

Genn, H. and Genn, Y. (1989), *The effectiveness of Representation at Tribunals*, Lord Chancellor's Department.

Gill, the Lord Gill's Report of the Scottish Civil Courts Review (2009) available online at: http://www.scotcourts.gov.uk/civilcourtsreview/)

Good., A., *Anthropology and Expertise in the Asylum Courts* IBSN-10**:** 1904385559; ISBN-13: 978-1904385554 2006

Meszaros, G., L Bridges, and M Sunkin "Judicial Review in Perspective" *Judicial Review*, Volume 2, Number 1, March 1997 , pp. 51-53(3).

Moorhead, R *The Passive Arbiter: Litigants in Person and the Challenge to Neutrality*, Social and Legal Studies, 16 (2) (2007) 405-424 ISSN 0964 6639 (print) 1461 7390 (online)

Thomas, R., V. Gelsthorpe, D. Howard, and H. Crawley "Family visitor appeals: an examination of the decision to appeal and differential success rates by appeal type" (2004) 18 *Immigration, Asylum and Nationality Law* 167-185

Thomas, R., *Administrative Justice & Asylum Appeals: A Study of Tribunal Adjudication,* 2011.

Government Research

Home Office, *Family visitor appeals: an evaluation of the decision to appeal and disparities in success rates by appeal type*, Home Office Online Report 26/03, available online at http://rds.homeoffice.gov.uk/rds/pdfs2/rdsolr2603.pdf (see also Thomas, below)

Scots Government *Legal Studies Research Programme Research Findings No.58/2006: Uniquely Placed: Evaluation Of The In-Court Advice Pilots (Phase 1)*(An Evaluation of 5 in-court advice pilots located in Aberdeen, Airdrie, Dundee, Hamilton and Kilmarnock. The pilots are intended to extend access to civil justice for people without legal representation in certain legal proceedings: small claims cases, and heritable and debt cases in summary cause procedure), January 2006 (S. Morris, P. Richards, E. Richards &v C. Lightowler, ISBN 0 7559 2918 7, available at http://www.scotland.gov.uk/Publications/2006/01/24132346/0

Scots Legal Aid Board and Consumer Focus Scotland *The Views and Experiences of Civil Sheriff Court Users: Findings Report , July 2009.*

Parliamentary Papers

Constitutional Affairs Committee *Asylum and Immigration Tribunal: the appeals process* Oral evidence given by Hon Mr Justice Hodge OBE, President, Asylum and Immigration Tribunal and Hon Mr Justice Collins, Lead Judge, Administrative Court on Tuesday 21 March 2006, HC 1006-i , uploaded on 17 April 2009Taken before the Constitutional Affairs Committee see

http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm

Home Affairs Select Committee, Fifth Report of session 2005-2006, *Immigration Control,* 23 July 2006, HC 7775-I

Other

Judgments of the courts, e.g.:

> *"...experience has shown that many party litigants who perceive themselves to be 'suitably prepared and well informed' have the tendency to elaborate their position to*

the point of obfuscation." (*Clark Advertising Ltd v Scottish Enterprise* 2004 SLT (Sh Ct) 85 at para [5] per Sheriff Principal E F Bowen QC)

Procedure rules designed to deal with litigants in person, e.g. rule12A of the Rules of the Court of Session and, for the Sheriff Court, rule 1.3A of the Ordinary Cause Rules.

'...the type of forum in which proceedings are held'

The tribunals are not simple to navigate. In the influential study, *Tribunals for Diverse Users*,[6] Professor Hazel Genn and her team observed

> *"...there are limits to the ability of tribunals to compensate for users' difficulties in presenting their case. In some circumstances, an advocate is not only helpful to the user and the tribunal, but may be crucial to procedural and substantive fairness"*

The Asylum Support Adjudicators 2000-2001 Annual Report commented:

> *"Despite the overwhelming importance of the proceedings to the individuals involved, less than 20% of appellants are represented at hearings before asylum support adjudicators. Often, those named as representatives have not been consulted and are unable or unwilling to act. Some appellants are therefore ill-prepared to argue their case and fail to produce documentary evidence in support of their appeal even where this should be readily available. Clearly the non-availability of legal aid for assistance and representation is a major stumbling block for representatives."*

The Joint Committee on Human Rights made a strong recommendation that legal aid should be available for asylum support appeals, to avoid the UK breaching its human rights obligations. It stated:

> *'The absence of provision for representation before the Asylum Support Adjudicators may lead to a breach of an asylum seeker's right to a fair hearing, particularly where an appellant speaks no English, has recently arrived in the UK, lives far from Croydon and/or has physical or mental health needs. Where an appeal fails, and as a result of the unavailability of legal representation an asylum seeker is left destitute, the result may also be a violation of Article 3 ECHR. We recommend that the Government should make legal aid funding available for representation before the Asylum Support Adjudicators.*[7]

A case study: asylum support

Citizens' Advice has conducted two studies of asylum support appeals. In 2007 it looked at 223 cases and found that among the 36 represented appellants, the success rate was 58 per cent, but among the 187 unrepresented appellants it was 29 per cent. For its June 2009 Evidence Briefing *Supporting justice: The case for publicly-funded legal representation before the Asylum Support Tribunal* it looked at 616 appeals and wrote:

[6] Genn, H., Lever, B. and Gray, L., DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice), January 2006.
[7] *Op. cit.*, at paragraph 99.

"Among all 616 appeals the success rate was 45.3 per cent. And it must be noted that, in the six-month period covered by our study, October 2008 to March 2009, the UKBA withdrew (or conceded) no fewer than 277 (27 per cent) of the 1,027 new appeals lodged with the AST, before they reached an oral hearing or paper-only decision. Indeed, including appeals conceded by the UKBA, the AST's own monthly outcome statistics show an overall success rate, in the six-month period October 2008 to March 2009, of 54.9 per cent. Such an overall success rate is strongly suggestive of poor quality (or, at least, inadequately informed) initial decision-making by the UKBA."

It looked at 115 appeals where the Asylum Support Appeals Project provided representation:

"Of these 115 appeals, 82 were allowed or remitted to the UKBA for a fresh decision – a success rate of 71.3 per cent. Including the 46 cases in which the ASAP gave advice to the appellant immediately prior to the hearing, but did not represent him or her at the hearing, the success rate among the 161 appellants who received pre-hearing advice from the ASAP, or were legally represented at the hearing, was 60.9 per cent. Among the 316 oral appellants who received neither representation at the hearing nor prehearing advice from ASAP, however, the success rate was just 38.6 per cent."

On 17 November 2010, the Chair of the Administrative Justice and Tribunals Council spoke on Radio 4's Today programme,[8] highlighting the failure of public bodies to get decisions right first time across many areas of public decision-making. He identified that there was a 37% success rate on appeal[9] and emphasised that this (and similar figures in other areas) indicated the degree to which public bodies were getting decisions wrong. He expressed concern that this was only the tip of the iceberg because there were many more decisions made by public bodies that were not brought before tribunals, many of which would be correct decisions but others, he feared, would be wrong but just not remedied. He also voiced concern that public bodies fail to learn the lessons of cases brought to tribunals, perhaps putting the matter right in the individual case but repeating the same mistake in other cases. All this reflects ILPA's experience and strengthens our view that savings could be made be improving decisions in public bodies which are parties to litigation.

The complexity of the law goes not only to the whether the litigant is able to present his/her case, but also to the tribunal judge or judge's ability to manage the case.

What the judges say

The late Mr Justice Hodge, former President of the Asylum and Immigration Tribunal, giving evidence before the Constitutional Affairs Committee, stated: *"The AIT and its judges, whenever they have been asked, have always said that we value representation and we want as many people to be legally represented as possible, and whenever we discuss these matters with the*

[8] http://news.bbc.co.uk/today/hi/today/newsid_9197000/9197123.stm

[9] See the discussion of appeal statistics in the response to questions 3 and 6 above.

Legal Services Commission, which we do periodically, that is entirely what we say....—the change in representation has been very much driven by the Legal Services Commission's worries about the total cost of their budget rather than anything to do with us."[10]

Mr Justice Collins was giving evidence in that same session and stated of litigants in person:

"...it makes it more difficult to give proper consideration when you do not have the evidence put before you in the form that it ought to be put."

The Hon Mr Justice Blake, President of the Immigration and Asylum Chamber in the Upper Tribunal, speaking at the Annual Conference of the Office of the Immigration Services Commissioner on 6 December 2010, noted how the Tribunal had benefited from having Lord Justice Sedley, a Court of Appeal judge, sit in the Immigration and Asylum Chamber including on a particularly complicated Article 8 case.[11] He made reference to the importance of case management and observed that the immigration judges of the tribunal need competent representatives for both parties before it to enable them to do their task and that targeted grounds of appeal enable the tribunal to do its job better. He recalled the hierarchy of laws with which the tribunal is dealing: domestic law, the cases of the European Court of Justice and those of the European Court of Human Rights.

In *Farquharson (removal – proof of conduct)* [2013] UKUT 146(IAC) The Upper Tribunal, including the then 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."

The tasks of case management and dealing with a hierarchy of laws are made considerably more difficult when dealing with litigants in person. The presence of interpreters at tribunal hearings does not assist in the preparation of a case. Their role is strictly limited. Detailed submissions, correctly identifying points of law and pertinent evidence, including expert evidence, having been sourced and then organised in a bundle, assist Tribunal judges and the Court of Appeal. Representatives of the parties can be asked to amplify particular points, whether in submissions or by presenting evidence and given directions with which they must comply, within the stringent timescales that apply in this jurisdiction.

[10] Oral evidence taken before the Constitutional Affairs Committee on Tuesday 21 March 2006, see http://www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/1006/6032103.htm

[11] *FH (Post-flight spouses) Iran* [2010] UKUT 275 (IAC), see http://www.bailii.org/uk/cases/UKUT/IAC/2010/00275_ukut_iac_2010_fh_iran.html

The Home Office's conduct of litigation can also create challenges with which an unrepresented appellant is ill-equipped to deal. The behaviour of the Home Office as decision maker and litigant has driven judges to despair:

> *"The history fills me with such despair at the manner in which the system operates that the preservation of my equanimity probably demands that I should ignore it, but I steel myself to give a summary at least… What, one wonders, do they do with their time?*
>
> *…I ask, rhetorically, is this the way to run a whelk store?"* Lord Justice Ward, in the Court of Appeal in *MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229[12]

Home Office representatives frequently arrive at a hearing with few or no papers. The contents of decisions can be changed at the last minute on the day of a hearing or in the course of the hearing. For example, it is not uncommon for a decision set out in a reasons for refusal letter, accepting certain points, to be withdrawn without notice. New evidence is often served on the day of the hearing. These practices can lead to adjournments if justice is to be served.

Where neither party is represented, this does not produce an inquisitorial system by default. Inquisitorial systems require greater resources and powers be given to those hearing the cases. An inquisitorial system requires written exchanges or else a series of hearings, to ensure effective case management and that the matters the court or tribunal wishes to address have been adequately investigated, pleaded and evidenced. A judge hearing in an inquisitorial system may have the power to order or conduct investigations (an example is the *juge d'instruction* in France) and require the identification and production of specific evidence. In inquisitorial administrative justice cases in France, written evidence is likely to be received from both parties sequentially, with the court identifying which points in one party's evidence it requires the other to address.

Tribunal judges currently do not receive case papers earlier than the day before the hearing, save in some detained fast-track cases. There is no room for this inefficiency in the current system; there would be even less in an inquisitorial system.

A Tribunal judge, without witness statements before him/her, would need to take a large number of family member witnesses through oral evidence in chief, with no witness statements to save time. In addition, an immigration judge is dependent upon the evidence put before him/her: if DNA evidence is required to prove a family relationship then the judge can at best adjourn for such evidence to be obtained, which will be of no avail if the appellant is unable to afford to obtain this evidence or to ensure that it is put before the Court.

There are limits to what a Tribunal judge can properly do to assist an unrepresented appellant without compromising judicial independence especially when the Home Office does not send a representative to the hearing.[13]

---

[12] http://www.bailii.org/ew/cases/EWCA/Civ/2009/1229.html

[13] See Moorhead, R., *The Passive Arbiter: Litigants in Person and the Challenge to Neutrality*, Social and Legal Studies, 16 (2) (2007) 405-424 ISSN 0964 6639 (print) 1461 7390 (online).

ILPA has seen a number of cases where, despite not having sent a representative to the hearing, the Home Office has sought to appeal the decision. If the appellant is also unrepresented in those circumstances the task of the Tribunal can become almost impossible.

Appeals from the First-tier Tribunal are on points of law only. In immigration cases, a lay appellant whose appeal is dismissed is ill-placed to assess whether the judge's determination is legally correct. There is a short time in which to grapple with the procedures, consider the determination and draft grounds of appeal in an appropriate case. By the same token an immigration appellant whose appeal is allowed but where the Home Office seeks permission to appeal has very little hope of defending the decision of the First-tier Tribunal without specialist legal advice. At the Upper Tier Tribunal a 'response' and 'reply' are provided for in the Procedure Rules. These are is aimed at concentrating the parties' minds in advance in an attempt to reduce the need for, or length of, hearings and gives the initially successful party the opportunity to re-open issues determined against him/her. This can become quite technical and involves further tight procedural timeframes. Home Office failure to comply with the timeframes or procedure is common.

Appeals from the Upper Tribunal lie to the Court of Appeal, which is procedurally still more complex, and beyond that to the Supreme Court. The appellant in an onward appeal has satisfied a Tribunal judge that the decision made against him/her was wrong; if the Home Office decides to pursue the case, it has specialist Presenting Officers for appeals, or can instruct counsel through Treasury Solicitors, and thus has a considerable advantage in a case which depends on legal argument, resulting in inequality of arms. In such cases the initial appeal has been found to be meritorious and the Home Office is or purports to be advancing a point of law.

Unrepresented appellants are ill-placed to identify points of law that they can properly rely on, but equally they may seek to advance other points, requiring Tribunal judges and judges to wade through copious evidence and letters by way of pleadings only to discover that no arguable point of law is being advanced.

The Supreme Court, and its predecessor, the House of Lords, whose work is confined to deciding the most complex points of law, have given more judgments on Article 8 of the European Court of Human Rights in recent years than on almost any other area of law. The leading case was that of *Huang and Kashmiri* in the House of Lords in 2007[14] but only a year after that judgment, not one but, four cases concerning Article 8 were heard by the House of Lords, with judgment on all four being given on 25 June 2008.[15] See also, for example, Supreme Court in *ZH (Tanzania) v SSHD* [2011] UKSC 4.

There is a plethora of statute law, case law, regulations, rules and guidance, relating not only to substantive matters but also to procedure. Changes in the law are frequent, necessitating understanding of previous provisions and transitional provisions. The weight of precedent, from the European Court of Justice, the European Court of Human Rights and the Higher Courts, is heavy. It overlays a system which largely defies comprehension and which is not always

[14] See [2007] UKHL 11

[15] *E B Kosovo (FC) (Appellant) v SSHD* [2008] UKHL 41*; Chikwamba v SSSHD* [2008] UKHL 4; [2008] *Beoku-Betts v SSHD* [2008] UKHL 39; *AL Serbia v SSHD; R (Rudi)v SSHD* [2008] UKHL 42

susceptible to interpretation by application of principles of common sense. The comments of the judiciary have repeatedly testified to this.

What the judges say [all emphasis added]

"...it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. ***The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires****" E B Kosovo v SSSHD* [2008] UKHL 4. House of Lords

*"****I am left perplexed and concerned how any individual whom the Rules affect*** *(especially perhaps a student, like Mr A, who is seeking a variation of his leave to remain in the United Kingdom)* ***can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves****. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done". AA(Nigeria) v SSHD* [2010] EWCA Civ 773, Court of Appeal, Lord Justice Longmore at Para 87

"It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. ***This is elevating policy to dogma****. Kafka would have enjoyed it." Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, House of Lords per Lord Scott

"...it is important to appreciate that under s 11 of the Immigration Act 1971 a person can be admitted into this country while an application is being considered, without being regarded from the legal point of view as having entered into this country. Davis J, not unreasonably in the court below, described this as an 'Alice in Wonderland' situation. Although that description is appropriate, the provisions of s 11 are of value because it enables a person who makes a claim to enter this country not to be detained but to be released temporarily while his position is considered." R (Veli Tum) v Secretary of State for the Home Department [2004] EWCA Civ 788 , Court of Appeal per Lord Justice Woolf

"I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. ***The provisions are labyrinthine*** *but, to cut a convoluted story short, she was a "person from abroad" pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 and, although her presence in this country was lawful – unless and until removal pursuant to regulation 21(3) of the Immigration*

(European Economic Area) Regulations 2000 – she did not enjoy the right to reside here at the material time because she was not a "qualified person" as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. ***A more comprehensive tour of the labyrinth can be found in*** *Abdirahman" Kaczmarek v Secretary of State for Work & Pensions* [2008] EWCA Civ 1310, Court of Appeal.

See also *Lekpo-Bozua v London Borough of Hackney & ors* [2010] EWCA Civ 909 where the Court of Appeal again described the provisions of domestic legislation pertaining to European free movement law as *'labyrinthine.'*

In cases involving European free movement law, there is a complex interface between domestic and international law. This is made all the more complex by the UK's failure to give effect in a timely manner to judgments of the European Court of Justice. The UK's approach to cases of the family members of EEA nationals was found to be incorrect by the European Court of Justice in its judgment in *Metock v Ireland* (the same approach had been taken by the Republic of Ireland).

"availability of alternative sources of funding"

See below response to question 2.

We do not consider that any of the cases that members currently undertake in the asylum, asylum support and immigration categories (judicial review and statutory appeals to the Court of Appeal or Supreme Court) or claims such as for unlawful detention by the Home Office are suitable for conditional fee arrangements. We have been involved in the presentation of evidence to the Legal Aid Agency in England and Wales that there are no After the Event insurance packages available for these types of cases, even supposing that those satisfying the means test for legal aid could meet the premiums. The outcomes (particularly in judicial review) are much harder to predict than the types of cases for which Conditional Fee Arrangements are suitable. Even the award of costs for a "successful" outcome can be uncertain. We consider that the Funding Code must make clear those categories of case in which the category as a whole is not suitable for a Conditional Fee Arrangement.

We make the general observation that whether a case is suitable for alternative funding is no guarantee that such funding will be available. If there are not legal representatives prepared to take the risks associated with, for example, a Conditional Fee Agreement, then the person is need of representation will go unrepresented. Complex and lengthy cases, requiring high levels of disbursements, are likely to struggle to find a representative. Representatives whose expertise lies in a caseload that results in very low profit margins will be particularly ill-placed to take on such cases.

'availability of other routes to solution'

The consultation paper does not identify any 'alternative means of resolution' for the individuals in need of the immigration and asylum support advice which it is proposed to take out of scope. Nor can ILPA. It is not possible to deal with an immigration problem through mediation with the Home Office or by any other private agency; resolution can only be achieved through legally sound and effective representation to the Home Office and the Tribunal.

Q2. Do you agree that as there are already multiple alternative funders for certain types of advice and that limited legal aid funding should be withdrawn from these areas and directed where it is needed the most and can make most difference?

In the case of immigration we do not agree with the assertion that there are already multiple alternative funders.

Voluntary organisations

It is not realistic to expect the voluntary sector to take on responsibility for providing immigration advice and representation. To give immigration advice in the course of a business 'whether or not for profit' an advisor must be a solicitor, barrister, or regulated by the Office of the Immigration Services Commissioner.[16] If not, the advisor commits a criminal offence.

Some voluntary 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. For generalist organisations, which 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.
ILPA has long strongly supported independent regulation of those giving immigration advice. The greatest protection against poor advice is access to high quality advice. Those who cannot afford such advice are vulnerable to exploitation as they seek to find the necessary funds and vulnerable to those giving poor quality advice. Protecting the pool of excellence and competence in legal representation is the first defence for clients.

In England and Wales, not for profits have quickly become overwhelmed:

> "*We are a very small voluntary organisation (two part-time OISC caseworkers, one Level 3, one Level 2, not enough money for more although we could do with double the staff to deal*

[16] Immigration and Asylum Act 1999, s 84.

with the workload) We have become even busier in the past year are struggling to cope with the demand for advice, and in particular, appeal representation. We are also getting many more people asking for help in other areas of law, saying that they cannot find anyone to help in employment and benefits in particular and there is nowhere local to refer them to."

Not for profits which do not give advice have also been badly affected. Previously many of these played a role in referring clients to lawyers. Voluntary 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.

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

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

In the case of support, where there is no prohibition on acting, voluntary sector organisations do considerable work. However, 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 its work well, the case can be resolved speedily.

Voluntary organisations provide considerable support to lawyers. They assist clients to arrive 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.

MPs and members of the Northern Ireland Assembly

If legal aid is cut, then unless voluntary organisations take on the responsibilities and expense of becoming regulated advisors, those too poor to pay will not receive assistance with their cases. MPs, members of the Northern Ireland Assembly, and their caseworkers, who are not regarded as giving advice *'in the course of a business',* will be amongst the few sources of advice on immigration left to those who cannot find or afford private advice.

This affects areas outside immigration as well. 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, the prohibition in giving immigration advice kicks in.

Self-funding

Practitioners and voluntary organisations with whom we are in touch in England and Wales 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.

> *"As an MP's caseworker, I have an informal list of around 20 immigration solicitors who I know are competent which I will pass on to constituents who need legal help or representation (or better legal representation than they have been getting...) … people* [are] *coming back to me to say they have tried but that nobody can take on their case as they are too busy, or that the firm has stopped doing legal aid…"*
>
> *"…we don't practice immigration law at this firm but have a team specialising in immigration detention cases* [for civil damages etc.]*…we speak to 'cold callers', usually from detention centres, regularly. Many of these individuals are awaiting removal or deportation but may have a right of appeal. Before the Legal Aid, Sentencing and Punishment of Offenders Act 2012, we would signpost clients who needed immigration advice to legal aid providers via the detention advice scheme* [surgeries in detention centres] *and where there is a protection claim we continue to do that. Now, for the large group of detainees who rely on Article 8 alone, there is no one to signpost them to as providers are simply unable to take on potential exceptional funding applications for non-protection claims given the huge amount of time and risk involved. There are very few detainees who have the means to pay so we are often giving very hopeless feedback to desperate individuals who have nowhere to turn and who may well have strong and compelling arguments to make on article 8 grounds, and children in the community."*
>
> *"As a legal aid practitioner, I am very conscious … that I am helping fewer people. Although I do this job because I want to help …, and I do not believe we should have a two tier justice system whereby the rich are properly represented but the poor are not, I am also conscious of the fact that if we do not make hard financial decisions, we will go out of business and will not even be able to help the few that do fall within the scope of legal aid. My workload remains primarily legal aid work, but this I am moving towards doing more private work to ensure I am helping the firm as a whole survive."*

For a splendid overview of the effect of the cuts in England and Wales on legal aid lawyers, from a mixed legal aid practice which includes immigration work, we refer you to the recent article "Fig leaves & failings" by Jo Renshaw, a solicitor at Turpin Miller LLP in Oxford[17].

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

[17] 8 April 2014, see http://www.newlawjournal.co.uk/nlj/content/fig-leaves-failings

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

Consideration should be given to the social costs and implications of putting applicants who cannot afford legal representation in a position where they cannot appeal life changing decisions without it. Inevitably some of those desperate not to be removed or deported from their families and communities, to have family members join them in the UK and not to be returned, will resort to desperate and potentially dangerous measures, such as borrowing from loan sharks or undertaking unsafe work, to raise the money to afford representation. Some may see trying to avoid immigration control entirely as the only alternative to trying to raise money they do not have for legal representation, and thus end up living a precarious existence outside the law, leaving them highly vulnerable to exploitation. Such a tendency would of course have consequences for the costs of enforcing immigration control. Not every immigration case will succeed; one of the reasons making it more cost-effective to retain access to free, expert advice is that applicants with cases that cannot succeed can be advised accordingly.

A 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."*

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

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

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

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

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

"While a significant proportion of this client group have managed to scrape together (over time) sufficient funds to pay privately for some help, an equally significant proportion have simply disappeared. Yes, they still ring and ask for an appointment, but when informed about the changes to legal aid, they say they will need to "think about it" and never call back. The concern is that these clients, already living under the radar because of their lack of status, simply disappear without a chance of obtaining even the most basic advice about their options." [18]

Because people initially want to pay as little as possible and instruct lawyers to keep costs down, applications are not prepared as fully as the legal representative recommends. As a result, all too often, is that they have to proceed to appeal, by which point people realise this could be their last chance to succeed and agree to extra evidence being collected or work done, so appeals sometimes have evidence not produced before, which could have led to a different outcome at the outset.

Pro bono

It is common for lawyers in the legal aid sector to do *pro bono* work as a matter of course in their day to day practice. *Pro bono* work is done as a matter of course by many immigration solicitors. Thus cut in legal aid cases means a cut in *pro bono* work done overall.

Since the advent of the recent cuts to the legal aid budget in England and Wales, legal aid lawyers (of whom fewer are in practice) are under more pressure than ever before to do *pro*

[18] "*Fig leaves and failings"*, Jo Renshaw, solicitor at Turpin Miller LLP in Oxford, *New Law Journal* , 8 April 2014, see http://www.newlawjournal.co.uk/nlj/content/fig-leaves-failings

bono work. Lawyers are faced with requests for assistance from people who have important immigration matters that used to be within the scope of legal aid, and now are not. 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[19].

In terms of *pro bono* work by non-legal aid lawyers, such as commercial law firms many immigration cases are highly specialist and demanding; lawyers who are not specialists are for good reason reluctant to "dabble" in this area[20].

Local authorities

Local authorities may be directly responsible for legal costs. They will have to pay at private rates.

In cases of looked after children for example, local authorities are required to pick up the tab for the non-asylum (which may be the only) aspects of the case. Some local authorities step up to this responsibility; in other cases it has taken threat of litigation to persuade them to do so. Ministers repeatedly stated that such young people will qualify for legal aid as persons seeking asylum because they failed to understand that while the child came to the UK seeking asylum, their circumstances may have changed or their asylum case may never been strong but after years in the UK they may have a strong case under article 8 of the European Convention on Human Rights.

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*

[19] 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).

[20] See the article by Paul Yates, head of London pro bono at Freshfields Bruckhaus Derringer on this topic, published on the Legal Voice website, 18 November 2013 http://www.legalvoice.org.uk/2013/11/19/pro-bono-filling-the-gap/

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.

Q3. Do you agree with the options to amend the merits test? Do you agree that Prospects of Success and Cost Benefit should be explicitly addressed in any application for legal aid?

No.

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.

When regulations on the legal aid merits test were debated in the House of Commons' First Delegated Legislation Committee on Tuesday 14 January 2014, the Minister had no answer to the contention that there was a risk of a bias in the development of the law that would favour the Government if appellants could not secure representation in borderline cases[21]. The Government can take a chance on running a case where the merits are poor. We recall the 4 June 2013 open letter of Treasury Counsel, the lawyers who act for the Government, to the Attorney General about judicial review, where they stated:

> *When advising government departments in public law cases, as when advising claimants, it is often difficult or impossible to say more than that there is a reasonable defence to a claim but that the outcome is hard to predict. This is so despite the fact that, especially in the early stages, the defendant is likely to have more information to enable it to assess the merits of a claim , Indeed most of us have had experience of being instructed to defend government decisions despite advising that the prospects of doing so are considerably below 50%. Sometimes we will have been proven wrong. No one has ever suggested that, in such cases, government bodies should be barred from defending a claim for judicial review*

The Minister's only reply to criticism was to suggest that the cases cited as examples of borderline cases were not in reality borderline:

> *Many of the cases to which he refers were strong in their own right. I am confident that where there is what might be described as a "borderline case"—which might be a test case—the likelihood is that the arguments presented at the outset would be of a sufficiently strong nature to make the likelihood of success more than 50%.*
>
> *…the Lords' Secondary Legislation Scrutiny Committee...spoke of the need for existing borderline case criteria to continue, to allow for test cases or necessary interpretation of the law, but I simply repeat my point. Where there are such cases, it is likely that the evidence will be strong and there will not be an issue of their being borderline cases in their own right*.[22]

[21] See col 11.
[22] Col 11.

Not only does it provide no response, the argument the Minister deployed was quite simply wrong. He had just been presented[23] with the evidence of Richard Drabble QC giving examples such as the case of *Edison*[24] where Court of Appeal and the House of Lords had both preferred the Government's case, splitting two to one and three to two respectively and *Anufrijeva*[25] where Court of Appeal held that it was bound by earlier authority to decide against the claimant but the House of Lords, split four to one, decided in her favour[26]. It is thus no answer to say, as did the Minister, that these cases would not be regarded as borderline. The person failing to regard them as such would, on the evidence, be wrong.

It is frequently impossible fairly to judge the merits of a case before it has been prepared. Problems in immigration and asylum are exacerbated by the "country guidance" cases in the Upper Tribunal that, purporting to judge of the factual situation in a country, go out of date in a way that legal precedents do not. The low standard of proof in asylum cases[27] makes it difficult to use examples from other areas of the law as to whether a case is borderline.

Q.4 Do you agree that the Civil case types outlined in paragraph 10.6 should be a lesser priority for funding? Are there other case types which you would consider to be more appropriate for removal from scope?

Not answered; these are not cases we undertake as immigration lawyers.

Q5. Do you agree with the rationale for removing the cases in Civil Legal Aid from scope? Do you think other considerations should be taken into account?

No we do not agree. See above. Applying the strategic aims identified leads inexorably to the conclusion that immigration cases should remain in scope as set out above.

Legal obligations must be taken into account.

The UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings require the provision of legal aid.[28]

Similarly with the UK's obligations under the Charter of Fundamental Rights of the European Union. Article 47 of the Charter states

> *"Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice."*

[23] Col 9.
[24] R*(Edison Ex Power Limited) v Central Valuation Officer et anor*, [2003] UKHL 20
[25] *R(Anufrieva) v SSHD* [2003] UKHL 36.
[26] Col 10.
[27] *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958).
[28] Council of Europe Treaty Series CETS No. 197

Provision of legal representation in immigration and asylum support cases will very frequently be required to meet the UK's international and domestic legal obligations because without it an individual will be unable to secure a fair trial as required by the common law, or an effective remedy, as required by Article 13 of the European Convention on Human Rights.

The 1951 UN Convention Relating to the Status of Refugees provides:

> *Article 16*
> *…*
> *2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance.*

The 1954 Convention on the Status of Stateless Persons makes identical provision for stateless persons.

As to other considerations, indirect costs should be taken in account. In England and Wales, the National Audit Office has been extremely critical of the Ministry of Justice's failure to examine the costs of similar proposals and has doubted that these have produced savings. ILPA provided evidence[29] to the National Audit Office for its inquiry *Implementing Reforms to Civil Legal Aid. T*he National Audit Office[30] 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.[31]

The National Audit Office highlighted that there are already areas of England and Wales country without active providers of legal aid. Its conclusions are in line with ILPA's evidence. 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).*
> *.*
> *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 &*

[29] On 21 July 2014, see http://www.ilpa.org.uk/resource/29091/ilpa-evidence-to-national-audit-office-legal-aid-21-july-2014
[30] 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
[31] Immigration and Asylum Act 1999 part 5.

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).

…

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.

We can see what is happening to local authorities as a result of the cuts in England and Wales. For local authorities, there are direct costs, of paying for legal representation, described above, and indirect costs, for example supporting people whose cases are subject to lengthy delays. There are costs for private individuals and local authorities.

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

"I am seeing a lot of cases where local authorities are having to pick up, one way or another, the consequences of the lack of immigration advice. Some of them are children leaving care, with local authorities having to fund legal advice directly. Increasingly, however (and I have one before me right now) I see cases under section 17 of the Children Act 1989 where there is an arguable Article 8 case or case under European Union law[32], the authorities have to pick up the tab for support, and the case is not being pushed because there are no immigration solicitors in play."

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

Changes in the behaviour of those providing publicly funded advice can result in indirect costs**.** 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:

- Many providers are doing a greater proportion of private work to legal aid work. A number

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

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.
- 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.

The official immigration statistics for 2009,[33] published in August 2010, recorded that 48% of immigration appeals succeeded. That cannot be considered the hallmark of a department "fit for purpose". The appealed decisions cost considerably more not only for the Home Office, but also in court time. There was also the cost to individuals who were funding themselves. Poor decisions also have enormous implications for the rights of those individuals, including rights to private and family life under Article 8 of the European Convention on Human Rights.
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."*[34]

Immigration appeal rights were described by Lord Hope in *BA (Nigeria)* [2009] UKSC 7 as an "elaborate system". These cases were described by Lord Avebury in debate on the Crime and Courts Bill in July 2012 as 'the most sensitive of cases.'[35]

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

[33] Control of Immigration, Statistics, United Kingdom see http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1510.pdf
[34] 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
[35] *Hansard*, HL Report, 2 July 2012, Columns 497-498.

Borders and Immigration's report on his inspection of the handling of legacy asylum and migration cases by the UK Border Agency[36];

- 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[37];
- 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*[38]);
- 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 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*

[36] 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.'

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

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

internal problems of the Defendant or her advisors to be visited upon the judicial system.[39]

Government departments can take many steps to make the administration of the tribunals and courts systems more efficient; ways of reducing the number of cases coming to hearings include the initial decision maker making the right initial decision, that decision being effectively reviewed before coming to the tribunal or court and withdrawn if it cannot be justified. If a case goes to appeal then effective and proper conduct of litigation by the Government department, including being represented at hearings and having provided the court or tribunal with the documents and case papers in good time, can reduce costs. The rapid implementation of decisions can eliminate further challenges arising from delays.

Support for prisoners

We comment on the proposals for prison law. 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.

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[40]. Family members, for example of those whose 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.

Home Office concerns about the risk of absconding affect prison categorisation of foreign nationals. Access to rehabilitation programmes[41] 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.

---

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

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

[41] 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).

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*[42]*:*

> *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.*

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)).

In considering costs and benefits, it is important to consider whether legal aid is buying what it used to. See further "*Fig Leaves and Failings"* Jo Renshaw, solicitor at Turpin Miller LLP, *New Law Journal* 8 April 2014.

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.

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,

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.

Q6. Do you think there are any other options to reduce expenditure in private law family proceedings? Please outline same.

Not answered; these are not cases we undertake as immigration lawyers.

Q.7 Do you agree with the options to reduce the scope of private law family proceedings?

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

Not answered; these are not cases we undertake as immigration lawyers. However, we observe that 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.

Q.8 Do you think that any other exceptions (apart from domestic violence or harm to the child) should be made?

We understand this question to be about reducing the scope of private law family proceedings. However, we highlight that domestic violence and cases involving child applicants or claimants, in no position to represent themselves, are of concern in other areas of law, including immigration.

Q.9 Are there any other factors or issues which should be considered by the Department as relevant when looking at Scope?

See above.

Discrimination

Compound discrimination can result from being unable to challenge a wrong decision by a Government department where particular groups have been disadvantaged in the initial decision-making process. In immigration and asylum cases, for example, success rates at appeal vary according to nationality. In the second quarter of 2010, while the overall success rate on appeal was 27%, for appeals from Eritreans and Somalis success rates on appeal were over 50%.[43] Discrimination against women in the asylum system has been highlighted by the work of the Refugee Women's Legal Group and of the Refugee Women's Resource Project at Asylum Aid. Many of the factors they identify are also relevant to women with asylum support and immigration cases.

Professional ethics

The changes in legal aid in England and Wales are throwing up ethical dilemmas for practitioners. Mixed cases present particular dilemmas.

> *"I had to turn away a client who wanted to use a family member as an interpreter. The family member was to be a witness. He could not afford an independent interpreter."*
>
> *"At the moment I have been lucky in that minor children who have been granted Discretionary Leave on refusal of asylum and who are applying for Discretionary Leave and making a fresh asylum claim have either been taken before the March 2013 changes or do not have an article 8 case. I have up to now provided one off pro bono advice as to*

[43] Available at http://rds.homeoffice.gov.uk/rds/pdfs10/immiq210.pdf

the lack of merits of an article 8 claim (in each case the Local Authority has agreed to pay the interpreter fee) but I am bound to come across a child with a strong article 8 claim and I do not know whether I will be able to get exceptional funding for him/her. If I cannot get it I cannot represent that child in the asylum or Article 8 matter (unless the Local Authority can be made to pay the fees for the Article 8 matter as I would be in breach of my rules of conduct since I should not be able to deal with all matters"

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

Accountability

Legal aid plays an essential part in ensuring that Government departments spend money wisely, and as parliament intended. It must be assumed that the intention of parliament is always that Government departments carry out their functions in a lawful manner. Legal aid has funded a very significant number of cases which have exposed that the Home Office has not carried out its function of maintaining effective immigration control in a manner which accords with the law. The case of *Baiai*[44] is one in point. In that instance, Ministers had taken the decision to try to identify marriages entered into solely to secure an immigration advantage for one party to the marriage by requiring a person with limited or no leave to remain to apply for a 'Certificate of Approval' to marry. In a challenge to the scheme, funded by legal aid, the Courts held the scheme unlawful in its contravention of the right to marry protected by Article 12 of the European Convention on Human Rights. The scheme devised for the detection of such marriages had no rational connection to the objective.

Alternative ways of achieving savings should be taken into account. Tackling the behaviour of Government departments would result in savings in all cases, not only in those cases that it is proposed to take out of the scope of legal aid, but in cases that the Government proposes should continue to receive legal aid funding and also in cases where people already do not receive legal aid but are paying their own legal costs. The savings, which would benefit individuals and government, could be huge.

ILPA urges the department to consider a 'polluter pays' principle, whereby the department, for example, UK Visas and Immigration, that generates costs for the legal aid budget and for the courts meets those costs. To minimise such expenditure, the department would need to evaluate:

- Whether it is appropriate to bring in new laws or procedures and the time frames involved; provisions drafted in haste frequently require amendment and attract costly litigation.
- The quality of decision-making;
- The timescales within which decisions are made;
- The Home Office's conduct as a litigant

In immigration there have been specific Acts of Parliament in 1993, 1996, 1999, 2002, 2005, 2006, 2007, 2008, 2009 and 2014 plus parts of other Acts, plus many more regulations, rule and policy changes, many of which have been hastily devised and led to all sorts of confusion.

[44] *R (On the application of Baiai and others) v SSHD* [2008] UKHL 53.

Complex questions of immigration, asylum and nationality law will not go away, but will fall to be dealt with in other parts of the system. For example:

- Detention cases, which are in scope, often involve consideration of a deportation/removal case where the person is being detained against removal.
- People who might otherwise not have advanced a claim for asylum may do so;
- It is likely that there will be an increase in public law challenges (before the High Court) where otherwise the matter might have been dealt with, at less expense, before a tribunal. Some of these challenges will be made by unrepresented litigants, again adding to the financial and time burdens on the courts.
- Challenges to refusals to fund a case will be an area of litigation in themselves, and may prove more costly than funding the cases directly, as discussed above in response to question 4.
- A person's immigration status may be relevant to other proceedings including criminal proceedings and questions of social entitlements. Dealing with immigration status in the context of those proceedings is likely to be inefficient and costly.

The increased costs associated with the above would reduce the savings anticipated.

ILPA
30 January 2015

Annex 1 Other ILPA responses

The following ILPA responses are of relevance to this enquiry (hyperlinks or link to website given)

ILPA Further Evidence to the Justice Select Committee: Legal Aid, 1 December 2014

ILPA response to Office of the Immigration Services Commissioner (OISC): Triennial Review 14 November 2014

ILPA evidence to National Audit Office Legal Aid, 21 July 2014

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

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 to 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

Annex 2: Cases

Mr DP grandfather who has been in the UK for 50 years

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

Mr I

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

Mr N (refugee from Afghanistan)

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

Mr A

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

Mr C

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

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

R

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

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

A lawyer writes…

"…we are seeing lots of single mothers who could make Ruiz Zambrano[45] or private life applications relating to their children but have no one to do those... They come to us destitute and needing section 17 Children Act support for them and their children but they can't get that without an application being made to the Home Office and there is no legal aid for that."

Ms S

Ms S was the unmarried partner of a British citizen exercising rights of free movement under European Union law (in line with the case of *Surinder Singh*[46]). She has three British children. She is a survivor of domestic violence. She does not qualify under the Legal Aid Sentencing and Punishment of Offenders Act

[45] *Ruiz Zambrano* (C-34/09), European Court of Justice.
[46] Case C-370/90, European Court of Justice.

2012 domestic violence provisions because there was no marriage. She cannot afford to pay for advice on how to apply for residence card to show she has retained a right of residence under European Union law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

four months longer to breastfeed her son. Then she tried to come back with her son but has not been able to find a way to get him a visa to come. She came back to the UK to try to get further help and is devastated that she has had to leave her son in Ethiopia. Islington Law Centre is assisting pro bono with an Entry clearance application for the baby. This has proven very time consuming as Ms AB is very difficult to work with and getting all evidence together is taking a great deal of time. So far some 96 hours have been spent endeavouring to assist her, the longest for any individual under the project.

Mrs PT

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

Mr A

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

The family had problems submitting the applications in person. They were turned away from the visa application centre in Turkey as the children did not have lawful residence in the country. The mother had a passport which was stamped as she crossed from Syria into Turkey but as the children did not have passports they were not stamped and had no proof of permission to be in the country. They went to the local police station and were told they had to be in Turkey for three or four months to get a residence certificate. They could not have afforded the living costs to stay there that long. The legal representative had to make representations to the Entry Clearance Manager who agreed to exercise her discretion to let the family submit their applications in these circumstances. The client could not have done this himself as he does not speak or write English and does not understand how to navigate the online communication systems. The legal representative observes

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

Mr F

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

Mr HB

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

Ms S

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

T

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

Mr C

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

KG

KG is a 23 year old Jamaican national who came to the UK in May 2008 with two other siblings to join their mother who was living in the UK. He was then 17. KG, his mother and siblings were subsequently granted Indefinite Leave to Remain. In November 2010 KG was convicted and sentenced to two years in prison for a drugs offence. KG's daughter was born whilst he was in prison but since his release the evidence was that he cared for his daughter three - four days a week and had full care of her during this

time. This enabled his partner to work. In addition, KG and his partner and daughter spent the other half of the week together as a family. All of KG's family with whom he is in close contact live in the UK and he has remained dependent upon his own family for financial and emotional support despite now being a young adult. KG has been convicted only once and he pleaded guilty and accepted full responsibility for his offence. Whilst in prison KG achieved an exemplary prison record with no adjudications and was an enhanced prisoner. His risk of re-offending and risk of serious harm to the public if he did reoffend were both assessed by the probation services as low.

The Secretary of State made a deportation order against KG and he appealed against it on Article 8 grounds, particularly on the grounds of his daughter's best interests. KG sought a three-week adjournment for his appeal hearing to adduce an expert social work report regarding his family life with his partner and daughter and his daughter's best interests. The adjournment was refused on a perfunctory basis without any regard to the child's best interests. The substantive appeal was then dismissed with no proper assessment of the child's best interests. Permission was granted to appeal to the Upper Tribunal but no error of law was found. KG had been legally aided throughout this process although his appeal was predicated upon Article 8 because his case began before the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force. An application for permission to appeal to the Court of Appeal against the Upper Tribunal's decision was made. The case was now out of scope of legal aid under the Act. The case was pursued on a *pro bono* basis including drafting grounds of appeal and a skeleton argument for the permission stage. Permission was refused on the papers and has been renewed to an oral hearing. All work continues to be done on a pro bono basis.

Mr M

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

Francesca

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

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

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

Mr V

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

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

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

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

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

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

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

She met her husband in the UK when she was studying on a valid student visa in 2010. He is a British citizen. They went to Pakistan briefly to marry during the university holidays and she returned on her student visa because he would not apply for the spouse visa. He was initially supportive of her studies but became violent and controlling. His behaviour was so controlling that she was unable to continue her

studies and so her student visa was curtailed. Once her visa was curtailed, the violence escalated and involved her husband, his father and brothers. She fled and called the police in May 2012. She was initially advised to make an application under the domestic violence rule although she had not had leave as a spouse. This was refused. She was then advised to claim asylum which she did. Her asylum claim was refused and she now has an upcoming appeal. Her solicitors have withdrawn funding because her asylum claim is not strong enough to reach the threshold for continued legal aid. She does not fall within the scope of the domestic violence exceptions for legal aid because she did not have leave as a spouse.

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

Ms D

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

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

Ms C

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

Ms A

Ms A is a Nigerian woman whose husband is studying in London. She is in the UK as his dependant. They have two children together, both born in the UK. They have separated as a result of domestic violence. Her daughter is unwell and receiving specialist treatment as she has a health condition that affects her ability to eat and breathe. The child is being fed through a tube. Her visa is about to expire. As there is no immigration application pending, the local authority has said it will stop all funding to her and the children once her visa expires (within two weeks). No legal aid is available for her to make an application

on the basis of Article 8. She does not fall within the domestic violence exception for legal aid because he husband is a student, not a British citizen or settled.

Mr X (not an immigration case but brought to our attention by a member and we highlight it lest others do not)
Mr X was considered a very dangerous prisoner. He was beaten up very badly in prison. He suffered a head injury. He no longer has the capacity to represent himself and has become extremely docile. He remains in a category A prison, incapable of making such representations or sending in neurological reports. The Secretary of State for Justice has taken the view that he has submitted no evidence. Therefore there is a judicial review of the Secretary of State for Justice for failure to make his own enquiries while Mr X remains in a category A prison, under a very costly regime, for the foreseeable future. This is likely to involve revisiting the finding in *R (Howard League for Penal Reform and Prisoners Advice Service) v the Lord Chancellor* [2014] EWHC 709 (Admin) that an unacceptable risk of procedural injustice was unproven.

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

Five experts and the family (including those currently looking after the children) agreed that it was in the best interests of the children to maintain regular contact with their mother. The Upper Tribunal gave insufficient reasons for dismissing the concurrent opinion of the five experts and all family members attending the appeal but there was no legal aid to take the case to the Court of Appeal.

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

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

While, in the judicial review application, the Upper Tribunal refused an interim injunction to stay removal, meanwhile, in the Court of Appeal, the fee exemption application was approved and his proceedings were formally issued. A single Lord Justice considering the litigant in person application for permission to appeal stayed pre-emptive removal, queried flaws in the decision-making which the unrepresented applicant had not specified, on which he invited submissions from the Secretary of State

and directed that there should be an oral hearing at which the question of whether to grant permission could properly be considered. At the Court of Appeal hearing, for which legal aid was not available, the Home Office was represented by counsel, who conceded that part of the decision-making was legally wrong, but argued that overall it made no difference and persuaded the Court not to give permission to appeal. The litigant in person did not understand enough to report back in detail on what had happened.

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."*

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.