ILPA EVIDENCE TO BACH COMMISSION

TOPIC 1: The current state of access to justice

The legal aid budget has been significantly cut in recent years and court and tribunal fees have risen. Court procedures are often prohibitively complex and legal costs for individuals and organisations have risen to the point of being unaffordable for even those of moderate means. The impact on access to justice has been significant. While savings to the legal aid budget have been made, the wider impacts are not being measured and the Government has been criticised for its lack of understanding of the knock-on costs and value for money of its reforms. The Commission will firstly review the impacts of the reforms so far, looking at their effectiveness, their impact on access to justice and wider areas such as health outcomes or poverty, and the scale of unmet need. The Commission will outline the difference that would be made by a strategy to redefine access to justice as a key public entitlement.

2. In a sentence, what are your biggest concerns about the state of access to justice? Please provide up to three answers.

ILPA is concerned about the effects on restrictions on access to justice on persons under immigration control or exercising rights of free movement and their family members and in particular

- the effect of cuts to legal aid on persons not permitted to work or claim benefits who have no means to pay for representation;
- loss of appeal rights and replacement with internal Home Office reviews in a broad range of decisions that cut across the whole range of persons under immigration control;
- the loss of rights to judicial review and challenges in funding judicial review;
- court and tribunal fees.

3. Please outline in more detail the way in which your/your organisation's work intersects with the question of access to justice, and the way in which current policy enables and undermines access to justice. The following questions are intended to serve as indications of the kind of response we are looking for, rather than as direct questions requiring an answer. Please feel free to address them or not, as you see fit, in your response. Try and limit your response to under 1000 words

• What would you or your organisation describe as the biggest impact of LASPO?
• What difficulties do you, your organisation, your clients or the people you represent face in enforcing their legal rights?
• What difficulties do you, your organisation, your clients or the people you represent face in navigating bureaucratic legal procedures?
• How have court and tribunal fees affected the capacity to enforce legal rights of you, your organisation, your clients or the people you represent?
• What, as a user of the system, are you or your clients' biggest frustrations

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association with around 1000 members (individuals and organizations). 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. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law and to work for a just and equitable, non-sexist, non-racist, immigration and nationality law practice, 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 organizations including the Legal Aid Agency/Law Society's Civil Contracts Consultative Group and the Administrative Justice Forum.

The biggest impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in the field of immigration is that persons under immigration control are no longer entitled to legal aid for immigration cases including cases in which they assert rights to private and family life under Article 8 of the European Convention on Human Rights. The loss of legal aid encompasses a loss of assistance with fees for disbursements, including translators, court fees and expert reports. This means that even where pro bono assistance is available, and it is very limited, a case cannot proceed because the costs of disbursements cannot be met. Court and tribunal fees as well as Home Office fees, are among the elements of a case which cannot be funded. These can be very significant. The Ministry of Justice is consulting on raising fees for an appeal before the First-Tier Tribunal from £140 to £800, with a further £455 to be paid to appeal against the decision of the First-tier Tribunal to the Upper Tribunal[1]. Home Office fees cost, for example, between £1,195 and £2,676 for a settlement (indefinite leave to remain application). Applications can be made for fee waivers, but these require considerable work by legal representatives. It is very difficult for an unrepresented person successfully to apply for a fee waiver and the Commission could usefully inquire into how many such applications are made and how many are successful.

Persons who have no permission to work, no access to benefits and are surviving on subsistence support have no money with which to pay for representation.

Immigration law is of considerable complexity and without legal representation many persons are simply not in a position to enforce their rights.

The biggest frustration is to people with no access to justice access to justice and to have to turn persons away because there is no capacity to represent them. As detailed in the documents listed at the end of this response, we are frustrated by Home Office failure to follow precedent or to manage cases effectively. All too often, winning one test case does not suffice, it is necessary to fight win again and again for clients with identical material facts. Similarly, to get a case stayed behind a lead case it is all too often necessary to make an application to the Administrative Court, rather than being able to agree with the Home Office that no further action should be taken on the case until the lead case is decided. This is approach drives up

[1] See https://consult.justice.gov.uk/digital-communications/first-tier-tribunal-and-upper-tribunal-fees/supporting_documents/consultation%20document.pdf

legal aid and court expenditure, as does the Home Office routinely appealing its defeats before the First-tier Tribunal, regardless of merit and despite criticism by the Tribunal[2].

The complexity of immigration law and the pace of change, often with no notice, increase the volume of legal challenges. It is not uncommon for Ministers to say in response to a challenge that a proposal breaches human rights that this will be tested in the courts. Clauses stating "unless it would be a breach of a person's human rights" are increasingly common in legislation and guidance[3], tacked on at the end of provisions that risk generating unlawful conduct. Human rights alone cannot bear the weight of the constitutional settlement in this fashion, we need respect for the rule of law so that legislation rules and guidance are designed to avoid breaches of human rights in the first place.

The Legal Aid Agency operates an extremely bureaucratic process. Completing forms takes a significant amount of legal representatives' time and is frustrating, soul-destroying work, Much of this work appears to be entirely futile as when the Legal Aid Agency is asked to interrogate the data it collects, for example by the Civil Contracts Consultative group, it proves unable to do so.

TOPIC 2: Transforming our justice system

There is widespread acceptance that there must be decent standards of health care or education provided by the State. The same should be true of access to justice. The Commission will look at what these guarantees should look like and establish priorities for publicly funded legal support and interventions, as well as a framework for spending decisions. The Commission will consider what alternative savings or sources of funding could be found to enable us to start to rebuild a decent provision. Our society has evolved and so has the way in which we "consume" services. So while savings will need to be found, the work of the Commission will focus on how we re-design our justice system for the 21st century, drawing on international and historic comparisons and looking in particular at legal aid and the provision of advice. It will identify shortcomings in the present system and seek to identify measures, which could prevent the escalation of legal problems and their consequential social and economic costs. It will look at what impact efficiency measures and better use of technology can have and where to focus such reforms. It will consider how to better integrate advice with other aspects of our lives and the role of different sectors. It will consider how best to empower innovative thinking locally and support the sharing of best practice, including a focus on prevention. It will seek to design the blueprint for a new scheme that better meets the needs of those on low incomes, and most especially the needs of vulnerable groups, within a more efficient and effective administrative framework.

[2] See, for example, *VV (grounds of appeal) [2016] UKUT 53 (IAC) (13 November 2015) Nixon (permission to appeal: grounds)* [2014] UKUT 368 (IAC), (*MR (permission to appeal: Tribunal's approach) Brazil* [2015] UKUT 00029 (IAC)
[3] See, for example, the Nationality Immigration and Asylum Act 2002, Schedule 3.

4. In a sentence, what practical steps could be taken to ensure access to justice for all was a reality? Please provide up to three answers.

Provide a right of challenge to a decision independent of the Government department making the decision[4] .

Implement a "polluter pays" approach so that departments make provision when changing laws, regulation and guidance for the effect on the courts and legal aid budget. Deploy these funds to support challenges.

Construct an accessible system of legal aid and fee remission so that no person is denied access to justice on the basis of their inability to pay, or of factors such as immigration status or race.

5. Please outline in more detail ideas for practical solutions to the crisis in access to justice. These could range from minor alterations to a radical overhauling in our justice system. The following questions are intended to serve as indications of the kind of response we are looking for, rather than as direct questions requiring an answer. Please feel free to address them or not, as you see fit, in your response. Try and limit your response to under 3500 words.

• If we were to design a legal aid system afresh, what would be its key features and what would be your red lines?

• How can our courts and advice systems better serve the end user? How we can better tailor the system around the client's journey?

• What minimum requirements to legal advice and assistance should the State provide? Should it be a minimum amount? Should it focus on specific problems or areas of law – and, if so, which ones?

• Do you have any thoughts on alternative savings/ revenue raising schemes that could help provide sources of funding?

• What do you think of the idea of devolving aspects of legal aid and what would be the best way of doing so?

• What would you do to make a career in legal aid more attractive to young lawyers without increasing spending substantially?

• How can we best spread public information about legal rights?

• What international examples should the Commission look at?

• How can we encourage a more integrated approach to solving people's problems (whether at the state, local or individual level)?

• How can the state/local authorities best encourage people away from litigation?

• What role, if any, do you think legal insurance can play in a new system?

• What role do you think new technologies should play

• If technology is going to be used for providing legal advice, how will it be possible to ensure that economic face-to-face advice will also be available for those who need it?

• If technology is going to be used for creating an online court, what face-to-face help will people need before they can access it?

• Do you have a view as to whether personal injury law should be brought back into scope?

---

[4] Se *Report of the Committee on Immigration Appeals,* August 1967, Cmnd. 3387 and *Asifa Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443.

General

We urge the review to guard against the following traps into which reviews of legal aid all too often all.

A failure to look at whether levels of expenditure are efficient

Insofar as the tenor of the questions is "how do we do more with less/the same?" we consider that the wrong question is being asked. 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. Legal aid is a potentially cost effective way of solving problems and it has been cut to a level where it cannot fulfil its functions effectively. What is being spent on legal aid is not being spent in an efficient manner. For example, in the light of the legal aid cuts in England and Wales

- Many people are doing a greater proportion of private work to legal aid work. A number of law centres and other not for profits have changed their constitutions to take on private clients. For the most part private work will be in immigration, legal aid work in asylum or in specialist areas of immigration (trafficking, national security, domestic violence) less likely to be done as part of private practice. Thus expertise gained doing private cases is less likely to inform legal aid work than was the case when general immigration was within the scope of legal aid.
- Some lawyers have focused more of their practice on judicial review.
- Some lawyers 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. Similarly a case may be opened for a matter that would previously have been dealt with under a drop in advice session.
- 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.
- Lawyers' behaviour is also affected by uncertainty and a high level of change, which makes medium to long term planning for a sustainable business difficult if not impossible.

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

Focus on "right first time" rather than what to do if things go wrong

There is much talk of the need to ensure that decisions are "right first time". All too often this is a distraction from considering questions of access to justice as it leads the questioner far into other policy areas. Questions of access to justice have as their focus what happens when things go wrong. It is the equivalent of saying that approaches to the global refugee crisis should focus solely on brokering peace, without regard to the needs of refugees.

The question of case for "right first time" is pertinent in the area of legal advice. A prompt intervention to tell a person that they do not have a case, or that the challenge they should

bring is a different one to the one they envisaged may save considerable distress and cost. In this respect it is important to distinguish advice and representation. Cuts to second tier advice services, and funding for drop in centres at law centres have hit at some of the most effective parts of the legal aid system.

Confusing the roles of advice and representation

There are many innovative (and traditional) ways in which people can be given information about their rights in general. The challenge is always to help them identify which sources of information are reliable and credible. Generic advice takes a person only so far. Those who identify that something has gone wrong then need advice based on the specific facts of their individual case. Where that advice identifies a legal challenge the question is then whether the person can enforce their rights. The Legal Aid Agency has focused on "acts of assistance" without identifying whether those acts of assistance have resolved a person's problems.

Assumptions that an inquisitorial system is the answer

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.[5]

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. You cannot graft an inquisitorial approach by a judge onto an adversarial system.

This is not all about legal aid

Cuts to legal aid for immigration cases and attempts to respond to them have brought to the attention of legal representatives formerly specialising in immigration law the swathe of people who are not eligible for legal aid because they do not meet means tests but who can nonetheless not afford court and home office fees, disbursements or very much legal representation.

The current fee remission regime is difficult to navigate. It relies on letters and facsimiles rather than electronic communication. The test for fee remission in the Immigration and Asylum Chamber is one of "exceptional circumstances" not just financial considerations. The "exceptional circumstances" test is opaque to the unrepresented. All too often a request for fee

[5] 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).

remission is met with a repeated demand for payment with no acknowledgement of the case put forward.

Fees create cash flow problems for those who may be eligible for full or partial fee remission but who are required to prove their income and necessary outgoings in considerable detail to establish their disposable monthly income.

It is essential to look at systems of fees and of disbursements in terms of their effect on persons not eligible for legal aid, whatever legal aid system is adopted.

Look at Scotland

In Scotland there is not a system of exclusive contracting. Those who are on the books of the Scottish Legal Aid Board may take as many or as few cases as required. There is not a fixed fee system. Levels of eligibility for legal aid are very much higher, although recipients may pay a contribution. Even where the contribution is 100%, this helps to manage cash flow and also provides protection against liability for the other side's costs, a considerable deterrent to litigating. We do not by any means suggest that the system in Scotland is perfect but we recommend that the Commission study the system in Scotland and the extent to which what each pound of legal aid spent buys more in Scotland than it buys in England and Wales and avoids the perverse incentives built into the system in England and Wales.

Rights of redress beyond the department

The 'Wilson Committee' said in 1967:

> *…"it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal'.*

A right of appeal against a range of immigration decisions was created by the Immigration Act 1971, following the recommendations of the *Report of the Committee on Immigration Appeals*[6]. The Committee said:

> *…however well administered the present [immigration] control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal…The safeguards provided by [a procedure requiring a clear statement of the administration's case, an opportunity for the person affected to put his case in opposition and support it with evidence, and a decision by an authority independent of the Department interested in the matter] serve not only to check any possible abuse of executive power but also to give a private individual a sense of protection against oppression and injustice, and of confidence in his dealings with the administration…themselves of great value.*

In *Asifa Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443 the then Lady Justice Hale said of the right of appeal to the Immigration Appeal Tribunal that:

[6] August 1967, Cmnd. 3387

In disputes between citizen and state [tribunals] are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review.

The Joint Committee on Human Rights, in its legislative scrutiny report on the bill which became the Immigration Act 2014, HL Paper 102, HC 395, stated "…limiting rights of appeal to the extent that they are restricted in the Bill constitutes a serious threat to the practical ability to access the legal system to challenge unlawful immigration and asylum decisions" citing the broader context, including the loss of legal aid (paragraph 38). It has expressed the view that the Tribunal, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new power on appeal (paragraph 46).

Equal access to Justice

The Supreme Court has identified in *R(Public Law Project) v Lord Chancellor* that the proposed residence test for legal aid is ultra vires the purportedly enabling statute, the Legal Aid Sentencing and Punishment of Offenders Act 2012 because it proposed to award legal aid on a basis that had nothing to do with need or an order of priority of need. The same can be said of the removal of legal aid from immigration cases more generally. By the all tests the Ministry of Justice said[7] it used to determine which cases would get legal aid under the Act, immigration cases should have continued to be funded.

Legal aid should be made available for refugee family reunion and statelessness cases which are protection cases just as asylum cases are protected cases.

Persons recognised as stateless should have the same access to legal aid as refugees. 1954 UN Convention on the Status of Stateless Persons contains exactly the same provisions as to access to the courts and free legal assistance as the 1951 UN Convention Relating to the Status of Refugees. 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.

Legal aid should be made available for immigration cases turning on rights to private and family life. Many of these cases are of persons who have no current leave, no permission to work and no recourse to public funds. Many are detained and/or destitute and in many cases will be facing imminent removal. Either they will be unable to meet disbursements, including court fees and to pay for legal representation and will be denied access to justice, or they will be forced into unlawful and potentially exploitative work to pay. Finding the funds to pay is complicated by the urgency of these cases.

"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.

[7] In its consultation *Transforming legal aid*

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."[8]

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 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.

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. 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, are compounded by the Home Office's regularly producing decisions which are wrong and many of which are inconsistent with the decided case law. ILPA submitted detailed evidence on these matters to the Justice Select Committee on 14 May 2014[9]

[8] "*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

[9] See http://www.ilpa.org.uk/resource/26355/evidence-submitted-to-the-justice-select-committee-on-legal-aid-14-may-2014 (accessed 29 September 2014).

Compensation claims in the immigration context, for example against public authorities for unlawful detention or assault/injury, raise questions 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. These are cases about misfeasance in public office assault or false imprisonment and challenging inhumane and degrading treatment,[10] can continue. They are not primarily about pecuniary matters and legal aid should be available for them.

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.[11] The courts have highlighted that in such cases Article 3 of the European Convention on Human Rights may be engaged.[12] Legal aid should be available for asylum support appeals as well as these cases at first instance.

In *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840 the procedure rules for appeals against the detained fast track were found to be systemically unfair and unjust. The Court held that "the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases". Appeal after appeal had gone through that process. An independent committee had made the rules that governed it. Immigration judges had presided over hearings, at which many appellants had been represented, within it. Would the system have been allowed to continue for so long had it involved a group other than asylum seekers, widely portrayed in political discourse, reflected in the media, as making false claims?

The role of racism and xenophobia in undermining respect for the rule of law and access to justice cannot be underestimated.

The Ministry of Justice's report *Research into the effects of the Legal Aid, Sentencing and Punishment of Offenders Act (2012) on onward immigration appeals* by Anita Krishnamurthy and Karen Moreton, part of the Ministry of Justice Analytical series, published on 3 August 2015 fails accurately to identify the effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in immigration. In its letter to the Minister protesting the poor quality of this report, ILPA said:

> ***I****LPA had already protested during the research at the very small number and narrow range of persons selected for interview, expressing particular concern at the lack of representation of those outside London and at the quality of the interview with the ILPA Legal Director, where the interviewer appeared rushed and disinterested. The final report suggests that those concerns were well-founded.*
>
> *The dominant trophe in the report is apophasis: while claiming not to draw conclusions as to the effect of the Legal Aid Sentencing and Punishment of Offenders Act 2012 from a cohort of cases, the majority of which are not proceeding under the funding regime established by that Act, the document repeatedly does so. …*

[10] See, for example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin); *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (5 August 2011; *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012); *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012); and *R(MD) V Secretary of State for the Home Department* [2014] EWHC 2249 (Admin).

[11] Immigration and Asylum Act 1999, section 95.

[12] See for example the *Limbuela* case [2005] UKHL 66.

The approach taken is all the more disappointing given that the Legal Aid Agency collects codes which, based on the detailed information that lawyers provide, should allow the cohorts to be distinguished and permit the disaggregation of data into cases funded under the Act and cases whose funding pre dates the Act. It was possible to have set out the number of cases funded the old and new regimes in the sample studied

Polluter pays

Tackling the behaviour of Government departments can result in savings in all cases, not only in those cases funded by legal aid. The savings, which would benefit individuals and government, could be huge. ILPA urges consideration of 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;
- Its 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 (with a Bill currently before parliament) 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.

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.[13] Published policies are frequently withdrawn from official websites with long periods during which there is no guidance. This leaves applicants ill-placed to understand and assert their rights and entitlements.

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.

[13] 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.

The Home Office's conduct of litigation can 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[14]

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. See *Kadyamarunga v SSSHD* [2014] EWHC 301 (Admin) (14 February 2014).

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.

It is too frequently the case that 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.

What the judges say

*"**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

***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*

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

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.

(Emphasis added)

Further information

For further information on the matters addressed in this paper please see the following papers by ILPA (hyperlinks or links to website given)

ILPA Briefing for House of Lords Debate on the Immigration and Nationality (Fees) Order 2016, 10 February 2016 and ILPA Briefing for House of Commons Consideration of the Immigration and Nationality (Fees) Order 2016, 2 February 2016

ILPA response to the Justice Select Committee inquiry into courts and tribunals fees and charges, 30 September 2015

ILPA response to The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals, 18 September 2015

ILPA response to Ministry of Justice consultation: Reform of Judicial Review, Proposals for the provision and use of financial information, 15 September 2015

ILPA response to Women's Resource Centre call for evidence on the Domestic Violence evidence requirements under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 following the report of the Committee on the Convention on the Elimination of Discrimination against Women, 14 August 2015
ILPA response to Legal Aid Agency CW3A/B/C checklist for extensions to the upper cost limits in immigration and asylum controlled work cases, 25 February 2015

ILPA response to the Legal Aid Agency Ministry of Justice consultation on the publication of Legal Aid Statistics in England and Wales, 20 February 2015

ILPA to Department of Justice Northern Ireland, response to consultation on the scope of civil legal aid 30 January 2015

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