# ILPA RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION: *PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES*

## INTRODUCTION

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-governmental organisations are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, and other, advisory groups. ILPA is a member of the Civil Contracts Consultative Group set up following the litigation between the Law Society and the Legal Services Commission and the Legal Services Commission Immigration Representative Bodies group. ILPA has attended Ministry of Justice meetings on the subject of legal aid and has also provided evidence to the Justice Committee and its predecessors on the question of legal aid as it affects immigration and asylum, including asylum support, law.

ILPA submitted an initial response to this consultation in December 2010. This document incorporates and is designed to replace that initial response. It is supported by the following Annexes:

- **Annexe 1 Case examples**
- **Annexe 2 Compendium of case law on Article 8 of the European Convention on Human Rights**
- **Annexe Table of remuneration rates in legal aid cases.**

ILPA has answered those questions on which members have specific expertise or concerns, and has responded in detail about the effects that the proposals could have on people needing legal advice and representation on immigration, asylum, nationality or asylum support. Much of what we have to say also applies to people needing advice and representation in other areas of law. As well as responding to the questions, ILPA also suggests means by which the Government could make savings equal to, or in excess of, those identified as resulting from cuts to legal aid in immigration and asylum support cases, and areas in which ILPA identifies that the assumptions informing the proposal are flawed and that implementation of the proposals will lead to perverse or unintended consequences.

ILPA is a member of the Refugee Children's Consortium and has contributed to the Consortium's response.

ILPA opposes removing immigration, and the many other areas of social welfare law, from the scope of legal aid. It is both wrong in principle to remove help from those who need it most and will be ineffective in practice in saving money. Early and competent legal advice on problems saves money later, in reducing the costs of the problems that ensue without it. Citizens Advice has calculated[1] that for every £1 of legal aid expenditure on:

- Housing advice, the State potentially saves £2.34;
- Debt advice, the State potentially saves £2.98;
- Benefits advice, the State potentially saves £8.80; and
- Employment advice, the State potentially saves £7.13.

Thus even if these proposals would make short-term savings in the legal aid budget, these may be negated by increased public costs elsewhere. The Ministry of Justice impact assessments accept that the loss of legal aid will mean reduced access to justice, so that disputes are resolved significantly less fairly, imposing wider social and economic costs to society in general, with consequences of reduced social cohesion, increased criminality, reduced efficiency of other Government services.[2] These are not prices worth paying for the financial savings envisaged.

**Scope**

**Question 1: Do you agree with the proposal to retain the types of case and proceedings listed in paragraphs 4.37 to 4.144 of the consultation document within the scope of the civil and family legal aid scheme?**

**Yes.**

ILPA supports the retention of all these areas of law. We agree that asylum cases should remain in scope for all the reasons given in paragraphs 4.38 to 4.42 of the consultation paper and consider the case for retaining funding for asylum is overwhelming. We are also grateful for the Ministry of Justice's confirmation, in response to ILPA's request for clarification on this point, that asylum claims that rely on Article 3 of the European Convention on Human Rights will remain in scope.[3] We consider that all claims that engage Article 3 should remain in scope, and this is one ground for our opposition to the removal of asylum support claims from scope, as set out in response to questions 3 and 6.

ILPA considers that refugee family reunion cases should be considered as asylum matters and we were disappointed by the Ministry of Justice's indication to us that:

> *'...we propose that only immigration detention cases will remain in scope. Refugee family reunion cases are classified for legal aid purposes as immigration, rather than asylum, matters. Therefore refugee family reunion cases would not be in scope.'*[4]

We urge that this be reconsidered, and discuss it in more detail in our response to question 6. Examples of such cases are included in Annexe 1, from which we take the following example, which illustrates how such cases involve matters that are similar to those raised by asylum cases, because family members may be living in situations of great danger:

> *C was seeking family reunion, outside the immigration rules, for his sister. C was a recognised refugee but there is no entitlement to family reunion for siblings. C had arrived in the UK as a minor. C had been kidnapped in his country of origin where his whole family had been killed with the exception of his*

[1] *Towards a Business Case for Legal Aid* – Citizens Advice (2010).
[2] *Legal Aid Reform: Scope Changes,* Impact Assessment MOJ028 15 November 2010, at paragraph 35.
[3] Email from Michael Tant, Ministry of Justice, to ILPA, 14 January 2011.
[4] *Ibid.*

*younger sister. She was also kidnapped, and he had not heard from her since the day that they were both taken. Both client and sister had been taken from their home town to the traditional family home, where they were kept following kidnapping.*

*Following recognition as a refugee, C had made attempts to locate his sister through the Red Cross, but without success. One consequence of C's escape and his search for his sister was that an adult who had helped him was murdered. C managed to get in touch with another person in his home country who, after a year of searching found his sister. She had been kept as a sexual slave for five years at this point. The person who found her assisted her escape and she stayed in hiding. It had been held in the appeal that the authorities in the country were complicit in allowing the persecutors to operate freely without hindrance from the law. The representatives collated a lot of evidence of attempts made to locate her, evidence of C's original asylum claim, and a statement as well as representations on family life. They obtained evidence that there were people willing to support the sister. The initial hurdle was that C's sister was not allowed to make the application because she did not have a passport. This was resolved. A couple of months later the UK consular authority said that they would not accept the application without a fee. The representatives pressed them to consider exercising their discretion to waive the fee. Finally this was referred to the UK. But still it was refused. Further representations and further complaints were made. Eventually the case was referred to the UK for consideration outside the immigration rules.*

*After a further delay, Entry Clearance was granted. After a variety of problems with travel, the applicant eventually made it to the UK and she is settling in, with assistance from friends and counselling. Legal Aid costs were approaching £1000, at private rates, much more. Without Legal Aid, she would have remained in her home country.*

Claims against public authorities remain in scope, (paragraphs 4.43 – 4.55 of the consultation paper) which is right for the reasons given. Those reasons apply equally to other areas which are to be taken out of scope. Individuals need to be able to hold the Government and local authorities to account, particularly where there are issues of abuse of power or significant breaches of human rights. Those considerations apply also in immigration cases, so the proposal to remove those from funding is inconsistent.

ILPA welcomes the retention of legal aid for domestic violence cases (paragraphs 4.64 – 4.68 of the consultation paper) but urges that the definition of domestic violence be brought in line with that used by other Government departments[5]. We urge that all cases where it is relevant that a person has been the victim of domestic violence should remain in scope.

The Ministry of Justice responded to our enquiry about immigration cases based on domestic violence by stating *'immigration claims that rely on the Domestic Violence immigration rule would not be in scope.'*[6]

There are immigration rules specifically designed to allow those in the UK as the spouse/partner of a person settled here, whose relationships have broken down because of domestic violence to apply to remain in the UK, in an effort to ensure that people do not stay in abusive relationships because they fear removal.[7] The UK Border Agency has recognised the particular difficulties experienced by women

[5] E.g. the definition used in the Home Office: *"any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality."* See http://rds.homeoffice.gov.uk/rds/violencewomen.html

[6] Email from Michael Tant, Ministry of Justice to ILPA, 14 January 2011.

[7] HC 395 as amended, rules 289A to 289C.

in this position by setting up a scheme, the Sojourner Project,[8] to provide financial support for an eight-week period to women applying for permission to remain under that rule, who are not normally entitled to claim to welfare benefits and therefore cannot access refuge accommodation. The UK Border Agency is committed to continuing that scheme beyond the current financial year. Even under current arrangements it has been difficult for those working with domestic violence survivors to find legal advisors or solicitors who can take on the case at short notice, and prepare the documentation to send to the UK Border Agency within the time permitted.

Immigration clients who have been victims of domestic violence find themselves in extremely difficult circumstances. As with other victims of domestic violence, their lives (and often those of children) are turned upside down by their experiences and the need often to abandon their lives and move into hiding or away to safety. Their abusive spouse or family may have controlled their lives (including their immigration status) until that point. They require good legal advice and assistance to enable them to take the next step in resolving their problems. Many issues such as benefit entitlement, re-housing, contact and residence arrangements for children are effectively put on hold until the immigration matter is resolved. Some will have become overstayers. There will be issues over the proof of the abuse they have suffered and members have experience of many applications wrongly refused (often wrongly) by the UK Border Agency because applicants do not have "adequate" documentation of the abuse. Providing time-limited financial support, but removing legal aid, from people in this situation is incoherent and inefficient. So too is funding legal assistance to obtain an injunction (which remains in scope) but not to enable them to obtain an immigration status which is not dependant on their spouse/partner.

Examples of such cases are set out in Annexe 1 from which we extract the following:

> *N was 16 when her British husband made arrangements to marry her with her parent's consent in N's country of residence. He completed all the relevant visa forms, and claimed that N was over 18. During the period spent waiting for the application to be determined, and prior to entry to the UK, N was sexually and physically abused by her husband. Soon after her entry to the UK, he became even more possessive and violent. N tried to leave her violent husband, but after finding herself destitute and having no-one to turn to, she returned to him on two separate occasions. N's husband kept all immigration status documents and refused to take N to see a doctor. He refused to allow N to speak to her family, and refused to allow her to attend English classes. At the third attempt in leaving her husband, N fled to a different city. N was then referred to a legal aid immigration solicitor for advice and assistance. Given that N had no documents, no proof of living with her husband and that he was violent, her representatives had to spend many hours in getting evidence of N's circumstances, including getting a copy of her visa application from the UK Border Agency files and an expert's assessment on N's experience of domestic abuse. N was granted Indefinite Leave to Remain.*

Other victims of domestic violence who are in the UK with another status (such as the spouse/partner of someone with limited leave or a person exercising European free movement rights) must also be re-considered for funding. While they do not fall within the immigration rule that exists to protect survivors of domestic violence, they may face many of the same problems as those who do. They too need legal advice and representation if they are not to face great injustice within the immigration system as a result of the abuse they have faced. Unchallenged decisions to remove adult victims of domestic violence could result in the separation of parent and child.

Examples of such cases are set out in Annexe 1 from which we extract the following:

> *A is a citizen of an Eastern Europe country which recently joined the European Union. She has resided in the UK since 2000, initially as a visitor, and then under the Association Agreement between the EU*

[8] See http://www.eaves4women.co.uk/Sojourner/Sojourner.php

*and her country. She was here on the basis of her self-employment in the UK until she married her British husband and applied for a spouse visa, which was granted for the standard two year probationary period until 2007. There were instances of domestic violence during the course of the probationary period, although she remained living with her husband after this. During the probationary period they moved away from the city where they lived to a more rural area where her husband's family lived. She was isolated from her support networks. She had two children with her husband, and he was also abusive towards them.*

*Her husband effectively caused her to overstay her visa by telling her that there was no requirement for her to apply to extend it before it expired in 2007. She had no reason to doubt this at the time.*

*It was only late in 2009 that she discovered that she did not have the right to reside in the UK solely on account of her nationality. There are no solicitors or organisations dealing with immigration law in the part of the UK where she lives. The close immigration law provider is 75 miles away. A sought help and received limited information from a local Citizen's Advice Bureau.*

*A was subjected to further violence resulting in criminal charges against her husband, and managed to obtain support to travel the 75 miles to get legal advice. The lawyers obtained evidence to support an application on the basis of domestic violence. The application was some three years late (it is designed for a person who has current leave). The lawyers also put forward a case under Article 8 of the European Convention on Human Rights, long residence and the rights of her two British children. The letter of representations was 11 pages long, and 63 separate pieces of evidence were submitted. The Home Office considered the application and granted indefinite leave to remain within four weeks. The lawyer observes "...if she had been able to obtain early legal advice...closer to her home she could probably have escaped her abusive relationship a lot sooner."*

We ask the Ministry of Justice to reconsider the proposals.

ILPA welcomes the retention of immigration detention within scope (paragraphs 4.82 - 4.85 of the consultation paper). Legal representation must be made available where individuals are deprived of their liberty. However, a bail application, or arguing a case for temporary release, cannot be most effectively pursued when it is not possible to prepare and present the substance of the person's immigration case, which is the basis on which he or she might qualify for leave to remain. At its most basic level, a person can be held in immigration detention pending removal. If it is not possible to argue whether the person may lawfully be removed, then any application for bail or temporary will be seriously impeded. We set out below more detailed reasons supporting the retention of immigration within scope.

ILPA agrees that funding for public law (paragraphs 4.95 – 4.99 of the consultation paper) must remain within scope. We concur that funding is justified on the basis that "they enable individual citizens to check the exercise of executive power by appeal to the judiciary" (paragraph 4.99 of the consultation paper). We observe that the same consideration applies within the immigration and asylum support categories where the challenge is to the Government and where sometimes the only remedy is judicial review. It is not clear how an individual is to know that they have a case for judicial review within the immigration context unless they have access to immigration advice in the first instance. All the reasons given for retaining public law in scope are reasons for retaining immigration in scope. The seriousness of such cases both for the individuals concerned and for public confidence in the administration of public policy and justice can be seen in the comments of the Court of Appeal in *Anwar & Anor v SSHD* [2010] EWCA Civ 1275. Two students had their leave curtailed on the ground that they had used deception in circumstances where the college at which they had been granted leave in order to study had been removed from the register of approved colleges:

*6. Neither Ms Pengeyo nor Mr Anwar received anything remotely resembling a hearing, or even notice of what was contemplated, from the Home Office. Each was presented out of the blue with a decision*

*– as it turned out, a wholly unfounded one - that they had been guilty of obtaining leave by deception (a criminal offence: Immigration Act 1971, s. 24A) and that they were to leave forthwith the country where they were lawfully and at considerable expense pursuing their studies.*

*...*

*24. In the judicial review proceedings brought by Ms Pengeyo, albeit now likely to be abandoned, a challenge was made to the decision of the Home Secretary to use the deception route, enabling her effectively to stifle any appeal, rather than the variation route carrying a right of in-country appeal. Judge Thornton QC, rightly in my judgment, granted permission to argue this. Had it been sought, permission would also have properly been granted to argue that the election of the Home Office, having used the deception route, to take the out-of-country point in order to stifle an appeal was a serious abuse of power. Once it is established that the point is good only when taken, to take it in order to prevent the exposure of a shameful decision – the effective criminalising and enforced removal of an innocent person without either worthwhile evidence or the opportunity to answer – is without doubt justifiable by way of judicial review.*

*25. There is a further concern which it has not been necessary to address in argument. A decision taken in defiance of basic standards of fairness and morality may be impeached as a nullity... Although we have not been called on to determine the question on the instant appeals, it is right to flag up a concern which all the members of the court share that, on the evidence before us, the powers of one of the great offices of state appear to have been so misused as to rob the successive administrative decisions of legal authority. We wish this to be brought to the Home Secretary's attention."*

**Question 2: Do you agree with the proposal to make changes to court powers in ancillary relief cases to enable to Court to make interim lump sum orders against a party who has the means to fund the cost of representation for the other party?**

This is not within ILPA's area of expertise.

**Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons;**

Answered together with:

**Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings**

ILPA does not agree with the proposals to remove these areas from scope.

We limit the detail of this response to the questions of the removal of immigration and of asylum support cases from scope, although the remarks below are also pertinent to cases where a person's immigration status is a relevant matter (e.g. welfare benefits cases). Many of the points we make, in particular about the benefit of early, competent legal advice, are also relevant to other areas of law, such as debt or housing matters.

We have set out above our detailed reasons why cases involving domestic violence must remain within scope.

We do not agree that the reasons given in the consultation paper for excluding areas from scope can credibly be applied to immigration cases.

The consultation paper states:

> *"4.12 In reaching our view about which types of issue and proceeding should continue to justify legal aid, we have taken into account the importance of the issue, the litigant's ability to present their own case (including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law), the availability of alternative sources of funding and the availability of alternative routes to resolving the issue. We have also taken into account our domestic, European and international legal obligations."*

Proper consideration of these factors would lead to the conclusion that legal aid for immigration and for asylum support cases should remain within scope.

***'the importance of the issue'***

The consultation paper states:

> *"4.19 ...there is a range of other cases which can very often result from a litigant's own decisions in their personal life, for example, immigration cases resulting from decisions about living, studying or working in the United Kingdom. Where the issue is one which arises from the litigant's own personal choices, we are less likely to consider that these cases concern issues of the highest importance."*
> ..
> *"4.201 We recognise that some of these cases may be of importance, in that they raise issues of family or private life, although individuals are not in any immediate risk as a consequence of the decision in their case. However, these cases do not raise issues of such fundamental importance as asylum applications, where the issue at stake may be, literally, a matter of life and death. In contrast to those cases, an individual involved in non-detention immigration cases will usually have made a free and personal choice to come to or remain in the United Kingdom, for example, where they wish to visit a family member in the United Kingdom, or to fulfil their desire to work or study here. We therefore consider that routine public funding is less likely to be justified. "*

ILPA considers that it is necessary for the Ministry of Justice to revisit these statements, as in ILPA's experience they are not applicable to the vast majority of immigration and asylum support cases that are funded under legal aid.

Those who have the means to make lifestyle choices in relation to immigration are unlikely to be eligible for legal aid (the more so under the proposed changes to the financial eligibility criteria). But many immigration cases do not involve lifestyle choices by the financially comfortable. Many cases involving whether a person can work in the UK are already excluded from the scope of legal aid,[9] and 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,[10] the applicant will not be eligible for legal aid.

[9] Access to Justice Act 1999, Schedule 2.
[10] HC 395, *passim*. For the definition of public funds see HC 395 paragraph 6ff, as amended.

In practice, the Legal Services Commission has for several years now required the means of the UK-based sponsor to be assessed in certain cases. Where the applicant is a spouse or civil partner then the means of both the applicant and the sponsor will be assessed. In family applications the level of maintenance required to be shown is equivalent to income support, but there are many other applications under the immigration rules (including some in which Article 8 of the European Convention on Human Rights could be in issue) where higher levels of maintenance are required to be evidenced and so applicants will not qualify for legal aid even where the case remains within scope.

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 in Annexe 1. The compendium of Article 8 cases in Annexe 2 contains many more examples.

Asylum support cases concern whether a person is entitled to a roof over their head and something to eat or will be left destitute, homeless and hungry. This is the specific subject of asylum support decisions where the test of eligibility for support is imminent destitution.[11] Given this definition, the reasoning in the consultation paper for providing legal aid where a person is at risk of homelessness, apply equally in asylum support cases. The courts have highlighted that in such cases Article 3 of the European Convention on Human Rights may be engaged.[12]

We have set out examples in Annexe 1, 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*

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

*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 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.*

Paragraph 4.101 of the consultation paper states (with regard to public law children family proceedings):

> *'...we recognize that families must have a practical means of taking part in proceedings brought by public authorities that affect the integrity of the family unit'.*

In the family cases in question the prospect is of families being separated through children being taken into care. In such cases the family members remain in the same country, under the same legal jurisdiction and the overriding concern will be the best interests of the children and the aim to preserve family as far as possible consistent with that.

However that statement can apply directly to immigration "family" cases. In those cases what is likely to be at stake is 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.

Those families too "*must have a practical means of taking part in proceedings brought by public authorities*" and where their means are such that they would be financially eligible for legal aid that practical means will come only through legal aid funding. The Supreme Court has recently 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 aims of the proposal and the criteria.

Examples of cases where families face separation are set out in Annexe 1. Annexe 2 provides a compendium of reported cases from the higher courts on Article 8 of the European Convention on Human Rights.

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 as a minimum 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.

Legal aid can assist individuals in obtaining redress against official mistakes, incompetence or misconduct. The import of those mistakes will depend on the powers of the Government departments challenged. In immigration, the UK Border Agency has very extensive powers: for example to refuse entry, forcibly to remove, not to mention powers of entry, search and detention.

Where rights to family life, affecting the applicant and family members, including those British and settled, are at issue, the interests of justice require that a proper standard of publicly-funded advice and representation. The consequences of wrong decisions in these areas can be hugely significant, long lasting or sometime irremediable. These are not *"matters of life and death"* (paragraph 4.201) but their importance is perhaps secondary only to such matters and on the basis of criteria set out for continuing funding the case for keeping these cases within scope is overwhelming.

***'...the litigant's ability to present their own case including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law'***

We disagree with the assessment of these criteria and suggest that proper assessment points to the need for immigration and asylum support cases to be retained within scope.

The law in this area 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 UK Border Agency'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; by the Home Office's calculations some 37% of appeals were allowed in 2009, the last year for which statistics are available.[13] This figure is derived examining all appeals that were allowed, dismissed or withdrawn; it does not identify those cases withdrawn by the UK Border Agency because the Agency has identified that the initial decision was wrong. The figures break down to show that in 2009 28% of asylum appeals were allowed; 36% of entry clearance appeals were allowed and 47% of 'other non-asylum' appeals (i.e. appeals in in-country immigration cases) were allowed. The Chief Inspector of the UK Border Agency in his report *An Inspection of Entry Clearance in Abu Dhabi and Islamabad,* of an inspection carried out from January to May 2010,[14] observes 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 the UK Border Agency 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 UK Border Agency'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.[15] 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.

---

[13]Home Office Research and Statistics Department *Control of Immigration; Statistics 2009* (the last year for which figures are available) see http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1510.pdf.

[14] 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

[15] 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 *Diego Andres Aguilar Quila v SSHD* [2010] EWCA Civ 1482, all of which have necessitated /will necessitate changes to the law and/or immigration rules.

It is proposed that those detained will get assistance to apply for bail but not with their substantive immigration case. 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. Immigration detainees therefore have a particularly strong case to have funding on the basis of this criterion. Furthermore, as discussed above, the strength of the substantive application may be a key factor in a bail application.

***'...the venue before which the case is heard'***

The tribunals may have been designed to be simple to navigate (paragraph 4.203), but they are not simple to navigate.

In the influential study, *Tribunals for Diverse Users*,[16] 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"*

There is no legal aid for hearings in asylum support cases and the (then) Asylum Support Tribunal has expressed concern at the effect of this,[17] as has the Joint Committee on Human Rights.[18]

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.[19]*

The then Government rejected the recommendation, on the grounds that 'providing public funding for representation at asylum support appeals would be disproportionate to the complexity of the issues and evidence under consideration' but also because of the existence of legal help for preparation of the case:

---

[16] Genn, H., Lever, B. and Gray, L., DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice), January 2006.

[17] See Asylum Support Adjudicators Annual Report for 2000-01. See also Asylum Support Adjudicators Annual Report 2004-05.

[18] *The Treatment of Asylum Seekers,* Joint Committee on Human Rights, Tenth Report of Session 2006-07, HL 81-1, HC 60-1.

[19] *Op. cit.*, at paragraph 99.

*'...funding for general legal advice (falling short of advocacy) is available to those who qualify financially, under the Legal Help scheme. This would potentially include appellants before the AST. The scheme allows legal aid solicitors to advise clients on tribunal procedures and can include the provision of written or oral advice, obtaining counsel's opinion if appropriate, and the preparation of a case to present at a tribunal. In addition, the Lord Chancellor has the power, on receipt of a recommendation from the Legal Services Commission (LSC), to authorise "exceptional funding" for representation under the Access to Justice Act 1999, s.6(8)(b) in those few cases where representation may be essential for a fair hearing, and where no other sources of help can be found."*[20]

**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:

*"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,[21] 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[22] 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 (see below).

[20] Government's response to the Tenth Report, Joint Committee on Human Rights, Seventeenth report of session 2006-7, HL 134 / HC 790, 5 July 2007.
[21] http://news.bbc.co.uk/today/hi/today/newsid_9197000/9197123.stm
[22] See the discussion of appeal statistics in the response to questions 3 and 6 above.

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 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."*[23]

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.[24] 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.

ILPA suggests that 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.[25]

The UK Border Agency's conduct of litigation can also create challenges with which an unrepresented appellant is ill-equipped to deal.

UK Border Agency 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

[23] 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

[24] *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

[25] See the Asylum and Immigration Tribunal Procedure Rules (SI 2005/230 (L.1) as amended) and the Upper Tribunal (Tribunal Procedure) Rules (SI 2008/2698 (L.15) as amended).

points, to be withdrawn without notice. New evidence is often served by the UK Border Agency on the day of the hearing. These practices can lead to adjournments if justice is to be served. ILPA members have been present at Tribunal hearings in which immigration judges have expressed feelings ranging from disappointment to utter despair that the UK Border Agency has not seen fit to provide a representative. The UK Border Agency statistics show that they did not provide a representative at 36% of immigration appeals in 2009.[26]

The lack of representation of the UK Border Agency adversely affects the Tribunals' ability to deal with a matter justly. 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.[27] Overstepping the mark will result in onward appeals, and decrease respect for the immigration judiciary.

ILPA has seen a number of cases where, despite not having sent a representative to the hearing, the UK Border Agency 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 are five days in which to grapple with the procedures, consider the determination and draft grounds of appeal in an appropriate case.[28] By the same token an immigration appellant whose appeal is allowed but where the UK Border Agency 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' is provided for in the Procedure Rules.[29] This 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

[26]House of Commons *Hansard,* 26 July 2010, col. 654W

[27] 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).
[28] The Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230 (L.1), as amended.
[29] The Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698 as amended.

become quite technical and involves further tight procedural timeframes. UK Border Agency 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. These are not *"designed to be simple to navigate"* but would be removed from scope under the proposals. ILPA urges in particular that funding (subject to means and merits tests) be maintained for all cases in the Upper Tier Tribunal, Court of Appeal and Supreme Court.

While maintaining a position of all higher appeals in particular remaining within scope, ILPA has urged the Ministry of Justice that as a minimum, where an appellant has been successful at one level of appeal but the UK Border Agency appeals to the next level, legal aid should be available for that further appeal.

The appellant in such a case has satisfied a Tribunal judge that the decision made against him/her was wrong; if the UK Border Agency 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 UK Border Agency is or purports to be advancing a point of law. We urge the Ministry of Justice to reconsider its view that *"where an area is out of scope, we propose that it remains out of scope even for appeal to a higher court (other than for judicial review). However, any out of scope case could apply for exceptional funding."*[30] We consider below the difficulties of establishing what 'exceptional' means; in the interests of justice, and of reducing the number of litigants in person, ILPA urges that in these instances as a minimum legal aid should be available (subject to the means and merits tests).

While a representative providing advice on legal aid must be satisfied of the merits of the appeal, an unrepresented appellant is under no such constraints. 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 complexity of the law'***

We do not agree that these cases *"do not generally involve complex legal issues"* (paragraph 4.202 of the consultation paper).

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. We have set these out in Annexe 2. The leading case was that of *Huang and Kashmiri* in the House of Lords in 2007[31] 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.[32] Recent confirmation of the substantive and procedural complexity has come with the judgments of the Court of Appeal in *Diego Andres Aguilar Quila v SSHD* [2010] EWCA Civ 1482 and of the Supreme Court in *ZH (Tanzania) v SSHD* [2011] UKSC 4. In *Quila,* Government lawyers advising the Minister on the policy of raising the marriage age were found by the Court of Appeal to have approved a policy that was not in accordance with Article 8. Two of the judges in the Court of Appeal praised the judgment given in the High Court by Mr Justice Burnett but ultimately concluded that his decision was wrong in law.

[30] Previously cited email from Michael Tant, Ministry of Justice, to ILPA, 14 January 2011.
[31] See [2007 ] UKHL 11
[32] *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

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 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 was taken by Ireland). The UK Border Agency's *Entry Clearance Guidance and Instructions* now state candidly:

> *The ECJ judgement on Metock in July 2008 prohibited Member States from having a general requirement for third country national spouses of EEA nationals to be lawfully resident in another EEA member state before they can benefit from a right to reside under the EU Free Movement of Persons Directive. Therefore, we can no longer apply the lawful residence requirement (which was based on the case of Akrich) or our own domestic legislation (the Immigration Rules) to family members seeking first admission to the EEA from outside the EEA.*[33]

Yet the UK has yet to amend its regulations, despite ILPA's consistently pressing it to do so.[34]

The arguments, that such cases do not generally involve complex issues or that applicant or potential applicant could be expected to understand their rights from such confusion, are entirely unconvincing.

***'the availability of alternative sources of funding'***

It is not realistic to expect the voluntary sector to take on responsibility for providing immigration advice and representation (and indeed the consultation paper does not suggest that there are alternative sources of funding available). 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.[35] If not, the advisor commits a criminal offence. Moreover, to give publicly funded immigration advice, advisors must be accredited on the Law Society's Immigration and Asylum Accreditation Scheme.

When ILPA raised this at a meeting on the proposals at the Ministry of Justice it appeared that it was not a matter that had been considered by the Ministry. 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 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.

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

[33] Entry Clearance Guidance and Instructions, ECN 2.5
[34] See, *inter alia,* ILPA's 30 September 2009 submission to the Joint Committee on Human Rights, reprinted in the Committee's *Enhancing Parliament's role in relation to human rights judgments* HL 85/HC 455, Session 2009-2010.
[35] Immigration and Asylum Act 1999, s 84

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.

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.

***'...the availability of alternative routes to resolving the issue'***

In contrast to other areas of civil legal aid advice, 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 UK Border Agency or by any other private agency; resolution can only be achieved through legally sound and effective representation to the UK Border Agency and the Tribunal.

***'We have also taken into account our domestic, European and international legal obligations'***

ILPA does not accept that the proposals meet even the minimal international legal obligations on the UK to provide legal assistance.

At the Child Trafficking Advice Line Advisory Group meeting at the Home Office in December 2010, the representative of the UK Border Agency present emphasised the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings that require the provision of legal aid.[36] In this regard we observe that the Convention also treats of the question of compensation, a matter relevant to proposals to cut legal aid for cases before the Criminal Injuries Compensation Authority, with which ILPA disagrees. We recall the following evidence submitted to the Home Affairs Committee:

> *"Case 1*
> *5.2 The first case involved an asylum claim by two Romanian sisters, MM and EM, who were trafficked into the UK as minors and who were subjected to years of sexual abuse, exploitation and violence at the hands of their trafficker and his accomplices. Once they escaped from their trafficker they were referred to the Poppy Project under whose care they remain to date. Having claimed asylum and having, over many months, assisted the police in their criminal investigations the two sisters gave chief prosecution evidence at Snaresbrook Crown Court which led to the successful conviction and sentence of the trafficker to 21 years imprisonment in November 2006. Despite the fact the sisters gave their evidence unshielded and without witness protection measures and their identities were disclosed during the trial proceedings (all leading to the Crown Court Judge to issue a note to the SSHD and the AIT that he was "in no doubt" as the serious safety risks that would befall the sisters on return*

[36] Council of Europe Treaty Series CETS No. 197

*to Romania), no apparent communication of the Judge's comments and the reality of such risks to the sisters took place between the Police (or the CPS) and the Home Office, which continued to refuse the sisters' claims for protection. Eventually, following a hearing at the AIT, the Home Office granted the sisters Humanitarian Protection in the UK. No doubt the length of the criminal investigation together with the trial proceedings and the intensification of the sister's fears, following the trafficker's conviction, as to the fate that might befall them at the hands of his criminal accomplices on return to Romania may have caused the sisters, in their unprotected position in the UK, lasting mental injury and damage.*

*5.3 Subsequently, in the summer of 2007, the sisters were the first successful trafficking survivors in the UK to be granted awards of compensation by the Criminal Injuries Compensation Authority (CICA) for the injuries they sustained as a result of the sexual abuse they suffered and for the loss of opportunity as enslaved victims of trafficking in the UK.*[37]

The UK has obligations relating to funding in these cases and the proposals must, as a minimum, be amended to reflect that.

We consider the approach taken in this paper may be in conflict with the EU Charter of Fundamental Rights of the European Union to the extent that it removes from scope most cases in which the individual is affected by European Union law. Debate continues over the effect of Protocol 30 to the Charter which contains opt-outs, *inter alia* for the UK[38] and the Ministry of Justice should be mindful of those debates. 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."*

For the reasons we have given we consider that the removal of immigration cases from scope will deny effective access to justice in many such cases.

**Question 4: Do you agree with the Government's proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including those under the ECHR) or where there is a significant wider public interest in funding Legal Representation for inquest cases?**

ILPA strongly supports the Government's abiding by its legal obligations and urges it to do so. That there must be a means of providing free legal representation where this is required by law is a given.

But, as described above, we do not consider that the general proposals recognise what is required to meet the UK's domestic and international obligations. As described above, 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. Under the proposals, this raises the spectre of individuals requiring advice and representation to make their case for exceptional funding, and of satellite litigation challenging refusals of such funding, not in the occasional case, but regularly. In cases involving Article 13 of the European Convention on Human Rights, this would involve taking cases to the European Court of Human Rights in Strasbourg, because Article 13 has not been incorporated into domestic law.

[37] See Home Affairs Committee, Sixth Report of Session 2008-2009 *The Trade in Human Beings: Human Trafficking in the UK*, Written Evidence, HC 23-II, Memorandum submitted by the Trafficking Law and Policy Forum.

[38] See http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/protocols-annexed-to-the-treaties/676-protocol-on-the-application-of-the-charter-of-fundamental-rights-of-.html

The prospect of satellite litigation has implications for the time that will be taken finally to determine cases and for costs of the system as a whole: the costs of legal advice and representation, of court time and, in immigration cases where the individual detained or receiving housing and assistance from the State, of those costs being incurred over a longer period.

We do not consider that a requirement that, for example, a trafficked person, apply for exceptional funding is a sufficient safeguard to ensure that the UK meets its domestic and international obligations. A system of exceptional funding would necessarily be slower than securing funding for a case within scope, more bureaucratic and more uncertain for the individual. Having to access exceptional funding places an additional barrier in the way of an individual's access to justice.

As to the proposal that exceptional funding should only be available where it is required to meet the UK's international and domestic obligations, ILPA does not agree. The test is not straightforward to apply and is likely to result in considerable litigation. It will result in matters where there is a need for certainty going unresolved, because they cannot be brought before the courts, with the prospects of costs and litigation about compensation at a later stage. For matters outside scope, funding should be available where there is a significant wider public interest or the matter is of overwhelming importance to the individual or where there is "Jarrett complexity".[39]

**Question 5: Do you agree with the Government's proposal to amend the merits criteria for civil legal aid so that funding can be refused in any individual civil case which is suitable for alternative funding, such as a Conditional Fee Agreement?**

As set out in our introduction, ILPA can only comment on immigration, asylum, nationality and asylum support cases.

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 UK Border Agency are "suitable for a CFA". To the best of our knowledge 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. Even in a category in which Conditional Fee Arrangements may generally be available, legal aid funding should be provided if in the individual case there is no Conditional Fee Arrangement available.

It remains only to highlight that 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 recent cases:

[39] See *R (Jarrett) v Legal Services Commission et ors* [2001] EWHC Admin 389, 22 May 2001

We recall the comments of judges in recent 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) (on a policy of an unpublished presumption of deprivation of liberty for certain foreign nationals on completion of criminal sentences'
>
> *"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

**Question 6: We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings.**

Answered in conjunction with Question 3 above.

For completeness we reproduce here the list of references ILPA sent to the Ministry of Justice for its review of the literature on litigants in person in the context of this review.

***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, the amendments to the various procedural rules which are contained in the Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (No. 2) 2010.

**Community Legal Advice Helpline**

**Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons;**

answered with

**Question 8: Do you agree that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.**

and

**Question 9: What factors should be taken into account when devising the criteria for determining when face to face advice will be required?**

ILPA answers no to all three questions. ILPA does not agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice for the reasons set out below. ILPA does not agree that specialist advice should be offered in all categories of law as we consider that it will never/almost never be appropriate for someone needing asylum or, if it is retained in scope, asylum support, advice to be obliged to go through a telephone gateway or to have specialist advice on their claim by phone for the reasons set out below.

ILPA does agree that if immigration is retained in scope, that immigration advice may be offered through the Community Legal Advice helpline, but note that in many (perhaps the majority of cases) it would not be appropriate for those requiring immigration advice to have telephone rather than face to face specialist advice. We also consider that practical and ethical problems (such as identifying whether a client is under duress) pose considerable challenges that may be unique or unusually significant in that category of law. We consider that the choice between telephone and face to face advice should allow for that choice to be made by the applicant (except where issues of duress etc may arise – see below – in which case face to face advice must be required). If they are not to be allowed their choice then there should be some right of appeal or review of that refusal.

We do not comment on other categories of law.

**Reasons**

The current helpline can work well in certain instances, and we note that its callers record a high level of satisfaction. But the satisfied users are people who have decided that a telephone helpline is the best way to access the advice they require, and who have the choice to access advice in person, from the internet or in any other appropriate way. ILPA does not consider that a compulsory telephone gateway is generally suitable for asylum, immigration, immigration detention or asylum support, or indeed any other, cases where people are (a) likely to be anxious, (b) to have a lot of papers the content of which they may not understand and the significance of which they may not appreciate, (c) in circumstances where they will have no opportunity to build up any kind of relationship of trust with a telephone operator so as to reveal personal information.

The consultation paper does not go into the detail of how the gateway would work and those details could make the difference between the helpline being of some assistance to ILPA members' clients or to it becoming a major barrier to accessing legal assistance putting the cases of clients at risk.

If there is to be any expansion of the Community Legal Advice helpline there must be a further consultation on the detailed scheme if grave adverse consequences are to be avoided.

As ILPA understands the consultation paper, the proposal is for a two-tier system, modelled on the Community Legal Advice helpline which has been an optional source of advice since 2004, but has never included immigration and asylum advice. As we understand the proposals, initial contact with an 'operator' will be the 'diagnostic' stage at which the caller is advised whether a) their problem comes within the scope of legal aid and b) they are financially eligible for Legal Aid. If the caller is in scope and eligible then the operator will route the person to the specialist advice tier of the phone line. The specialist phone advisor may then, as we understand it, deal with the entire case by phone, or refer the caller to another suitable service. Callers may be referred for face to face advice from a legal aid provider where cases appear too complex to be dealt with on the phone although the expectation is that that will happen only in the minority of cases.

We assume that telephone advice services confirm the advice given in writing and that clients are not expected to rely purely on their incomplete and inaccurate recollection of the content of the call and should be grateful for confirmation that this is the proposal. If our understanding is not correct, then we should have further objections to the proposal.

In response to written questions from ILPA the Ministry of Justice has told us that:

- the remit of the call agents within the (first tier) Operator Service is to signpost callers to appropriate sources of advice and does not extend to providing legal advice. No specific level of qualification is therefore appropriate.
- At present specialist telephone advice providers have to meet Specialist Quality Mark requirements. We envisage that this requirement would remain should the range of categories of law in which specialist telephone advice is offered be broadened as a result of the proposals set out in the consultation. Dependent on the category of law additional requirements may be made, such as the need, in the case of immigration advice, for specialist providers to be registered with the Office of the Immigration Services Commissioner.[40]

The purported justification for introducing a 'telephone gateway' is that those seeking civil legal aid 'find the process time-consuming, inconvenient and stressful'. This evidence for this assertion is not given. We accept that there may be many people seeking legal advice for whom a telephone service as proposed has advantages. However, we consider that any advantages are more than outweighed by the disadvantages in almost any asylum or asylum support claim and in most immigration cases. ILPA considers that issues such as trust, documentation and communication tip the balance in favour of face to face advice.

Legal problems are invariably stressful. It is ILPA members' experience that for the vast majority of legal aid clients and the voluntary sector organisations which assist them in accessing legal advice a significant source of stress is being unable to access a specialist advisor in whose ability to tackle the problem one has confidence... Once a suitable legal aid advisor is identified enquiries have to be made as to whether the advisor has the capacity to take on their case within the necessary time frame or at all. For the clients of ILPA's members, this problem is compounded by the often very short deadlines within which action must be taken to prepare and submit an application or to challenge a refusal by the UK Border Agency or the Tribunal. If an optional gateway can assist in matching clients with available advisors that would be a welcome outcome. The current situation, whereby potential clients may have to make 20 or 30 increasingly desperate calls to try and find an advisor who can see them in time, can deny access to justice.

The justification given for the proposal is couched in the terms of meeting client needs but makes no allowance for the individual client to set out their own needs or priorities, which may include a face to face appointment. It replaces the current "one size fits all" model with another. For an individual who wants to meet their advisor it is proposed they will be limited to the telephone service unless a service provider, applying the criteria, decides that their case is sufficiently complex or the person's ability to deal with the case by telephone so compromised as to necessitate a face to face interview. It is inconsistent to propose that legal aid clients be denied the choice promoted in so many areas of Government provision, such as the NHS. This is especially so when, for the reasons given below, it appears that any costs savings are unlikely to materialise other than simply through cutting the level of fees for advice.

ILPA considers that there are no real savings to be achieved through establishing the telephone gateway at least as far as asylum, asylum support and immigration cases are concerned. On the contrary, there is a real risk that this system would increase costs overall. The gateway "first tier" is not an advice

[40] Email from Michael Tant, Ministry of Justice, to ILPA, 14 January 2011.

service but a very basic diagnostic service (merely labelling the problem) which is currently effectively provided free of charge by suppliers at the moment. Accredited advisors' work in receiving initial calls, identifying the category of law and financial eligibility is unremunerated.

In the "second tier" it appears that the cost saving claimed for the service is proposed to be achieved through its dealing with the simplest cases which would otherwise have been dealt with under the main contract on a fixed fee basis. The "simple" case is paid for through the telephone service at a lower hourly rate and thus so costs less than the fixed fee. ILPA is mindful that "simple" cases were part of the proposed original balance between shorter and longer cases; the "swings and the roundabouts" of the fixed fee schemes.[41] Beyond that there is intrinsically nothing quicker or cheaper about telephone advice compared to face to face advice.

The most cost effective way to provide advice in asylum, asylum support, most immigration and most detained cases is generally going to be to meet with the client, see their documents (much quicker to do by sifting through the pile than bringing up scanned copies on a screen or asking for them to be read out or described over the telephone) and to be able to ask questions, with the interpreter (if one is needed) in the room, taking into consideration the client's overall demeanour and their non-verbal communication signs.

Some of problems we perceive with the proposal arise specifically from the proposed compulsory nature of the telephone service being the sole gateway to legal aid services. Others relate to the nature of advice giving in asylum, asylum support and immigration cases.

ILPA's conclusions about the phone gateway proposal may be summarised as follows:

i. Telephone-only advice is not appropriate for those who may need to claim asylum, but are not aware of this. Clients seeking asylum require face to face advice at nearly every stage of the process as outlined below.

ii. Telephone-only advice is not appropriate for those who are vulnerable by reason of age, physical and/or mental illness and experiences of trauma. It is not appropriate for those who are destitute; whose are unlikely to have the means to access it or to make use of it. A lengthy telephone call, in which the caller is referring to documents and must wait for interpreters and answer detailed questions, cannot be conducted in any acceptable manner in a public telephone box.

iii. Telephone-only advice is not appropriate for those who do not speak English as a first language or at all. Three-way telephone conversations involving an interpreter are highly problematic and less effective than personal attendances. Non-verbal signs in communication are always important; where a language barrier exists and there is a risk of losing important detail in translation, non-verbal signs in communication are of critical importance.

iv. A non-qualified diagnostic operator will not be able to spot an asylum claim unless it is completely obvious to the caller and the operator alike (and they are not all obvious).

v. A diagnostic operator or telephone adviser will not be able to see whether the caller is making contact under duress. This may be an insurmountable problem in certain cases, the identification of which could be difficult.

[41] See for example *Legal aid: the way forward* Cm 6993, Legal Services Commission and Department for Constitutional Affairs; Legal Services Commission, *Civil Fee Schemes – National and Regional fees* www.legalservices.gov.uk/docs/civil_consultations/CivilFeeSchemesNationalregional(noMH)_1.pdf

vi. Consideration of documents and the taking of detailed and accurate statements in asylum cases are of the first importance and this cannot be achieved effectively or efficiently over the phone for the reasons we have described.

vii. We have identified reasons for which there will be particular problems for detained clients and that it is wholly unsuitable for those in the detained fast-track.

viii. We have identified reasons for which telephone advice may not appropriate for the kinds of immigration cases which legal aid currently funds including the characteristics of the applicant.

ix. On a straightforward cost / benefit analysis it is very hard to see how this proposal will justify its start-up and running costs, and how duplication of work will be avoided in cases where the individual has already identified the adviser they want perhaps because an appropriate referral of their case has been made, when there is already a network of specialist advice in place.

***Emergencies***

Emergencies often present as telephone calls when the caller is aware of the danger and can communicate this clearly to the diagnostic operator who should be able to make an appropriate referral. However we not that the clarification note on Ministry of Justice website[42] indicates that emergencies won't have to go through the telephone gateway. It is not at all clear how this process will work. It is often difficult for clients to distinguish genuine emergencies.

***Trust***

For the asylum work which it is proposed will remain in scope, a telephone gateway and second tier mandatory telephone specialist advice presents many barriers. As acknowledged in the consultation paper, the clients in question may be traumatised, having fled persecution. They may not speak English. Trust is a significant problem.

In asylum cases the matters under discussion are almost invariably very sensitive. The person may still be in fear, or fear for family members and comrades left behind. Persecution may have taken the form of rape or sexual abuse, or been the result of the person's religion or sexual identity being unacceptable in the country s/he has fled.

ILPA has had sight of the letter submitted in response to this consultation from Dame Helen Bamber OBE, Dr David Bell Consultant Psychiatrist and President of the British Psychoanalytic Society and Professor Dinesh Bughra, President of the Royal College of Psychiatrists, setting out their concerns about the implications of a telephone gateway for people seeking asylum and for refugees. ILPA urges the Ministry of Justice to give the most serious consideration to this letter from experts in the field.

Physical conditions such as HIV/AIDs may be difficult to speak about. Asylum clients often require significant reassurance that their advisor is independent of the Government. In members' experience it is often hard for clients to grasp that although the State pays for their legal advice, their representative is independent of the State. Asylum clients may be highly suspicious of interpreters from their own countries or region. This can be a problem with face to face advice, but it is one which can be resolved by calling for another interpreter, or by the legal representative being able to give appropriate reassurance about having worked with the interpreter before and knowing the interpreter to be trustworthy. Again, ILPA considers that such reassurance can be given far more effectively in a face to face meeting than on the phone.

[42] At http://www.justice.gov.uk/consultations/docs/telephone-clarification-background-2011.pdf

ILPA considers that even where a person seeking asylum appears content to have telephone advice that is undesirable. Opportunities to assess whether the person is under duress or withholding important personal information through fear or embarrassment will be lost and the work that needs to be done preparing the case cannot be properly addressed by telephone. For example, very detailed instructions on the applicant's history are essential but the process of taking those instructions is more likely to be rushed and skimped in the course of a telephone call. A call lasting several hours is physically uncomfortable and will feel much more arduous that the same conversation in a meeting room together. That will put pressure on all involved to shorten the process. Non-verbal clues as to whether something is being withheld or the client is fatigued are lost. Overall the detriment to the preparation of the case is such that it should not an option for an asylum client (see further below).

In ILPA members' experience, people want and need the reassurance of meeting face to face with a suitably qualified advisor, even if in the end that advisor tells them that their problem is incapable of the resolution they desire. In ILPA's view, the advice that the client does not have a viable case to pursue may be more readily accepted following a face to face meeting where the client can satisfy themselves that the person they have been talking to has really listened to and considered their instructions. People are much more likely, we believe, to feel they have not been listened to, and that they have just been fobbed off, if they cannot see the face of the person to whom they are talking.

The problem of trust also arises for clients with cases before the Special Immigration Appeals Commission. Many cases come before the Commission because it is contended that the appellant, or the nature of the evidence held, poses a danger to the national security of the United Kingdom. Individuals involved or potentially involved, in such cases are unlikely to speak candidly on the phone to give their instructions.

These problems also arise in other immigration cases, and are not the only ones that arise in such cases. There are several categories of applications under the Immigration Rules and based on Home Office policies outside the Immigration Rules in which the clients may be as traumatised as asylum seeking clients.

Clients who require advice about making an application for indefinite leave to remain when their marriage has broken down as the result of domestic violence may have similar problems of trust, linguistic difficulty and possible duress highlighted above.

Clients who have been recognised as refugees and who require advice about applying to sponsor an application for family reunion from a spouse or a child may still be suffering psychologically and/or physically as a result of their experiences of persecution. If they have had face to face advice for their asylum application, the same advisor who is already familiar with the specific issues in the individual's case will be best placed to deal efficiently and cost effectively with an application for refugee family reunion. Diverting the client via a telephone gateway is bound to result in duplication of work and as such is not cost effective.

The quality, integrity, confidentiality and value for money of the service is jeopardised by all the factors above. If the wrong diagnosis is made, the wrong signposting will follow. This is not cost effective. The scheme will give rise to duplication of work in terms of taking instructions and the maintenance of records, which are essential. It is unclear whether the scheme will attempt to refer to specialists, for example firms that, because of their location and long-established referral patterns, have experience in cases from particular countries. Currently, a considerable number of cases are referred by voluntary sector agencies who do not give legal advice. These agencies build up relationships with firms of whom they think highly or whose specialism in a particular area they recognise. Similarly the firms learn to trust their referrals. Some providers also have well established patterns of firm to firm referrals (for example asylum solicitors may refer their clients for advice on support to community care providers they know and trust, and those providers in turn may refer community care clients with immigration

problems to immigration providers they know and trust). Both parties identify the information pertinent in the referral. These referrals can work efficiently in local areas and in specialist areas of the law and every effort should be made to ensure that they can continue.

***Duress***

The diagnostic operator, unable to see the person to whom they are speaking, will not know whether that person is alone, or whether they are giving information under duress. A person with a claim for asylum as a victim of human trafficking may present on the phone as someone seeking advice about an in-country leave application if their trafficker is standing close by when the call is made. In the case of a victim of forced marriage or domestic violence, the settled spouse or members of the family may be present with the caller, but unseen and unheard by the telephone operator. A family member of a person seeking asylum may have their own claim for asylum but be under pressure not to advance it, for example for cultural reasons (e.g. that see a wife as dependent upon her husband) or because they have a conflicting claim (perhaps as an opponent of their family).

These problems arise in immigration and asylum claims and have to be identified by the adviser and addressed through the physical arrangements of the meeting. For example the adviser can insist on seeing the client alone out of sight or hearing of family.

ILPA has grave concerns about how the issue of duress or other conflict could be dealt with in a telephone advice service other than by excluding from the telephone service any case in which it was a possible factor. This is itself would be problematic because of the difficulties of identification. A victim of trafficking can be any age or sex or nationality. While studies may identify certain groups are more at risk of forced marriage, there are exceptions. To proceed with advice in a situation where there may be duress on a client or witness is of course unethical.

Some adults, including the mentally ill or disabled, may wish or need to give instructions via a third party, but the identity and authority of a third party to give instructions cannot be verified over the telephone. The person giving advice must be satisfied that these clients are protected from those who purport to have authority to give instructions on their behalf but have no such authority. Equally, an individual may feel pressurised into an arrangement of someone instructing on their behalf because of the difficulty of them dealing with advice by telephone, whereas in a face to face setting they may be willing or able to give instructions, or at least some instructions, for themselves.

These issues can be more significant in immigration and asylum cases than say benefits or housing cases as it may not be so clear what is in the individual's interests and what they actually want. For example the family of a mentally ill person may consider that the best thing for him/her is to remain in the UK whereas s/he may desire to go back to his country of origin.

A child may have difficulty in giving instructions face to face, let alone over the telephone. The problem of verification of the identity / authority of adults seeking to give instructions on a child's behalf may be complex and virtually impossible during a first contact over the phone. Non-verbal communication signs are of particular importance when dealing with children. One member describes reports having taken the decision to terminate an appointment at which she was taking instructions from a child in an asylum case, with an interpreter. At one stage it was observed that the child turned very slightly away from the interpreter and put his head down. It subsequently transpired that the interpreter had said to the child, in his language, about the child's claimed experience of persecution, 'such things do not happen in our community.' The change in the child's position and demeanour instantly alerted the solicitor's suspicion that something was very wrong, and so it proved to be. This could never have been picked up during a telephone conference.

***Misdiagnosis***

ILPA is concerned that callers could be denied legal aid advice to which they are entitled, or could be delayed in accessing timely assistance, because the complexity of immigration law, not to mention the imperfect understanding many applicants have of the procedures in their own cases, gives rise to a risk that the diagnosis of the true nature of the problem will be incorrect.

A person who is not qualified and experienced in asylum law, immigration and detention or the law pertaining to cases before the Special Immigration Appeals Commission may not be able to reliably distinguish:

- a real emergency (e.g. with regard to deadlines for action) from a case about which the client is understandably highly anxious but is not an emergency as such. Deadlines are not always spelt out (e.g. judicial review deadlines) or given comprehensibly (e.g. the impact on a deadline of the deemed service and time provisions within the tribunal procedure rules);
- that the client has a claim for asylum. Clients do not always identify this themselves, if the advisor cannot then s/he could wrongly determine, if immigration cases are removed from scope, that the case is out of scope. This could arise with, for example, a domestic violence victim who also has a fear of family "honour" violence in their country of origin or in a case where a person is in fear, for example of female genital cutting in their country of origin but does not realise that this can be the basis of a claim for international protection. It could arise because a decision which is amenable to judicial review and therefore within scope as a public law matter. If immigration remains within scope the risk of misdiagnosis and a client being excluded is reduced as the second tier specialist adviser will have to trained and experienced in both asylum and immigration;
- the level of complexity of the case and the need for a referral for face to face advice

If the diagnostic operator is not qualified to make these distinctions then resources will be wasted and clients with emergencies may not access specialist help in time or at all. If there are delays in making suitable onwards referrals then a matter which was not an emergency at the time of initial contact could end up being an emergency, and therefore far more costly to deal with, by the time the client accesses the appropriate level of specialist advice. An example of this was provided in a meeting with the Ministry of Justice on 28 January 2010. The example was of a housing matter in which delays by the current Community Legal Advice helpline in making a referral for face to face advice to a solicitor meant that the case had become an emergency by the time the client saw the solicitor, who had to apply out of hours for a High Court injunction. Similar situations could arise in asylum, asylum support or immigration cases, e.g. where removal has to be challenged. In such cases the earlier the client presents to a suitably qualified advisor then the more likely that justice can be done, and the less costly dealing with the case is likely to be.

***Documents – understanding the case***

As noted, asylum, asylum support and immigration clients may have many documents the contents of which they do not understand the content of and the significance of which they do not appreciate.

It is not an answer in asylum and asylum support cases and in many immigration cases to say that documents can be sent to the phone service by fax or scan / e-mail. Those in need of asylum support and those seeking asylum in particular may often be without any contacts or resources in this country to assist with this. Faxing or scanning documents from shops or libraries to the phone service is highly unsatisfactory in terms of confidentiality**.** There can also be problems with clients selecting out the documents to be scanned or faxed (to save time and/or cost) and thereby missing out documents the adviser may consider highly significant. Most immigration advisors will have had the experience of spotting an otherwise unnoticed but vital document amongst a pile of documents a client has brought into their office.

Posting documents is equally problematic as any adviser whose client's documents have gone astray in the post will testify, but will be unavoidable in cases where an application is being prepared for submission and the originals must be submitted.

These problems are not insurmountable but make the service less effective and can eliminate any expected time or cost savings.

**Experience from the police station telephone advice line and the advice line for immigration advisors**

ILPA members have experience of running the police station immigration telephone advice and second tier advice help lines, the latter for advisors. In both cases, the advice line does not have a gateway function. In the case of the police station advice line, detainees are automatically given access to an advisor who must be accredited by The Law Society at Level Two of its immigration scheme.

The main drawback of telephone advice is not being able to see important documents such as passports to see the visas and current conditions/time limits, copies of decisions by the UK Border Agency or determinations by Tribunal judges or copies of relevant supporting documents etc. It takes longer to advise if a client needs to describe these or read them over the telephone and it is impossible to be certain that you have been given an accurate and complete description. The caller may have documents in their possession which are significant but which they do not mention to the advisor because they do not appreciate the significance of them. The problem is exacerbated by language difficulties. The Legal Services Commission has arranged with Language Line that those running the police station advice line can call Language Line to provide an interpreter for a three way telephone conversation where the client does not speak English. Language Line charges £0.89 per minute or £53.40 per hour for this service. This is far in excess of what a community interpreter will charge a legal aid firm - £15 per hour is the going rate up to £25 per hour for those with an interpreting qualification. In immigration cases the telephone gateway is likely to make the interpreting costs much higher than the costs of face to face advice.

The Legal Services Commission also funds a specialist support service for legal advisors. This is an example of where telephone advice can be effective. As with the police station advice line, the advice is given by experienced specialists in an already properly regulated context. The people calling the specialist support line are qualified advisors who have already taken instructions from the client. The advisors who operate the telephone advice line are solicitors with a minimum of five years post-qualification experience. Those to whom they provide advice are solicitors and advisors in voluntary sector agencies with legal aid contracts, who are regulated under The Law Society scheme.

***Preparation of a case without face to face meetings***

With regard to asylum procedure, it is very difficult to imagine any asylum case could be dealt with satisfactorily on the phone. The only example we have been able to identify as potentially appropriate is the final application for settlement after five years leave as a refugee for an individual with no complicating factors relating to travel, accidentally renouncing refugee status, character or dependents.

A person seeking asylum may contact the Operator Service at any stage of the case, including a point at which specialist advice is *urgently* needed, such as the day before a substantive interview, or three days after. The basic process of making an asylum application is:

- As soon as the need to claim asylum is identified as arising the client is expected to apply for asylum without delay at the nearest UK Border Agency screening unit. Failure to do so as soon as reasonably practicable after the need to claim has been identified will lead to adverse credibility findings[43] and the possible refusal of asylum support.

- Once the asylum application has been registered at the screening unit, the client will receive a date for his / her asylum interview. They will need advice on whether in the circumstances of their case it is appropriate to submit a statement of the basis of their claim in advance of the interview. If it is, then a detailed statement of the basis of claim will need to be taken. This is likely to be a lengthy and often traumatic process of 'reliving' experiences of persecution.

- The client may have documents s/he wishes to submit at the interview in support of his / her claim. These documents will need to be considered, authenticated and translated and the client advised as to whether or not the documents should be submitted.

- The client will require advice about the asylum interview, in advance of the interview. This will include ascertaining whether the client falls into the categories of cases for which legal aid remains available for a representative to attend the interview with the client. If the case does not fall into this category then it is necessary to write to the UK Border Agency about taping the interview.

- After the interview, the interview record needs to be perused, the transcript checked against the tapes, and any apparent discrepancies discussed with the client. Any representations about this need to be made to the UK Border Agency within five days of the interview.

- Once a decision is received the client needs to be advised of their entitlements if a positive decision is received and about when to apply for further leave. If Humanitarian Protection or Discretionary Leave is granted it is necessary to advise as to their right to appeal against the refusal of recognition as a refugee. If they are refused any form of protection, the merits of appealing need to be considered and, if the adviser is so instructed, an appeal lodged within 10 working days if the client is at liberty, five days if they are detained).

There are specific problems with telephone advice in detained cases. Most representatives have some experience of these, having had occasion to speak to detained clients on the telephone in the context of cases where they are providing face to face advice. Persons in detention are likely to be particularly vulnerable by reason of the trauma of being detained. For many persons seeking asylum, incarceration without limit of time may recall the very experiences they have fled. Such clients are likely to have acute problems in trusting anyone, which makes diverting them via the telephone gateway inappropriate. Again the problem of identifying the asylum claim will arise for the unqualified Operator Service. In the detention setting, the difficulties of obtaining clear instructions will be exacerbated as clients may be so preoccupied with getting out of detention that this is the only issue they raise clearly with the Operator Service.

Immigration Removal Centres and prisons are not set up for prisoners and detainees to receive advice by telephone. Even short calls can present significant difficulties. Shared telephones may not be free at the required time, and even where an arrangement has been made there may be competing, urgent and unforeseen demands to use them. Detainees may not have money for telephone cards. Telephones

[43] Asylum and Immigration (Treatment of Claimants etc.) Act 2004, s 8.

for detainees' use tend to be located in public areas, where confidentiality is not assured. Better computer access to receive and send written information would be required. Better, and free, access to scanners and fax machines would be required, and all this for what would be a lower quality of service than can be provided face to face (i.e. via the exclusive contracts for detention centre work recently let by the Legal Services Commission after a competitive tender). It is members' experience that as a rule there is no facility for legal representatives to make phone calls into prisons, unless there is an emergency and the agreement of the Governor / Duty Governor has been obtained. It is therefore unclear how the 'call back' facility could work in the prison setting, with regard both to serving prisoners requiring immigration advice and those detained within the prison estate under the Immigration Acts.

The detained fast-track is predicated on on-site legal advisors being present at Immigration Removal Centres and it is extremely doubtful whether a detained fast-track without this provision could ever be held to be lawful.[44] All the issues raised generally on the difficulties with telephone advice for asylum seekers will be magnified many times for anyone within fast-track detention, not least because of the extremely short timescales in those schemes.[45]

***Viability of Provider base***

There is a risk that the projected loss of income for private practice and Not for Profit agencies which implementation of the phone gateway proposal would entail, 75% and 85% respectively, according to the Impact Assessment,[46] especially when considered with the proposed cuts in payment rates for all levels of service, increases the risk of loss of a substantial part of the provider base. See further below.

**Question 10: What organisations should work strategically with Community Legal Advice and what form should this joint working take?**

In the context of asylum, immigration and asylum support advice ILPA does not understand how a first tier operator can safely and accurately diagnose many of the cases within those categories so as to involve anyone other than a specialist advisor qualified to advise on those matters. The question appears to be misconceived.

**Question 11: Do you agree that the Legal Services Commission should offer access to paid advice services for ineligible clients through the Community Legal Advice helpline?**

It is unclear what will happen to people calling about a problem which is deemed to be not within scope, or who do not meet the means or merits test for a matter which remains in scope. It is unclear whether they will told that they cannot be helped or might be referred to private solicitors or organisations regulated by the Office of the Immigration Services Commissioner (bearing in mind the points already made about there being no alternative sources of advice for immigration clients) and if the latter, on what basis the representative would be chosen; whether for inclusion in a list of providers from whom they might be selected, or in a particular case.

---

[44] *R V. Secretary Of State For The Home Department Ex Parte Saadi (Fc) And Others (Fc) (Appellants)* [2002] UKHL 41 at 24 "If conditions in the centre were less acceptable than they are taken to be there might be more room for doubt but it seems to me that the need for speed justifies detention for a short period in acceptable physical conditions as being reasonably necessary." These observations related to the slower precursor to the current 'super fast track' and do not obviate the possibility of a successful challenge to current procedures.

[45] See ILPA's *The Detained Fast-Track: a best practice guide*, available from with forward amend the Asylum and Immigration Tribunal **(Fast Track Procedure) Rules** 2005 (S.I. 2005/560), to bring

[46] Equality Impact Assessment sections 1.59-16.0 and Tables A to C.

We can envisage circumstances in which the telephone advisor would have to make a considerable number of calls before identifying a private provider able or willing to take the particular case.

It is also unclear what would happen if, after a person has been referred to a private solicitor, that solicitor finds that the case has wrongly been determined not to be eligible for legal aid, for example if the merits test has been wrongly applied. Will the solicitor be able to refer the person back to the telephone line expressly requiring that the person be referred to a legal aid provider because of that assessment, or will the person have to go through the diagnostic operator again? What of the time that the private provider has given up to making the appointment and establishing the merits of the case? Have the implications of the tight deadlines involved in immigration and asylum cases been considered in this context?

In short, there is insufficient detail about the proposal for ILPA to be able to do more than to raise these questions at this stage.

**Financial eligibility**

**Question 12: Do you agree with the proposal that applicants for legal aid who are in receipt of passporting benefits should be subject to the same capital eligibility rules as other applicants?**

**No**.

This would create an unnecessary and confusing stratum of welfare benefits entitlement, whereby a person who qualifies for income support and therefore for other passported benefits could just be restricted from qualifying for legal aid. We also question whether the savings ever could be worth the considerable extra bureaucracy involved in administering the additional test.

**Question 13: Do you agree with the proposal that clients with £1000 or more disposable capital should be asked to pay £100 contribution?**

**No.**

The administrative effort in collecting £100 contributions and getting them to the Legal Services Commission would be disproportionate to the amount of money collected or to any deterrent effect on unnecessary litigation that it might be expected to have.

It would also add to injustice, as people, such as pensioners, who are on a fixed income with no expectation of being able to augment or replenish it will be harder hit by having to spend part of their "savings" towards a legal case, whereas those who might expect to work again, or to work more hours, in the future, will see the possibility of making up the money.

A thousand pounds is not a substantial sum in savings. It may be a person's essential safety net against for example disruptions to benefits payments, or to pay their council tax bill or that will enable them to pay for things such as a computer at home or field trips required to support their child's education.

It may also in an immigration case be a person's visa or leave application fee, or the air fare to bring their family to the UK for refugee family reunion, or, given current proposals,[47] to pay an appeal fee, a

[47] Ministry of Justice Consultation paper CP10/10 *Introducing Fee charges for appeals in the Immigration and Asylum Chambers of the First -Tier Tribunal and Upper Tribunal,* 21 October 2011.

proposal ILPA opposes.[48] At the very least, if such a measure is to be implemented there must be a mechanism for disregarding funds which are needed for fees and payments such as these which are essential to progress the case. The legal aid granted in such cases would not be put to good use if the person then does not have the capital to make necessary related expenditure.

**Questions 14-23**

ILPA does not have relevant expertise on property or other civil cases.

**Questions 24-31**

ILPA does not have relevant expertise in criminal law.

**Question 32**: **Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.**

ILPA does not agree with the proposal to reduce all fees paid in civil and family matters by 10%. We consider the reduction of already low levels of remuneration will jeopardise the viability of suppliers, with the result that there will be insufficient providers of good quality advice. But we do not agree with a more radical restructuring of fees for asylum and immigration and asylum support cases that would reduce the payments to be made.

The fixed fee for advising in an immigration case is £260; £459 in an asylum case. The nominal hourly rate for preparation is £58.50. That hourly rate is paid if the value of the case exceeds three times the fixed fee. If the case were to take just less than three times the fixed fee then only the fixed fee would be paid and the payment per hour would work out to just over one third of the nominal rate or around £19.50 per hour. Rates are essentially unchanged since 2001. Yet these are the rates that it is proposed to cut. For comparison Her Majesty's Court Services current Guideline Hourly Rates for 2010 for a Grade B solicitor (over four years post qualification experience) would be £242 and for Outer London for a Grade C (less than four years post qualification experience) £165.[49] We provide further details of fees in **Annexe 3**.

The Legal Services Commission has said that it considers that across a caseload there will be 'swings and roundabouts': that legal aid fixed fees will not cover the costs of all cases, but would more than cover the costs of others.[50] We have seen nothing from the Legal Services Commission that examines the effect of removing legal aid from immigration and asylum support cases; it has not made any proposals to reassess whether it still considers that there will be 'swings and roundabouts' if practitioners are restricted to undertaking asylum and detention cases. At the same time it is proposed that more of the simpler cases (the "swings") will be taken out of the face to face contract and dealt with instead by a telephone service, leaving a disproportionate number of "roundabouts" in which suppliers will do more work than the fee pays for.

ILPA has also long argued for the improvement of payments arrangements as suppliers carry very large amounts of unpaid work in progress (WIP) and disbursements for the Legal Services Commission. Under the current contract, disbursements can be billed every six months (often months after payment has become due as a matter of professional ethics and then only on new cases, not the thousands of ongoing cases providers already have open) but profit costs cannot be billed until a case reaches a particular stage; the timing of which is in the control not of the Legal Service Commission or of

[48] See ILPA's response to the consultation, available from www.ilpa.org.uk
[49] See http://www.hmcourts-service.gov.uk/publications/guidance/scco/previous_rates.htm
[50] *Legal aid: the way forward* Cm 6993, Legal Services Commission and Department for Constitutional Affairs.

representatives, but of the UK Border Agency. This already causes tremendous problems, not least for private providers who pay partnership tax on money they have never seen, and for the Legal Services Commission which does not know, beyond the broadest brush calculations, what it owes. Asylum cases generally take longer than immigration cases (and both take longer than cases in other categories of civil law) and the problems will be exacerbated if only asylum remains in scope and if shorter cases are diverted to the telephone service. The Government's intention to preserve asylum cases within scope will be thwarted if there are not lawyers of high quality willing and able to continue doing such work. There is an urgent need, both for providers and for the Legal Services Commission's proper accounting to address the question of work in progress and the urgency can only be increased by the proposals in the consultation paper.

The cumulative effect of the difficulties of the current funding regime and the proposals renders the supplier base for asylum and immigration casework at risk. The combined impacts and level of risk have been largely ignored in the consultation paper.

Cases before the Special Immigration Appeals Commission are funded on full certificates but there are relatively few of these cases and they are undertaken by the very few practitioners with experience in these complex cases.

It is clear from the above that strategies for financial survival may include firms seeking to specialise either in cases of exceptional complexity that will take three times the fixed fee, or identifying a sufficient number of cases sufficiently straightforward to be brought within the fixed fee or reducing the proportion of legal aid work they undertake. From the outset many organisations, including ILPA, have repeatedly expressed concerns that fixed fees will lead to 'cherry-picking' of cases. The evidence that those concerns were well founded is admirably summarised in the report *Review of quality issues in legal advice: measuring and costing asylum work* (June 2010) produced by the Information Centre for Asylum Seekers and Refugees (ICAR) for Refugee and Migrant Justice, the Immigration Advisory Service and Asylum Aid and the sources cited therein.

Legal aid work can only survive while there are firms not only willing, but also able, to deliver it. Following the latest tender, there is no publicly funded legal advice in immigration and asylum in some parts of the country. Devon Law Centre has closed, and many seeking help in the Plymouth area now have to go as far afield as Bristol to find legal representation. In the Dover ports area no contracts have been signed in asylum and immigration. In both areas, the Legal Services Commission has invited expressions of interest for new tenders.

If providers are lost to the legal aid scheme, those providers will be lost for good. The risk is that there will not be providers for the asylum cases which it is intended to retain in scope.

There is a need for the Ministry of Justice to look at how it can best support the best lawyers and advisors doing legal aid work. The more they are able to flourish, the better value the Government gets from the legal aid budget.

**Question 33: Do you agree with the proposal to cap and set criteria for enhancements to hourly rates payable to solicitors in civil cases? If so, we would welcome views on the criteria which may be appropriate.**

The consultation paper would have greater credibility if it called this what it is: a reduction in the maximum fees payable to suppliers for a complex case rather than couching it in terms of predictability and consistency. Those could be achieved without reducing the maximum enhancement.

As a cut, we cannot support it for the reasons we have already given about the viability of suppliers to continue when their incomes are being attacked in so many different ways at the same time under the proposals in this paper.

We are concerned by the vague reference to prospective determination of the enhancement. There will need to be a further consultation on this once any detail has been proposed as there is nothing to comment on at this stage. The main danger of fixing the enhancement prospectively would be that a case may proceed very differently from the initial predictions and may be more complex and more urgent than anticipated. There must be allowance for that.

We are also mindful of the experience of the other attempt of the Legal Services Commission prospectively to set costs; namely case plans and contracts for high cost cases. The experience of ILPA members is that case plans are immensely time consuming to draw up and agree. This is time for which the Legal Services Commission pays. They are then frequently dealt with so slowly by the Commission that they are often agreed retrospectively after the case has concluded. They therefore only contribute to cost control and planning of the case by the imposition of a lower rate of remuneration and a limit to the maximum claimable.

Our experience of very high costs cases to date does not give us confidence that prospective determination of fees in civil cases generally by the Commission will be timely or fair.

**Question 34: Do you agree with the proposal to codify the rates paid to barristers as set out in Table 5 above, subject to a further 10% reduction?**

ILPA members include barristers and solicitors. There are a range of views about whether barristers' rates should be codified. ILPA agrees that if there is to be an across the board cut in remuneration, a proposal ILPA opposes, then that should apply equally to barristers and solicitors. To achieve that, it is essential that the rates to which the 10% reduction is applied are accurate. ILPA notes the information from the Bar Council that the rates that the consultation paper states are presently paid are in practice out of date and lower than the true rates. ILPA is concerned in this as in other areas that the changes should be implemented on the basis of accurate figures. An equal across the board reduction in rates cannot be achieved if the rates to which it is applied are not the rates currently paid.

The impact assessment admits there is a paucity of information about the Bar. We suspect that in respect of immigration and asylum the available information is more incomplete than for other categories as the Legal Services Commission does not collect any data on Counsel instructed under controlled legal representation in the Tribunal. The figures that are collected relate only to Counsel in the higher courts.

The Bar, like other legal aid suppliers, has been hit hard by the switch to fixed fees. Barristers also rely on certificated work to make legal aid work commercially viable. The impact on the Bar of the cumulative changes proposed in this paper is unclear. ILPA considers that a vibrant Bar for both the individual and the Government is essential for the training of advocates who will in the future be suitable to appear in the higher courts. It should be of concern to the Ministry of Justice in the promotion of justice if the proposals look to be driving significant numbers out of the junior Bar.

**QUESTIONS 35: Do you agree with the proposals:**

- **To apply "risk rates" to every civil non-family case where costs may be ordered against the opponent; and**
- **To apply "risk rates" from the end of the investigative stage or once total costs reach £25,000, or from the beginning of cases with no investigative stage?**

We restrict our comments to immigration, asylum and asylum support cases and related public law and civil matters.

We welcome the acknowledgement that judicial review cases are different from other civil cases. We are concerned that there is an unwarranted assumption that if the claimant succeeds after having secured permission that their costs will be paid by the defendant. Although that should happen, and may happen in some cases, ILPA members' experience is that in significant numbers of cases they do not at that stage get an order for costs to be paid by the Secretary of State either by agreement (in the terms of a consent order) or in the order of the Court. If the Ministry is to go ahead with this proposal we should suggest that the Secretary of State for the Home Department instruct the UK Border Agency to agree to pay the Claimant's costs if they concede or lose, absent some change of circumstance post the grant of permission that means the claim succeeds on grounds that were not previously present).

**Question 36**. **The Government would also welcome views on whether there are types of civil non-family case (other than those described in paragraph 7.22 and 7.33) for which the application of risk creates would not be justifiable, for example, because there is less likelihood of cost recovery or ability to predict the outcome.**

There is no mention of asylum and immigration statutory appeals to the Court of Appeal and Supreme Court. In respect of the Court of Appeal particularly we should note that there is less likelihood of costs recovery as the appeal is usually about an error by the immigration judge and even when permission has been granted the Court, and the UK Border Agency negotiating terms of consent where that is the outcome, often takes the view that the Secretary of State was not to blame for the error so will not bear the costs.

**Questions 37-38**

These relate solely to family law cases so we do not comment on them.

**Expert fees**

**Question 39: Do you agree that there should be a clear structure for the fees to be paid to experts from legal aid?**

ILPA would welcome a clearer structure for fees to experts, whether called in by the appellant or the respondent, but on the understanding that there must always be provision for exceptions where there is in effect no choice over the expert and they are not prepared to work for less than their normal remuneration in their day job. This might be the case where an expert has a particular and unusual specialism which cannot be found elsewhere, for example a security consultant on a particular country which is not widely studied, or the individual's own treating physician.

We are concerned that the suggested test of the "expert's evidence is key to the client's case" is potentially too tightly drawn. The current test for a disbursement in controlled work is

> 4.21 You may incur disbursements where:
> (a) it is in the best interests of the Client to do so;
> (b) it is reasonable for you to incur the disbursement for the purpose of providing Controlled Work to the Client;

(c) the amount of the disbursement is reasonable; and
(d) incurring the disbursement is not prohibited by this section or the applicable part of Sections 10 to 16 of this Specification. [51]

The test of the disbursement being in the Client's best interests and it being reasonable must remain the test of whether a disbursement is to be incurred, whether the case is within the fixed rates or qualifies for exceptional funding. Requiring that the report must be "key" is highly subjective and will be a source of disputes between the Legal Services Commission and the representative. It is very difficult to know to a fine degree what constitutes sufficient evidence especially when many immigration and asylum decisions turn on matters such as whether the appellant is believed or the proportionality of interference with rights to private and family life. An immigration or asylum appellant will not get a second chance to adduce expert evidence if it is not presented at their substantive appeal hearing before the First Tier Tribunal and they lose for want of the report. They cannot say there is an error of law in the Tribunal judge's decision because the Tribunal judge did not have regard to a report that was not produced because the Legal Services Commission did not consider it to be "key".

**Alternative sources of funding**

**Questions 40-44**

We do not consider that we have sufficient information or expertise to comment on these issues.

**Question 44**

We do not consider we have sufficient information or expertise to comment on the issue of the involvement of regulators. ILPA has consistently championed and supported schemes to improve the quality of legal advice.

The Legal Services Commission has consistently failed to invest sufficiently in the best, albeit imperfect, method of quality control, namely peer review. It seems intent on paying the minimum possible for a legal advice service and doing as little as possible itself to maintain and raise standards, shifting the burden for that wherever possible onto suppliers.

The years particularly since 2004 have seen many widely respected firms give up the unequal struggle and leave the field of legal aid immigration work. Winstanley Burgess closed its doors in 2004, while firms such as Wesley Gryk solicitors and Bates Wells and Braithwaite left legal aid work. When Wilkin Chapman closed its legal aid immigration and asylum work in Hull this left the area without legal aid advice in immigration and asylum. Dexter Montague closed its immigration and asylum legal aid in Reading. Both firms continue to do private work. In June 2010 Refugee and Migrant Justice, which, at the time of its closure had 13 offices in England, some 336 staff and a caseload of c. 10,000 live cases, entered into administration. Deighton Guedalla closed its immigration department in 2010 and Glazer Delmar ceased to do legal aid work in immigration, while retaining a private immigration department, in the same year. ILPA doubts that the exodus is over.

Immigration and asylum work is financially precarious. There is no cushion to protect firms and organisations against the effects of uncertainty or to allow for contingency planning. Unlike some other areas of civil work such as housing or family very few immigration or asylum cases proceed onto the more highly remunerated public funding certificates. Many legal aid providers, by dint of many hours of work that is done without pay, for all that is rarely recognised as *pro bono* work, strive to make up the difference between what the Commission will pay for and the service to which they consider that their

[51] Legal Services Commission 2010 Standard Civil Contract: Specification.

clients are entitled and that their professional ethics oblige them to provide. There comes a point at which these efforts cannot make up the shortfall in payment. ILPA's concern is that as income in the sector is diminished further still, provision will continue to decline and a critical point will be reached at which the number of providers who remain in the sector simply cannot meet even the level of demand for their services that the Legal Services Commission is prepared to fund.

The Ministry of Justice intends that asylum work remain within scope, recognising

> *"...the immediacy and severity of the risk to the individual...they could suffer persecution, torture or death...applicants may recently have fled persecution or torture. In these circumstances it may be difficult for them to navigate their way through the asylum process without legal assistance. In addition, applicants for asylum may be traumatised and so find it more difficult to represent themselves without legal assistance"*[52]

The notion that it suffices to leave asylum work within scope to protect it should be regarded with scepticism in the circumstances described. In these circumstances, the additional cost of regulatory oversight cannot be allowed to fall back on legal representatives. It is the best, striving to provide the highest standards of service, who are stretched the furthest; to impose burdens that will drive them from the field will have the opposite effect from that intended; which is to raise the standards of advice.

**Questions 45-47**

ILPA has made its views about the Legal Services Commission's administration of the legal aid scheme well known to them in responses to consultations, regular contact through meetings such as the Immigration Representative Bodies meeting and other *ad hoc* contact. We have also provided evidence to parliamentary committees about our experiences of the Commission's work and witness statements in cases before the courts. We refer you to the submissions and briefings on ILPA's website. For example, we have with the detail of the Delivery Transformation project only to see nothing concrete emerge from that.

We consider there to be excessive expenditure on administration by the Commission just as we are concerned about the excessive administrative burdens it imposes on suppliers, without evidence that this enables the Commission to manage its own work, or legal aid funds, more effectively. We are concerned about the effect on the standard of service members receive now; we are concerned about the standard of service we will receive if cuts are badly implemented.

**Question 46** is about standard monthly payments. In effect, these are very little different from payment as billed except that there is a measure of smoothing out of the billing so that suppliers have some predictability to their cash flow. Some members who have billed more than they have been paid may like the idea of having all their claims settled now. However we consider the terms agreed in the deed of settlement with the Law Society is the better compromise between payment as billed and standard payments.

We have already explained in response to question 32 above, the acute problems of cash flow that members face for legal aid work. ILPA members do much more of their work on Legal Help and Controlled Legal Representation than practitioners in some other categories of law, such as housing, and cases last longer. The need is for billing to be brought forward to earlier points in the case not delayed absolutely until the case is finished. Members do not control when their cases conclude. That is almost invariably in the hands of the UK Border Agency. Members carry work in progress for the Commission for months and years.

[52] Paragraph 4.30 of the Ministry of Justice Consultation paper.

It is bad accounting practice for the Commission to hide its already committed expenditure (work in progress) from its accounts by simply delaying payment until the cases end. As a result, the Commission can have no accurate idea as it to its financial liabilities. Any removal of standard monthly payments must be implemented in a manner that addresses the problems of the current payment regime, rather than, as could be the result, exacerbating these.

**Question 48: Are there any other factors you think the Government should consider to improve the administration of legal aid?**

answered with

**Question 49: Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper?**

and

**Question 50: Do you agree that we have correctly identified the extent of impacts under these proposals? (Please give reasons.)**

ILPA is concerned that the proposals in the consultation paper will result in grave injustice and we fear that they will do so without producing the intended savings. The justice system cannot be considered in isolation from all the other Government departments and local authorities which make unjust or unlawful decisions. Improved decision-making in many areas as well as in immigration would also produce substantial savings.

As set out in our introduction, the Ministry of Justice impact assessments identify and appear to accept that the loss of legal aid will mean reduced access to justice, so that disputes are resolved significantly less fairly, imposing wider social and economic costs, with consequences of reduced social cohesion, increased criminality, reduced efficiency of other Government services.[53] In circumstances where inequality of arms and denial of justice can be identified as the results of implementation of a proposed Government policy, the actions of Government departments having created or contributed to the initial injustice, a responsible Ministry of Justice must decline to proceed with those proposals.

We have identified elsewhere in this response ways in which we consider that the assessments are incomplete and deficient and we are aware of the work of others, such as Citizens Advice, in demonstrating flaws in the calculations on which they are based, set out in the responses of those others to this consultation.

At all meetings in the course of this consultation, with the Minister and with officials, it has been emphasised that this is intended to be a 'genuine' consultation and that all evidence received will be taken into account. We urge that this is done, the impact assessments revisited and the proposals withdrawn.

***A 'comprehensive' spending review?***

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.

[53] *Legal Aid Reform: Scope Changes,* Impact Assessment MOJ028 15 November 2010, at paragraph 35.

When this was raised with the Minister at the All Party Parliamentary Group on Legal Aid in December 2010, he noted that all departments are looking to make cuts in their own budgets. However, ILPA is aware of no document that suggests that the UK Border Agency is examining how it could take steps that would reduce expenditure in the Ministry of Justice, whether on legal aid or in the cost of running courts.

Moreover, 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 UK Border Agency has not carried out its function of maintaining effective immigration control in a manner which accords with the law. The case of *Baiai*[54] 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.

ILPA urges the government to consider a 'polluter pays' principle, whereby the department, for example, the UK Border Agency, 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 Acts of Parliament in 1993, 1996, 1999, 2002, 2005, 2006, 2007, 2008 and 2009, plus many more regulations, rule and policy changes, many of which have been hastily devised and led to all sorts of confusion.

The official immigration statistics for 2009,[55] published in August 2010, record 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 UK Border Agency, but also the Ministry of Justice 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**.**

The behaviour of the UK Border Agency as decision maker and litigant has driven judges to despair. See box below. There are many other examples of similar concerns through this response and we should be happy to provide many more should this be of assistance.

*"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?"*

[54] *R (On the application of Baiai and others) v SSHD* [2008] UKHL 53
[55] Control of Immigration, Statistics, United Kingdom see http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1510.pdf

Lord Justice Ward, in the Court of Appeal in *MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229[56]

The Ministry of Justice should take steps to ensure that it is in a better position to identify the need for, and demand, robust legal aid impact assessments for all proposed legislation and to challenge impact assessments produced by departments when these are inadequate.

The proposals in the consultation paper may lead to people making inappropriate applications, or claiming asylum when this may not be the strongest part of their case. The asylum system has been the source of considerable controversy over many years and the UK Border Agency is currently engaged in an extensive 'Case Resolution' problem, endeavouring to clear as much as possible of a backlog of cases involving applications for asylum made before March 2007. Any proposal that has the effect of destabilising the current system of asylum determination is likely to be unwelcome to the Home Office, to those claiming asylum and those endeavouring to secure justice for them.

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 examples in Annexe 1 help to illustrate these points.

The increased costs likely to be associated with the above would reduce the savings anticipated in the impact assessments and render those impact assessments inaccurate.

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.

We have identified other indirect costs of the proposals in this response.

**Impact assessments**

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

**Questions 49-50**

The impact assessments make it clear that because more women than men access legal aid, as do a higher proportion of black and minority ethnic people than their representation in the total population, they will be disproportionately affected. But because this is a function of the statistics, the Ministry appears to regard this as acceptable. But what it means is that more women than men, and proportionately more black and minority ethnic than the majority ethnic group, have good legal cases which, because of their limited means, they need legal aid to pursue. They will be disproportionately affected by losing legal aid in areas where this is necessary to secure important rights – such as continuing to live in the UK, escaping from domestic violence, being joined by children and partners.

The impact assessments fail to take account of the compound discrimination that 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%.[57] 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.

ILPA is willing to meet to meet with the Ministry of Justice again to discuss the matters set out in this response in more detail and to provide further information where this would be of assistance.

Sophie Barrett-Brown
Chair, ILPA

Annexe 1 – Case Studies
Annexe 2 Compendium of cases on Article 8 of the European Convention on Human Rights
Annexe 3 Table of Remuneration Rates in legal aid immigration and asylum cases.

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