ILPA note on the "Transformation" Legal Aid consultation

April 2013

Amended 14 May 2013 to rates in first paragraph in response to question 32.

This did state:
Travel will be paid at between £25.50 and £26.50, preparation and attendance at between £51.00 and £55.00, for self-employed professionals who must meet tax, national insurance and overheads. The uplifts support the practices of more junior practitioners who are appearing in the First-tier Tribunal on fixed fee cases.

It now states:
Currently the rates for travel time are, at least nominally, between £26.51 and £36.82, preparation and attendance at between £47.30 and £74.36, for self-employed professionals who must meet tax, national insurance and overheads. The highest rate in each case being the current uplifted rate paid in only some of the Upper Tribunal cases.

SUMMARY

The results of the proposed changes would be that persons who have a good case with excellent prospects of success will:

- Not be able to bring that case because they cannot pay
- Unable to find a legal aid lawyer to bring the case even if they are eligible for legal aid.

The main proposals, which will further limit access to justice, are[1]:

- a residence test for civil legal aid claimants;
- a reduction of legal aid for judicial review;
- amendments to the civil merits test to prevent the funding of any cases with less than a 50% chance of success.

The proposed changes will deny legal protection to poor litigants and so directly undermine the rule of law[2]. This is not an immigration problem or even a legal aid problem. It is a problem about access to justice, about equality of arms, about holding the State to account.

INTRODUCTION

ILPA is unlikely to comment substantively on the criminal/defence legal aid proposals in the paper, except where there is a specific effect on persons under immigration control.

In what follows, extracts from the consultation paper are in Times New Roman. ILPA is at the beginning of work on responding to this consultation and this is, therefore, an initial not a final position.

We refer to the part of the Home Office that deals with immigration and enforcement casework as the UK Border Agency pending its being given a name.

THE PROPOSALS, THE CONSULTATION QUESTIONS AND ILPA's COMMENTS

Prison Law

[1] The detail can be found here: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid
[2] *The Rule of Law*, Lord Bingham, Allen Lane 2010, page 88

The proposal:

> 3.4 We believe that criminal legal aid advice and assistance should be available, subject to merits and means, for any prison law case which involves the determination of a criminal charge, or which affects the individual's on-going detention and where liberty is at stake, or which meets the criteria set out in case law (see paragraph 3.14).

The question:

Q1. Do you agree with the proposal that criminal legal aid for prison law matters should be restricted to the proposed criteria? Please give reasons.

ILPA agrees with the matters remaining in scope, we do not agree with the proposals to remove matters from scope. We are concerned in particular about the effect upon foreign national prisoners and ex-offenders held in prison at the end of their criminal sentence under immigration act powers. Such detention is without limit of time and without any oversight of the courts; the detainee only appears before a court or tribunal if s/he instigates this. Detention under Immigration Act powers is frequently lengthy, not infrequently for years. Family members, for example of those whose claims for asylum have failed, who are likely to be subsisting on non-cash support under section 4 of the Immigration and Asylum Act 1999, have difficulties in visiting at all, so the location of the detained person may present problems. UK Border Agency concerns about the risk of absconding affect prison categorisation. Access to rehabilitation programmes and/or planning for release is affected by presumptions that the person will be removed at the end of the sentence, however strong the case against this may be and however unlikely it is in any event that a decision on return will rapidly be resolved.

We are particularly concerned for those with mental health problems. The Government has four times in the last year been found guilty of breaches of Article 3 of the European Convention on Human Rights for its treatment of foreign national ex-offenders with mental health problems, although the worse problems have consistently occurred in immigration removal centres rather than with the prison estate (see for example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) and *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin)). We are also concerned for those with a history of torture and ill treatment or otherwise in need of medical care and those whose treatment in prison is affected by a limited command of English.

Residence Test

Entitlement to civil legal aid is removed from those without 'strong connections' to the UK. Applicants for civil legal aid will be required to satisfy a residence test which will be undertaken by the legal aid practitioner who will be required to establish (and retain evidence on file for audit) as follows:

> 3.49 First, the individual would need to be lawfully resident in the UK, Crown Dependencies or British Overseas Territories at the time an application for civil legal aid was made. This would have the effect of excluding both foreign nationals and British nationals applying from outside the UK, Crown Dependencies or British Overseas Territories from receiving civil legal aid. It would also have the effect of excluding, for example, illegal visa overstayers, clandestine entrants and failed asylum seekers from receiving civil legal aid.
>
> 3.50 Second, the individual would also be required to have resided lawfully in the UK, Crown Dependencies or British Overseas Territories for 12 months. This 12 month period of lawful residence could be immediately prior to the application for civil legal aid, or could have taken place at any point in the past. However the period should be continuous. The fact that the residence period could have been in the past would mean, for example, that people who had previously lawfully resided within the UK, Crown Dependencies or British Overseas Territories on a visa for 12 months, or British nationals who had lived within the UK, Crown Dependencies or British Overseas Territories for 12 months, would immediately satisfy this limb of the test on their return.
>
> 3.51 The residence test would be carried out by the legal aid provider who was dealing with the application for civil legal aid. They would need to see evidence that the client was lawfully resident and had previously been lawfully resident for 12 months, and they would need to

retain copies of this evidence on file for audit purposes. [from footnote: For example, evidence of a right to reside lawfully in the country, such as evidence of British nationality (e.g. a passport), evidence of a right to reside (e.g. a valid EEA Passport), evidence of a right of abode (e.g. a certificate of entitlement as a result of Commonwealth ancestry) or any other evidence of being here legally (e.g. a visa).]

3.56 We propose an exception to allow asylum seekers to be exempt from the residence test for all civil proceedings (including family proceedings, as well as asylum matters). Asylum seekers are "lawfully present" in this country rather than "lawfully resident" and would not otherwise qualify under the proposed test. Although asylum seekers do not have a strong connection to this jurisdiction, they are seeking refuge from their country of origin, and by virtue of their circumstances this group tends be amongst the most vulnerable in society. We therefore propose that a general exception to the lawful residence test is made for asylum seekers.

3.57 Where an asylum seeker is successful in their asylum claim, they will normally be given 'leave to remain' for five years. At this point they will be 'lawfully resident' rather than 'lawfully present', but will not qualify under the second limb of the test until 12 months have passed. We propose that where an individual is an asylum seeker and granted legal aid for a civil or family case, if they are successful in their asylum claim legal aid should continue to be available for that civil or family case. To expect the individual who was an asylum seeker to have to wait a further 12 months to comply with the second limb of the lawful residence test would disrupt the ongoing court proceedings. For any new claim for which the individual who was asylum seeker wished to obtain legal aid, they would need to satisfy the residence test in full like any other applicant.

3.58 If an asylum seeker had their claim for asylum rejected and their appeal rights had been exhausted, they would cease to qualify for legal aid under the asylum seekers exception, and funding would cease. Only where they had made a 'fresh claim' for asylum would they once again benefit from the exception for asylum seekers.

3.59 There is a risk that such an exception to the residence test for asylum seekers, might be exploited by some, who might make spurious claims for asylum simply as a means of obtaining legal aid. However, we consider this risk is low, as it is unlikely that, for example, illegal visa overstayers would wish to bring themselves to the attention of the authorities in this way. Nonetheless, we would monitor the operation of this exception and if it appeared to be being abused we would consider bringing forward secondary legislation to revise the exception.

3.60 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation, to be laid in autumn 2013.

The question:

Q4. Do you agree with the proposed approach for limiting legal aid to those with a strong connection with the UK? Please give reasons.

No. This is about the rule of law. Foreign nationals will be without a remedy when decisions are made which they have the right to challenge, but for which they cannot obtain legal advice. There must be equality before the law. It is a constitutional principle, observed by the courts, that there must be access to the courts to secure the rule of law, see for example *R v Secretary of State for the Home Department, ex parte Leech* [1994] QB 198 per Lord Steyn, and Lord Bingham's, *The Rule of Law* (Allen Lane, 2010), p 85 'means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties are unable themselves to resolve' and p 88 'denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law' . Given that we have an adversarial legal system there must be equality of arms.

Immigration, and many other, practitioners do need to know immigration status to identify rights and entitlements this is not the same as checking status to refuse help. The legal aid means test may involve checks

and lead to refusal of help, but a person who is identified as having funds can be directed toward help for which s/he can (in theory) pay. The impecunious person failing the residence test is simply turned away.

The checks will present difficulties for those legal representatives who are not immigration specialists. The consultation paper is simplistic[3]: the UK Border Agency guidance for employers on preventing illegal working, which is concerned with verifying immigration status runs to 89 pages and still employers rely on lawyers to help them interpret it. The practitioner who decided against a person may have got it wrong, the issue is not always straightforward, - yet the person would have no way to challenge that decision.

There are four elements to the residence requirement:

- lawful
- residence
- continuously
- for more than 12 months

All elements must be satisfied.

As an alternative to satisfying any element, a person can be seeking asylum.

Lawful

The lawfulness of a person's residence may be the very matter in issue in the proceedings for which legal aid is needed, be the proceedings to do with immigration, other aspects of public law or homelessness.

Those not lawfully present include;

- persons brought to the UK as children, some of whom are still children, some of whom are in their 50s or 60s and unaware that their country of origin's independence from the British empire has affected their immigration status;
- trafficked persons, for a claim for asylum is about risk on return, not what has been suffered in the past, and some trafficked persons have no claim for asylum. Some in this category will be domestic slaves. Here there is a risk of a violation of Article 47 of the EU Charter of Fundamental Rights because of the EU Directive on Trafficking in Human Beings[4];
- those whose claims for asylum have failed, but who cannot be removed. The consultation paper makes clear, there will be no legal aid to assist such persons to make a fresh claim for asylum, although there will be legal aid if they succeed in doing so. There is no right of appeal against the Home Office's refusal to accept that matters raised constitute a fresh claim, the only challenge is by judicial review. Accelerated procedures such as the "detained fast track", in which claims are decided in a matter of days, before corroborating evidence, including expert evidence, can be obtained, often result in a fresh claim very soon after the initial claim is refused.
- Those who made a clandestine entry or whose lawful leave has expired, who are unknown to the authorities. Such persons are likely to need assistance to attempt to regularise their stay and unlikely to bring themselves to the attention of the authorities without advice as to what to expect and assistance in presenting their cases. In their case this appears to be an own goal for the Government, ensuring that such persons remain hidden.
- Those in the UK without lawful leave who have come to the attention of the authorities. This class will include persons who have lived in the UK all or most of their lives, and persons with British spouses and children. Those partners and child would be able to bring a human rights claim in the country court under section 7 of the Human Rights Act 1998 to argue that the separation is not lawful.
- Those facing removal or deportation whose challenges are based on rights to private and family life, rather than asylum claims. Such claims still involve the UK's international obligations under the ECHR and the obligations on public authorities under the Human Rights Act 1998 not violate rights protected by that Act.

Residence

The consultation does not go into detail in distinguishing between 'residence' and 'presence'. It would appear that the term is intended to distinguish those in the UK, not subject to immigration control (British citizens etc.) or

[3] See Footnote 30 in the consultation paper.
[4] Directive 2011/36/EU.

with leave from those on temporary admission following a request for leave which has yet to be determined. However, the only persons who would normally be on temporary admission for such a lengthy period would be persons seeking asylum. Given that they have been dealt with separately, this criterion adds nothing.

How quickly the UK Border Agency deals with a case and therefore how long a person spends on temporary admission is a matter of how the UK Border Agency allocates its resources and of its efficiency. Its record on each is poor. A person on temporary admission will, if their claim succeeds, likely settle in the UK and later acquire British citizenship. This highlights the particular unfairness of paragraph 3.57 of the consultation, that a person, how ever long they have been in the UK waiting to be recognised as a refugee (notwithstanding this is a declaratory status i.e. they were a 'refugee' on arrival) must then wait 12 months to be eligible for legal aid.

Continuously

This element goes to both residence and lawful residence. It appears aimed primarily at preventing persons aggregating short visits. It is unclear what would be the effect of short absences from the country during the currency of a visa, for example for holidays if a person is in the UK with leave and able to travel. There are different permitted absences in different areas of immigration and nationality law and the reasons for an absence may affect how it is treated.

It is possible to have a break in continuous lawful residence. For example, a person might arrive as a visitor, then overstay, but subsequently have rights as the family member of a European Economic Area national.

For 12 months

What is at issue here is the continuous period for which the person has had lawful leave, rather than the length of any leave granted. It is unclear whether the proposed provision would be for 12 months or "more than 12 months"; this could be significant as in some cases leave is granted for 12 months exactly. There appears to be no statistical evidence to suggest how many people presently in receipt of civil legal aid would not satisfy this element of the residence test and therefore what the projected 'saving' is. At present it appears to be a wholly random requirement.

Those who will be affected by this element:

- Those present on a visa for six months or less (e.g. visitors).
- Those in the first year of their visa or with leave of less than six months. This includes persons who fully anticipate remaining in the UK for the rest of their lives and taking British nationality (e.g. spouses and partners, children joining parents). One affected group would be children whose claims for asylum have been refused but who have been given limited leave of less than one year because no arrangements can be made for their safety and welfare on return. Such children do not have an appeal against the refusal of asylum until they are given leave of more than one year or until they face removal.
- EEA nationals in their first year of living in the UK including accession State nationals.
- Trafficked persons who are likely to need assistance when first they come to the attention of the authorities.
- Survivors of domestic violence. Immigration applications under the domestic violence rule can only be made by a person with limited ("probationary") leave as a spouse, thus the rule is generally used by persons who have been in the UK for a limited period.
- Domestic workers who are now given only six month visit visas – some may be trafficked. Others may not be receiving all to which they are entitled as workers.
- Those who are British but have never spent a continuous period of 12 months in the UK.

Matters which are likely to arise on which persons would not receive assistance:

- Immigration cases including challenges to unlawful refusals to transfer from one immigration category to another;
- Housing and community care cases, including homelessness, support for persons who have been trafficked, support for those whose claims for asylum have failed but who cannot be removed, and community care cases about support for children and families. Often in such cases the very issue to be decided is whether the person has an immigration status that renders them eligible for assistance. This does not always involve looking for a Home Office grant of leave to remain. In many cases, such persons claim a status that arises by automatic operation of law, such as a parent from a non-EEA state who cares for a British citizen child (such a parent may derive a right of residence directly from EU law). There is a risk of persons being excluded from assistance in this area because they cannot produce a document

proving their right of residence to secure funding to challenge a denial of access to social assistance by a local authority that also (wrongly) does not recognise an automatic right of residence;

- Challenges to detention: applications for bail, judicial reviews of unlawful detention, habeas corpus applications; applications for damages for unlawful detention. Contrast this with the approach to prison law cases where it is stated that cases going to questions of liberty or the unlawfulness of detention should continue to be funded. Immigration detention is without limit of time, as a result of an administrative decision, a person is not brought before a court but must instigate any challenges to detention themselves;
- Claims for damages for false imprisonment;
- National security cases before the Special Immigration Appeals Commission, including those British citizens deprived of citizenship whilst outside the UK and excluded from re-entry (an area previously expressly preserved within the scope of legal aid);
- Age dispute cases and other challenges to local authorities brought by separated children whose asylum claim has finally been determined (at least for the moment, where they have no right to an "upgrade" appeal against refusal under section 83 of the Nationality, Immigration and Asylum Act 2002);
- Public law cases;
- Actions against the police;
- Family law cases;
- Actions against the UK Border Agency for misfeasance in public office, etc.

These thus include areas where persons are particularly vulnerable to the State acting in excess or abuse of its lawful powers and likely to be isolated and at risk. They are areas where the rule of law is always under pressure.

The reason given in the consultation paper for preserving civil legal aid for persons seeking asylum (who are "lawfully present") is because they are "vulnerable." But in all the categories above we are concerned not with high earners moving for work or study or to be with their family but with persons who meet the means test for legal aid. Some will be without any entitlement to support or any right to work. They are, as a group, very much at risk and the powers the State has over them far more extensive than over most citizens or settled persons.

Judicial review: permission

The proposal:

> 3.65 In 2011–12 there were 4074 cases where legal aid was granted for an actual or prospective judicial review. Of these, 2275 ended before applying for permission to the Court.
>
> 3.66 Of the 1799 cases which did apply for permission, 845 ended after permission was refused, either on application or on renewal.
>
> 3.67 In 330 of these 845 cases, the provider recorded that the case was of 'substantive benefit to the client'. This might have been because the public authority had modified its decision to some extent as a result of the proceedings or had conceded the position in advance of the Court's consideration (and the application was not withdrawn, perhaps for costs reasons). Or it might have been because the challenge was for a delay in eaching a decision and the relevant decision had been taken by the point that permission was considered by the Court.
>
> 3.68 Therefore there were just over 500 cases funded by legal aid which did not settle, applied for permission and failed, and ended without benefit to the client but with potentially substantial sums of public money expended on the case. These figures suggest that there are a substantial number of cases which benefit from legal aid, but are found by the Court to be "unarguable".
>
> 3.69 We propose that providers should only be paid for work carried out on an application for permission including a request for reconsideration of the application at a hearing, the renewal hearing or an onward permission appeal to the Court of Appeal), if permission is granted by the Court.
>
> 3.70 Currently a similar system exists for immigration and asylum Upper Tribunal appeals. In an immigration or asylum appeal case, (subject to some exceptions) where an application for

permission to appeal to the Upper Tribunal is refused, then funding for the permission application is not payable.

3.71 Legal aid would continue to be paid in the same way as now for the earlier stages of a case, to investigate the strength of a claim, for example, and to engage in pre-action correspondence aimed at avoiding proceedings, as is required by the Pre- Action Protocol for Judicial Review. [Footnote 42 This work is usually carried out under the Legal Help or the Investigative Representation form of service.] Where a permission application was made the claimant would continue to be technically in receipt of legal aid for the permission stage of the case, and so would continue to benefit from cost protection, and would therefore not be personally at risk of paying costs if the permission application were unsuccessful.

3.72 We recognise that the merits criteria are in place to help weed out weak cases, however we do not consider that these are sufficient by themselves to address the specific issue we have identified in judicial review cases. When making an application for legal aid, the provider certifies their assessment of the merits of the case based on their detailed knowledge of the case and specialist understanding of the law in the relevant area. The LAA is necessarily strongly guided by the provider's assessment of the prospects of success of the proposed judicial review claim in deciding whether the claim should receive funding. We consider that it is appropriate for all of the financial risk of the permission application to rest with the provider, as the provider is in the best position to know the strength of their client's case and the likelihood of it being granted permission.

3.73 We also recognise that this proposal would affect the 330 cases identified where permission was refused but a benefit to the client was recorded. Our approach would tackle the large proportion of cases (61% in 2011–12) in which permission is refused and which have no benefit to the client, thereby incurring unnecessary costs for public authorities and the legal aid scheme. We do not consider it would be appropriate to retain funding for such cases simply in order to retain funding for the minority of cases in which permission is refused but which are recorded by the provider as having substantive benefit to the client. In the immigration and asylum Upper Tribunal appeal system, costs are not paid if permission to appeal is refused even if the provider records that there is a substantive benefit to the client.

3.74 We do not consider that it would be sensible to make an exception and allow funding to be provided where a provider says the case was in any event of substantive benefit. Providers have been incentivised by LAA contract key performance indicators to record substantive benefit as part of their management information. Allowing providers to decide whether or not they get paid for the permission work of failed cases would not provide a robust control of funds.

3.75 In addition, depending on the circumstances, it may well be possible for the provider to recover their costs in these situations, either as part of a settlement between the parties or through a costs order from the court. For example, if the challenge is to a failure by a public authority to make a decision, and the decision is taken after the permission application is made, permission may well be refused because the case is academic, however, the claimant can pursue a costs order and the court can grant any costs reasonably incurred by the claimant if, arguably, the proceedings have brought about the making of the decision.

3.76 The same reasoning applies in relation to cases where an application for permission for judicial review is made and the case is withdrawn because the defendant concedes or the parties settle the case. Again, depending on the circumstances, the claimant may agree the costs of the permission application as part of the settlement, or if no costs are agreed, the claimant can seek a costs order from the court.

3.77 Therefore we consider that this proposal is the appropriate way in which to ensure that legal aid is not used to fund a significant number of weak cases and is focussed on cases that really require it.

3.78 Reasonable disbursements, such as expert fees and court fees, which arise in preparing the permission application, would continue to be paid, even if permission was not granted by the Court. This reflects the exceptions made for the payment of interpreters and experts under the immigration and asylum Upper Tribunal remuneration scheme.

Implementation

3.79 Subject to the outcome of this consultation, it is currently anticipated that this proposal would be implemented through secondary legislation to be laid in autumn 2013 and, if necessary, contract amendment

The question:

Q5. Do you agree with the proposal that providers should only be paid for work carried out on an application for judicial review, including a request for reconsideration of the application at a hearing, the renewal hearing, or an onward permission appeal to the Court of Appeal, if permission is granted by the court (but that reasonable disbursements should be payable in any event? Please give reasons.

No.

The approach puts all the power in the hands of the UK Border Agency or other Government departments. They will have no incentive to concede a point in the consultation paper's 1799 (4074-2275) cases that ended before an application for permission for judicial review had been made if they consider that lawyers are likely to be reluctant to apply for permission because of fears over costs. It will undermine the use of pre-action protocols to sort matters out before they progress to court (and/or, now, the Upper Tribunal).

The change will make it more difficult for people to find representation because some providers will be very risk adverse. The outcome of permission applications is difficult to predict, especially in circumstances where the Home Office is likely to concede some but not all points. It seems likely that attempts will be made to pass the risk onto the client.

Even where a lawyer is willing to bring an application on this basis, this approach will affect the amount of judicial review a solicitor or a barrister can do at any one time, because the work is "at risk." Given that many legally aided firms are limited to 100 or so cases ("matter starts) in immigration and asylum, legally aided firms are reliant on judicial review work to survive. But where things are very difficult it is necessary to limit the amount of "at risk" work on the go at any one time. Risk exposure will increase with the complexity of the judicial review.

Attempts to keep costs down may result in firms/organisations keeping as much of the work as possible in house will directly affect the specialist bar.

The analysis in the consultation paper does acknowledge that cases settle in circumstances where the applicant achieves all that would have been achieved had a judicial review been successful. The conclusion that this is not reason enough to abandon the proposal does not flow logically from the arguments set out in the consultation paper. In the case of the UK Border Agency, even after a point has been settled by the higher courts, individuals are very likely to have to start judicial review proceedings to be treated in line with the leading case. Indeed, it appears that some parts of the Agency react only to a pre-action protocol letter. Judicial review is used frequently in cases of delay or inaction, some involving people sleeping rough. See annexe.

It is disheartening and indeed unacceptable to be told that (accredited) practitioners' assessment of whether the course taken was of substantial benefit to the client cannot be trusted. The Legal Aid Agency requires that practitioners must be accredited and providers must be audited. There are no longer devolved powers in judicial review and the LAA LAA must understand and be convinced of the merits of the case at the outset. If LAA LAA has so little faith in the professional standards/ethics and probity of providers, why has it given them contracts?

It is suggested that applications for permission to appear to the Upper Tribunal in immigration and asylum cases are the model for this approach to judicial review. As to lessons we can learn from such cases, the parallel is fundamentally flawed because of the very different stage the case is at. With the application to the Upper Tribunal the case has been fully prepared at First-tier Tribunal stage, counsel has drafted the skeleton argument

and reviewed the determination of the First-tier Tribunal, for which they have received payment. The at risk work is the drafting of the grounds of appeal. The grounds are succinct because they do not repeat the information in the case, but focus on the error of law. The application to the Upper Tribunal is only the tip of the iceberg. The work that is done at risk, may be 10% of work done.

By contrast in a judicial review the letter before claim will refer to the relevant decision, earlier correspondence and relevant law, but the papers for the court are more akin to preparing for an appeal before the First-tier Tribunal. There is a requirement in Part 54 of the Civil Procedure Rules and in the Practice Direction for a "Detailed Statement of Grounds" as well as a statement of facts and supporting documents to be filed with the claim form. An oral renewal of the application for permission to apply for judicial review generally requires an additional skeleton argument. Most of the work would be done on an 'at risk' basis. It would not be financially viable for anyone to work in this away.

The current time limit for permission to appeal to the Upper Tribunal is five business days[5] (28 if the appellant is outside the UK[6]). The application is a paper application. Not only the sums at risk but also the delays in knowing the outcome are much less than in most judicial reviews. The cases are not tactical matters in the way that a judicial review is. An application for permission to appeal to the Upper Tribunal is an assertion that the immigration judge at first instance got the decision wrong. It is not usually an attempt to speed up UK Border Agency decision-making, or to force the Agency to reconsider a stance taken in general or on a particular case.

We do see cases where a person has had to put in an application for permission to appeal without assistance and only finds representation once they have succeeded in appealing. These cases must be considered in the context of clients who cannot secure lawyers to draft grounds of appeal for want of public funding, who therefore draft their own grounds that fail to disclose arguable errors of law for want of skill and expertise, and who are refused permission to appeal.

The changes are likely to give rise to unintended consequences including:

- More work being done at the Pre-Action stage, before the at risk work starts;
- The application for permission having to be determined rather than the parties sorting matters out between themselves;
- There will be fewer "rolled up" hearings where the permission application and the main application are dealt with at the same hearing;
- There will be applications for the judge to exercise discretion to award costs at the permission stage.

We are extremely surprised that it is considered an efficient use of public money to have the court (or Tribunal) determine the question of costs in these cases, rather than the Legal Aid Agency. We consider that there is a need for some rigorous work to identify whether the result will be a saving or increased expenditure both as the result of increased bad behaviour by Government departments and because of the costs of administration.

Civil merits test – removing legal aid for borderline cases

The proposal:

> 3.85 Cases must generally have at least a 50% chance of success to receive legal aid funding for full representation (i.e. must have a moderate or better prospects of success). However, there are certain types of housing or family cases which will receive funding with borderline prospects of success. In other cases funding will be available if there is a borderline prospect of success and the case has special features (that is to say it is a case of significant wider public interest or a case with overwhelming importance to the individual). Funding may also be granted in public law claims, claims against public authorities and certain immigration and family claims which have these special features or if the substance of the case relates to a breach of ECHR rights.
>
> 3.89 This proposal would apply equally to asylum cases assessed as having 'borderline' prospects of success. The Government recognises its responsibilities under Council Directive

[5] Rule 24 Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230)..
[6] Rule 24 Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230).

2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. This requires the Government to provide legal assistance for those refused asylum. However article 15(3)(d) of the Directive makes clear that this obligation only extends to those appeals
which are 'likely to succeed'.

The question:

Q6. Do you agree with the proposal that legal aid should be removed for all cases assessed as having "borderline" prospects of success? Please give reasons.

Immigration practitioners with a mere 100 or so matter starts are unlikely to be in any position to squander one on a case that they do not think winnable. However, they are frequently in the position of challenging cases that they know will be hard to win, for example because there is settled law in the higher courts against them. It is frequently impossible fairly to judge the merits of a case before it has been prepared, which is why the borderline category is important. In such cases and in cases generally, the state has an obligation to ensure that appropriate evidence should be made available ([7]e.g. where the European Court of Human Rights said the court should have ensured that a report on scars was obtained to support client's case, etc.).

Problems in immigration and asylum are exacerbated by the "exotic" notion of a factual precedent[8], "country guidance" cases in the Upper Tribunal that, purporting to judge of the factual situation in a country, go out of date in a way that legal precedents do not. The low standard of proof in asylum cases[9] makes it difficult to use examples from other jurisdictions as to whether a case is borderline.

One possibility is that this will simply lead to increased use of the 'unclear' category where it is available.

The cases funded where the prospects of success are borderline are a very particular class of case, cases of particular importance which are likely to involve substantial injustice or suffering. Where there is such injustice or suffering, the State should encourage attempts to use the law to put them right.

There are no figures whatsoever in the consultation paper that look at the success rates in these cases. We could draw attention to this but it may be high risk given that we do not know what the success rate is.

The consultation paper proceeds on the assumption that if the borderline category is funded the cases within it should no longer be eligible for legal aid instead of looking at the particular cases and whether it is necessary to make special arrangements for them.

Other Matters

Legal Aid practitioners will have to cope with the proposed 'transformation' against the background of successive and increasing restrictions in Legal Aid Agency (LAA LAA) contracts. Legal aid firms and organisations, especially not for profits that cannot balance reduced earnings from legal aid with increased private work, are in many cases struggling to survive. Any change disturbs whatever precarious equilibrium they have reached. Many have, however good they are and however good LAA LAA thinks they are, been able to secure a contract for only 100 legal aid cases at the initial stages and have built the types of work now under attack into their survival strategy. With so little wriggle room it is difficult to do much work "at risk" as described above.

The matters that follow are not primarily an attack on the legal profession. Lawyers have the possibility of doing well-paid private client work. They are an attack on doing the work funded by legal aid in the areas under threat and thus on the clients who would benefit from this work and the persons who would benefit from legal precedents being set or the UK Border Agency being called to account.

Reforming Fees in Civil Legal Aid - Barristers' fees

[7] *R.C. v. Sweden*, Application no. 41827/07, Council of Europe: European Court of Human Rights, 9 March 2010) at para 53.
[8] *S et ors v SSHD* [2002] EWCA Civ 539 per Laws LJ.
[9] *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958).

The question:

Q31. Do you agree with the proposal that fees for self-employed barristers appearing in civil (non-family) proceedings in the County Court and High Court should be harmonised with those for other advocates appearing in those courts. Please give reasons.

No.

This is not about harmonising, it is about levelling down. There is no suggestion that other advocates should be paid what a barrister is currently paid, instead it is suggested that the barrister's fee be reduced.

Barristers are subject to the cab-rank rule and cannot pick and choose their cases to achieve a particular balance of work. It is wrong to assume, as the consultation paper does, that just because a cut of 10% in rates has not affected supply, further cuts will not do so. This ignores the prospect that cuts to a certain level are absorbed, but then this stops. The cumulative effect of measures on the self-employed specialist bar must be considered.

The fees paid to barristers are fees from which they deduct their expenses and costs such as chambers rent. What remains is income. The fees proposed make it very difficult for barristers to devote a significant part of their practice to these cases. The availability of a cadre of barristers skilled in immigration issues (including unlawful detention and false imprisonment actions in civil courts) who are able to undertake advocacy provides a service to publicly funded solicitors operating in this area. It allows them to secure advocacy services as and when they need them without having to go to the expense of maintaining in-house advocates regardless of the need for such advocates and where there may be insufficient work to keep such advocates fully occupied. Securing advocacy services from barristers on a case-by-case basis broadens access to justice in a cost effective way. The rates for barristers should be maintained. Harmonisation can be achieved by increasing the rate paid to solicitors, which is in no way unreasonable given all the problems with levels of pay for this work.

Removing the uplift in the rate paid for immigration and asylum Upper Tribunal cases

The proposal:

> 6.28 Providers currently receive uplifted legal aid rates of payment for immigration and asylum Upper Tribunal appeals. The higher rate was put in place under an old scheme of retrospective funding where work on the whole appeal was 'at risk', and was intended to compensate providers for carrying the risk of non-payment throughout a case. Under existing arrangements only work on the permission
> application is 'at risk' and payment is made after a successful application. However the higher rate of payment still applies. Given the different arrangements in place since the higher rate was introduced, we do not consider continued payment of the higher rate to be justified.
>
> 6.30 We consider that there is no justification for the continuing payment of the higher rate, and that it may potentially incentivise applications to appeal in weaker cases.

The question:

Q32. Do you agree with the proposal that the higher legal aid civil fee rate, incorporating a 35% uplift payable in immigration and asylum Upper Tribunal appeals, should be abolished? Please give reasons.

It is correct that the uplift was originally intended to be compensation for work being at risk and that now only the permission stage is all that is at risk. However, it is arguable that over time the uplift has been factored in each time legal aid rates have not been increased. Underlying rates in immigration and asylum cases are essentially unchanged, save for a10% cut in 2012, for over 10 years. The proposed rates can be compared with the Guideline Hourly Rates used by the High Court in assessing costs. They fall far short. Currently the rates for travel time are, at least nominally, between £26.51 and £36.82, preparation and attendance at between £47.30 and £74.36, for self-employed professionals who must meet tax, national insurance and overheads. The highest rate in each case being the current uplifted rate paid in only some of the Upper Tribunal cases.

The risk is of losing specialist advocates because they will have to leaven legal aid work with private work (or work in other fields). The risk is all the more pronounced now that (non-asylum) immigration has been taken out

of legal aid, meaning that different knowledge and skills are needed for work that can be done on legal aid mainly asylum and private work, where there is much less asylum work.

The suggestion that the rate incentivises appealing in weak cases is backed by no evidence. If the cases have got permission, then they cannot be weak as not only does there has to be an error of law to get permission, but it must also be a material error, one that would have made a difference to the outcome.

Aside the manifest illogicality, it is a slur on those practising in accordance with their professional obligations to suggest that they would take weak cases for the uplifted fees. And it is a sorry reflection on the Legal Aid Agency if it has contracted with persons who are not practising in accordance with their professional obligations. Competent representatives of probity have insufficient legal aid matter starts to run a viable business. If there are persons who are not competent representatives of probity with legal aid matter starts this is a reckless way of treating applicants and a reckless waste of public money.

Expert Fees in Civil, Family, and Criminal Proceedings

Q33. Do you agree with the proposal that fees paid to experts should be reduced by 20%? Please give reasons.

We are not convinced that we have ballpark rates of fees in immigration and asylum such as make it easy to form a view.

Equalities Impact

The questions:

Q34. Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.
Q35. Do you agree that we have correctly identified the extent of impacts under these proposals? Please give reasons.

The quality and reasoning of the Equalities Impact Assessment is poor. It takes the line that any 'disproportionate effect' is justified and it is unclear whether this would be revisited if calculations and reasoning were showin to be wrong. We highlight some interesting statistics, although whether they are accurate must be in doubt.

- 18-24 year olds most likely to be affected by the judicial review changes.
- 48% providers affected by the removing the uplift in Upper Tribunal immigration and asylum cases are from black and minority ethnic groups, higher than in other areas of law and higher than 14% in the general population. Does racism or prejudice explain the tendency to believe the very worst of providers' motives in the area? Or a belief that that they will keep on doing this work whatever the pay?

The question:

Q36. Are there forms of mitigation in relation to impacts that we have not considered?

Not to make the cuts but to opt for a "polluter pays" approach. The frequency with which the Home Office changes the law and the number of changes where it anticipates challenges before the courts are notorious and costly, to the legal aid budget and to the court. Were the Home Office made to pay it is likely to force it to improve its work.

These proposals make it more difficult to hold the State to account. e have come a very long way from the Ministry of Justice's statement in its 2011 consultation paper *Proposals for the reform of legal aid in England and Wales*

> *"4.16 In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of*

executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly."

For further information: Alison Harvey, General Secretary, ILPA, alison.harvey@ilpa.org.uk 02072518383