

EXCLUDING MIGRANTS FROM JUSTICE: THE LEGAL AID CUTS

BY ANNE SINGH AND FRANCES WEBBER

IRR BRIEFING PAPER NO.7

**INSTITUTE OF
RACE
RELATIONS**

Anne Singh, a solicitor experienced in immigration law and Frances Webber, a recently retired immigration barrister, discuss the impact on refugee and migrant communities of past and proposed legal aid cuts.

Removal of immigration cases from the scope of legal aid is the culmination of ten years of government cuts in this field, which have already had devastating effects.

In November 2010, the ministry of justice announced proposals¹ to cut £350 million from legal aid in civil cases. The proposals will abolish public funding for legal help and advice in areas of law including welfare benefits, immigration, employment, divorce and child residence, and school exclusion appeals.

The proposals will severely impact on the ability of poor and BME groups to obtain access to justice. Here, we examine the cumulative impact of the removal of immigration from the scope of legal aid and previous cuts and changes in the field.

Whilst incensed by the proposals to cut civil legal aid, advisers in immigration and asylum practice are not surprised: government attacks on publicly funded legal advice in this field have been sustained and unrelenting for ten years. Migrants and asylum seekers seeking legal help have found a constantly shrinking pool of available legal expertise, and consequential restrictions on access to justice.

The rise and fall of legal aid

Legal aid became available for representation in immigration and asylum appeals in 1998. Prior to that, free immigration and asylum advice was provided either by the Home-Office funded Immigration Advisory Service (IAS, formerly UKIAS), or by the small number of extremely dedicated and underpaid solicitors whose payment came from the 'green form', legal aid which paid for advice but not for representation at an appeal hearing. In these 'bad old days',

migrants were frequently gulled into paying thousands of pounds for incompetent representation by unqualified high street advisers, including travel agents and 'community leaders', who became notorious for exploiting and cheating migrants and sometimes for working behind the scenes with the Home Office to ensure their deportation. The advent of public funding for representation, together with a new regulatory scheme which criminalised unregulated immigration advice, cleaned up the field and ensured a good supply of qualified and competent legal advice and help for those seeking to stay in the UK, to fight deportation, or to bring in family members.

In 2000, the Legal Aid Board was succeeded by the Legal Services Commission (LSC), which administers three forms of public funding in immigration and asylum cases: Legal Help for advice, Controlled Legal Representation (CLR) for representation before the Tribunal on appeal or bail and Legal Aid ('certificate') for appeals to the Court of Appeal and for judicial review. Eligibility for funding is determined by the person's means and by the merits of the case. Firms and organisations are awarded contracts to provide publicly funded legal services in a specified number of cases.

In 2004 the LSC imposed cost limits on immigration and asylum work, allowing payment only for three hours' Legal Help work in preparing and presenting an immigration application (five hours in asylum cases), with similar limits imposed on CLR work undertaken for appeals. The limits attached to the client's case, rather than the adviser. This meant that if an asylum seeker was dispersed, and had to find a new representative in the town where they were sent, the new representative frequently found that most of the client's casework hours had been used

up, leaving too few for the new representative to prepare the case properly. Following vigorous representations, limits were made somewhat flexible, but most advisers were required to apply to the LSC before incurring further costs, a process which took up a great deal of time and caused huge frustration.

At the same time, the LSC also stopped paying for caseworkers to attend asylum interviews, unless the client was a child or there were other special features. The removal of legal aid for asylum interviews did enormous harm to the asylum process, since many asylum seekers are unclear about what is relevant to their claim and neglect to mention important matters unless specifically reminded. This matters because anything not referred to in the asylum interview, but remembered later, tends to be rejected out of hand by UKBA and by immigration judges as 'embellishment' of the original claim.

A major blow to specialist immigration advisers was the abolition in April 2004 of 'staged billing', whereby firms and organisations with an LSC contract billed the LSC every six months for work done during the period. Henceforth, the LSC would only pay for work done on a case once the case was completed. Given that many cases – particularly asylum claims and appeals – could take years to be completed, this had a serious impact on the financial viability of the firms and organisations providing publicly funded immigration and asylum advice and representation, many of whom had 'work in progress' as a substantial proportion of their turnover. Indeed, it was the end of staged billing and the LSC's failure to pay its debts that was behind the collapse in 2010 of Refugee and Migrant Justice (RMJ), the UK's largest national not-for-profit provider of advice and representation in the asylum field, with thirteen

regional offices, 270 staff and 10,000 clients in the past year (including 900 children). RMJ went into administration in July 2010 because it could not pay its staff, although it was owed nearly £2 million in unpaid fees by the LSC. The justice ministry was oblivious to the patent injustice of this situation and to the hardship which RMJ's demise would bring to asylum seekers.

But as early as 2004, the impact of the legal aid changes was beginning to show, as experienced and widely respected practitioners were leaving the publicly funded immigration and asylum field. This in turn inevitably had a direct impact on those using their services: migrants, asylum seekers and their families. In April 2005, Bail for Immigration Detainees (BID) issued a report on the effects of the 2004 cuts on migrants and asylum seekers, *Justice Denied*. BID found that the 2004 cuts had led to a severe shortage of advice and representation in asylum and immigration for very vulnerable people including torture and trafficking victims:

'... the effects of the changes are injustice, destitution, illegal working, frustration, loss of faith in the justice system, desperation and exploitation. Many law firms have pulled out of asylum and immigration work altogether, or have significantly reduced the amount of work they are able to take on.'

Transferring risk to advisers

In 2005, the government introduced new rules providing that representatives would have to bear the cost of seeking to challenge dismissal of first-instance appeals in immigration and asylum. If their challenge was unsuccessful, they would not be paid for the work. Even if it succeeded, they could apply for public funding, but this was not automatic. The new rule discouraged innovative

and risky challenges, which are needed if standards of due process and procedural protection are to be maintained.

The following year, the LSC introduced a new requirement for contracts: firms and organisations had to have an overall 40 per cent success rate in their appeals. Once again, the effect was that more 'borderline' or risky cases were refused funding – often the cases which establish important new legal principles. Landmark cases extending refugee protection to women victims of domestic violence and to homosexuals facing persecution would probably not have been brought under these new rules. The Asylum Appellate Project, set up in June 2007 to assist asylum-seekers who are refused Controlled Legal Representation as a result of failing the merits test, succeeded in 79 per cent of funding appeals to the Independent Funding Adjudicator, demonstrating how solicitors have applied the merits test too harshly in order to ensure an average success rate which will allow them to renew their LSC contract.

In 2006, Lord Carter proposed a fixed-fee system to replace payment by the hour in immigration and asylum cases (along with other civil cases such as family). The Constitutional Affairs Committee² warned that 'imposing national fixed fees on large swathes of legal aid work ... is an exceptionally risky strategy. These providers will be faced with a stark choice between cutting by reducing staff costs and time spent on cases or leaving the legal aid market.' Despite the warning, the change was implemented in October 2007. The committee's prediction that 'specialist providers will be lost to the legal aid system' proved accurate, with yet more of the surviving specialist immigration firms no longer able to afford to provide legally aided immigration and asylum services. The fixed-fee system rewards firms with a speedy turnover of cases, and discourages firms from handling

complex cases or those involving vulnerable clients who cannot be hurried.

The assault continues

As if these attacks to legal provision were not enough, in February 2010, despite overwhelming opposition from lawyers and legal bodies including the Law Society, the ministry of justice withdrew legal aid from most cases involving 'non-residents'. The measure affects not only those abroad, seeking to appeal refusal of entry to join families here, but also potentially excludes those in the UK unlawfully, including trafficking victims.

Then, later in the year, the successful bidders for new contracts for publicly funded work were announced. The result of LSC procurement was a total shambles: most of the best of the surviving firms and not-for-profit organisations, those recommended year after year by practice guides and by peers for the quality of their work and the care they show to their asylum seeking and migrant clients, found themselves without contracts, or with contracts so seriously restricted that they could not continue to provide a service to anyone. For example, Greater Manchester Immigration Aid Unit (GMIAU), one of the most successful providers of publicly funded legal advice and representation in Manchester, had its funding for legal aid work cut by 70 per cent. Devon Law Centre, which had done award-winning work on the quality of representation in immigration and asylum,³ was forced to close in December.⁴ One hundred and fifty of the 400 firms seeking renewal of their contracts were turned down. The LSC and the ministry of justice were unconcerned: people could, they said, go to Citizens' Advice Bureaux (CABx) if they needed advice. But as they know, CABx cannot provide legal representation, but must refer or 'signpost' enquirers to accredited immigration advisers.

This shocking situation applied not just to those providing immigration and asylum advice but also to those providing legal advice with housing, family and other areas of welfare law, including benefits advice. But it did not go unchallenged. A number of firms and not-for-profit providers launched a legal challenge to the LSC's procurement process and particularly, the criteria and scoring applied for the award of the contracts. In granting permission for a legal challenge to the LSC's contract criteria, judges have described the criteria as apparently 'totally irrational' and 'utterly absurd'.

Legal aid desert

The combination of fixed fees and the renegotiation of contracts has left some towns, such as Hull, with no legal aid immigration and asylum solicitors at all, while in other areas such as East Anglia and the south-west, a tiny number of appropriately qualified and accredited lawyers have to try to deal with the volume of unmet legal need. Less visible, but equally significant for those needing help, numerous other firms have had to cut the proportion of legal aid work in immigration and asylum that they do. The unsurprising result has been that migrants and asylum seekers with complex cases, including the most vulnerable, are increasingly going unrepresented, and the availability of high quality publicly funded advice has been severely restricted.

The new proposals

For migrants and their families, no funding will be available for advice on staying in the country or for legal representation in fighting deportation, unless the case involves national security. Destitute asylum seekers will not be eligible for legal advice on their entitlement to asylum support. Only asylum advice and appeals, bail and challenges to immigration detention will be

legally aided under the proposals. The justification is cost: the government wants to cut a significant proportion of the £85 million spent on legal help and representation in immigration and asylum in 2009-10.

The ministry claims that the cuts are aimed at discouraging a 'culture of litigation'. But this ignores the evidence of the culture of disbelief and refusal and poor standards of decision-making at the UK Border Agency (UKBA). These decisions affect vital areas of life, such as whether a person may be joined by a spouse, partner and/or their children or whether they must leave the UK and close family behind, or whether they can safely flee domestic or sexual slavery without fear of being removed to further abuse. In an echo of its treatment of those reliant on welfare benefits, the government claims that immigration is a matter of choice, so that those seeking to enter or stay should fund their own legal appeals. It also claims that in most cases, migrants can represent themselves, since tribunals are 'user-accessible', interpreters are provided at public expense and cases do not involve complex legal issues.

The ministry's claims that self-help and self-representation are easy for migrants are belied by the sheer complexity of the law, caused by the plethora of legislative changes in recent years and many more changes to secondary legislation, policy and practice. UKBA decisions by their nature involve complex domestic rules and EEA regulations and many involve human rights, especially the right to family and private life which is a particularly dense area of immigration law on which the UK Supreme Court (previously the House of Lords Judicial Committee) has given more judgments in recent years than on any other area of law. So complicated is this area of law that uniquely, those advising and representing in immigration and asylum must satisfy a number of regulation and competence requirements and a

rigorous accreditation scheme. If lawyers in the field need to be accredited, the difficulties for migrants without lawyers, unfamiliar with the legal system and perhaps even the language, can easily be imagined.

Voluntary sector

Legal aid is essential to ensure that decisions that so directly impact on fundamental human rights can be properly scrutinised. The ministry seeks to assure us that legal aid will continue to be provided 'in cases where a litigant's life is at stake, or involves the loss of liberty, homelessness, physical harm, or in cases involving children being taken into care.' But this is hollow reassurance when people are separated from their families or relying on the immigration rules to seek safety from domestic violence. Such claims are not about people's choices but about violations of human rights. Vulnerable people are being subject to UKBA's flawed decision-making and being excluded – by virtue of being poor migrants - from bringing effective challenges. This is so even in the so-called protected areas of asylum and detention. Because of the decade of cuts we have described above, a large and increasing proportion of asylum seekers are forced to present their own appeals. And many detainees have to represent themselves on applications for bail. Voluntary organisations have responded by providing what help they can – for example Bail for Immigration Detainees (BID), which was set up in 1998, has a pool of young solicitors and barristers who provide free representation on bail applications, but such is the volume of demand that it has produced a guide for detainees on how to make their own bail applications. In similar vein, Crossroads Women's Centre has produced a self-help guide for asylum seekers to help them present their own asylum appeals, while the National Coalition of Anti-Deportation Campaigns (NDADC) provides practical (non-legal) advice and guidance for those facing deportation.

But restrictions on the provision of legal help in this field make it difficult for the voluntary sector. Resource-stretched voluntary organisations are less and less likely to be able to afford the costs of regulation and training of advisers in such a complex area of legal practice, and so people become even more vulnerable to exploitation by charlatans and the profit-driven. The best protection against injustice is good legal advice and, for those who cannot pay, that means good legal advice funded by legal aid. Exclusion from legal aid is exclusion from justice. We cannot return to the situation encapsulated in the well-worn quotation of US Judge Sturgess, 'Justice is open to everyone in the same way as the Ritz Hotel'.

Thanks to the Immigration Law Practitioners Association for material used in this article.

Endnotes

- 1 Ministry of Justice: Proposals for the reform of legal aid in England and Wales, November 2010, Consultation paper 12/10.
- 2 Constitutional Affairs Committee report on implementation of Carter proposals for fixed fees in civil legal aid, para 119; II: 82.
- 3 See the final report of the project at www.lawcentres.org.uk/.../Asylum_Appellate_Project_Final_Report.doc
- 4 See <http://www.devonlawcentre.org.uk/> for information.

Useful groups

Asylum Aid (Also Refugee Women's Resource Project)
Club Union House, 253-254 Upper Street, London N1 1RY
Tel: 020 7354 9631
Email: info@asylumaid.org.uk
www.asylumaid.org.uk/

Bail for Immigration Detainees (BID)
London: 020 7247 3590
Portsmouth (Haslar): 0239 281 6633

Oxford: 01865 200 357
Email: enquiries@biduk.org
www.biduk.org/index.htm

Immigration Law Practitioners Association (ILPA)

Lindsey House, 40-42 Charterhouse Street, London EC1M
6JN
Tel: 020 7251 8383
Email: info@ilpa.org.uk
Web: <http://www.ilpa.org.uk/>

London Detainee Support Group

Unit 3R, Leroy House, 436 Essex Road, London N1 3QP
Freephone for clients: 0800 587 2096
Email: info@ldsg.org.uk
Web: <http://www.ldsg.org.uk/>

**National Coalition of Anti Deportation Campaigns
(NCADC)**

Email: ncadc@ncadc.org.co.uk
Web: www.ncadc.org.uk

Crossroads Women's Centre

230a Kentish Town Road
London NW5 2AB
Tel: 020 7482 2496
E-mail: allwomenscount@crossroadswomen.net
Web: <http://www.allwomenscount.net/>

Published by the Institute of Race Relations ©
December 2010.

More copies of this briefing paper can be downloaded at:
http://www.irr.org.uk/pdf2/IRR_Briefing_No.7.pdf (183kb)

Or download a copy of:

- IRR Briefing Paper No. 1 - *Working with the media*
http://www.irr.org.uk/pdf/IRR_Briefing_No.1.pdf (192kb)
- IRR Briefing Paper No. 2 - *In defence of multiculturalism*
http://www.irr.org.uk/pdf/IRR_Briefing_No.2.pdf (72kb)
- IRR Briefing Paper No. 3 - *Community responses to the "war on terror"*
http://www.irr.org.uk/pdf/IRR_Briefing_No.3.pdf (88kb)
- IRR Briefing Paper No. 4 - *Asylum deaths: what to do next*
http://www.irr.org.uk/pdf/IRR_Briefing_No.4.pdf (232kb)
- IRR Briefing Paper No. 5 - *Youth deaths: the reality behind the 'knife crime' debate*
http://www.irr.org.uk/pdf/IRR_Briefing_No.5.pdf (248kb)
- IRR Briefing Paper No. 6 - *Racial violence: the buried issue*
http://www.irr.org.uk/pdf2/IRR_Briefing_No.6.pdf (303kb)

Institute of Race Relations

2-6 Leeke Street, London WC1X 9HS
Tel: 020 7837 0041 / Fax: 020 7278 0623
Web: www.irr.org.uk/ Email: info@irr.org.uk