PROPOSALS FOR THE REFORM OF LEGAL AID IN ENGLAND AND WALES

A response from Garden Court Chambers' Immigration Team

Introduction

1. The immigration team at Garden Court Chambers is the longest established at the bar. The team consists of 33 barristers including 3 silks who appear in all of the domestic courts and tribunals that hear immigration cases as well as in the European Court of Human Rights and the Court of Justice of the European Communities. Members of the team are responsible for the leading practitioner text-books in this area including: *Macdonald's Immigration Law and Practice, Fransman's British Nationality Law, Asylum Law and Practice, JCWI Handbook: Immigration, nationality and refugee law, Support for Asylum Seekers* and *Halsbury's Laws: Immigration and Nationality Law.*

2. What follows responds principally to questions 1, 3 and 35 in the consultation paper.

Question 1: Do you agree with the proposals 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?

3. The response is limited to the proposals relating to immigration.

4. We agree with the proposal to continue to provide publicly funded legal assistance in asylum cases for the reasons given in para. 4.39 – 4.41 of the consultation paper.

5. We assume that the reference in the consultation paper to 'asylum' includes cases concerned with claims for humanitarian protection under paragraph 339C of the Immigration Rules and for protection under articles 2 and 3 of the ECHR as well as claims under the Refugee Convention. The reasons given in the consultation paper for continuing to fund asylum cases apply with equal force to humanitarian protection and articles 2 and 3.

6. We invite the government to make clear that that is the intended meaning of 'asylum'.

7. We also agree with the proposal to retain public funding for 'claims against public authorities' and for the reasons given in para. 4.43ff which clearly has a bearing on immigration cases.

8. We agree with the proposal to retain public funding for domestic violence cases (para. 4.64ff). Domestic violence is an issue that arises not infrequently in non-asylum immigration cases, particularly under paragraph 289A of the immigration rules. That rule was introduced to protect victims of domestic violence who might otherwise feel compelled by their immigration status to remain in an abusive relationship. We think that public funding should continue to be available for such cases because of 'the importance of the issue and the characteristics of the litigants' (para. 4.64).

9. We agree with the proposal to retain funding for public law cases for the reasons given in para. 4.97.

10. We agree with the proposals to retain funding for cases concerned with detention under the Immigration Acts and proceedings in SIAC for the reasons given in para. 4.83ff.

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?

11. This response is limited to the proposals to exclude 'immigration where the individual is not detained' set out in para. 4.198 – 4.204.

12. We are surprised that application of the criteria set out in para. 4.146 has led the government to conclude that immigration cases, particularly those falling within the following categories should be excluded from public funding. We think that those criteria should result in at least the following categories of case remaining within scope:

    a. those where the case is initiated by the state taking action against the individual e.g. a decision to deport or to remove a person or to cancel, curtail or revoke leave to enter or remain;

    b. cases in which a human rights claim, particularly an article 8 claim is made;

    c. cases in which a child is the applicant or appellant or where a child, albeit not a party to the case would nevertheless be affected by its outcome;

    d. cases concerned with vulnerable individuals.

    e. cases concerned with detained individuals

    f. cases concerned with rights under European Community law;

Proceedings initiated by the state

13. We think that your reasons for retaining public funding of public law challenges apply with equal force in relation to immigration proceedings initiated by the state, i.e. decisions to deport or remove or to cancel, vary or revoke leave to enter or remain. In para. 4.99 of the consultation paper you say:

> We therefore consider that legal aid for most public law challenges is justified on the basis that they enable individual citizens to check the exercise of executive power by appeal to the judiciary, often on issues of the highest importance, and we propose that it be retained.

14. The commencement of immigration proceedings against a person renders him or her liable to being the object of a wide range of coercive, executive powers including:

    a. the use of force against him or her by immigration officers;[1]

    b. administrative detention (whose introduction during peacetime by the Immigration Act 1971 was a constitutional innovation[2]);

    c. imposition of residence, reporting, employment and occupation restrictions, [3] backed by criminal sanctions,[4] as an alternative to detention;

    d. cancellation or invalidation of extant leave to enter or remain and loss of concomitant rights e.g. to work, receive benefits;

    e. enforced removal from the jurisdiction;

    f. ban on re-entry to the UK (for as long as any deportation order remains in force) or liability to mandatory or discretionary refusal of entry clearance or leave to enter.

[1] Immigration and Asylum Act 1999, s. 146
[2] See *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719
[3] Immigration Act 1971, Sch. 2, para. 21
[4] Immigration Act 1971, s. 24(1)(e)

15. Being made liable or actually subject to powers of that nature makes immigration decisions having those consequences sufficiently important to justify retaining challenges to them within the scope of legal aid.

16. The involuntary removal of a person from the UK or the imposition of a requirement that the person leave the country entails exclusion from the person's home and from the family, social, educational, work and community relationships and networks that he or she was part of for what may have been a long time. There is no other peace-time power that may so completely extinguish a person's social existence and membership of a community – even imprisonment does not entirely eliminate a person from the community of which he or she was part in the way that a person's removal from the country does.

17. We think that the exercise of so radical a power potentially having consequences of such moment for the affected individuals must be subjected to effective judicial scrutiny, accomplishment of which necessitates legal representation. It is in the interests both of the individual affected by the power and the public on whose behalf the power is supposed to be exercised that there should be such scrutiny.

18. We cannot see any good reason why the fact that judicial scrutiny of the exercise of state power is provided by way of an appeal to the tribunal rather than a claim for judicial review in the High Court makes any difference to whether public funding should be available. Until recent legislation provided for in-country rights of appeal against the kinds of decision referred to here, challenges to them would have been brought by way of judicial review in the High Court. It seems to us to be perverse to make decisions as to the scope of legal aid on the basis of the venue in which proceedings are brought as opposed to the nature of the issues involved. The right of access to the tribunal is just as important and fundamental as the right of access to the ordinary courts.[5] All of the grounds on which the exercise of public power may be challenged in the High Court are available in the tribunal[6], along with a range of other grounds and fact finding powers unavailable to the High Court but which enable the tribunal to subject the exercise of

[5] *R (Saleem) v Secretary of State for the Home Department* [2000] 4 All ER 814
[6] Nationality, Immigration and Asylum Act 2002, s. 84(1)(e) and, e.g. *AG (Kosovo)* [2007] UKAIT 0082

public power to far more searching scrutiny than the High Court is capable of.[7] Consequently, the issues of fact and law requiring determination by the tribunal may be at least as complex and are certainly as grave as those that arise before the High Court.

19. The factual, evidential legal and procedural issues likely to arise are such that an individual will be severely prejudiced by not having legal representation and it is unlikely that justice will be done or be seen to be done for the unrepresented. We return to this issue below.

Article 8 claims

20. We think that the proposal to exclude article 8 cases from routine public funding is wrong. It is justified in the consultation paper (para. 4.201) on the basis that in contrast to asylum cases they do not raise issues of 'such fundamental importance' including matters of life and death and that

> an individual 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.

21. Whilst the rights to respect for family and private life may not be concerned with issues of life and death the consultation paper has seriously failed to appreciate the significance that they have in both international and domestic law. They are protected by the European Convention on Human Rights which is concerned with 'the protection of fundamental human rights, not the conferment of individual advantages or benefits'.[8] The House of Lords has referred[9] to "the core value which article 8 exists to protect" and went on to say:

[7] Nationality, Immigration and Asylum Act 2002, s. 84 and 85
[8] Lord Bingham in *Razgar v Secretary of State for the Home Department* [2004] UKHL 27
[9] *Huang v Secretary of State for the Home Department* [2007] UKHL 11

> This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives.

Article 8 cases frequently raise the issue of whether a parent and child are both to remain in the UK or are to be separated by the removal of one of them and in such cases, 'a fundamental element of an elementary right',[10] i.e. a parent's right to care for his or her own child is put in issue.

22. In this context little if any relevance should be attached to the fact, if fact it be, that the person concerned 'made a free and personal choice to come to or remain in the United Kingdom' (consultation paper para. 4.201). However, it should be noted that in many cases, those affected by immigration decisions may have made no such choice. They may be the children of immigrant parents brought to or even born in the UK and resident here all of their lives, albeit having no legal status. They may be the British or EU citizen spouses, partners, children or parents of family members to be removed or deported from the UK.

23. In any event, what is relevant to the issue of whether the fundamental rights protected by article 8 have been breached is not whether the person chose to come to the UK in the past but whether he or she can presently be reasonably expected to leave the UK in order to enjoy family or private life. If the person cannot reasonably be expected to leave the UK then removing the person may breach article 8 and if it does, the breach will be no less unlawful and of no less gravity or importance because the person once chose to come to or stay in the UK.

24. The factual, evidential, legal and procedural issues likely to arise are such that an individual will be severely prejudiced by not having legal representation and it is unlikely that justice will be done or be seen to be done for the unrepresented. We return to this below.

[10] Judge Martens in *Gul v Switzerland* (1996) 22 EHRR 93, approved by the House of Lords in *Razgar* and *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64

Cases involving children

25. Immigration decisions may have a profound effect on children including those who are themselves subject to an immigration decision and those affected by an immigration decision made in respect of one or more members of their family. Children who have spent much or even all of their lives in the UK and who are integrated in the community, go to school, speak English and are culturally or even legally British may be faced with removal from or being required to leave the UK or with constructive expulsion if a British child's parents are to be removed. Children may be faced with removal of close family members, maybe even a parent. The quality of their lives may be seriously diminished whilst their parents try to deal with immigration problems that may prevent them from working and may even leave them without income and with their home in jeopardy.

26. The UK has particular obligations towards children, whether or not subject to immigration control. There is the obligation, in all actions concerning children, to treat the best interests of the child as a primary consideration.[11] There is also the child's right to be heard in any judicial or administrative proceedings affecting the child.[12]

27. The factual, evidential legal and procedural issues likely to arise in immigration cases (as to which, see below) affecting children are such that a child will be severely prejudiced by not having legal representation. It is impossible to see how the UK will be able to comply with the obligations mentioned in the previous paragraph if children affected by immigration decisions are not legally represented and cannot be legally represented because the state has withdrawn legal aid. It is inconceivable that justice will be done or will be seen to be done for unrepresented children.

[11] UN Convention on the rights of the child, art. 3(1)
[12] UN Convention on the rights of the child, art. 12

Vulnerable individuals

28. The factual, evidential legal and procedural issues likely to arise in immigration cases are such that an individual will be severely prejudiced by not having legal representation and it is unlikely that justice will be done or be seen to be done for the unrepresented. This is elaborated below. These obstacles to justice being done for the represented are even greater for vulnerable individuals.

Detained individuals

29. The government has, quite rightly, recognised the particular gravity of issues relating to the exercise of Immigration Act powers of detention. However, the individual's immigration status and the view taken by the state of the individual's immigration history and future is a significant and often decisive factor informing the exercise of the detention powers. An individual's liability to being detained and the exercise of detention powers against the individual cannot properly be addressed without addressing the substantive immigration matters. For that reason, as well as the reasons set out below, we think that for those detained under Immigration Act powers of detention, their substantive immigration matters should remain within the scope of legal aid.

30. It is likely that an individual detained under immigration act powers will have more complicated and less tractable immigration problems than most. The fact of being in detention will make it even more difficult for an individual to prepare his or her case than for a person at large. The detainee will have no or limited access to telephones, computer and internet facilities necessary for researching aspects of the case and for communicating with those who might be able to assist with the case – whether witnesses of fact or expert witnesses and for communicating with the tribunal and with the immigration authorities. The detainee will have limited or no facilities and opportunities for being able to interview witnesses and he or she will have severely restricted capacity to track down documents and witnesses.

31. The factual, evidential legal and procedural issues likely to arise are such that an individual will be severely prejudiced by not having legal representation and it is unlikely

that justice will be done or be seen to be done for the unrepresented. For the reasons given above, these obstacles to justice for the unrepresented are compounded for those who are detained.

Cases concerned with European Community law rights

32. As it currently stands, the consultation paper's proposal suggests that all immigration cases based on EU citizens' rights (defined to include EEA nationals' rights) and those of their family members of any nationality would be excluded from the funding scheme. This has serious implications both practically and legally on an individual's ability to establish entitlement to and enforcement of EU rights.

33. First, with regard to practice, it is our experience that cases based on EU rights or with an element of EU law require a comprehensive understanding of a very complicated and specialist legal framework, such that a litigant in person would not be in a position, in the vast majority of cases, to put her case effectively. This is likely to result in bad decision making by administrative decision makers. Further, given the statutory grounds of appeal (see section 84 (1)(d) of the Nationality Immigration and Asylum Act 2002 and regulation 26(7) and Schedule 1 of the Immigration (European Economic Area) Regulation 2006) bad decision making is likely to lead to further appeals both to the First-tier Tribunal and the Upper Tribunal, adding unnecessary expense and defeating the purpose of the proposals.

34. Second, it is important to note that immigration cases with an EU element concern UK's obligations under the Treaty on European Union and associated treaties. It is likely that depriving an individual of legal aid with regard to her entitlement to and enforcement of EU rights in UK courts and Tribunals constitutes an unlawful obstacle to the effective enjoyment of those rights. In simple terms, there is a real question mark over the legality of the proposals in that they inhibit an effective enjoyment of an individual's rights under EU law and inhibit effective access to justice. The Charter of Fundamental Rights of the European Union (2010/C 83/02) provides:

Article 47

Right to an effective remedy and to a fair trial

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*
>
> (emphasis supplied)

35. For the reasons set out above and elaborated further below an individual relying on community law rights requires legal representation to have 'effective access to justice' so that withholding legal aid from those who lack sufficient resources to engage a lawyer will be contrary to Article 47.

The putative simplicity of immigration proceedings

36. The consultation paper is simply wrong to regard immigration matters, certainly those of the kind referred to above, as being generally so straightforward that legal representation is unnecessary (para. 4.202).

37. Immigration law is very complex and rapidly changing: there are 12 immigration acts and numerous other pieces of primary legislation and more than 100 statutory instruments currently in force that have a bearing on the field of immigration; there are the immigration rules that have been changed 59 times since May 2003 and there are home

office policies and guidance that interpret and supplement the rules and, as self-described 'living documents' are constantly changing; the tribunal and the higher courts are constantly making decisions interpreting and applying the substantive and procedural law – since the start of 2008 there have been 24 decisions of the House of Lords and Supreme Court about immigration; there are decisions from the European Court of Human Rights interpreting the ECHR and there are decisions of the CJEU interpreting EU free movement law. Even fundamental, elementary features of the system of immigration control remain controversial and may be put in issue in appeals, for example, as to the legal status and effect of immigration rules[13] and of policies that are contained in documents outside the immigration rules.[14]

38. The observations of a senior judge who had heard a student appeal are entirely apposite:[15]

> I am left perplexed and concerned how any individual whom the [Immigration] 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 representation, funded by the taxpayer, that justice can be done.

39. Home Office decisions are made by specialist officials with expert knowledge and understanding of the legal framework referred to above. Their decisions are explained cogently and in detail in notices and letters that relate the person's factual background to the applicable legal framework and are treated as statements of case or as substitutes for skeleton arguments by the tribunal. The decisions are (usually) defended before the tribunal by specialist Home Office Presenting Officers who can and do cross examine witnesses and make submissions to the tribunal and can take advice if needed from senior colleagues or from the various policy units in the Home Office.

[13] *MO (Nigeria) v Secretary of State for the Home Department* [2009] UKHL 25
[14] *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719
[15] Lord Justice Longmore in *Adedoyin v Secretary of State for the Home Department* [2010] EWCA Civ 773

40. An unrepresented appellant without specialist knowledge of immigration law is seriously disadvantaged by the inequality of arms that results from being unrepresented before the tribunal.

41. Moreover, it may well be that the tribunal is 'designed to be user-accessible' and that interpreters are provided free of charge for hearings (para. 4.202). However, the quality of preparation for an appeal is the crucial determinant of an appeal's outcome and unrepresented appellants are critically prejudiced in that respect because:

    a. without fluency in English, the appellant will have no hope of understanding the issues involved in his or her case. By the time the appellant is provided with a free interpreter for the hearing it will be much too late;

    b. without a detailed and full understanding of the complex legal framework, an appellant will not appreciate what facts need to be established in order to succeed in an appeal or application;

    c. without knowing what facts need to be established, the appellant will not know what evidence needs to be obtained and adduced;

    d. without knowledge of how tribunals approach and assess evidence, an appellant will have little or no insight into the nature and quality of evidence that will have to be adduced if the tribunal is to be persuaded of the appellant's case. Such knowledge is really only available to those with professional experience of judicial proceedings generally and tribunal proceedings in particular;

    e. without legal representation, an appellant will be unlikely to appreciate the importance of using expert evidence to address some issues (e.g. medical and psychiatric evidence; country evidence; social work reports) and will be unlikely to have the knowledge let alone means to instruct a suitable expert;

f. without legal representation an appellant will not be able to make effective submissions in writing and orally that address the factual and legal issues in his or her case.

42. All of these points apply with particular force in relation to deportation and removal cases and article 8 cases. In these, the legal, factual and evidential issues are likely to be the most complex – the number of occasions that these issues have been considered by the House of Lords, Supreme Court and Court of Appeal in the recent past indicates both the complexity of the issues and the scope for real and material legal argument.

43. An appellant who loses before the First-Tier Tribunal will have little chance of being able to exercise his or her statutory right of appeal to the Upper Tribunal because doing so depends upon being granted permission to appeal and that in turn depends upon drafting grounds of appeal that identify an error of law in the First-Tier Tribunal's determination. There is little prospect of an unrepresented appellant being able to draft grounds of appeal that show an error of law may have been made. The same point applies with respect to the right of appeal from the Upper Tribunal to the Court of Appeal.

44. Our collective experience is that quality of case preparation and representation rather than the degree of underlying merit is frequently the decisive feature in determining outcomes. Substantial parts of many of our individual practices consist of trying to resurrect cases that have intrinsic merit but that have previously failed because of no or inadequate representation. The Administrative Court is very appreciative of the need to approach cases with anxious scrutiny where it is apparent that they have been damaged by absent or deficient representation in the past. If immigration cases are removed from the scope of legal aid as proposed, we would anticipate an even greater volume of immigration cases being brought to, and succeeding in the Administrative Court.

Private funding of legal assistance by impecunious people

45. Many impecunious people faced with immigration decisions managed to raise funds to pay for legal representation in the days before legal aid was available or presently when those living in the expanding 'advice deserts' had been unable to instruct a legal aid lawyer.

46. Their capacity to continue to do this if the proposals in the consultation paper are implemented will be seriously diminished by swingeing increases in the fees charged for making immigration applications and by the proposed introduction of fees for the bringing of immigration appeals. There is a real likelihood that impecunious immigrants will exhaust such funds as they have on paying these fees and will have less or none left to pay for legal representation. There is also the prospect that the fees will prove prohibitive for many so that instead of aspiring to preserve or establish regular status in the UK by making appropriate applications and appealing against adverse decisions increased numbers will remain as irregular migrants.

Question 35: Do you agree with the proposal 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?

47. We strongly oppose the proposals to extend the application of risk rates and we endorse the submissions of the Civil Legal Aid Sub Committee of the Bar Council at paragraphs 189 – 204 of its response, opposing this proposal.

48. Many of the clients we represent in judicial review proceedings and bringing challenges against decisions made by the United Kingdom Border Agency, which affect their most fundamental human rights. In removal cases, the decisions engage the right not be exposed to a real risk of persecution (Article 1A(2) of the Refugee Convention), the right to life (Article 2 ECHR), the prohibition against ill-treatment and/or torture (Article 3 ECHR), and the right to respect for family life (Article 8). Further, judicial review claims challenging the legality of immigration detention obviously engage Article 5 ECHR, namely the prohibition on arbitrary detention. These areas of law are dynamic and ever-changing, not least because they engage international human rights obligations which are derived from 'living instruments'. In these sorts of cases, the quantification of prospects of success is an inexact science, as many of these challenges seek to expand the law beyond its current state. Therefore the hypothesis that once permission is granted, the lawyers involved in such cases are in a much better position to accurately assess the risks

involved in proceeding with the case, fails to recognise the inherent uncertainty which characterises this sort of litigation.

49. For that reason, whilst many claims will receive permission from a judge to proceed, a significant proportion of these cases will not ultimately result in costs being awarded to the claimant. However, this does not mean that these cases have been inappropriately funded – on the contrary. The proposal that risk rates apply as soon as the application for permission has been granted will result in lawyers being far less willing, purely for reasons of financial viability, to take on cases which deserve and require representation. Further, such a drastic extension of risk rates in legally aided cases will disproportionately penalise those lawyers who are committed to taking on claims which have the potential to develop these areas of law, and which impact upon the fundamental rights and freedoms of some of the most vulnerable and marginalised in our society.

50. We consider that the proposal will have a grave effect on the numbers of legal aid practitioners who can continue to operate viable practices. The attendant damage to those who most require access to justice is obvious. We therefore strongly urge the government to retain the existing £25,000 threshold for the application of risk rates.

Garden Court Chambers Immigration Team
14th February 2011