



Legal Aid in Immigration and Asylum Cases

As always with these legal briefing papers it is stressed that they are not published as authoritative legal advice but for general guidance and information for users of the Migration Watch website.

1 Restrictions on the availability of legal aid are imposed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The provisions of which on legal aid were brought into effect in early April 2013. This is a substantial enactment dealing with three major subjects. Of its 154 sections 62 relate to legal aid, which is made the responsibility of the Lord Chancellor (otherwise the Secretary of State for the Justice Department), who is required by section 4 of the Act to appoint a civil servant as Director of Legal Aid Casework. Section 8 defines the general scope of civil legal services, including providing advice and representation in relation to legal proceedings.

2 The scope of civil legal services which are available to individuals and eligible for legal aid is defined in considerable detail in Schedule 1 of the Act. Summarised below are the main areas of the law thus defined which are of concern in relation to immigration and asylum cases.

Paragraph 16: Provision of civil legal services in relation to forced marriage protection orders. On forced marriage generally see Legal Paper MW 240, Legal Paper MW 241 and Legal Paper MW 252.

Paragraph 19: Provision of legal services in relation to judicial review of an enactment, decision, act or omission. In recent years there has been a huge increase in the use of judicial review in immigration and asylum cases, particularly for the purpose of contesting deportation and removal of convicted criminals and others. Paragraph 19 includes provision for exclusions from availability of legal aid for judicial review applications in particular circumstances in future. Sub-paragraph (5) excludes legal aid in cases where review would involve the same issue being litigated as in a previous review or appeal in which the decision was delivered less than one year previously and went against the applicant. Sub-paragraph (6) similarly excludes legal aid in any case in which judicial review is sought against removal directions which have been made less than one year after the dismissal of the appeal or other decision on which those directions are based.

Paragraph 22: Provision of legal services in relation to cases which involve allegations of breaches of rights arising under the European Convention on Human Rights (ECHR). In view of the considerable and ever increasing reliance on human rights in immigration and asylum cases since the Human Rights Act 1998 was brought into force in October 2000, such cases could continue to impose major demands on the legal aid budget. See also note on paragraph 30 below.

Paragraph 24: Provision of legal services in relation to proceedings before the Special Immigration Appeals Commission (SIAC) set up under the Special Immigration Appeals Commission Act 1997. SIAC's main jurisdiction is to hear appeals against decisions by the Home Secretary to deport particular individuals, usually convicted criminals or terrorists, on the ground that their deportation is conducive to the public good.

Paragraph 25: Provision of legal services in relation to detention under the Immigration Act 1971. This is consistent with provision made in other paragraphs of the Schedule for provision of legal aid in relation to the conduct of *habeas corpus* proceedings, the basic common law remedy against unlawful detention of individuals.

Paragraph 26: Provision of legal services in relation to temporary admission under paragraph 21 of Schedule 3 to the Immigration Act 1971. Applicants for asylum are normally given temporary admission while their cases are considered.

Paragraph 30: Provision of legal services in relation to rights to enter and remain under the Refugee Convention, ECHR (see also paragraph 22 above) or either of two European Economic Area measures, the Temporary Protection directive and the Qualification Directive.

3 The paragraphs summarised above define the extent to which legal aid may be provided in particular categories. **Normal immigration appeals against for example, refusals of visa applications for students or spouses will from now on no longer be eligible for legal aid** unless they raise issues under one or other of the treaties and Directives mentioned in paragraph 30. It may be expected that in spouse and other dependant visa cases the right to family life under Article 8 of the ECHR will continue to be raised as an issue. Legal aid will continue to be available for judicial review cases, but the carefully drafted exclusions mentioned in the summary of paragraph 19 above should if effective greatly reduce the number of last minute appeals against deportation and removal orders.

4 There are one or two charities which provide free legal representation in immigration and asylum appeals and some lawyers will represent clients on a *pro bono* basis. However, with the greatly diminished scope of legal aid for immigration and asylum appeals, many appellants will be obliged to represent themselves before immigration judges, which coupled with the need in most cases for interpretation to and from English will mean that hearings will take longer. Judges will need to assist unrepresented appellants but without ceasing to be impartial.

Harry Mitchell QC
Honorary Legal Adviser
Migration Watch
12 April 2013

