ILPA BRIEFING Legal Aid, Sentencing and Punishment of Offenders Bill June 2011: Matters of relevance to Immigration Detention

This briefing has been prepared specifically for parliamentarians who attended or had wished to attend the parliamentary meeting organised by the Detention Forum and chaired by Julian Huppert MP at 1 Parliament Street on Wednesday, 15th June 2011.

No Legal Aid when liberty is at stake

The Bill retains Legal Aid for challenging immigration detention but not for the underlying immigration case; only asylum cases will be eligible for legal aid (Sched 1, Part 1, paras 22-26).

At first reading of the Bill in the Commons, the Lord Chancellor stated: "*...we will retain legal aid in cases where people's life or liberty is at stake...*" (Hansard HC, 21 Jun 2011: Column 166).

There is a contradiction at the heart of the Government's position. Unlike other administrative decisions, people's liberty is immediately at stake when immigration decisions are taken. And the lawfulness of a person's detention or the prospects of that person being granted bail are intrinsically linked to his or her ability to articulate, present and pursue a claimed entitlement to enter or remain. A central plank of the Government's proposals – that Legal Aid is to be available where someone's liberty is at stake – is fundamentally undermined in this Bill by the denial of Legal Aid for the purpose of challenging the administrative decisions upon which immigration detention is founded, or indeed preventing such decisions from being wrongly made.

Immigration decisions may be made out of the blue

In very many cases immigration decisions are not the product of a formal process. Decisions to remove someone from the UK may, and frequently do, come entirely out of the blue, including for people lawfully in the UK. A particularly egregious example was described by Lord Justice Sedley in the Court of Appeal in the case of two people lawfully pursuing their studies in the UK:

> "*Neither Ms Pengeyo nor Mr Anwar received anything remotely resembling a hearing, or even a notice of what was contemplated, from the Home Office. Each was presented out of the blue with a decision – as it turned out, a wholly unfounded one – that they had been guilty of obtaining leave by deception...*" (*Anwar & Ors v SSHD* [2010] EWCA Civ 1275)

These decisions rendered Ms Pengeyo and Mr Anwar immediately liable to detention. In many cases when an immigration decision is made or served, the person is detained for the purpose of taking immediate steps to remove him or her from the UK. Where appeal rights exist, the timescales for exercising these rights are especially short in immigration cases (10 days if the person is at liberty, five days if he or she is in detention).

Immigration law is complex and changes frequently and rapidly

The Supreme Court said in June 2011 "*...in general these tribunal systems share some common characteristics. They were set up by statute to administer complex and rapidly changing areas of the law.*" (*R (Cart) & Anor v The Upper Tribunal* [2011] UKSC 28, para 13 (*per* Lady Hale)).

There were 10 Statements of Changes to the Immigration Rules published in 2010 and a further three have been published to date this year; from 1993, there have been nine immigration Acts of Parliament; and an enormous number of significant decisions of the immigration tribunals and UK and European courts. One Court of Appeal judge, Lord Justice Longmore, has recently observed:

> "*I am left perplexed and concerned how any individual whom the* [Immigration] *Rules affect... can discover what the policy of the Secretary of State actually is at any particular time if it*

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necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done." (*AA (Nigeria) v SSHD* [2010] EWCA Civ 773)

Evidential requirements can be prohibitively extensive and expensive

If the law is often complex, the necessary evidence – e.g. where the case turns on the person's private and family life in the UK, his or her physical or mental health or the welfare of children in the UK – may be voluminous and expensive to put together. The preparation or acquisition of witness statements and expert reports (e.g. independent social worker reports and medico-legal reports) is far beyond what can reasonably be expected of a person in detention, and indeed of most who would currently qualify for immigration Legal Aid.

General conclusions and risks

Immigration tribunals are neither part of an inquisitorial system nor currently endowed with the powers that such a system would require. An immigration judge can decide a case only on the evidence put before him or her. Without legal advice and representation, very many appellants have neither the understanding of the law and procedures nor the evidence needed to make their case. The immigration judiciary has long recognised the value to them of competent legal representation. Previous presidents of tribunals dealing with immigration cases, Mr Justice Collins and Mr Justice Hodge described to the Constitutional Affairs Committee in oral evidence on 21st March 2006 the importance of competent legal representation, in particular in connection with the acquisition and presentation of evidence. The current President of the Upper Tribunal (Immigration and Asylum Chamber), Mr Justice Blake, spoke on 6th December 2010 at the Office of the Immigration Services Commissioner's annual conference of the importance of case management, observing that for this immigration judges need competent representation of both parties to the case.

This Bill creates the prospect that people are deprived of their liberty because they are detained under immigration powers in circumstances where there is no sound basis for that detention yet no realistic opportunity of their demonstrating this. Such a prospect is the antithesis of the Lord Chancellor's claim, when announcing the Bill, that: "[o]*n legal aid, the overall effect will be to achieve savings while protecting fundamental rights of access to justice*" (Hansard HC, 21 Jun 2011,col 167).

Parliamentarians attending the meeting on 15th June 2011 identified that the current arrangements for legal advice and assistance for those in immigration detention are inadequate. ILPA concurs. This Bill risks depriving detainees of that advice and assistance, save in relation to bail applications which risk failing because the underlying immigration case is not understood.

The Bill risks having other perverse or unnecessary effects because, for example:

- There may be an increase in judicial review applications because matters which might, with legal advice and representation, have been pursued in the generally cheaper and quicker tribunal are not or cannot be pursued by reason of lack of Legal Aid.
- Those subject to immigration decisions and/or detention may be driven to make asylum claims, which they would not otherwise have made, in the hope or expectation of thereby attaining legal advice and representation.
- There may be an increase in the number of immigration detainees where proper consideration of their circumstances would show there to be no sound basis in law for their detention.

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ILPA is a professional association the majority of whose members are immigration, asylum and nationality law practitioners. Academics and charities are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law. ILPA is represented on numerous Government, including UK Border Agency, consultative and advisory groups.