

**ILPA HOUSE OF COMMONS SECOND READING BRIEFING
Legal Aid, Sentencing and Punishment of Offenders Bill
29 June 2011**

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 and Legal Services Commission, consultative and advisory groups.

General:

The Bill aims to exclude all immigration cases from Legal Aid except for asylum cases, challenges to immigration detention such as bail applications and cases before the Special Immigration Appeals Commission¹. In doing this, the Bill makes no distinctions, thereby excluding from Legal Aid immigration cases involving or brought by children, victims of trafficking and of domestic violence and cases where a person faces removal or deportation from the UK. Children and victims of domestic violence are not given the same protection in immigration proceedings as the Bill gives them in family proceedings². The Government states that a critical reason for making changes to Legal Aid is to encourage people to seek means to resolving their disputes other than resorting to the courts or tribunals³. However, such alternatives do not exist in relation to decisions and actions of the UK Border Agency.

The importance of liberty:

The Government has stated that: "...we will retain legal aid in cases where people's life or liberty is at stake..." (Hansard HC, 21 Jun 2011: Column 166 *per* the Lord Chancellor). However, the Bill does not do so. Unlike other administrative decisions, immigration decisions (such as to take away someone's leave to remain or to remove someone) immediately place the person's liberty at risk. Often, an immigration decision is served at the very point at which the person is detained. While Legal Aid will be available for a bail application, it will generally be the underlying immigration decision that needs to be addressed to show that detention is either unlawful or unnecessary; and for this Legal Aid is to be excluded.

Protecting the individual against the State and equality of arms:

The Government has stated that: "*We are not resiling from those areas where the taxpayer needs to finance the small man against the state...*" (Hansard HC, 21 Jun 2011 : Column 175 *per* the Lord Chancellor). However, the Bill does resile from this, including in cases where the person is lawfully in the UK and the UK Border Agency takes an unreasonable or unlawful decision, without warning, to deprive that person of leave to remain or citizenship and to remove that person from his or her family, including British and settled family members, community and life in the UK.⁴ In the Green Paper, the Government argued that immigration cases are about people's choices⁵. However, in the circumstances described, and in many other cases concerning family life, this is not so.

In the Green Paper the Government set out a robust and principled defence of judicial review,⁶ yet in the Bill Legal Aid is removed from certain immigration judicial reviews in ways not trailed in the Green paper and never consulted on, for example where a person wishes to bring a judicial review within a year of their appeal⁷. In its response to the Green Paper, the Government observed "*only a minority of the immigration and asylum judicial review cases referred to by the Judges Council [in its response to the Green Paper] are funded by legal aid*" (para. 14). A significant number of these are brought or pursued by litigants in person, creating difficulties for the High Court⁸. The importance of judicial review as a backstop increases when people will have had no representation at their immigration appeal and where, without a judicial review and attendant court orders the UK Border Agency declines to review a decision alleged to be unlawful and proceeds to implement that decision⁹.

The procedure rules for immigration appeals include very much shorter timescales than for other tribunal appeals¹⁰, difficult for a representative and intolerable, and arguably unlawful, for a litigant in person. In many immigration cases extensive evidence (including witnesses, expert reports and DNA evidence is needed). Successive presidents of immigration tribunals have confirmed the importance of competent legal representation for both parties (appellant and UK Border Agency) on appeals so that tribunals can effectively manage cases¹¹. If Legal Aid is removed for immigration appeals, appeals will take longer and more adjournments are likely to be needed. Delays in the tribunals system, affecting both immigration and asylum appeals, are likely.

If an appellant overcomes these barriers and wins his or her case, it is open to the UK Border Agency to appeal. There is no clearer illustration of the inequality of arms than the prospect of a case going all the way to the Supreme Court, with the UK Border Agency represented by a bevy of solicitors and counsel, and the appellant all alone.

Refugee family reunion:

While the Bill would retain Legal Aid for asylum cases, it would exclude Legal Aid for refugee family reunion cases. In its response to the Green Paper, the Government said that these cases are “*generally straightforward*” and suggested that where there are concerns about the safety of family members then they may claim asylum in their own right (para. 90). The suggestion that an asylum claim be made is absurd since the family member cannot make an asylum claim while he or she is outside the UK. The claim that these cases are straightforward ignores the facts that (i) the UK Border Agency has a particularly poor record on dealing with these claims with around two-thirds of appeals against refusal of family reunion being allowed¹²; (ii) the UK Border Agency routinely demands DNA evidence to establish relationships for which, without Legal Aid, many will simply not be able to pay, (iii) some family members of refugees are in danger in the country of origin, in a precarious situation or a refugee camp in a third country, with their movement constrained; (iv) some refugees will be suffering the physical, emotional and psychological consequences of ill-treatment and torture, exacerbated by their continued separation from their family members.

Rewarding the polluter:

ILPA has consistently argued that money can be saved by adopting a ‘polluter pays’ approach. The Home Office and UK Border Agency change the immigration law, policy and procedures frequently and rapidly.¹³ The UK Border Agency continues to make poor decisions (with high overturn rates on appeal¹⁴), to create delays in immigration proceedings and to fail consistently and timeously to apply the decisions of the courts¹⁵. If the UK Border Agency (or the Home Office) were to bear the costs of these myriad failings, not only would much Legal Aid and court costs be saved but there would be a strong incentive for it to improve, and thus save money, in all cases. Instead, the Bill will, by removing Legal Aid in immigration cases, reduce the prospect that the UK Border Agency is held to account and thereby permit it to continue its current bad practices.

Risk of exploitation and pressure on MP’s mailbags and surgeries:

If competent legal advice and representation is not available by Legal Aid, there will be increased risk that people become vulnerable to exploitation, whether from resorting to situations whereby they are exploited in seeking to raise funds to pay for legal advice¹⁶ or by paying significant sums of money (which they, their families or friends) cannot sensibly afford for inadequate and sometimes harmful legal advice. If so, the problems experienced by the courts and tribunals with litigants in person¹⁷ may significantly increase if people are encouraged or assisted to lodge hopeless or hopelessly presented judicial review claims or appeals. Ultimately, if there is nowhere else to turn, as happens in many cases now, individuals and families will turn to their constituency MP for help.

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ILPA’s response to the Green Paper and briefings on legal aid can be found at www.ilpa.org.uk in the ‘Submissions’ section.

See case studies in annexe.

¹ Immigration-related matters for which Legal Aid will remain available are set out at paras. 21-26 of Part 1 of Schedule 1 to the Bill.

² See e.g. paras. 10 and 13 of Part 1 of Schedule 1 to the Bill.

³ See Ministerial Foreword to the Government's response to the Green Paper, *Reform of Legal Aid in England and Wales*: "...legal aid too often encourages people to bring their problems before the courts, even when they are not the right place to provide good solutions..."

⁴ See e.g. Lord Justice Sedley in the Court of Appeal on two students lawfully 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)

⁵ The Green Paper stated: "...an individual involved 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..." (para. 4.201).

⁶ The Green Paper stated: "*In our view, proceedings where the litigant seeks to hold the state to account by judicial review are important, because they are the means by which citizens can seek to ensure that state power is exercised responsibly. In addition, the issues at stake themselves in public law challenges can be of very high importance where they are used to address serious concerns about the decisions of public authorities... 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.*" (paras 4.97-4.99).

⁷ See para. 17(5) and (6) of Part 1 of Schedule 1 to the Bill.

⁸ In evidence to the Constitutional Affairs Committee (now the Justice Committee), the then Lead Judge in the Administrative Court (and former President of the Immigration and Asylum Tribunal), Mr Justice Collins, explained that many applications to the Administrative Court to challenge the refusal of permission to appeal against a decision of an immigration judge were made without lawyers; though judicial review applications outside this process were usually "*with some form of representation*". He did not, however, elaborate on what form that took and how it was provided. He continued: "*...from our point of view we do not suffer quite so much in the judicial review claims from litigants in person – I say suffer from litigants in person, I do not mean to say that they are not people whose cases should be properly considered, but it makes it more difficult to give proper consideration when you do not have the evidence put before you in the form that it ought to be put and our system does not enable us to act as the inquisitor, or at least not to any great extent...*" (Oral Evidence, 21 March 2006, Q35)

⁹ *R(N) v SSHD* [2009] EWHC 873 (Admin) provides a particularly egregious example of the UK Border Agency carrying out a removal where legal representatives were actively seeking to pursue, what was ultimately revealed to be a good claim. The UK Border Agency unlawfully removed the claimant to Uganda. Following the Administrative Court's ruling, arrangements were made for his return to the UK. His asylum claim was then considered, and he was found to be a refugee (i.e. at risk of persecution in Uganda to which he had been returned).

¹⁰ An immigration appeal in the UK must be brought within 10 days of receipt of the decision against which it is brought (or within five days if the person is detained). Applications for permission to appeal against a decision of an immigration judge on the appeal must be brought within five days of receipt of the decision. The time-limits for appeals in social welfare cases range from one month from the date of decision upwards to longer periods depending on the particular benefit to which the case relates. An application for permission to appeal against the decision of the social entitlement judge on the appeal must be brought within one month of receipt of decision.

¹¹ See e.g. evidence of Mr Justice Hodge (former President of the Asylum and Immigration Tribunal) to the Constitutional Affairs Committee (now the Justice Committee): Oral Evidence, 21 March 2006, Q31 & Q39; see also fn. 8.

¹² UK Border Agency management information provided to ILPA and others in December 2010 indicated that 66% of appeals in family reunion cases were allowed in 2008 and 61% in 2009. The information was said to be "*provisional and subject to change*", but we are not aware of any amendment.

¹³ From 1993, there have been nine immigration Acts of Parliament. In 2010, the Immigration Rules were changed on ten occasions. Below this, the UK Border Agency amends its policies and practices frequently.

¹⁴ Tribunal Service statistics for 2010/11, first three quarters: of those allowed or dismissed, appeals were allowed in: 28% of asylum, 56% of managed migration, 51% of entry clearance, 47% of family visit and 28% of deportation/other appeals: see <http://www.justice.gov.uk/publications/statistics-and-data/tribunals/quarterly.htm>

¹⁵ Most recently, decisions of the Supreme Court (*ZH (Tanzania) v SSHD* [2011] UKSC 4) and the Court of Justice of the European Union (*Ruiz Zambrano* [2011] EUECJ C-34/09), of 1 February 2011 and 8 March 2011 respectively, each of which have important implications for cases concerning families, continue to be examples of the UK Border Agency failing to provide publicly available guidance to its decision-makers and those representing it on appeals. Particularly egregious examples of the UK Border Agency's failure to implement the judgments of courts are given in ILPA's September 2009 evidence to the Joint Committee on Human Rights (see e.g. the case of *Baijai* described there). That evidence is available at www.ilpa.org.uk in the 'Submissions' section.

¹⁶ See e.g. The Children Society *Living on the edge of despair* (2008), highlighting asylum-seeking mothers turning to prostitution to survive destitution. In 2007, the Society found instances of children "*begging or selling sex to pay for legal advice*", see *Give me a life* (p11) at <http://www.societyofeditors.co.uk/userfiles/file/SOERefugeeBook.pdf>

¹⁷ See fns. 8 & 11.