

**Memorandum of Evidence to
PUBLIC BILL COMMITTEE
Legal Aid, Sentencing and Punishment of Offenders Bill**

Introduction

1. 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.
2. This Memorandum addresses matters related to immigration and asylum law, focusing on Legal Aid.

Analysis of the Bill and the Government's rationale: Legal Aid (immigration/asylum)

3. The Government identifies four factors relevant to what should remain in scope for Legal Aid:¹
 - a. Importance of the issue; the following are of high priority: cases concerning life, liberty, physical safety, homelessness, intervention by the State and holding the State to account;
 - b. Individual's ability to present his/her own case, with consideration given to whether proceedings are adversarial or inquisitorial and whether litigants are "*from a predominantly physically or emotionally vulnerable group*";
 - c. Availability of alternative sources of funding, with Conditional Fee Agreements, legal insurance and trade unions identified; and
 - d. Availability of alternative means of resolution, with alternative sources of advice, ombuds and complaints procedures identified.
4. The Bill excludes 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 Commission². This general exclusion is in conflict with the Government's 'four factors'-analysis and risks serious undesirable and perverse outcomes.

¹ *Proposals for the Reform of Legal Aid in England and Wales: Consultation Response* Ministry of Justice, June 2011 paragraph 6 (page 11).

² Paragraphs 21-25, Part 1, Schedule 1, paragraphs 21-25; paragraph 26 also preserves Legal Aid for some asylum support.

5. In immigration cases, there are no alternative means of resolution. There is no mediation or other dispute resolution option (save insofar as constituency MPs may intervene). Neither an ombuds nor complaints process can address the question of a person's entitlement to continue to reside in the UK. Nor are there generally alternative sources of funding or advice for those who qualify for Legal Aid. Immigration is peculiar in that advice and representation in this area are regulated (under pain of criminal sanction).³ Charities and other advice organisations, if unable or unwilling to meet the requirements of the regulatory scheme, are thus prohibited from filling any gap that may be left by the removal of Legal Aid. For those without leave to be in the UK (including those whose leave has been taken away), working will generally be illegal. Accordingly, individuals will be unable to raise funds themselves, save by exposing themselves to the risk of serious exploitation. While sometimes friends or family may be able to collect funds for legal advice or representation, MPs immigration caseloads will be aware that this can also leave individuals open to exploitation. Thus the Government's factors (c) and (d) point overwhelmingly in favour of retaining Legal Aid.
6. The Government's stated approach was to consider all four factors together ("*no one factor was determinative*"⁴). The remaining two factors (a) and (b) are considered in respect of the discrete matters addressed in the following paragraphs. As regards factor (a), "*holding the state to account*"⁵ has benefits in providing incentive for the state to improve. Removing effective scrutiny of the state by removing Legal Aid, allows the state to continue bad practices and can exacerbate these. This is certainly of concern in relation to the work of the UK Border Agency.

Judicial Review

7. The Government generally accepts that judicial review should remain in scope for Legal Aid and the Green Paper contains a robust defence of judicial review.⁵ However, the Bill introduces immigration exceptions. These exceptions are said to be a response to proposals made by the Judge's Council,⁶ but they do not accord with the Judge's Council's proposals in critical respects:
- a. The Judge's Council's proposals were predicated on retention of Legal Aid for immigration appeals. However, the immigration judicial review cases, which the Bill excludes from Legal Aid, are also excluded from Legal Aid for appeals⁷.
 - b. The Judge's Council's proposals sought (albeit ILPA considers unsuccessfully) to exclude only unmeritorious cases. However the Bill excludes all immigration judicial review cases save where the UK Border Agency has not acted within 12 months of a final decision of a court or tribunal, regardless of merit.

³ Immigration and Asylum Act 1999, Part V: the Office of the Immigration Services Commissioner.

⁴ *Consultation Response, op.cit.*, paragraph 7, page 12.

⁵ *Proposals for the Reform of Legal Aid: Consultation*, paragraphs 4.16 and 4.95ff.

⁶ *Consultation Response, op.cit.*, paragraph 13 *et. seq.*, page 13.

⁷ Bill, Part 1, Schedule 1, paragraph 25.

- c. The Judge’s Council’s proposals were intended to address a group of cases, which the Government and the Government’s lawyers have indicated are generally not brought on Legal Aid⁸.
8. The provisions on judicial review risk the following undesirable and perverse effects:
- a. The immigration exclusions apply where there have been previous court or tribunal proceedings (on the same or a similar issue), even when the individual succeeded in those proceedings. Thus, if the UK Border Agency fails to act on the decision of a court or tribunal (or acts in disregard of that decision), the individual will be excluded from Legal Aid in seeking to “*hold the state to account*”.
 - b. The Judge’s Council’s concerns, if the Government and its lawyers are correct, largely relate to cases brought without Legal Aid. These would include litigants in person and cases where family or friends have paid for the lodging of a judicial review application but there are no funds for continued legal representation. The exclusion of Legal Aid may increase the number of judicial reviews brought without any or competent advice and representation, without decreasing the total number brought.
 - c. Individuals may be discouraged from exercising appeal rights (for which Legal Aid is excluded) to preserve their entitlement to Legal Aid on judicial review.
9. These measures have not been the subject of consultation. They concern cases directly concerned with the intervention of the State, holding the State to account and liberty: hence the Government’s robust defence of judicial review. Judicial review is subject to complex and adversarial procedures. Potential litigants may fall within the Government’s “*vulnerable group*” analysis. The exclusion of Legal Aid for these immigration judicial reviews offends against the Government’s ‘four factors’-analysis and creates additional risks.

Onward appeals

10. The Bill generally ignores this subject. Either Legal Aid is retained for court or tribunal proceedings, in which case onward appeal from an initial decision of the relevant first instance court or tribunal is within scope; or Legal Aid is excluded at first instance and for any stage thereafter. There are two undesirable and perverse outcomes from this:
- a. Onward appeals generally (and always in immigration cases) are only available where the first instance court or tribunal has erred in law. They therefore require legal expertise.
 - b. Onward appeals generally are available to both parties. In immigration matters, the other party is the State (the UK Border Agency). The Bill would permit the UK Border Agency to pursue onward appeals all the way to the Supreme Court, with expert representation, while leaving an appellant who had succeeded at first instance alone and unaided to

⁸ *Consultation Response, op.cit.*, paragraph 14, page 13. At the Administrative Court Users’ Group meeting on 28 June 2011, Treasury Solicitors indicated that around 70% to 80% of immigration judicial reviews were without Legal Aid.

address the questions of law to which any onward appeal must necessarily be restricted. A more striking example of inequality of arms is difficult to imagine and such inequality of arms does not assist the courts in developing the law.

Children

11. The Government revised its original proposals concerning family law to take into account “*that children are not able to represent themselves*”.⁹ Children are no better placed to represent themselves in immigration proceedings. The exclusion for immigration cases particularly affects children in the following situations:
 - a. Separated (unaccompanied) children, other than those pursuing asylum claims. This will include children, some of whom will have been in the UK for several years, applying for an extension of discretionary leave and who are being cared for by a Local Authority.
 - b. Children facing removal from the UK along with a parent, or separation from a parent by reason of that parent’s removal where their interests require separate representation.

12. Where a separated child with no Legal Aid and no income is in the care of a Local Authority, that Local Authority may be looked to for funding for representation.¹⁰ This would constitute a substantial (and unpredictable) transfer of cost from the Ministry of Justice to Local Authorities¹¹ (something antithetical to the Government’s stated antipathy to public expenditure “*cost shifting*”¹²); and would risk increasing costs because paying privately for representation will cost more than is paid under Legal Aid rates. This group may therefore, uniquely among the immigration cases, be able to find an alternative source of funding, but is this desired?

13. As to family removals, the Supreme Court and its predecessor have highlighted that there will be cases where the child needs separate representation. Two cases were, in the view of those courts, examples of this. In *EM (Lebanon)*¹³, removal of him and his mother to Lebanon would have resulted in his custody being given to his estranged and abusive father with permanent separation from his mother. In *ZH (Tanzania)*¹⁴, the effect of the children’s mother’s removal would either be to separate the British children from their mother or to remove them from their settled life in the UK and their father.

⁹ *Consultation Response, op.cit.*, paragraph 50, page 21; Bill Schedule 1, Part 1, paragraph 13.

¹⁰ Community Legal Service (Financial) Regulations 2000 SI 200/516, regulation 11, but see the Legal Service’s Commission’s Funding Code, Chapter 29 Immigration at paragraph 29.11.2..

¹¹ With implications for the Home Office/UK Border Agency budget in view of the grant arrangements by which Local Authorities receive payment for care responsibilities toward separated children seeking asylum.

¹² *Hansard* HC, 29 Jun 2011 : Column 1063 (*per* Jonathan Djanogly MP, Parliamentary Under Secretary of State for Justice).

¹³ *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

¹⁴ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

14. These cases involve international and domestic obligations concerning the best interests of the child¹⁵ and the safety and welfare of children¹⁶. The State (the UK Border Agency, which has been found wanting in this regard¹⁷) must be held to account. The Government is correct that children are not able to represent themselves. The exclusion of Legal Aid for children in immigration proceedings as intended by this Bill offends the Government's 'four factors'-analysis; and does so with additional undesirable and perverse risks.

Victims of domestic violence

15. Despite representations, proposals to exclude victims of domestic violence making an application under the domestic violence rule¹⁸ have not been revised. The rule enables those on a spousal/partnership visa to escape their abusive relationship by providing an alternative means to indefinite leave to remain. The Government said that the applications "*are generally straightforward*"; and that an application does not require a victim to "*face the alleged abuser in court*"¹⁹.

16. The domestic violence rule is designed to ensure that victims (and their children) can escape abuse without putting at risk their immigration status, so that they do not remain in the abusive relationship. These victims constitute a paradigm "*physically or emotionally vulnerable group*." The exclusion of these victims from Legal Aid offends the Government's 'four factors'-analysis.

17. Domestic violence applications are far from straightforward:

- a. The UK Border Agency's record in dealing with these cases is especially poor. Some 61% to 69% of refusals are overturned on appeal;²⁰
- b. The gathering and presentation of evidence, with associated costs and risks, is often necessary for success. Many applications are (including wrongly) refused by the UK Border Agency on the grounds of inadequate evidence;
- c. To escape abusive relationships, victims need to understand the implications for their immigration status. They need immigration advice. As described above, only regulated advisors can provide this; a refuge etc. cannot. Without advice and assistance, the aim of the domestic violence rule is defeated because victims do not find the confidence to escape.

¹⁵ Article 3.1, 1989 UN Convention on the Rights of the Child.

¹⁶ Section 55, Borders, Citizenship and Immigration Act 2009.

¹⁷ On 18 March 2011, ILPA wrote to the UK Border Agency having reviewed the decisions of the higher courts in respect of the Agency's duties under section 55 and the UN Convention on the Rights of the Child (*op.cit.*), which show serious failings in several parts of the Agency.

¹⁸ Immigration Rules (HC 395), paragraphs 289AA *et seq.*

¹⁹ *Consultation Response*, page 27 (paragraph 87).

²⁰ Figures disclosed by the UK Border Agency to Rights of Women show success rates on appeal within this range for the period April 2009 and September 2010.

18. The Bill risks the undesirable outcome that victims of domestic violence remain (with their children) in abusive relationships for fears of the immigration consequences of escape. It may lead those with a risk on return to advance an asylum case they would not otherwise have made.

Trafficked persons

19. The Bill would exclude from Legal Aid trafficked persons who do not claim asylum. Asylum claims are based on risks on return; while some victims face such risks, others do not. Trafficked persons constitute a paradigm “*physically or emotionally vulnerable group*.” Their cases often require expert evidence (including medico-legal reports, country expert evidence and evidence on the *modus operandi* of traffickers) for which, without Legal Aid, they will be unable to pay. The exclusion of Legal Aid for trafficked persons offends against the Government’s ‘four factors’-analysis. Additionally, it may increase the number of cases in which an asylum claim is made.

Refugee Family Reunion

20. Despite representations, proposals to exclude refugee family reunion cases from the scope of Legal Aid have not been revised. The consultation response says that these applications are “*generally straightforward*” and that an alternative for family members is to claim asylum in their own right²¹. It is incorrect:

- a. The family members are outside of the UK and hence cannot claim asylum. It would be unlawful²² to assist them to do. To deny family reunion increases the risk that they make hazardous and clandestine journeys to the UK.
- b. The UK Border Agency routinely requires DNA testing to establish family relationship. It does not provide or pay for testing. Without Legal Aid to pay for tests, many applications would be doomed to failure.
- c. The UK Border Agency’s record in dealing with these applications is especially poor, and belies the suggestion they are straightforward. Some 61% to 66% of refusals are overturned on appeal²³.

21. Family members (often in situations of extreme risk, such as hiding in the country of origin or in camps) constitute a paradigm “*physically or emotionally vulnerable group*.” Their exclusion from Legal Aid as intended by this Bill offends the Government’s ‘four factors’-analysis.

Removal, deportation and detention

22. Challenges to removal and challenges to deportation are both removed from scope. These are cases where a person may face removal from his/her family, including British citizen family members, and from the place where s/he has lived sometimes since early childhood. As set out

²¹ *Op. cit.* paragraph 90, page 28.

²² Immigration Act 1971, s25A

²³ Management information collected by the UK Border Agency for 2009 and 2008, and shared with ILPA and others in discussion on refugee family reunion applications and policy. More recent evidence is not to ILPA’s knowledge available.

in ILPA's response to the Green paper, the removal and deportation cases that pass the merits threshold for legal aid are among the most serious cases that come before the courts. They have also been among the cases that have seen the most egregious errors by the State, including wrongful removals of British citizens or persons with a right of abode in the UK. The importance of the issues at stake, the absence of alternative funding, as described above, or of any possibility of mediation, demonstrate that their exclusion from scope is contrary to the Government's 'four factors'-analysis. It also risks creating unintended and perverse effects, in particular an increase in claims for asylum. If such claims are not meritorious, the individual will not obtain Legal Aid and the case will proceed as an asylum case run by a litigant in person.

23. The Bill would retain Legal Aid for challenges to detention²⁴. This is considered a high priority because "*the individual's liberty is at stake*"²⁵. The Consultation response records that:

*"[a]lmost all of those [who disagreed with the immigration and detention proposals in the Green Paper] felt that it would be practically impossible to distinguish between the underlying immigration matter and the detention matter..."*²⁶.

It continues:

*"The Government considers that contracted legal aid providers should not generally find it difficult to distinguish between advice related to aspects of immigration detention or bail and the underlying immigration issue."*²⁷

24. The difficulties with this are:

- a. In immigration cases, particularly in removal and deportation cases, the individual's liberty is immediately at stake. The State (the UK Border Agency) has, and exercises, broad powers of detention which are directly consequent upon its immigration decision.
- b. Challenging immigration detention is necessarily and intrinsically linked to challenging the underlying immigration decision which is both the cause of, and justification for, detention. Seeking release (e.g. bail) involves challenging the prospects of removal. Challenges to detention will not enjoy the priority intended if the means to challenge the practicality, reasonableness or legality of the immigration decision on which detention is founded are constrained.

25. An example may assist. In *Muuse*²⁸, a Dutch national, born in Somalia, was detained in consequence of a decision to deport him to Somalia. He was sentenced to six months

²⁴ Bill, Schedule 1, Part 1, paragraphs 22-24. These measures include the retention of Legal Aid for matters relating to alternatives to detention and the conditions that may be imposed in respect of these (e.g. residence and reporting conditions).

²⁵ *Consultation Response, op.cit.*, paragraph 73, Annex A, page 100.

²⁶ *Consultation Response, op.cit.*, page 100 (paragraph 71, Annex A).

²⁷ *Consultation Response, op.cit.*, page 100 (paragraph 72, Annex A).

²⁸ *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453

imprisonment for common assault, but his release was ordered immediately due to time spent in prison on remand. However, before leaving the court he was asked to return to the cells, whereupon he was taken back to prison for 'immigration'. At the time of making its decision, the UK Border Agency had his original Dutch passport. His deportation to Somalia was unlawful. Nonetheless, by reason of the deportation decision he was detained under immigration powers, ultimately for more than four months. Without pursuing the underlying immigration issue, that Mr Muuse was Dutch and could not lawfully be deported to Somalia, the basis for the challenge to detention would not have existed.

26. Detainees are significantly disadvantaged in trying to prepare and present their own cases, being isolated and ill-placed to gather evidence, including witness evidence. Accordingly the exclusion of the immigration cases of immigration detainees from scope offends the Government's 'four factors'-analysis.

27. If an individual is given legal aid to challenge detention but not to challenge the underlying immigration case then There would be perverse consequences if Legal Aid for the underlying immigration case is refused or withdrawn while someone is not yet detained or released from detention:

- a. It would lead to situations in which a person is detained, despite the detention being unnecessary and unlawful in the light of the underlying case, because without Legal Aid the person has been unable to adequately present or evidence that case.
- b. It would risk that individuals are caught in a cycle of repetitive periods of detention. An individual might secure release because the UK Border Agency could not demonstrate that the reasons for detention were made out but the individual would then, without Legal Aid, be unable adequately to pursue and present the case making a subsequent period of detention likely
- c. None of the above is in the interests of the UK Border Agency in its use or management of its detention estate.

The importance of high quality free legal representation

28. Detainees are significantly disadvantaged in trying to prepare and present their own cases, being isolated and ill-placed to gather evidence, including witness evidence. Accordingly the exclusion of the immigration cases of immigration detainees from scope offends the Government's 'four factors'-analysis.

29. We draw attention to the following view of the Judge's Council (a view we share):

*"The recent withdrawal of a number of able representatives from legally aided asylum and immigration work illustrates the risk of excessive cut-backs and is viewed with alarm."*²⁹

²⁹ Response of a subcommittee of the Judge's Council to the Green Paper, paragraph 25

30. Where there is no free advice on offer, the individual has no money and so much is at stake, there is a grave risk that injustice will be done. These cases largely concern people's private and family life³⁰ in the UK. They involve complex questions of law and require the gathering and presentation of detailed and complex evidence (including witness statements and expert evidence)³¹.

31. Persons seeking to raise the funds to pay for representation, however good that representation is, are vulnerable to exploitation by employers. But desperate people are also vulnerable to exploitation by those purporting to advise and assist them. The debates to date have drawn attention to the poor quality of advice and representation in this field and the venality of some advisors. The best protection against poor advice and representation is the availability of good advice and representation, and for those with no money this means free good advice and representation.

32. The relevant courts and tribunals are not inquisitorial and they are not equipped or resourced to gather evidence. Successive presidents of immigration tribunals have made this point. The late Mr Justice Hodge explained that he and his judges: "...want as many people to be legally represented as possible..."³², saying:

*"It is a hugely different way of approaching cases if you become an inquisitor; you move away from sitting back and having both sides tell you what they think the right answer to the particular conundrum should be to you getting involved in it. The German judges who deal with asylum and immigration cases take far longer than we do, but they call for reports from doctors on medical issues, they ask for particular reports on country issues before they get anywhere near talking to person (sic) making the claim. They then tend to quiz the person making the claim, quite often more than once, and then they take the whole thing together and make a decision."*³³

33. Mr Justice Collins (then Lead Judge of the Administrative Court and previously an immigration tribunal President) said:

*"...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..."*³⁴

³⁰ Article 8, European Convention on Human Rights

³¹: "...the difficult evaluative exercise which article 8 requires." *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 4 (per Lord Bingham of Cornhill; "I am left perplexed and concerned how any individual whom the Rules affect ...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 assistance, funded by the taxpayer, that justice can be done." *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773 (per Lord Justice Longmore).

³² *Op cit*, Q31

³³ Oral Evidence to the Constitutional Affairs Committee, 21 March 2006, Q39.

³⁴ *Op cit*, Q35

34. Mr Justice Blake, speaking, at the Annual Conference of the Office of the Immigration Services Commissioner on 6 December 2010, highlighting the importance of case management, observed that his judges need competent representatives for both parties to enable them to perform their role.
35. The points raised by the successive presidents are consistent with the findings of the Government's literature review on litigants in person³⁵.

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The following material relevant to the Bill can be found at www.ilpa.org.uk in the 'Submissions' and 'Briefings' section:

ILPA's Briefing for Second Reading and Annex (27 June 2011)

ILPA's Briefing on matters relating to immigration detention (23 June 2011)

ILPA's Briefing for Westminster Hall Debate on Legal Aid (11 May 2011)

ILPA's Response to Ministry of Justice Consultation *Breaking the Cycle* (4 March 2011)

ILPA's Response to Ministry of Justice Consultation *Civil Litigation Funding* (14 February 2011)

ILPA's Response to Legal Aid Green Paper and Annexes (14 February 2011)*

ILPA's Briefing for Adjournment Debate on Legal Aid (15 December 2010)

**This Response has been provided to the Committee as an Annex to this Memorandum.*

³⁵ See page 5, Ministry of Justice, *Litigants in person: a literature review*, Research Summary 2/11, June 2011.