

**ILPA BRIEFING
House of Commons - Committee****July 2011****LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –
Bill 205****Amendment Nos. 79 & 80**

Kate Green

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Clause 1, page 2, line 7, at end add –

- (6) The Lord Chancellor must ensure that when an individual is in dispute with the state or with a body that is an emanation of the state, in relation to a matter of welfare benefits, employment, debt, housing, or immigration, education or asylum support, that the individual shall continue to be entitled to legal advice, assistance and representation against the state or emanation of the state on the same basis existing prior to the enactment of this Act.

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Clause 1, page 2, line 7, at end add –

- (7) The Lord Chancellor must ensure that in any case where the state or an emanation of the state has legal advice, assistance or representation, a party in dispute with the state or an emanation of the state, shall continue to be entitled in turn to equality of arms and to legal aid for legal advice, assistance or representation in relation to any claim in welfare benefits, employment, debt, housing, or immigration, education or asylum support, as they would have been prior to the enactment of this Act.

Presumed Purpose

These amendments draw attention to the disparity of arms in legal disputes between the State and the individual, particularly where the individual is poor; and hence the importance of preserving Legal Aid in the case of legal disputes between the State and the individual. They further draw attention to the point of principle identified by Dr E J Cohen (*Legal Aid for the Poor*), recently cited by the late Lord Bingham of Cornhill shortly after his retirement as the senior Law Lord¹:

Legal aid is a service which the modern state owes to its citizens as a matter of principle. It is part of the protection of the citizen's individuality which, in our modern conception of the relationship between the citizen and the State, can be claimed by those citizens who are too weak to protect themselves. Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc. so should it protect them when legal difficulties arise.

¹ The extract is taken from *The Rule of Law*, Tom Bingham (Penguin Books, 2011), p87.

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Indeed, the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crisis. But the State is responsible for the law. That law again is made for the protection of all citizens, rich and poor alike. It is therefore the duty of the State to make its machinery work alike, for the rich and the poor.

Briefing Note

The principle (cited above) may be extended. In situations where it is the State that is party to the legal dispute, or by its action or inaction the cause of the dispute, it is all the more the responsibility of the State to ensure that the individual can effectively hold it and its agents to account. In such situations the State, and those to whom it delegates its authority, have access to considerable resources – particularly by comparison to individuals who currently qualify for Legal Aid in legal disputes with the State in the areas of welfare benefits, employment, debt, housing, immigration, education and asylum support. The content, cause and conduct of these legal disputes are, at least in some significant part, the responsibility of the State.

As regards immigration, it is the State and its agents that are responsible for the decisions that are made and the actions taken in consequence of those decisions. For example, it is the UK Border Agency that decides to remove or deport², and its immigration officers and subcontractors that carry out the arrests, detention and expulsions that may either separate partners and parents from children or uproot families from their home, wider family and community, including where individuals and families affected by these actions are British citizens, born in the UK and have no connection to or experience of the countries to which they are to be effectively exiled.

The resources and powers available to the State in such cases are enormous. By contrast, an individual or family, if Legal Aid is removed by this Bill, firstly faces the task of establishing what are the limits of the State's lawful exercise of its powers, what are the legal remedies by which those limits may be insisted upon and what is the evidence required to establish any case against the State; and secondly, if they are to have any chance of resisting the State, must have the means to acquire and present that evidence in a formal legal process (such as an appeal), in which the State may, and will usually, be represented (and with the option of further calling upon the support of various advisers and lawyers).

Yet the actions of the State in such cases are notorious for examples of arbitrariness, incompetence and unlawfulness³; and the law to which the individuals and families may turn to protect themselves is notorious for its complexity⁴. For example, it is not

² Occasionally, these decisions may be taken in person by the Home Secretary.

³ ILPA's experience of this is reflected in the observations of others. The reports of the Chief Inspector of the UK Border Agency have repeatedly raised concerns about the quality of decision-making. In his most recent Annual Report (2009-2010, 16 December 2010), the Chief Inspector recorded: "*During my inspections, I repeatedly found examples of Agency staff not following the Agency's own standards and guidance. I would like to see the Agency develop a 'right first time' culture to decision making.*" In its most recent report on the 'Work of the UK Border Agency' (May 2011, HC 929), the Home Affairs Committee repeatedly drew attention to continuing and long-standing concerns about quality of decision-making, and stated: "*As we pointed out in our last report on the Agency, the main aim of its managers should be to improve the quality of initial decision-making as this would avoid the substantial delays, financial costs and human suffering that occur now.*"

⁴ See e.g. Lord Justice Longmore in *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773: "*I am left perplexed and concerned how any individual*

unusual for the UK Border Agency to wrongly notify individuals that they have no appeal right against its decision⁵. The statutory provisions on appeal rights have become so complex that they include two provisions simultaneously in force with the same section number in the same statute⁶. These provisions are the subject of a three hours training course for immigration advisers run by ILPA, yet participants have recently suggested that a full day is needed⁷. Indeed such is their complexity, despite the provisions largely having been on the statute book since 2002, there continue to be instances of the immigration judiciary misunderstanding and misapplying them⁸. These are the provisions governing access to an appeal by which the State is to be held to account for its decisions in an area in which it has, repeatedly over many years, shown itself prone to unlawful decisions and actions such as to detain and deport a Dutch national to Somalia⁹, to effectively impose the exile of British children to a country they have never seen¹⁰, to remove children from the UK in ignorance or disregard of their welfare¹¹ and to strip people of their lawful entitlement to be in the UK, without warning or inquiry, on the spurious ground that they have used deception in order to deprive them of any right of appeal¹².

In considering these matters, Committee members need to have regard to the particular circumstance of immigration advice and assistance being regulated under sanction of criminal law¹³. Thus, charities and other advice agencies, unable or unwilling to enter that regulatory scheme – e.g. because they are insufficiently specialist or cannot afford to provide training and support to would-be advisers – cannot lawfully fill the gap left by the withdrawal of Legal Aid.

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whom the [Immigration] Rules affect... can discover what the policy of the Secretary of State actually is at any particular time...

⁵ For example, two of the case examples provided among those given by ILPA in response to the Ministry of Justice Legal Aid consultation were cases where the UK Border Agency had wrongly issued a notice with its decision stating there was no right of appeal or had simply not informed the recipient of its decision of his appeal rights.

⁶ Section 88A, Nationality, Immigration and Asylum Act 2002; one section 88A was introduced by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the other section 88A was introduced by the Immigration, Asylum and Nationality Act 2006 (but has only replaced the former for certain points-based system cases leaving it in force for other cases).

⁷ In feedback on the course run on 15 July 2011 in Birmingham, a participant writes: “...could definitely have benefitted from being a full day. Overload of information.” The course (Challenging Immigration Decisions: Appeal rights and other remedies) almost exclusively focuses on understanding the statutory provisions on when a right of appeal is available and what, if available, is its scope.

⁸ See e.g. *SA (Pakistan)* [2007] UKAIT 00083 and *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78; see also *LZ (Zimbabwe) v Secretary of State for the Home Department* [2010] EWCA Civ 916 for a different jurisdictional error arising in an immigration appeal.

⁹ *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453

¹⁰ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

¹¹ In a letter of 18 March 2011 to the then Acting Chief Executive of the UK Border Agency, ILPA drew attention to several judgments of the higher courts identifying failures to have any or proper regard to the Agency’s statutory duty to have regard to the safety and welfare of children, including *R (TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin), *R (Suppiah & Ors) v Secretary of State for the Home Department* [2011] EWHC 2.

¹² *Anwar & Anor v Secretary of State for the Home Department* [2010] EWCA Civ 1275

¹³ Part V, Immigration and Asylum Act 1999 provides for this regulation and establishes the Immigration Services Commissioner.