ILPA BRIEFING
House of Commons - Committee

July 2011

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL – Bill 205

Amendment No. 82

Kate Green

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

(9) The Lord Chancellor must ensure that where an individual would experience difficulty in protecting their legal rights by reason of learning difficulties, mental health problems, other disabilities, language difficulties, problems of literacy or from not being articulate, in relation to welfare benefits, employment, debt, housing, or immigration, education or asylum support, that they continue to be entitled to legal aid on the same basis as they would have been prior to the enactment of this Act.

Presumed Purpose

The amendment draws attention to a profound failing in the Government's approach to Legal Aid in this Bill being that the Bill's measures are blind to the particular needs of individuals, and so whole areas are for all taken out of scope for Legal Aid on the asserted ground that in general people may be able to deal with legal proceedings without advice or assistance regardless that some may be especially incapable of dealing with such proceedings.

Briefing Note

In June 2011, the Government published (as part of its Legal Aid consultation process and response) a literature review concerning litigants in person[1]. It is interesting to start with the review's findings, but will be necessary to come back to the impact of exclusion from Legal Aid on those identified in the amendment many of whom may by reason of this exclusion never have a real or effective opportunity to litigate to assert their legal rights. The review found:

> "*...most research suggested that litigants in person may experience a number of problems, which in turn impact on the court. For instance, the research pointed to problems with understanding evidential requirements, difficulties with forms, and identifying facts relevant to the case (Genn and Genn, 1989; Lewis, 2007; Langan, 2005; Sales et al., 1993; Kelly and Cameron, 2003; Moorhead and Sefton, 2005; Law Council of Australia, 2004).*
> *A number of sources also pointed out that litigants in person may have difficulty understanding the nature of proceedings, were often overwhelmed by the procedural and oral demands of the courtroom, and had difficulty explaining the details of their case (Lewis, 2007; Langan, 2005; Genn and*

[1] Research Summary 2/11, Ministry of Justice, June 2011

> *Genn,1989; Hunter, 1998; Hunter et al., 2002; Baldwin, 1997). For instance, Genn and Genn found that many unrepresented tribunal appellants and applicants felt ill-equipped to present their case effectively at their hearing. They felt intimidated, confused at the language and often surprised by the formality of proceedings.*
> *Such problems may also be relevant for those engaging in mediation without legal representation. One study (Petterson et al., 2010) examined the effect of representation at mediation. This found that parties in mixed representation cases (where one party was represented and the other was not) were more likely, than cases where both or neither parties were represented, to report feeling unprepared to mediate, and concerns and fears about mediation.*"

As the Justice Committee has commented upon[2], the Government has tentatively posited that removing Legal Aid from whole areas, such as those identified in the amendment, may reduce the number of cases coming before the courts and tribunals[3]. The findings in the Government's literature review as to the experience of litigants in person may support such an assumption. However, if the assumption is to prove correct, it seems inevitable that those identified in the amendment – i.e. those who would experience difficulty in protecting their legal rights by reason of learning difficulties, mental health problems, other disabilities, language difficulties, problems of literacy or from not being articulate – will be disproportionately, perhaps overwhelmingly, represented among those who do not bring their cases before the courts or tribunals. If this were so, any reduction in cases before the courts and tribunals would not result from a discouraging of unmeritorious claims but from a disenfranchisement of the most vulnerable from the right of access to justice.

ILPA is very concerned that in immigration cases, those with "*learning difficulties, mental health problems, other disabilities, language difficulties, problems of literacy or from not being articulate*" will not be able to identify their legal entitlements, understand the procedures to which they may be subjected, obtain and present the evidence that may be relevant to those procedures and ultimately to defend themselves against actions by the State which will have the most profound impact upon them – such as detention and removal, which may result in the permanent separation of people from their home, family (including children) wider community, including where this is to return or remove people to countries to which they have little or no connection and, insofar as they may have special needs requiring specific support, where the circumstances they face may be wholly unsuitable or inadequate to their needs.

In its equality impact assessment[4], the Government states:

> "*2.109 The Government's view is that, in general, individuals in immigration cases should be capable of dealing with their immigration application and should not require a lawyer. Tribunals are designed to be accessible to users. Interpreters are provided free of charge. Claims for asylum, including claims under article 3 of ECHR, will remain in scope. Otherwise, while it is true that immigration law can be complex, it is not generally the case that an appellant will need to argue points of law or have any knowledge of the law. Immigration cases are generally about whether the facts of a particular case*

[2] *Government's proposed reforms of legal aid*, Third Report of Session 2010-2011, March 2011, HC 681, para. 164 *et seq*
[3] The Government's position is essentially repeated in its more recent 17 June 2011 Impact Assessment No. MoJ090 (para. 37, page 12).
[4] June 2011 (which deals with non-detained immigration at page 44 *et seq*)

> *meet the immigration rules, and a significant amount of guidance is produced by UKBA and others to explain what these rules are, and how they apply.*"

How does this in any way begin to address the needs of those identified in the amendment? Their needs are not answered by the Government's assertion that in general people should be capable of dealing with cases without legal advice or assistance. By definition, those identified in the amendment are not among "*the general*". The Government's concession that "*immigration law can be complex*" may be regarded as something of an understatement where senior members of the judiciary have been driven to the following observations:

> "*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… It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done.*"[5]

> "*The history fills me with such despair at the manner in which the system operates that the preservation of my equanimity probably demands that I should ignore it, but I steel myself to give a summary at least… I ask, rhetorically, is this the way to run a whelk store?*"[6]

Nor is the Government correct to focus on the Rules, since in cases where it is the State which takes action to remove or deport, including of individuals who are here lawfully, it is not the Rules that generally governs the case but questions of the proportionality of the State's decision to remove them from their home, family (including children) and community under Article 8 of the 1950 European Convention on Human Rights (as adopted in domestic law by the Human Rights Act 1998). In such cases:

> "*The search for a hard-edged or brightline rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.*"[7]

Inevitably, such cases often require, not only an understanding of the various legal principles in play, but an ability to identify, obtain and present detailed and complex evidence. ILPA has also specifically questioned how these concerns will be addressed for persons such as victims of domestic violence, victims of trafficking, children and detainees, each of whom face particular difficulties in immigration proceedings[8].

For further information please get in touch with:

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[5] *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773, Longmore LJ (para. 87)
[6] *MA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 1229, Ward LJ (paras. 2-7)
[7] *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, Lord Bingham of Cornhill (para. 12)
[8] see ILPA's memorandum of evidence to the Public Bill Committee, July 2011