ILPA BRIEFING
House of Commons - Committee

July 2011

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

Amendment No. 89

Kate Green

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

(16) The Lord Chancellor must ensure that before any changes to legal aid set out in this Act are made, a full independent assessment is carried out into any likely increase litigants in person resulting from such changes and the effect accordingly on the deficit.

Presumed Purpose

This amendment provides opportunity for the Committee to consider the adequacy of the Government's evaluation of the impact on the public finances which the Bill would have by reason of any increase in litigants in person to which it may lead.

Briefing Note

The Government's literature review concerning litigants in person[1] states:

"*...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 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."

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

It is important to recall that neither tribunals nor courts in our legal system are inquisitorial. As regards the immigration tribunals, successive Presidents of these 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…*"[2], 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.*"[3]

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…*"[4]

Most recently, 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.

In cases, which require the identification, gathering and presentation of detailed and complex evidence (such as those concerning private and family life and the evaluation of the proportionality of a decision to remove or deport the person[5]), in the absence of legal advice and assistance, the First-tier Tribunal (Immigration and Asylum Chamber) is likely to be faced with the prospect of either not discovering and deciding upon the real substance of the case or giving, possibly repeated, guidance to litigants to go away and seek to obtain relevant evidence or the appearance of a family member, friend or professional in tribunal to give evidence; with necessary adjournments. The Upper Tribunal and higher courts may be faced with individuals seeking to advance points, which are not points of law; and judges may be forced to wade through copious evidence or letters by way of pleadings only to discover no arguable point of law is being advanced or to deal with extensive oral submissions which similarly raise no point of law[6]. These are all factors which may lead to substantial delay in individual cases.

However, there are cumulative and consequential risks. Delays in some cases ultimately lead to delays in other cases (as there is finite judicial time). Where the

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[2] *Op cit*, Q31
[3] Oral Evidence to the Constitutional Affairs Committee, 21 Mach 2006, Q39.
[4] *Op cit*, Q35
[5] In *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, the House of Lords made clear that such cases involve a "*difficult evaluative exercise*" which cannot be reduced to any "*hard-edged or brightline rule*" (para. 12).
[6] The then Lead Judge in the Administrative Court, Collins J, indicated these very concerns in his evidence to the Constitutional Affairs Committee (*op cit*) in relation to paper applications for reconsideration of decisions by the then Asylum and Immigration Tribunal made by unrepresented litigants: see Q35.

law is developed by decisions of the Upper Tribunal and higher courts in cases where only the State is represented, the prospect is that such development will need to be more frequently revisited as the decisions will not be adequately informed by submissions on the part of the other party. A system of justice developing along these lines risks having less authority; and the confidence in it by those it serves is likely to be less. If so, the risk of repeat applications and of judicial review proceedings on the part of those who, deprived of any legal advice and assistance, have understandable reason to be dissatisfied with the result of earlier proceedings may increase. Indeed, such applications and judicial reviews may, in many cases, not only be understandable, but necessary if the individual's understanding of what was or was not relevant or ability to collect and present evidence in an earlier appeal has meant that the decision on that appeal does not address the substance of his or her case.

If realised, these risks will bring with them costs to public funds – both costs to the Ministry of Justice arising from the impact on court time, and to other departments such as the Home Office (UK Border Agency) in making greater demands on its caseworkers and operations and increasing delays. We note that others, such as Citizens Advice[7], have highlighted wider potential costs to public funds in relation to the Legal Aid proposals.

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[7] *Towards a Business Case for Legal Aid* – Citizens Advice (2010)