ILPA BRIEFING
House of Commons - Committee

September 2011

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

Asylum
(Schedule 1, Part 1, paragraphs 17(7)(a) and 25(1))

Mr Elfyn Llwyd

237

Schedule **1**, Page **106**, leave out lines 13 to 15 and insert –

(a) judicial review in connection with a matter within paragraph 25(1) of this Part;

Purpose

To ensure that the definition of asylum matches that given in paragraph 25(1) and thus that judicial review remains in scope for the asylum cases that remain in scope.

Mr Elfyn Llwyd

238

Schedule **1**, Page **109**, line **9**, at end insert –

(aa) Article 2 of the Human Rights Convention

Schedule **1**, Page **109**, line **10**, at end insert –

(ba) Article 15c of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

Purpose

To correct a presumed oversight in the drafting. The purpose of the paragraph is to ensure that asylum cases remain within scope but the basis of the definition of an asylum case for legal aid (and most other) purposes in UK law is set out in Directive 2004/83/EC (the Qualification Directive) and includes not only the matters already set out in this subparagraph but also Article 2 of the Human Rights Convention (death penalty or execution) and Article 15c: *serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.*

Briefing

The Government's decision to retain legal aid for asylum has three key aspects:

- Asylum cases "*are about the immediacy and severity of the risk to the individual: if an applicant for asylum is returned to an unsafe country, they could suffer persecution, torture or death*"[1].
- Asylum-seekers are among those the Government accept to be particularly vulnerable: "*When making their case, asylum applicants may have recently fled persecution or torture. In these circumstances, it may be difficult for them to navigate their way through the asylum process without legal assistance. In addition, applicants for asylum may be traumatised and so find it more difficult to represent themselves.*"[2]
- Obligations under international law: "*We also recognise the importance of continuing to provide free legal assistance and/or representation in the event of a negative asylum decision as set out under Article 15 of the 2005 EU Asylum Procedures Directive.*"[3]

Amendment 238 does no more than assist the Government to achieve its aim by ensuring that paragraph 25(1) effectively covers all asylum cases. Those whose asylum claims are brought on the basis of a serious risk of execution or a serious threat to life or person in situations of international or internal armed conflict are facing risks no less immediate or severe and are as a class no less vulnerable to the difficulties of representing themselves than other asylum-seekers.

All these claims fall within the Asylum Qualification Directive (Directive 2004/83/EC)[4]. If the Government is seeking by this Bill to distinguish certain claims within that Directive from others in relation to legal aid, this is likely to lead to satellite litigation on the inter-relationship of the European Asylum Directives[5] and their relationship with the 1951 Refugee Convention[6] and UK domestic law, and further on the scope of Article 6 of the European Convention on Human Rights and the common law requirements of a fair trial. Having regard to the Government's stated reasons for retaining asylum within legal aid scope, this appears to be an unnecessary and likely expensive risk.

In the circumstances Amendment 238 should be accepted so as to fulfil the Government's aim.

As regards Amendment 237, this would ensure that the Government's aim in retaining legal aid for asylum is fully effective in relation to judicial review claims. ILPA has briefed separately on the provisions in paragraph 17(5) and (6)[7] concerning the exclusion of legal aid in certain immigration judicial reviews. The points raised there in relation to immigration, apply equally to asylum judicial reviews.

However, in asylum, the Bill provides some protection against the exclusion of legal aid for judicial review by paragraph 17(7)(a), which provides:

---

[1] CP 12/10, Ministry of Justice *Proposals for the Reform of Legal Aid in England and Wales* November 2010, page 37, paragraph 4.39
[2] CP 12/10 *op cit*, pages 37-38, paragraph 4.40
[3] CP 12/10 *op cit*, page 38, paragraph 4.41
[4] Article 2(c) and Article 15
[5] The key Directives for these purposes are the Reception Directive (2003/9/EC), Qualification Directive (2004/83/EC) and Procedures Directive (2005/85/EC)
[6] 1951 UN Convention relating to Status of Refugees
[7] Part 1, Schedule 1 to the Bill

"*Sub-paragraphs (5) and (6) do not exclude services provided to an individual in relation to –*

(a) judicial review in connection with a negative decision in relation to an asylum application (within the meaning of the EU Procedures Directive);"

The Government's response to the consultation explains the need for exceptions as being "*principally to take into account potential changes in an individual's circumstances over time, and to ensure that cases where an appeal has not already taken place are not inadvertently captured*"[8]. We also understand from the Ministry of Justice that paragraph 17(7)(a) is included to comply with European law obligations.

We note that it is not just changes in the individual's circumstances that may be critical in asylum cases. For example, the litigation of Zimbabwean asylum claims over the last few years has shown how both changes in country conditions and changes in judicial (or the UK Border Agency) appreciation of country conditions can reveal a person to be a refugee even when previously his or her asylum claim was refused. For example, Country Guidance decisions of the Asylum and Immigration Tribunal in 2005 and 2008[9] showed that several Zimbabwean asylum-seekers had been refused on unsafe and unduly narrow grounds (e.g. the 'low-level' of their political activities), and had faced return to persecution but for the capacity for the asylum system to entertain fresh asylum claims. Similarly, the decision of the Supreme Court in 2010[10] has shown that many gay and lesbian asylum-seekers had been refused on unsafe and unduly narrow grounds (e.g. that they could be discreet if returned) and faced return to persecution.

In the circumstances, an alignment of paragraph 17(7)(a) and paragraph 25(1) would better achieve the Government's stated aim of protecting asylum. Moreover, that alignment (taken together with the amendment to paragraph 25(1) proposed by Amendment 238) would avoid the likely satellite litigation on the inter-relationships between the European Asylum Directives, the 1951 Refugee Convention and the right to a fair trial at common law and provided by Article 6 of the European Convention on Human Rights.

For further information please get in touch with:

Steve Symonds, Legal Officer, steve.symonds@ilpa.org.uk, 020-7490 1553
Alison Harvey, General Secretary, alison.harvey@ilpa.org.uk, 020-7251 8383

[8] Cm 8072, Ministry of Justice *Reform of Legal Aid in England and Wales: the Government's response*, June 2011, page 104, paragraph 92
[9] *AA (Zimbabwe)* [2005] UKAIT 00144; *RN (Zimbabwe)* [2008] UKAIT 00083
[10] *HJ (Iran) & HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31