

**ILPA BRIEFING
House of Commons - Committee****September 2011****LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –
Bill 205****Children and vulnerable adults (immigration)
(Schedule 1, Part 1, Paragraph 25)****Mr Elfyn Llwyd****240**

Schedule 1, Page 109, line 11, at end insert –

*(ca) Civil legal services provided in relation to rights to enter and to remain in the United Kingdom to a specified person***Mr Elfyn Llwyd****241**

Schedule 1, Page 109, line 33, at end insert –

“specified person” means a person –

- (i) under the age of 18; or*
- (ii) who claims an entitlement to enter or remain arising from his having been subjected to domestic violence or human trafficking; or*
- (iii) whose ability to represent himself or herself is significantly impaired through physical or mental disability or illness, through old age or otherwise; or*
- (iv) any other class of person as may be specified by the Secretary of State in regulations.*

Purpose

These are probing amendments. Their effect would be to preserve legal aid in immigration cases for children; victims of human trafficking and domestic violence; the elderly, mentally handicapped and mentally ill and the aged. They would confer a power to specify other classes of person in regulations.

The ‘specified person’ definition is modelled on the definition in paragraph 3(7), but also includes children, victims of trafficking and victims of domestic violence.

Briefing Note

What the amendments highlight is the fundamental inequality of arms that results when persons at a particular disadvantage are forced to represent themselves because they do not have the money to pay for representation. The consequences for the individual may be that they are unable to pursue their case at all, or that they do so with no prospect of succeeding. The consequences for the legal system are also severe: the courts have to contend, for example with the mentally ill or with a

person who is unable to navigate the system. Meanwhile important points of principle that may affect many cases are not properly argued and tested, and effective scrutiny of the State is removed from cases where the actions of the State affect those least able to protect themselves.

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).¹ 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 will be aware from their immigration caseloads that this can also leave individuals open to exploitation.

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..."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

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.

¹ Immigration and Asylum Act 1999, Part V: the Office of the Immigration Services Commissioner.

² *Op cit*, Q31

³ Oral Evidence to the Constitutional Affairs Committee, 21 March 2006, Q39.

⁴ *Op cit*, Q35

The points raised by the successive presidents are consistent with the findings of the Government's literature review on litigants in person⁵.

The amendment also highlights that 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. Additionally, it may increase the number of cases in which an asylum claim is made.

These are probing amendments and if they were to be incorporated into the Bill it would be necessary to work up further definitions, such as the definition of domestic violence (for example by borrowing from paragraph 10 of the schedule, which may yet be the subject of amendment, or from the immigration rules) and of human trafficking.

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

Annexe case studies

Case of R

R suffered from a severe mental illness and had been treated in hospital. His complicated immigration history had reached a point where a visa application submitted by his family had been refused and he was, in effect, confined to the hospital since he was not eligible for the level of support he needed in the community while his immigration status was unresolved. His legal aid solicitors made an application for him to be allowed to remain on the grounds that his family were in the UK. The application was refused but an immigration judge allowed his appeal. His legal team had obtained medical evidence and a social worker's report which dealt with the strength of the ties between R and his extended family in the UK. Although there was no appeal against this decision, there was a considerable delay in issuing status papers to R. During this time he was forced to remain in hospital. Only when his solicitors threatened judicial review were the papers issued.

Case of E

E travelled to the UK when a babe in arms and has lived here for over forty years. When she was still a minor, her mother applied to register her as a British citizen. E has learning difficulties but although she can barely read and write, she tried to deal with the Home Office over a number of years without success. She persisted, alone, until she faced eviction and needed to prove her immigration status.

She was granted legal aid and her solicitors made a data protection act application and discovered that the application had lapsed because her mother had not provided all the necessary documents. The Home Office was persuaded to reopen the decades old application and register her as British citizen.

Her learning difficulties would have been a significant impediment to E being able to resolve this matter herself, even if it had been straight forward and all information readily available. With help, however, the matter was quickly resolved and she was able to establish her status and keep her home.

Case of A

A is twelve. He came to the UK when he was four to join his father and father's British partner. The father left the UK but A remained in UK with the British partner. A's aunt has been in the UK for over seven years with her two daughters. She applied to regularise her status, that of her daughters and that of A. This has been refused. A requires separate legal advice on his rights to private and family life. No notice of removal has been issued so A is in limbo – until such a notice is issued he cannot challenge the removal. He cannot be expected to represent himself or to gather relevant evidence.

Case of V

V was referred to legal aid lawyers by social services as one of London's 250 most deeply embedded homeless people. He has been in the UK since 1969 initially coming as a student and then working in various jobs until 1997 when he had become homeless, remaining on the streets since that date. He lost contact with all of his family in 1994. He was of the view that he might have been granted ILR in 1978 but he was unable to verify this having only a badly damaged expired national passport and the UK Border Agency would not confirm this. Social services had contacted the UK Border Agency to ask for advice and they had recommended that he instruct a solicitor to make an application to regularise his status. An application was submitted an application on the basis of his long residence in accordance with the immigration rules and the decision is awaited.