

ILPA BRIEFING
House of Commons - Committee**September 2011****LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –**
Bill 205**Children party to proceedings**
(Schedule 1, Part 1, Paragraph 13)**Mr Elfyn Llwyd****242**

Schedule 1, Page 102, line 44, leave out 'family'

Purpose

To preserve legal aid for children who are a party to any legal proceedings, not only family proceedings. This is not an amendment specific to immigration.

Briefing Note

The Government revised its original proposals concerning family legal aid to take into account "*that children are not able to represent themselves*".¹ The result is a stark contrast in the Bill between the position of children who are party to family proceedings and children in other jurisdictions of the courts and tribunals. The Bill contemplates that, other than in family proceedings, a child who is a party could be forced to appear unrepresented. We deal with immigration cases, because those are the cases we know, but it appears to us that the point goes wider.

Children are no better placed to represent themselves in immigration proceedings than in family proceedings. Dr Maggie Atkinson, the Children's Commissioner for England and Wales, stated in oral evidence to the Public Bill Committee:

*"It is important that we understand that litigation in person by a child is completely inappropriate in a court system that, even in family law, remains adversarial rather than inquisitorial."*²

The exclusion for immigration cases particularly affects children in the following situations:

- Separated (unaccompanied) children, other than those pursuing asylum claims. This will include children, some of whom will have been in the UK for several years, applying for an extension of discretionary leave and who are being cared for by a Local Authority;

¹ *Consultation Response, op.cit.*, paragraph 50, page 21; Bill Schedule 1, Part 1, paragraph 13.

² Public Bill Committee, 14 July 2011, afternoon session, Q306.

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- Children facing removal from the UK along with a parent, or separation from a parent by reason of that parent's removal where their interests require separate representation.

Where a separated child with no Legal Aid and no income is in the care of a Local Authority, the child may look to that Local Authority for funding for representation.³ This would constitute a substantial (and unpredictable) transfer of cost from the Ministry of Justice to Local Authorities,⁴ and one that is antithetical to the Government's stated antipathy to public expenditure "*cost shifting*".⁵ Those local authorities with a higher concentration of separated children will be at risk of higher payments. It seems likely that they will look to the Home Office, which makes grant payments to them for the separated children they support, to meet these extra costs. Nor will it simply be a question of shifting what would have been paid by legal aid to the Local Authority or onward to the Home Office. The Local Authority will be paying privately for representation which will cost more than is paid under Legal Aid rates. This group may, uniquely among the immigration cases removed from scope, be able to find an alternative source of funding, but is this desired? Over and above the financial considerations outlined above, there is a risk of conflicts of interest since the local authority must support and pay for the child while that child remains in the UK.

As to family removals, the Supreme Court and its predecessor have highlighted that there will be cases where the child needs separate representation. Two cases were, in the view of those courts, examples of this. In *EM (Lebanon)*⁶, removal of the child and his mother to Lebanon would have resulted in his custody being given to his estranged and abusive father with permanent separation from his mother. In *ZH (Tanzania)*⁷, the effect of the children's mother's removal would either be to separate the British children from their mother or to remove them from their settled life in the UK and their father.

These cases involve international and domestic obligations concerning the best interests of the child⁸ and the safety and welfare of children⁹. The State (the UK Border Agency, which has been found wanting in this regard¹⁰) must be held to account.

One of the criteria identified by the Government as a reason to keep a case within the scope of legal aid is '*...the litigant's ability to present their own case including the venue before which the case is heard, the likely vulnerability of the litigant and the complexity of the law.*' On this analysis how can it be right that a child who passes

³ Community Legal Service (Financial) Regulations 2000 SI 200/516, regulation 11, but see the Legal Service's Commission's Funding Code, Chapter 29 Immigration at paragraph 29.11.2.

⁴ With implications for the Home Office/UK Border Agency budget in view of the grant arrangements by which Local Authorities receive payment for care responsibilities toward separated children seeking asylum. This concern has been highlighted by the South East Strategic Partnership for Migration in its evidence to the Public Bill Committee, and we are aware that the question is being considered by other local authorities also.

⁵ *Hansard* HC, 29 Jun 2011: Column 1063 (*per* Jonathan Djanogly MP, Parliamentary Under Secretary of State for Justice).

⁶ *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

⁷ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

⁸ Article 3.1, 1989 UN Convention on the Rights of the Child.

⁹ Section 55, Borders, Citizenship and Immigration Act 2009.

¹⁰ On 18 March 2011, ILPA wrote to the UK Border Agency having reviewed the decisions of the higher courts in respect of the Agency's duties under section 55 and the UN Convention on the Rights of the Child (*op.cit.*), which show serious failings in several parts of the Agency.

the merits test for legal aid, and who needs to bring proceedings, should have to do so unrepresented? What of the burden placed on the judiciary and tribunals judiciary, those caring for the child, and indeed the representatives of the Secretary of State for the Home Department, the other party in immigration proceedings?

The Bill would permit the UK Border Agency to pursue onward appeals all the way to the Supreme Court, with expert representation, while leaving a child appellant who had succeeded at first instance alone and unaided to address the questions of law to which any onward appeal must necessarily be restricted. A more striking example of inequality of arms is difficult to imagine and such inequality of arms does not assist the courts in developing the law.

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Annexe: cases

Case of Y

Y is from a war-torn country in Africa. She entered the UK as an unaccompanied minor and made an application for asylum. She was recognised as a refugee. Y made an application for her mother to join her under the Family Reunion Policy (as opposed to the immigration rule; necessitating showing compelling compassionate circumstances). DNA evidence was obtained to prove family relationship and detailed representations were made based on Article 8 of the European Convention on Human Rights. Y's mother was granted leave to enter the UK. This case is not technically a 'refugee family reunion' case, because the UK immigration rules make provision for an adult refugee to be reunited with his/her children but do not make provision for child refugee to be reunited with his/her parents and it is necessary to rely on an exercise of discretion in such cases. It is however a case where legal aid meant that a refugee child was reunited with her mother. Y, a child would not have been able to afford the DNA evidence to establish her relationship with her mother, nor to plead her own case

Case of T

T's mother died of cancer while her (the mother's) claim for asylum was pending. Nothing happened on T's case. When she turned 16, T was moved out of foster care and into a bedsit in a shared house, where she felt frightened and intimidated. Her former foster mother continued to be immensely supportive. T went to see a legal aid lawyer. T knew very little about the circumstances that had led her mother to leave their country. Some of the little that she did know appeared to confirm what her mother had said, but some did contradict it. This was confusing and frightening for T. It was clear that T could not make an application based on what little she knew of her mother's claim for asylum. Her lawyer put forward a claim for discretionary leave. Meanwhile, T became pregnant, her boyfriend, while staying with her, was in no position to support her. The claim for discretionary leave was eventually accepted on the basis of T's statement and the lawyer's detailed representations but the decision was never sent. Her case went from pillar to post in the UK Border Agency until the lawyer managed to track down the official who had made the decision on the grant of leave who tracked down the case to ensure that T was issued with the positive decision.

Case of A

A was 12 years old. Her mother was from Africa. No father was named on her birth certificate and while it was thought that her father was a British citizen, because her parents were unmarried, she was not a British citizen in any event. By the time her mother died of cancer her father's whereabouts were unknown. She was in the care of an aunt. Legal aid lawyers made an application for a residence order, as well as an immigration application under Article 8 of the European Convention on Human Rights. Following detailed representations, A was granted indefinite leave to remain.

Case of J

J was from a war torn country in Africa. He had been in care in the UK since the age of six. He was referred to legal aid lawyers as he approached 18 to represent him in an application to regularise his status on the basis of his best interests as a child. An application was made but was refused by the UK Border Agency on the basis that he would shortly be turning 18 and thus his best interests as a child were not the issue because he would soon be an adult. The lawyers represented him in his appeal which succeeded under Article 8 of the European Convention on Human Rights.