ILPA BRIEFING
House of Commons - Report

October 2011

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL – Bill 235

Immigration Judicial Review
(Schedule 1, Part 1, paragraph 17(5), (6) and (7))

Mr Elfyn Llwyd

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Page **108**, line **44**, leave out sub-paragraphs (5), (6) and (7).

Purpose

To remove the immigration-specific exclusions on availability of Legal Aid for judicial review claims.

Briefing Note

Appended to this Briefing is a short note on Judicial Review.

In its Green Paper, the Government set out a robust defence of judicial review and the need for retaining Legal Aid in these cases[1]:

> "*In our view, proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly.*"

In its response to the consultation the Government maintained its view that holding the State to account was of particular importance[2]. Nonetheless it compromised this position in the case of immigration. The Government says it has drawn on the response to the Green Paper by the senior judiciary[3], who had raised concerns about unmeritorious judicial reviews. However, the Government accepts that the judiciary's concerns generally relate to non-Legal Aid cases because "[t]*he current criteria*

[1] CP 12/10 - *Proposals for the Reform of Legal Aid in England and Wales*, Ministry of Justice, November 2010, page 33, paragraph 4.16
[2] Cm 8072 – *Reform of Legal Aid in England and Wales: the Government Response*, Ministry of Justice, June 2011, paragraph 112
[3] Cm 8072 *op cit*, page 13, paragraph 14; and see *Response of a Sub-Committee of the Judges' Council to the Government's Consultation Paper CP12/10*, Judge's Council of England and Wales

governing the granting of legal aid in individual cases would generally preclude such funding"[4]. **Given that unmeritorious cases generally are not brought on Legal Aid, why is the Government excluding Legal Aid in this area?**

The Government has ignored three key aspects of the judiciary's proposals:

- the proposals were advanced only on the basis that "*careful further consideration would need to be given*" before the proposals could be taken up[5]; yet there has been no consultation on what is now included in the Bill and the errors of drafting and perverse outcomes that would result (each discussed below) show no careful consideration
- the proposals were advanced on the basis that "*in principle*", Legal Aid should be available for appeals before the First-tier Tribunal[6]; yet the Bill would remove Legal Aid in these (non-asylum) immigration appeals
- the proposals were advanced on the basis that Legal Aid should not generally be excluded, but rather it should be available where there was a positive decision in favour of granting Legal Aid in any individual case (e.g. because a judge had decided the case had merit)[7] and the senior judiciary added "*we stress the importance of continued funding for representation by competent lawyers in meritorious cases*"[8]; yet the Bill removes Legal Aid for these immigration cases regardless of the merit of any individual case

Despite making clear that unmeritorious judicial reviews are not generally brought on Legal Aid[9], the Government seeks to justify the new immigration judicial review exclusions contained in the Bill by stating:

> "*…we believe that the principle of refusing funding for a case which has already had one full oral hearing on the same, or substantially the same, issue is the right one… Given our aim to reduce unnecessary litigation, and to target resources to those who need them most, the Government does not believe that public funding is merited in these cases…*"

Yet the provisions in the Bill exclude Legal Aid when there has been no oral hearing, and the Government has effectively reversed its position that holding the State to account was of especial importance, hence the need to retain Legal Aid for judicial review[10]. The consequence is that Legal Aid will not be available to hold the State to account at any stage because immigration applications and appeals are also being removed from Legal Aid scope[11]. This includes cases of non-asylum claimants facing removal from the UK and their family, home and community; cases such as:

- trafficking victims receiving rehabilitative care and treatment
- British children and spouses facing permanent separation from parent or partner
- children who have lived in the UK many years (or all their life) facing removal to countries they have never seen, do not know and where they do not speak the language
- adults who have lived in the UK for many years (sometimes decades) facing removal to countries they do not know

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[4] Cm 8072 *op cit*, page 104, paragraph 92
[5] Judges' Council response *op cit*, paragraph 15
[6] Judges' Council response *op cit*, paragraph 16
[7] Judges' Council response *op cit*, paragraphs 22-23
[8] Judges' Council response *op cit*, paragraph 25
[9] Cm 8072 *op cit*, page 13, paragraph 14
[10] CP 12/10 *op cit*, page 33, paragraph 4.16
[11] This is the consequence of Part1, paragraph 25 of Schedule 1 to the Bill, which generally excludes legal aid for all immigration matters save for certain asylum cases

- victims of torture and other trauma, who are no longer at risk of persecution in their home country but are reliant upon professional care and treatment, and the emotional support of community and family in the UK; including those who are suicide risks if removed
- those who are ill or disabled, physically or mentally, who rely on care and treatment and the support of community and family in the UK; including those with illnesses that will quickly become terminal if they are removed

If they are too poor to afford legal advice or representation for judicial review, they will be denied Legal Aid despite having been denied Legal Aid for all earlier proceedings. To defend themselves against the actions of the State they must litigate in person. The Committee has briefly considered that prospect, Kate Green MP quoting from the Government's own review[12]:

> "*..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… 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…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.*"

For those who are poor and suffer from mental illness or trauma, or are children, or are suffering the distress of proceedings in which they face permanent separation from their family and loved ones, or have poor English, or are unfamiliar with the English legal system, the problems described in the review will hit hardest.

The position now advanced by the Government is not supported by its own stated principles, is not supported by the position advanced by the senior judiciary and would leave a powerful agency of the State (the UK Border Agency) free of effective judicial oversight when exercising powers to remove people from their family, home and community, including where this will harm their welfare, health or life prospects. For these reasons alone, sub-paragraphs (5), (6) and (7) should be deleted. These sub-paragraphs, however, contain additional discrete defects and perverse risks.

Firstly, since the Bill will exclude Legal Aid in immigration (non-asylum) cases, there is every incentive for an individual, faced with a decision that he or she is to be removed, not to engage with the tribunal appeal system. This is because sub-paragraph (6)(c) will mean that, by bringing an appeal for which Legal Aid is excluded by paragraph 25, the individual will extend the period during which Legal Aid will also be excluded for any judicial review challenge.

Secondly, sub-paragraphs (5) and (6) would exclude Legal Aid for judicial review because of previous proceedings, even where the person was successful in those previous proceedings. This will include cases where, despite the individual's success, the UK Border Agency is persisting in the action that was the subject of challenge in those previous proceedings. **Why does the Government intend that people who have been successful in previous proceedings should be excluded from Legal Aid to hold the UK Border Agency to account when it refuses or**

[12] *Hansard* HC, Public Bill Committee, 19 July 2011 (afternoon) : Column 223; Ministry of Justice *Litigants in person: a literature review*, Research Summary 2/11, June 2011

fails to act in accordance with the result in those previous proceedings? (An example is given in the Annexe.)

Thirdly, sub-paragraphs (5) and (6) will exclude Legal Aid for judicial review where the previous proceedings did not proceed to a full hearing or final judgment because the UK Border Agency accepted it must reconsider its actions. This is a common outcome in immigration judicial review proceedings, and also happens (though less frequently) in appeals. The provision of Legal Aid would in effect be dependent upon the actions of the UK Border Agency. The Agency could effectively deprive a person of Legal Aid by withdrawing its decision, on the basis that it will reconsider, and if making the same decision and taking the same action against the individual within a 12 months period would effectively have deprived that person of any legal advice or representation. The only means to avoiding this would be for an application to be made in the previous proceedings for the judge to stay (i.e. hold the case over), rather than (as is usual) the case being withdrawn. If acceded to, this would impose a substantial burden on the High Court in keeping open cases that could otherwise be closed. **What justification does the Government offer for excluding Legal Aid when the UK Border Agency has conceded in previous proceedings that it must revisit its decision?**

Fourthly, sub-paragraph (6)(a), also goes beyond the stated justification that there has already been a "*full oral hearing*". Sub-paragraph (6)(a) applies where there has been no oral hearing, including where a person is deprived of a right of appeal because the decision to remove him or her is not properly served or because he or she does not understand its effect or the remedies available (e.g. because, as would be the case, there is no Legal Aid available for the person to receive legal advice and representation). The statutory appeal provisions are notoriously complex in immigration cases[13]. The UK Border Agency, legal representatives and immigration judges continue to make mistakes about whether someone does or does not have a right of appeal[14] – including service of papers by the UK Border Agency expressly stating there to be no right of appeal where such a right does exist[15]. Hence a person, particularly where he or she has no access to legal advice, may miss an opportunity to appeal. Others will not have an opportunity to appeal unless and until they have left or been removed from the UK. This is because a decision that someone is to be removed (which is the trigger for sub-paragraph (6)(a)) is not of itself a decision that can be appealed from within the UK[16]. These individuals cannot get a full oral hearing before any judicial review action, but will still be caught by the exclusion from Legal Aid.

The remainder of sub-paragraph (6) and sub-paragraph (5) also exclude Legal Aid in cases where there has been no "*full oral hearing*" (e.g. in the cases where the judicial review or appeal does not proceed because the UK Border Agency withdraws its decision). **What justification does the Government offer for excluding Legal Aid when there has been no full oral hearing previously?**

[13] See Part V, Nationality, Immigration and Asylum Act 2002; indeed such is the complexity of those provisions that they include two sections of the same number (section 88A) simultaneously in force

[14] See e.g. *SA (Pakistan)* [2007] UKAIT 00083 and *JH (Zimbabwe) v Secretary of State for the Home Department* [2009] EWCA Civ 78

[15] In our response to the Green Paper, ILPA included several case studies, two of which also involve examples of the UK Border Agency giving wrong information as to appeal rights with a notice of decision

[16] Section 92(1) and (2), Nationality, Immigration and Asylum Act 2002

Fifthly, despite what the Parliamentary Under-Secretary of State, Jonathan Djanogly, said in Committee about judicial reviews brought "*without merit*"[17], these sub-paragraphs take effect regardless of the merit of the individual case. **Will the Government amend the provision so that, when a judge has determined the judicial review does have merit, Legal Aid will be available?**

Sixthly, sub-paragraph (6)(b) is simply defective. Leave is not required to appeal against a decision that a person is to be removed.

Finally, sub-paragraph (7) is also inadequately drafted. In Committee, the Minister, said:

> "*Judicial reviews of a refusal by the Secretary of State to treat a claim for asylum as a fresh claim... will also be retained* [within Legal Aid]*...*"
> (*Hansard* HC, Public Bill Committee, 6 September 2011 : Column 377)

To retain Legal Aid for all such refusals, the Bill ought to capture each of the matters set out in paragraph 25(1)[18]. Sub-paragraph (7)(a), however, is restricted to the Procedures Directive[19]. This Directive does not make express reference to all types of asylum claim (it does not refer to those within paragraph 25(1)(b) or (c), or those matters to be added by Government Amendments Nos. **60**, **61** and **62**). **Will the Government amend the provision, in line with what the Minister said in Committee, to ensure that all challenges to the decision not to treat a claim as a fresh asylum claim are exempted from the Legal Aid exclusion?**

For further information please get in touch with:

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[17] *Hansard* HC, Public Bill Committee, 6 September 2011 : Columns 376 & 377
[18] Paragraph 25(1), Part 1 of Schedule 1 to the Bill sets out the asylum cases for which Legal Aid is to generally be retained
[19] The Procedures Directive (2005/85/EC) provides a narrow definition of 'application for asylum' restricted to claims under the 1951 UN Refugee Convention – i.e. only matters captured by paragraph 25(1)(a)

Annexe: Case Study

In this case, the case went all the way to the Court of Appeal where the result of the initial appeal, which F had won, was reinstated. However, the [UK Border Agency] failed to act on that result until judicial action was threatened.

F is married to a British citizen. She had two young children under the age of five. In the tribunal she successfully argued that it would be a disproportionate interference with right to family life to require her to return to her country of origin with her two young children to apply for a visa to rejoin her husband. The Home Office appealed and the decision to allow her appeal was overturned by senior immigration judges.

She instructed legal aid solicitors to represent her in an application to the Court of Appeal.

The court found that the original immigration judge had not made an error of law in assessing proportionality and allowed her appeal. She was not however granted discretionary leave to remain until, after a lengthy delay her solicitors were forced to threaten the Home Office with judicial review.

The issues were purely legal and complex. F would not have been able to represent herself. Given the complexity of the case and her financial situation, she would not have been able to pay for private representation before the Court of Appeal nor in pursuit of papers granting her leave to remain.

Appendix: Note on Judicial Review

Judicial review cases may be brought in circumstances where the State is acting unlawfully. The court has discretion in all such cases, and discretion to consider a claim for judicial review is generally not exercised where there is an alternative, effective route to challenging the decision or the claim is not brought in good time[i]. There is a pre-action protocol to be followed, usually requiring the claimant to first notify the State of the alleged unlawfulness with an opportunity to remedy this. Failing that a claim may be presented to the court, in which case the court must first decide whether the claim has sufficient merit to proceed. If so, permission is granted to pursue the claim.

In immigration cases, challenges are brought against the UK Border Agency. The UK Border Agency routinely ignores pre-action protocol letters, and much court and lawyers' time and public funds are wasted in cases where claims must be lodged with the court because the UK Border Agency has failed to consider these letters[ii]. A large number of these cases do not proceed to a final decision by the court because, the claim having been lodged, the UK Border Agency elects to withdraw its decision under challenge. Concerns have been expressed by the judiciary and Government that many immigration judicial reviews lack merit. However, data disclosed to ILPA in response to a freedom of information request reveals that very large numbers of such cases are withdrawn without a final decision[iii], which is often the result of the UK Border Agency deciding to withdraw its decision. Moreover, the Government and Treasury solicitors have each indicated that the cases of concern to the judiciary are largely not legal aid cases[iv].

Unlike in an immigration appeal, the judge in a judicial review case does not generally determine what the ultimate outcome should be. Rather, the judge decides whether the way in which the UK Border Agency has thus far acted is lawful – in particular, has the UK Border Agency considered the law and evidence properly and followed any necessary procedure. If not, it is for the UK Border Agency to review its position and take any necessary action.

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[i] Claims should be brought "*promptly and in any event not later than 3 months after the grounds to make the claim first arose*", see Civil Procedure Rules, Part 54, paragraph 54.5

[ii] This was e.g. the case in the five matters that very recently came before the Court of Appeal in *R (Bahta & Ors) v Secretary of State for the Home Department* [2011] EWCA Civ 895

[iii] In June 2009, the UK Border Agency responded to an April 2009 freedom of information request from ILPA. In that response, the Agency stated that in 2006, 1,185 immigration judicial reviews had been withdrawn and in 2007, 1,532 had been withdrawn. The Agency had no later data, and was unable to state the reasons for the withdrawals.

[iv] Cm 8072 - *Reform of Legal Aid in England and Wales: the Government's response*, Ministry of Justice, June 2011, page 13, paragraph 14; Treasury solicitors indicated at the 28 June 2011 Administrative Court Users' group that around 70% to 80% of immigration judicial reviews were brought without legal aid