

**ILPA BRIEFING  
House of Commons - Report****October 2011****LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –  
Bill 235****Government Amendments Nos.  
55, 56, 57, 58, 59, 60, 61, 62, 63****(Immigration Judicial Review, Immigration  
Domestic Violence and Asylum)*****Immigration Judicial Review***

Secretary Kenneth Clarke

**55**

Page **109**, line **13** [*Schedule 1*], leave out 'in connection with' and insert 'of'

**Presumed Purpose**

To narrow the potential scope of the exception in sub-paragraph (7)(a) retaining Legal Aid for judicial review of a refusal of an asylum application such that a judicial review relating to, but not of, a decision to refuse an asylum application would not escape the exclusions set out in sub-paragraphs (5) and (6).

**Briefing Note**

Immigration is singled out as the only area in which the Government has resiled from its original commitment to protect, by retaining Legal Aid, the individual's ability to ensure by way of judicial review "*that state power is exercised responsibly*" (Ministry of Justice Legal Aid Green Paper, Cm 7967, page 33, paragraph 4.16). It has done so despite accepting that the concerns of the Judge's Council as to unmeritorious immigration judicial reviews generally relate to cases that are not brought with Legal Aid because "[t]he current criteria governing the granting of legal aid in individual cases would generally preclude such funding" (Ministry of Justice Response to Legal Aid Consultation, Cm 8072, page 104, paragraph 92). Amendment **83** (in the name of Elfyn Llwyd) would restore the Government's original commitment to retaining Legal Aid in judicial review without an immigration exception. Please see ILPA's briefing for Report on Immigration Judicial Review and amendment **83**.

Page 109, line 15 [*Schedule 1*], at end insert 'where there is no right of appeal to the First-tier Tribunal against the decision'

**Presumed Purpose**

To narrow the potential scope of the exception in sub-paragraph (7)(a) retaining Legal Aid for judicial review such that a judicial review of a decision to refuse an asylum application, where there was a right of appeal to the First-tier Tribunal against the decision, would not escape the exclusions set out in sub-paragraphs (5) and (6).

**Briefing Note**

Generally, a refusal of asylum will be accompanied by an appealable decision, in which case there is ordinarily no judicial review. However, in relation to fresh asylum claims (e.g. where new representations are made to the Secretary of State by reason of new evidence or circumstances since the refusal of an original asylum claim), there is only an appeal if the Secretary of State accepts that new representations do amount to a fresh asylum claim. If the Secretary of State refuses to treat such representations as a fresh asylum claim, judicial review may be brought against that decision in order to secure a right of appeal.

Page 109, line 16 [*Schedule 1*], after 'section', insert '94 or'

Page 109, line 17 [*Schedule 1*], after 'preventing', insert 'or restricting'

**Presumed Purpose**

To expand the scope of the exception in sub-paragraph (7)(b) so as to retain Legal Aid for judicial review of a decision of the Secretary of State to deny an in-country right of appeal against a refusal of an asylum or human rights application by certifying the asylum or human rights claim as 'clearly unfounded' under section 94 of the Nationality, Immigration and Asylum Act 2002.

**Briefing Note**

Amendment 58 is necessary because certification under section 94 of the Nationality, Immigration and Asylum Act 2002 does not prevent an appeal, but restricts the right to appeal such that an appeal can only be brought after the asylum-seeker has been left or been removed from the UK.

***Immigration: Domestic Violence***

Secretary Kenneth Clarke

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Page 112, line 5 [*Schedule 1*], at end insert –

*Immigration: victims of domestic violence and indefinite leave to remain*

24A(1) Civil legal services provided to an individual (“I”) in relation to an application by the individual for indefinite leave to remain in the United Kingdom on the grounds that –

- (a) I was given leave to enter or remain in the United Kingdom for a limited period as the partner of another individual present and settled in the United Kingdom, and
- (b) I’s relationship with the other individual broke down permanently as a result of the abuse of I by an associated person.

*General exclusions*

(2) Sub-paragraph (1) is subject to the exclusions in Parts 2 and 3 of this Schedule.

*Specific exclusion*

(3) The services described in sub-paragraph (1) do not include attendance at an interview conducted on behalf of the Secretary of State with a view to reaching a decision on an application.

*Definitions*

(4) For the purposes of this paragraph, one individual is a partner of another if –

- (a) they are married to each other,
- (b) they are civil partners of each other, or
- (c) they are cohabitants.

(1) In this paragraph –

“abuse” means physical or mental abuse, including –

- (a) sexual abuse, and

(b) abuse in the form of violence, neglect, maltreatment and exploitation;

“associated person”, in relation to an individual, means a person who is associated with the individual within the meaning of section 62 of the Family Law Act 1996;

“cohabitant” has the same meaning as in Part 4 of the Family Law Act 1996 (see section 62 of that Act);

“indefinite leave to remain in the United Kingdom” means leave to remain in the United Kingdom under the Immigration Act 1971 which is not limited as to duration;

“present and settled in the United Kingdom” has the same meaning as in the rules made under section 3(2) of the Immigration Act 1971.

Secretary Kenneth Clarke

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Page 120, line 38 [*Schedule 1*], at end insert –

12A Advocacy in the First-tier Tribunal that falls within the description of civil legal services in paragraph 24A of Part 1 of this Schedule.

#### **Presumed Purpose**

To implement the Government’s commitment, given in Committee (*Hansard* HC, Public Bill Committee 19 July 2011 : Column 245), to bring immigration domestic violence cases into Legal Aid scope.

#### **Briefing Note**

As the Minister said in Committee (see previous citation):

*“There is a real risk that, without legal aid, people will stay trapped in abusive relationships out of fear of jeopardising their immigration status. The type of trauma that they might have suffered will often make it difficult to cope with such applications. We also appreciate that people apply under great pressure of time, and access to a properly designated immigration adviser is a factor.”*

Amendment 59 provides for Legal Aid in relation to an application for indefinite leave to remain by a victim of domestic violence, whose relationship has broken down and in circumstances where the victim had limited leave to enter or remain in the United Kingdom as a probationary spouse or partner of a British citizen or settled person. Amendment 63 makes clear that Legal Aid will be provided for appeals to the First-tier Tribunal against a refusal of such an application by the UK Border Agency.

The Amendments, however, fail to address equally vulnerable groups of migrant victims of domestic violence, including those dependent on partners exercising European free movement rights (see amendment **124** in the name of Caroline Lucas and Bridget Phillipson) and those dependent on partners with limited leave to enter or remain in the UK. Please see ILPA’s briefing for Report on Immigration and Domestic Violence and amendment **124**.

Amendment **59** also adopts the definition of “abuse” currently to be found in paragraph 10 of Part 1 of Schedule 1 to the Bill. However, amendment **23** in the name of Caroline Lucas and Bridget Phillipson seeks to amend the definition of “abuse” in paragraph 10 so as to bring it into line with the definition of domestic abuse that has been adopted by the Association of Chief Police Officers. See discussion in Committee (*Hansard* HC, Public Bill Committee 6 September 2011 : Column 351 *et seq*).

### **Asylum**

Secretary Kenneth Clarke **60**

Page **112**, line **10** [*Schedule 1*], after ‘Article’, insert ‘2 or’

Secretary Kenneth Clarke **61**

Page **112**, line **11** [*Schedule 1*], at end insert –

( ) the Qualification Directive.

Secretary Kenneth Clarke **62**

Page **112**, line **25** [*Schedule 1*], at end insert –

“the Qualification Directive” means 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;

### **Presumed Purpose**

To give effect to the Government’s stated intention that Legal Aid be retained for asylum cases.

**Briefing Note**

Amendment **60** provides for Legal Aid to be retained in relation to claims for asylum on the grounds of a serious risk to life (e.g. a risk of execution), Article 2 of the Human Rights Convention being the right to life. Amendments **61** and **62** provide for Legal Aid to be retained in relation to claims for asylum on grounds derived from the Qualification Directive. Importantly, this will include claims based upon a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict' (Article 15(c) of the Directive).

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