ILPA BRIEFING
House of Lords – Committee

December 2011

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL – HL Bill 109

Judicial Review
(Schedule 1, Part 1, Paragraph 17)

55 to 59

LORD THOMAS OF GRESFORD
LORD DHOLAKIA
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LORD PHILLIPS OF SUDBURY

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Page **126**, line **3**, leave out sub-paragraphs (5) to (7)

Purpose

To remove the immigration-specific exclusions of legal aid for judicial review claims. Amendments **56** to **59** would not remove the immigration-specific exclusions but would narrow the scope of the exclusions (thus preserving legal aid in specific circumstances).

Briefing Note

The immigration-specific exclusions were not part of the original consultation. At that time, the Government robustly regarded judicial review as of particular priority because it said these proceedings "*represent a crucial way of ensuring that state power is exercised responsibly*"[1]. In its response to the consultation, the Government said, in relation to unmeritorious judicial review applications, that "*current criteria governing the granting of legal aid in individual cases would generally preclude such funding*"[2]. Given that unmeritorious cases generally are not brought with legal aid funding, and between 70% and 80% of immigration judicial reviews applications are not brought with legal aid[3], why is the Government excluding legal aid for these cases which it acknowledges to be crucial to ensuring state power (that invested in the UK Border Agency) is exercised responsibly?

[1] *Proposals for the Reform of Legal Aid in England and Wales*, Ministry of Justice, November 2011, p33 (CP 12/10)
[2] *Reform of Legal Aid in England and Wales: the Government response*, Ministry of Justice, June 2011, p104 (Cm 8072)
[3] Information presented by Treasury solicitors at the Admin Court Users Group meeting in June 2011

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Page **126**, after line **27** insert –

(8) Sub-paragraph (5) does not exclude services provided to an individual if –
(a) the individual did not receive services in connection with the previous judicial review or appeal to which that sub-paragraph refers; or
(b) the previous judicial review or appeal to which that sub-paragraph refers was resolved by any of the following –
(i) a grant of judicial review;
(ii) a decision to allow the appeal;
(iii) a refusal of leave, or refusal of permission, to the Secretary of State to appeal
(v) a decision to dismiss an appeal by the Secretary of State;
(vi) an order of a court or tribunal consequent upon the withdrawal by the Secretary of State of his decision against which the application for judicial review or the appeal was brought.
(9) Sub-paragraph (6) does not exclude services provided to an individual if –
(a) the individual did not receive services in connection with the matters described in sub-paragraphs (6)(a) or (c);
(b) the appeal to which sub-paragraph (6)(c) refers was allowed; or
(c) the appeal to which sub-paragraph (6)(c) refers was withdrawn as a consequence of the withdrawal of the decision to remove the individual from the United Kingdom.

Purpose
To retain legal aid for an immigration judicial review where a previous appeal or judicial review had been successful, or had not been brought with legal aid.

Briefing Note
Previous appeal or judicial review proceedings, by this Bill, will act as triggers for excluding legal aid for subsequent immigration judicial review applications. This will be so, whatever the merit of the subsequent application and whatever the result in the previous appeal or judicial review proceedings – including where those earlier proceedings were successful and the UK Border Agency has either failed to act on the previous decision or is effectively flouting that decision by pursuing its previous course.

The Bill will remove legal aid generally for all non-asylum immigration matters. This means that those unable to pay for legal advice and representation, will in immigration cases not be able to obtain legal aid for advice about their immigration situation or representation in dealing with the UK Border Agency or any immigration appeal. The immigration-specific exclusions relating to judicial review effectively ensure that those affected cannot have any legal aid at any stage of the immigration process.

Immigration advice and representation is regulated, such that only solicitors, barristers, legal executives and those within the scheme run by the Office of

the Immigration Services Commissioner (OISC)[4] are permitted to give immigration advice and representation in the course of a business (this includes not for profits). A voluntary agency or charity will not (save that they take out indemnity insurance, comply with continuing professional development requirements and meet other demands of the OISC scheme) be permitted to give immigration advice or representation, and if doing so will be committing a criminal offence. Thus, those who cannot afford to pay legal fees, if excluded from legal aid, may be effectively excluded from any legitimate source of immigration advice or representation at any and every stage (save that given by family or friends outside the course of any business). This can only increase the need for those persons to be able to bring effective judicial review applications, with legal advice and representation, in circumstances where they have been unable to effectively identify or present their immigration claims previously.

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Page **126**, line **15**, leave out sub-paragraph (a)

Purpose

To retain legal aid for an immigration judicial review where there has been no previous appeal.

Briefing Note

Sub-paragraph (6)(a) excludes legal aid for a subsequent judicial review of removal directions if a decision to remove has been made. The Government has suggested that any challenge to the earlier decision to remove can be dealt with on appeal[5]. However, a decision to remove does not, of itself, entitle a person to appeal before he or she has left or been removed from the UK. On the Government's own analysis, therefore, a decision to remove ought not to be a trigger for excluding legal aid for any judicial review application because it does not provide an opportunity for any oral hearing before a tribunal judge prior to the proposed removal.

In relation to removals, there is a two stage process (these stages may take place within a short period of time or after a substantial passage of time). The first stage is the decision to remove. The second stage is the making of a removal direction giving a time, method and destination for the removal. One aspect of this is that there may be no challenge available to the proposed destination prior to the making of the removal direction[6].

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Page **126**, line **17**, leave out sub-paragraph (b)

[4] Established under Part V of the Immigration and Asylum Act 1999

[5] The Government's response to consultation (Cm 8072 *op cit*, p13) referred to cases which had already had "*one full oral hearing*"

[6] *GH v SSHD* [2005] EWCA Civ 1182

Purpose
To remove a defect from them Bill. Paragraph (6)(b) refers to decisions to refuse leave to appeal at a stage where such decisions cannot be made (at the point of appeal to the First-tier Tribunal). Appeals at this stage are brought as of right, so there can be no leave to appeal decision.

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Page **126**, line **21**, for sub-paragraph (a) substitute –

(a) judicial review in connection with a matter within paragraph 26(1) of this Part;

Purpose
To align the preservation of legal aid for judicial review in connection with refusals of asylum with the scope of 'asylum' as provided at paragraph 26(1).

Briefing Note
The Bill currently preserves legal aid in relation to fresh asylum applications, but only insofar as the EU Procedures Directive applies. This is potentially problematic because that Directive refers to an application for asylum as "*a request for international protection... under the Geneva* [Refugee] *Convention.*" Other EU Directives and UK domestic law treat other applications as applications for protection (or asylum) where the Refugee Convention may not strictly apply but the level of harm (such as torture or execution) which the individual faces is no less.

While the cases where the distinction is critical are few[7], the exclusive reference to the EU Procedures Directive is likely to cause confusion and litigation. Arguably, the Directives must all be read as one body of law and the relevant protection in relation to fresh asylum applications is not limited to Refugee Convention applications. In any event, the seriousness of the cases involved are indistinguishable. Hence, it is inappropriate to exclude the non-Refugee Convention cases, which may by reason of their close similarity to the Refugee Convention cases demand the application of the exceptional cases provisions in clause 9 of the Bill even if the EU Procedures Directive, properly understood, does not otherwise capture them.

By aligning the provision in sub-paragraph (7) with paragraph 26(1), the distinction would be closed. This would be better meet the Government's stated intention to prioritise asylum, avoid potentially complex and expensive litigation, and avoid the bureaucracy that likely would be required to operate the exceptional cases scheme. Given that the affected cases are relatively

[7] In 2010, the UK Border Agency made 3,488 initial decisions to grant asylum under the Refugee Convention, compared to 91 grants on non-Refugee Convention grounds.

few, there is little financially to be gained by the Government from retaining the distinction yet serious risks and potential costs from doing so.

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