# ILPA BRIEFING
# House of Lords – Committee

**December 2011**

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

## Persons liable to immigration detention (Schedule 1, Part 1, Paragraph 26)

**LORD THOMAS OF GRESFORD**
**LORD AVEBURY**
**LORD CARLILE OF BERRIEW**
**LORD PHILLIPS OF SUDBURY**

**68**

Page **130**, line **8**, after "Kingdom" insert "*to a person who is liable to detention under immigration laws, or*"

**70**

Page **130**, line **39**, at end insert –

> *"immigration laws" has the same meaning as given in section 33(1) of the Immigration Act 1971.*

**Purpose**

To retain within the scope of legal aid the immigration cases of persons who are liable to be detained under immigration laws. The amendments should be read together, as amendment **70** provides a meaning of the term "immigration laws" as used in amendment **68**.

**Briefing Note**

The Bill as drafted makes provision for people detained under immigration act powers to get legal aid to challenge their detention[1] but not for assistance with their substantive case. The Government has set out its intention to protect legal aid for cases where liberty is at stake[2]; but this will not be achieved if a person can get legal aid to challenge his/her detention but cannot get legal aid to sort out the problem that has caused and continues to cause his/her detention.

The removal and deportation cases, where a person will be liable to detention, that pass the merits threshold for legal aid are among the most serious cases that come

[1] Bill, Schedule 1, Part 1, paragraphs 22-24. See paragraphs 4.82 to 4.85 of the Government response to the consultation. These measures include the retention of Legal Aid for matters relating to alternatives to detention and the conditions that may be imposed in respect of these (e.g. residence and reporting conditions).

[2] See the Government response to the consultation, Ministerial Foreword: *"Under the proposals set out in November, legal aid would continue to be routinely available in cases where people's life or liberty is at stake..."* and paragraph 73, Annex A, page 100.

before the courts. They have also been among the cases that have seen the most egregious errors by the State, including wrongful removals of British citizens or persons with a right of abode in the UK. The importance of the issues at stake, the absence of alternative funding or of any possibility of mediation, all militate against their removal from scope which also risks creating unintended and perverse effects, including an increase in claims for asylum.

The Government's consultation response records that:

> "[a]*lmost all of those* [who disagreed with the immigration and detention proposals in the Green Paper] *felt that it would be practically impossible to distinguish between the underlying immigration matter and the detention matter…*"[3]

It continues:

> "*The Government considers that contracted legal aid providers should not generally find it difficult to distinguish between advice related to aspects of immigration detention or bail and the underlying immigration issue.*"[4]

This fails to address the problem. In immigration cases, particularly in removal and deportation cases, the individual's liberty is immediately at stake. The State (the UK Border Agency) has, and exercises, broad powers of detention which are directly consequent upon its immigration decision. Challenging immigration detention is necessarily and intrinsically linked to challenging the underlying immigration decision which is both the cause of, and justification for, detention. Seeking release involves challenging the prospects of removal. A person can be held in immigration detention pending removal. If it is not possible to argue that a person may not lawfully be removed, then any application for bail or temporary admission will be seriously impeded. Challenges to detention will not enjoy the priority intended if the means to challenge the practicality, reasonableness or legality of the immigration decision on which detention is founded are constrained.

The amendments concern those who are *liable* to be detained and not simply those in detention. These are persons without leave to be in the UK who therefore face removal from the UK or who are subject to a decision to deport them. Those liable to be detained also include persons seeking asylum, but they are already within the scope of legal aid and would thus be eligible for legal aid with or without the amendments.

Those liable to detention under immigration laws are:

- a person arriving in the UK for the purposes of establishing whether the person is entitled to enter the UK;[5]
- a person attempting to leave the UK;[6]
- a person being considered for removal, during the period of consideration and, subsequent to a decision to remove being made, in preparation for that removal;[7] and

[3] *Consultation Response, op.cit.*, page 100 (paragraph 71, Annex A).
[4] *Consultation Response, op.cit.*, page 100 (paragraph 72, Annex A).
[5] Immigration Act 1971, Schedule 2, Paragraphs 16(1) and (1A)
[6] For the purpose of establishing the lawfulness of entry to and stay in the UK and whether any prohibition may be imposed on return: Immigration Act 1971, Schedule 2, Paragraphs 16(1) and (1A).
[7] Immigration Act 1971, Schedule 2, Paragraph 16(2) and the Nationality, Immigration and Asylum Act 2002), section 62.

- a person who has been recommended for deportation following conviction; a person in respect of whom the Secretary of State is deciding whether or not to make a deportation order, a person against whom such an order is in force.[8]

The types of cases affected concern:

- whether people will have to leave the UK where they have lived for years, sometimes for decades, and often as a result of someone else's decision, for example that of a parent or former spouse or partner; including cases in which they will be leaving close family members, including British citizens, behind;
- whether a person who has fled domestic slavery can live safely in the UK away from those who abused them;
- what happens to a person (including a child) when a relationship breaks down, including as a result of domestic violence;
- what happens to children whose claims for asylum have failed and who cannot be returned to their country of origin because their safety and welfare cannot be guaranteed;
- what happens to young people who as children have been allowed to remain in the UK, sometimes for many years, when they turn 18;
- whether a person should be deported from the UK following conviction despite having served their sentence and in some cases having been settled for many years;
- what happens to people who thought they were in the UK lawfully and turn out not to be, and to people who cannot prove their immigration status.

The Government's response to the consultation identified as a criterion for the grant of legal aid "*...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.*" Detainees are significantly disadvantaged in trying to prepare and present their own cases, being isolated and ill-placed to gather evidence, including witness evidence. Those in immigration detention, whether in immigration removal centres or prison service establishments, are also less able to meet the procedural requirements of the tribunals and courts than others. However much care an immigration judge takes over litigants in person, this will not make good lacunae in the evidence and an immigration judge must decide a case on the basis of the evidence available to him/her. Accelerated timescales apply to those in detention and a person may have as little as five days[9] in which to lodge an appeal.

Many of those in detention will have no access to funds to pay for a lawyer privately and will be prohibited both from working and from claiming public funds. If the detainee's case at its highest can be put to the UK Border Agency and to the tribunals then it can be efficiently determined. A case poorly put and its determination may result in detention being prolonged. It is likely to be more cost effective, as well as more humane, that the detainee be advised and represented on the underlying immigration matter.

Examples are provided in the Annexe.

***For further information please get in touch with:***

Steve Symonds, Legal Officer, steve.symonds@ilpa.org.uk, 020-7490 1553
Alison Harvey, General Secretary, alison.harvey@ilpa.org.uk, 020-7251 8383

[8] Immigration Act 1971, Schedule 3, paragraph 2(1)-2(4).

[9] The Detained Fast Track makes provision for a timescale of only two days to lodge an appeal. However, this is currently only used for asylum cases, for which the Bill is to retain legal aid.

**Annexe: Examples**

A Dutch national, born in Somalia, was detained in consequence of a decision to deport him to Somalia. He was sentenced to six months imprisonment for common assault, but his release was ordered immediately due to time spent in prison on remand. However, before leaving the court he was asked to return to the cells, whereupon he was taken back to prison for 'immigration'. At the time of making its decision, the UK Border Agency had his original Dutch passport. His deportation to Somalia was unlawful. Nonetheless, by reason of the deportation decision he was detained under immigration powers, ultimately for more than four months. Without pursuing the underlying immigration issue, that Mr Muuse was Dutch and could not lawfully be deported to Somalia, the basis for the challenge to detention would not have existed. Moreover, the trial judge expressly found that but for the efforts of Mr Muuse solicitor he would have been deported to Somalia. However, in view of the difficulties in deporting persons to that country, an alternative prospect would have been Mr Muuse's prolonged detention (for months or years). ***Muuse v Secretary of State for the Home Department*** **[2010] EWCA Civ 453; [2009] EWHC 1886 (QB)**

The claimant was given a six month prison sentence for theft of an oyster card and a return to custody order. On 8 July 2006 he was detained under immigration act powers. At the time of the hearing of his judicial review he had been detained for four years and 11 months. The High Court ordered his release. It held that there was no prospect that his detention would take place within a reasonable time and therefore no power to continue to detain him. The court concluded that his detention from 8 July 2006 until his release on 10 June 2011 had been unlawful as there had never during that period been the prospect of deportation in a reasonable time. The decision to detain him had been influenced by the unlawful secret policy, contrary to published guidance, that had been operated by the Home office between April 2006 and September 2008 whereby foreign national ex-offenders facing deportation were detained regardless of their individual circumstances. ***Sino v Secretary of State for the Home Department*** **[2011] EWHC 2249 (Admin)**

*"...it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires"* ***E B Kosovo v SSSHD*** **[2008] UKHL 4. House of Lords**

*"It is, or ought to be, accepted that the appellant's husband cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe and that if the appellant were to be returned to Zimbabwe she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it."* ***Chikwamba v Secretary of State for the Home Department*** **[2008] UKHL 40, House of Lords** ***per*** **Lord Scott**