

ILPA BRIEFING
House of Lords – Committee
January 2012**LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –**
HL Bill 109**Immigration**
Amendments: 54, 55, 56, 57, 58, 59, 68, 69, 70, 71

These Amendments have been grouped as at 20th December 2011:

Amendment 54 (in the names of Lord Thomas of Gresford, Lord Dholakia, Lord Carlile of Berriew and Lord Phillips of Sudbury) would remove the exclusion of civil legal aid for judicial review in relation to personal injury or death; negligence; assault, battery or false imprisonment; trespass to goods; trespass to land; and breach of statutory duty.

Amendment 55 (in the names of Lord Thomas of Gresford, Lord Dholakia, Lord Carlile of Berriew and Lord Phillips of Sudbury) would remove the immigration-specific exclusions of civil legal aid for judicial review.

Amendments 56 to 59 (in the names of Lord Thomas of Gresford, Lord Dholakia, Lord Carlile of Berriew and Lord Phillips of Sudbury) would narrow the immigration-specific exclusions of civil legal aid for judicial review.

Amendments 68 & 70 (in the names of Lord Thomas of Gresford, Lord Avebury, Lord Carlile of Berriew and Lord Phillips of Sudbury) would retain the availability of civil legal aid to those liable to immigration detention.

Amendment 69 (in the names of Lord Thomas of Gresford, Lord Dholakia, Lord Carlile of Berriew and Lord Phillips of Sudbury) would retain the availability of civil legal aid to those seeking refugee family reunion.

Amendment 71 (in the names of Lord Thomas of Gresford, Lord Dholakia, Lord Carlile of Berriew and Lord Phillips of Sudbury) would retain the availability of civil legal aid in relation to specific immigration matters: to those seeking refugee family reunion, to victims of human trafficking and to those party to an appeal to the Upper Tribunal, Court of Appeal or Supreme Court.

Briefing Note:

ILPA supports the various amendments in this group, which in large part seek to give effect to the original principles on which the Government has sought to establish its legal aid proposals, including the particular importance of judicial review as “*a crucial way of ensuring that state power is exercised responsibly*”¹, that legal aid is to be “*routinely available in cases where*

¹ *Proposals for the Reform of Legal Aid in England and Wales* (the legal aid consultation), CP 12/10, page 33

people's [] liberty is at stake"², the especial importance of asylum³ and the need to protect the "physically and emotionally vulnerable"⁴.

General observations:

Immigration is subject to regulation, which does not apply in other areas. This prohibits charities, other not for profit agencies, and other businesses from giving immigration advice or representation unless they are solicitors, barristers or legal executives or within the Office of the Immigration Services Commissioner's regulatory scheme (which requires professional indemnity insurance, continuing professional development and general competence in immigration law and practice)⁵. Thus without legal aid, those who cannot afford to pay a lawyer face being excluded from any legitimate source of advice or representation. This will seriously exacerbate the risk of exploitation in one or both of two ways – by exposing individuals to illegitimate and/or incompetent advisers and/or by subjecting them to exploitation (e.g. sexual or labour exploitation) in seeking to raise funds to pay an adviser.

These risks are further exacerbated by the following factors:

- immigration law is an especially complex area – in November, the Court of Appeal referred to it as "an impenetrable jungle"⁶; one area of particular complexity is the provisions on when a person may or may not exercise an appeal⁷
- poor decision-making and practice by the UK Border Agency substantially contributes to legal aid and other public costs, and prolongs and complicates immigration proceedings⁸
- the immigration judiciary are restricted to determining appeals on the basis of the evidence before them, and despite best efforts are not in a position to remedy defects in an unrepresented appellant's appeal caused by his or her unfamiliarity with the law or procedure; and have generally confirmed the importance of competent legal representation⁹

The Administrative Justice and Tribunals Council drew attention to these points, and highlighted as "highly successful" the provision of legal aid in administrative justice including immigration, in explaining that it "strongly opposes" the Government's proposals to exclude non-asylum immigration from legal aid¹⁰.

² *Reform of Legal Aid in England and Wales: the Government response* (Government response), Cm 8072, page 4

³ The legal aid consultation, page 37 *op cit*

⁴ Government response, pages 11-12 *op cit*

⁵ This is the scheme established under Part V of the Immigration and Asylum Act 1999

⁶ *Sapkota & Anor* [2011] EWCA Civ 1320, paragraph 127 *per* Jackson LJ

⁷ Part V of the Nationality, Immigration and Asylum Act 2002

⁸ In his most recent annual report (for 2010-11) the Chief Inspector of the UK Border Agency made several criticisms concerning inaccuracy, inconsistency, unfairness and delays in decision-making by that agency, see: http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/CIUKBA-Annual-Report-2010_11-final-web.pdf

⁹ See e.g. evidence of Hodge J (formerly President of the Asylum and Immigration Tribunal) to the Constitutional Affairs Committee (Oral Evidence, 21 March 2006, Q31 & Q30); and evidence of Collins J (formerly President of the Immigration Appeal Tribunal) in the same evidence session (Q35)

¹⁰ See http://www.justice.gov.uk/ajtc/docs/Legal_Aid_Response.pdf

Immigration judicial review (Amendments 55-59):

The matters set out under ‘general observations’ (above) will increase the prospect that, without legal aid, individuals (including children, torture survivors, victims of trafficking, etc.) cannot or do not obtain justice from the UK Border Agency or by any appeal, thus increasing the importance of judicial review as the backstop to ensure that decisions by that agency to separate (potentially permanently) people from their home, family, children or community by removal from the UK are only pursued in circumstances where it is both reasonable and lawful to do so. The Government correctly identified judicial review as crucial to holding state power to account; but its late decision to exclude certain immigration judicial reviews from legal aid (this was not trailed in the consultation) reverses its previous commitment despite the Government’s express recognition that unmeritorious judicial reviews are not brought on legal aid¹¹, and in relation to an agency of the state with particularly wide powers (to detain, remove and exclude from the UK). One of the ways in which the exclusion of legal aid for immigration judicial review in this Bill would work is described in the case example below. The briefing at <http://tinyurl.com/cncm9m4> addresses these amendments further.

Case Example:

M brings a judicial review against his or her removal. Before the matter is heard by a judge, the UK Border Agency concedes it has not considered the case properly. The Agency withdraws its decision, and M’s judicial review is withdrawn. However, the Agency decides to make the same decision to remove and still fails to properly consider the points M had sought to raise in the first judicial review. This all happens within 12 months. The Bill would exclude legal aid for M to bring another judicial review claim, even though the first was never heard by the judge because it succeeded in showing the Agency it was necessary to reconsider the removal.

Persons liable to immigration detention (Amendments 68 & 70):

The Government has stated its commitment to retain legal aid where liberty is at stake. However, this commitment is not met in relation to persons liable to immigration detention. The case example below shows this. The briefing at <http://tinyurl.com/d45skdl> addresses these amendments further.

Case Example:

In *Muuse* [2009] EWHC 1886 (QB); [2010] EWCA Civ 453, a Dutch national was detained for more than four months because the UK Border Agency had decided to deport him to Somalia. The deportation and detention were unlawful, and the Agency all along had evidence to prove this. The trial judge emphasised that without the work of his solicitor in establishing the deportation to be unlawful, the detention would have continued and the judge expected he would have been deported to Somalia. However, difficulties in removal to Somalia in other cases suggest that detention for the purposes of removal to that country could have extended for many more months or years. Nonetheless, it is the Government’s intention that such a deportation matter would not be within legal aid scope.

¹¹ Government response, page 102 *op cit*

Refugee family reunion (Amendments 69 & 71):

While the Government has prioritised asylum cases for legal aid, once a person is recognised as a refugee such assistance will cease. A particular concern relates to those refugees who have had to flee leaving family behind, often in dangerous or desperate circumstances. Applications for family to be reunited in the UK with the refugee can be legally and evidentially complex and refugees separated from family are often isolated and struggling to integrate, yet legal aid is not to be available. Below is a case example; and the briefing at <http://tinyurl.com/coe43c3> addresses these amendments further.

Case Example:

B fled his home country after being detained and tortured. After his escape, the security forces in searching for him killed his wife. He was recognised as a refugee and his 15 years old daughter applied for refugee family reunion to join him in the UK. That application was refused. The Entry Clearance Officer did not accept B was her father, or that she had lived with B before he fled; and argued that she was now living an independent life (her aunt had been looking after her since her mother was killed). An appeal was successful, with detailed evidence being prepared by lawyers. Without legal aid, B (who remains several traumatised from his experiences) would have been left to represent his daughter in her appeal on his own; and to have collected evidence to address the refusal of her application. It is likely that father and daughter would still be apart.

Immigration onward appeals (Amendment 71):

Onward appeals against a decision of an immigration judge may be brought by either the appellant (if he or she has lost the appeal) or by the UK Border Agency (if the appellant has won his or her appeal). Onward appeals can only be brought on error of law grounds and by permission of a judge. They may go to the Upper Tribunal, the Court of Appeal and the Supreme Court. Currently, the Bill would exclude legal aid at all of these stages in the same way it excludes legal aid for appeals before the immigration judge. The prospect is that individuals, including successful appellants, face onward appeals alone against teams of lawyers on the side of the UK Border Agency. The briefing at <http://tinyurl.com/bm6ddof> addresses this further.

Human trafficking (Amendment 71):

Victims of human trafficking experience sexual and labour exploitation, often of the most shocking kind. Such victims constitute a paradigm 'physically and emotionally vulnerable' group. However, the Bill by excluding these victims from legal aid to address their immigration problems seriously risks driving those that have escaped their abuse into other abusive situations as the only means to secure funds to obtain advice or representation. The briefing at <http://tinyurl.com/dxzgzlz> provides further information and some case examples. Amendments **61A & 90A** (in the name of Baroness Butler-Sloss) are also significant, and importantly would additionally provide for legal aid to victims of trafficking to pursue claims for compensation and/or damages for their abuse.

For further information please get in touch with:

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Annexe – Amendments addressed by this briefing

54

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

Page 125, line 38, leave out “paragraph 15” and insert “paragraphs 1 to 5, 8 and 15”

Presumed Purpose

To provide for civil legal aid for judicial review proceedings in relation to matters of personal injury or death; negligence; assault, battery or false imprisonment; trespass to goods; trespass to land; and breach of statutory duty.

55

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

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

Purpose

To remove the immigration-specific exclusions relating to legal aid for judicial review.

Briefing Note

ILPA supports this amendment. A briefing is available at: <http://tinyurl.com/cncm9m4>

56, 57, 58 & 59

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

Page 126, line 15, leave out paragraph (a)

(56)

Page 126, line 17, leave out paragraph (b)

(57)

Page 126, line 21, leave out paragraph (a) and insert—

(58)

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

(59)

Page 126, line 27, at end 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—*
- (c) *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;*
- (iv) *a decision to dismiss an appeal by the Secretary of State;*
- (v) *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 limit the exclusions of legal aid in relation to immigration judicial reviews.

Briefing Note

These various amendments provide an alternative to amendment 55. ILPA supports these amendments, and a briefing is available at: <http://tinyurl.com/cncm9m4>

68 & 70

**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 provide for civil legal aid in relation to immigration matters where the person is liable to detention.

Briefing Note

ILPA supports this amendment, which highlights the failure of the Government to meet its own stated prioritisation of liberty in the allocation of legal aid. Immigration decisions to remove or deport place a person's liberty immediately at risk. Moreover, in order to be able to effectively challenge any decision to detain a person for the purpose of removal or deportation it is necessary to address the underlying immigration dispute upon which the decision to detain is founded.

69

LORD THOMAS OF GRESFORD
LORD DHOLAKIA
LORD CARLILE OF BERRIEW
LORD PHILLIPS OF SUDBURY

Page 130, line 12, at end insert—

“(1A) Civil legal services provided to an individual for a matter arising out of any rule laid down under section 1(4) of the Immigration Act 1971 making provision for family members to enter or remain in the United Kingdom as the family member of a refugee or beneficiary of humanitarian protection.”

Purpose

To provide for civil legal aid in relation to refugee family reunion matters.

Briefing Note

ILPA supports this amendment. A full briefing is available at:
<http://tinyurl.com/coe43c3>

71

LORD THOMAS OF GRESFORD
LORD DHOLAKIA
LORD CARLILE OF BERRIEW
LORD PHILLIPS OF SUDBURY

Page 131, line 3, at end insert—

“Immigration: family reunion cases, trafficking victims and onward appeals

27A (1) Civil legal services provided to an individual in relation to any rule having effect under section 3(2) of the Immigration Act 1971 making provision about a person's entering or remaining in the United Kingdom as a member of the family of a person who is entitled to enter or remain in the United Kingdom—

(a) (in a case where the services in question do not fall within paragraph 26) under the Qualification Directive, the Refugee Convention or the Temporary Protection Directive, or

(b) as a beneficiary of humanitarian protection.

(2) Civil legal services provided in relation to any question as to whether a person who is, or claims to be, a victim of human trafficking is to be permitted to enter or remain in the United Kingdom.

(3) Civil legal services in relation to an appeal to the Upper Tribunal, the Court of Appeal or the Supreme Court insofar as the appeal relates to an issue under any enactment about immigration.

Exclusions

27B Sub-paragraphs (1) and (2) of paragraph 27A are subject to the exclusions in Parts 2 and 3 of this Schedule.

Definitions

27C In this paragraph and paragraphs 27A and 27B, the Qualification Directive, the Refugee Convention and the Temporary Protection Directive have the same meanings as in paragraph 26.”

Presumed Purpose

To provide for civil legal aid in relation to the following immigration matters: (i) refugee family reunion claims; (ii) claims by trafficking victims; (iii) immigration appeals to the Upper Tribunal, Court of Appeal or Supreme Court.

Briefing Note

ILPA supports these amendments. See also amendments **69** (on refugee family reunion), **78** (on onward appeals) and **61A** and **69A** (on trafficking victims).