ILPA BRIEFING
House of Lords – Committee

February 2012

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

GOVERNMENT AMENDMENT
Rehabilitation of Offenders: Spent Convictions

Government Amendment 185G

Insert the following new Clause—

"No rehabilitation for certain immigration or nationality purposes

Before section 57 of the UK Borders Act 2007 (and after the italic cross-heading before that section) insert—

"56A No rehabilitation for certain immigration or nationality purposes

(1) Section 4(1), (2) and (3) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) do not apply—

(a) in relation to any proceedings in respect of a relevant immigration decision or a relevant nationality decision, or

(b) otherwise for the purposes of, or in connection with, any such decision.

(2) In this section—

"immigration officer" means a person appointed by the Secretary of State as an immigration officer under paragraph 1 of Schedule 2 to the Immigration Act 1971,

"relevant immigration decision" means any decision, or proposed decision, of the Secretary of State or an immigration officer under or by virtue of the Immigration Acts, or rules made under section 3 of the Immigration Act 1971 (immigration rules), in relation to the entitlement of a person to enter or remain in the United Kingdom (including, in particular, the removal of a person from the United Kingdom, whether by deportation or otherwise),

"relevant nationality decision" means any decision, or proposed decision, of the Secretary of State under or by virtue of—

(a) the British Nationality Act 1981,

(b) the British Nationality (Hong Kong) Act 1990, or

(c) the Hong Kong (War Wives and Widows) Act 1996,

in relation to the good character of a person.

(3) The references in subsection (2) to the Immigration Acts and to the Acts listed in the definition of "relevant nationality decision" include references to any provision made under section 2(2) of the European Communities Act 1972, or of EU law, which relates to the subject matter of the Act concerned.""

Presumed Purpose

To provide that in relation to any application for leave to enter or remain in the UK, in connection with any removal or deportation from the UK, or in relation to any British citizenship or nationality application, disclosure of any conviction, however minor and long ago spent, may be requested and required. In relation to these applications or proceedings, a rehabilitated person would be treated as someone who has been convicted or charged with the relevant offence, despite the conviction being spent.

Briefing Note

ILPA is opposed to this Amendment, and to Government Amendment 185H (see below) for reasons set out here.

Under the Rehabilitation of Offenders Act 1974, a person convicted of an offence may become a 'rehabilitated person' and his or her conviction 'spent' after the passage of a specified period of time[1]. This relates to both convictions that lead to imprisonment and convictions that lead to such sentences as a community order, a fine or compensation order.

By Government Amendment 185F (to which ILPA does not object), the Act is to be amended so that the period of time before a person may become a rehabilitated person and convictions are spent will, in certain circumstances, be reduced. If that Amendment is accepted, certain offences will continue never to become spent, including offences for which the person is sentenced to a life term of imprisonment or to a term of more than four years.

The effects of a person becoming 'rehabilitated' and his or her convictions spent are set out in section 4 of the 1974 Act:

- Under section 4(1), a rehabilitated person "*...shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the* [spent conviction(s)/offence(s)]*...*".
- Under section 4(2), where a person is asked about any previous convictions of a rehabilitated person (save "*in proceedings before a*

[1] Section 1(1)

judicial authority"), that question is to be treated as not relating to any spent conviction(s).

- Under section 4(3), any obligation a person may have in law to disclose to another any previous convictions of a rehabilitated person shall not extend to requiring disclosure of any spent conviction(s).
- Section 4(2) and (3) include protection to the person (which may be the rehabilitated person or another) who does not disclose a spent conviction against any liability or other prejudice for not doing so.

There are various ways by which the effects of a person becoming rehabilitated as set out in section 4 of the 1974 Act are or may be limited:

- Section 7(2) of the Act provides that section 4(1) shall not apply in relation to specified proceedings (e.g. criminal proceedings, certain proceedings concerning adoption, Children Act 1989 proceedings and proceedings in which the rehabilitated person is a party or a witness).
- Section 4(4) of the Act permits the Secretary of State to make provision to exclude or modify the application of section 4(2) and/or to provide exceptions to the application of section 4(3). Exclusions and exceptions for which provision has been made permit enquiry and require disclosure in relation to persons, for example, intending to work with children and vulnerable adults[2], or seeking to enter specified professions or occupations (e.g. taxi drivers, fire arms dealers, barristers, medical practitioners and judicial appointments)[3].
- The Gambling Act 2005 introduced an exception to section 4 of the 1974 Act in relation to specified offences (e.g. relating to gambling, dishonesty, sex or violence) for those applying for an operating licence (e.g. to operate a casino or lottery).

Government Amendment 185G would create a general exception to section 4 of the 1974 Act relating to immigration and nationality matters.

This differs from the exceptions made under the provisions of section 4(4) of the 1974 Act (and described above), which do not provide a blanket exception to all of the effects of section 4 of that Act (also described above). It differs from the exception introduced by the Gambling Act 2005 in that it is not restricted to particular or specified offences.

The effect of Government Amendment 185G would be that the Secretary of State (e.g. acting via the UK Border Agency) may request and require disclosure of any conviction, however minor and long ago spent (including a conviction that was immediately spent at the point of conviction[4], and convictions when the person was a minor), in relation to any application for leave to enter or remain in the UK, or in connection with any removal or deportation proceedings, or in relation to any British citizenship or nationality application. In these matters a rehabilitated person would continue to be treated as someone who has been convicted or charged with the relevant offence, despite his or her conviction having been spent.

[2] See e.g. SI 2008/3259 and SI 2010/1153

[3] See the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975, SI 1975/1023 (as amended)

[4] See subparagraph (4) of Government Amendment 185F

ILPA is aware of no consultation in relation to what is intended to be done by this Amendment. There are several problems, complexities and anomalies that would result from its enactment.

Firstly, the Amendment introduces further complexity and uncertainty in immigration and nationality law and practice. Applicants may fail to understand that convictions (or cautions) that are not required to be disclosed in other areas of life, are required to be disclosed in immigration matters. The consequences of failing to disclose may be severe. This may lead to an allegation of deception, and a mandatory refusal of the application[5] and any future applications (for up to ten years)[6]. Even if it is understood that disclosure is required, the applicant will nonetheless be in a far weaker position seeking to assess the prospects of his or her application, worrying how a spent conviction that may be many years old may or may not count against him or her. He or she may need (but not know how) to address mitigation in relation to the spent conviction in an application, which given passage of time may be especially complex. This adds to the myriad reasons why the Government's intention to generally remove legal aid for immigration matters will cause significant harm to migrants and the Government's assertion that immigration matters are 'straightforward' is wrong.

Secondly, the complexities just outlined are complicated by the fact that the Rehabilitation of Offenders Act 1974 applies to convictions in the UK and outside the UK.[7] A conviction outside the UK may relate to an offence not recognised in the UK, or to a perverse or unfair criminal justice process, including where prosecution is used as a means to repress or persecute.

Thirdly, the Amendment exacerbates the problems with the recent introduction into the Immigration Rules of a requirement to be free of any unspent convictions for the purposes of settlement (indefinite leave) applications.[8] As has been drawn to the attention of Government, this requirement has a particularly chilling effect in relation to victims of domestic violence because it excludes such a victim from the intended protection provided by the 'domestic violence immigration rule'. That rule is designed to encourage certain victims of domestic violence to make an application for settlement as a victim of domestic violence rather than remaining dependent for their immigration status on their abusive partner.[9] In response to the concerns highlighted by ILPA and many others[10], the Government has taken the limited (and in the opinion of ILPA and over 100 leading organisations working with survivors of domestic violence, inadequate) step of setting out in UK Border Agency guidance[11] how discretion may be exercised in favour of an applicant under the domestic violence immigration rule. This is inadequate because it leaves

[5] Immigration Rules (HC 395) (as amended), paragraphs 320(7A), 321(i), 321A(2) and 322(1A)
[6] Immigration Rules (HC 395) (as amended), paragraph 320(7B)
[7] Section 1(4)(a)
[8] See Statement of Changes in Immigration Rules HC 863 and HC 908
[9] In May 2011, ILPA, Rights of Women, Eaves Housing Project and Southall Black Sisters wrote (with 102 other signatories) to the Home Secretary setting out concerns.
[10] *ibid*
[11] See UK Border Agency, Modernised Guidance on victims of domestic violence

the applicant (and any adviser) in a state of uncertainty as to how the discretion may be exercised in an individual case: thus significantly reducing the prospect that a victim of domestic violence will be prepared to leave an abusive relationship for fear of the immigration consequences of so doing. The Amendment will add further uncertainty, since even where a conviction is spent there will remain discretion to consider the conviction.

Fourthly, the Amendment is contrary to the aim of integration by those migrants permitted to stay long-term or permanently and to Government stated objectives that migrants should 'play by the rules'.[12] The Amendment creates a separate and penalising rule for migrants. Whereas others are permitted to have their convictions generally treated as spent, migrants will have to live with the uncertainty that even the most minor of conviction may have devastating consequences for them years down the line – excluding them from citizenship and/or from the UK. This is discriminatory, and will have an effect contrary to that of promoting integration or any shared sense of justice or fairness.

Fifthly, the Amendment creates an anomaly in relation to deportation such that even those whose convictions are relatively minor, and have been spent for other purposes years or decades ago, may find that changes in circumstances lead to deportation proceedings or investigation after years or decades.[13] This undermines aims of integration and rehabilitation.

Government Amendment 185G should be read with subparagraphs (7) to (9) of Government Amendment 185H, which provide:

> *(7) Section (No rehabilitation for certain immigration or nationality purposes) applies in relation to convictions before the commencement date (as well as in relation to convictions on or after that date).*
>
> *(8) Section (No rehabilitation for certain immigration or nationality purposes) applies as mentioned in subsection (7) above whether or not, immediately before the commencement date—*
>
> *(a) the person concerned is treated as a rehabilitated person for the purposes of the Act of 1974 in respect of the conviction, or*
>
> *(b) the conviction is treated for the purposes of that Act as spent.*
>
> *(9) But section (No rehabilitation for certain immigration or nationality purposes) does not affect—*

[12] In her Foreword to the *Family Migration* consultation (on which a Government response remains pending), the Home Secretary emphasised the need to promote integration and for immigration rules to "*be fair and seen to be fair*". In her Foreword to the *Employment-related Settlement* consultation (Government response also pending), she similarly emphasised the importance of integration.

[13] This may be an especially acute problem in relation to two matters – 'automatic deportation; under the section 32 *et seq* of the UK Borders Act 2007; and refugees convicted of immigration offences in the course of their seeking to reach or enter the UK to claim asylum.

> *(a) any proceedings begun, but not completed, before the commencement date,*
>
> *(b) any applications for immigration or nationality decisions made, but not finally determined, before the commencement date, or*
>
> *(c) the validity of any proceedings, or any relevant immigration or nationality decision (within the meaning of section 56A of the UK Borders Act 2007) which is made, before the commencement date.*

Government Amendment 185H provides for retrospective application of Government Amendment 185G. An application (or appeal) currently in progress would be saved from that retrospective application (by reason of paragraph (9)(a) or (b)), thus for the purposes of that application (or appeal) preserving the current position that a spent conviction be treated as spent. However, this may be of very little value since it would not preclude a new decision (to refuse or remove) after the consideration of the application (or appeal) by reference to the same conviction.

ILPA has seen the impact assessment signed off by the Minister on 2 February 2012.[14] It largely relates to Government Amendment 185F. In relation to Government Amendment 185G, it correctly asserts that[15]:

> "*The clause relating to UKBA will exempt them entirely from the operation of the* [Rehabilitation of Offenders Act 1974] *so that they can rely on all conviction information (spent and unspent) when making immigration and nationality decisions.*"

The assessment later acknowledges the effect will be to allow the UK Border Agency to consider information that currently it may not consider[16]. The asserted justification in the assessment is that Government Amendment 185G is necessary so that the UK Border Agency can continue to rely on information that would be lost to it by reason of the reduction in periods by which convictions shall become spent to be introduced by Government Amendment 185F.[17] However, the Amendment goes far further than the justification requires. As regards assessing impact, the assessment states[18]:

> "*We cannot estimate the impact that the UKBA exemption would have...*"

For further information please get in touch with:

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[14] See http://www.justice.gov.uk/downloads/publications/bills-acts/legal-aid-sentencing/laspo-rehab-of-offenders-act-ia.pdf
[15] Paragraph 35 of the assessment
[16] Paragraph 40 of the assessment
[17] Paragraph 47 of the assessment
[18] Paragraph 41 of the assessment