

**ILPA BRIEFING
House of Lords – Report**

March 2012

**LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –
HL Bill 129****Government Amendments: Judicial Review (immigration)
Amendment Nos. 49-55, and 57****LORD McNALLY****49**Page **136**, line **4**, leave out sub-paragraph (5) and insert –

(5) The services described in sub-paragraph (1) do not include services provided in relation to judicial review in respect of an issue relating to immigration where –

(a) the same issue, or substantially the same issue, was the subject of a previous judicial review or an appeal to a court or tribunal,

(b) on the determination of the previous judicial review or appeal (or, if there was more than one, the latest one), the court, tribunal or other person hearing the case found against the applicant or appellant on that issue, and

(c) the services in relation to the new judicial review are provided before the end of the period of 1 year beginning with the day of the determination.

50Page **136**, line **12**, leave out “a removal direction” and insert “removal directions”**51**Page **136**, line **13**, leave out “direction was” and insert “directions were”**52**Page **136**, line **15**, after “decision” insert “(or, if there was more than one, the latest decision)”**53**Page **136**, line **16**, leave out “such a direction” and insert “removal directions”**54**Page **136**, line **27**, at end insert –

(7A) Sub-paragraphs (5) and (6) do not exclude services provided in relation to judicial review of removal directions in respect of an individual where prescribed conditions relating to either or both of the following are met –

(a) *the period between the individual being given notice of the removal directions and the proposed time of his or her removal;*

(b) *the reasons for proposing that period.*

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Page 136, line 39, at end insert –

“an issue relating to immigration” includes an issue relating to rights described in paragraph 26 of this Part of this Schedule;

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Page 136, line 49, leave out ““removal direction” means a direction” and insert ““removal directions” means directions”

Purpose

The substitution of the new sub-paragraph (5) is to ensure that where an applicant in judicial review proceedings or an appellant in appeal proceedings is successful, that his or her success does not constitute a bar to his or her eligibility for legal aid in subsequent judicial review proceedings.

The amendments at lines 12, 13, 15, 16 and 49 are technical amendments substituting the term ‘removal directions’ for ‘a removal direction’.

The new sub-paragraph (7A) would permit the prescribing of conditions in which legal aid may be provided despite the application of sub-paragraph (5) or (6) to challenge removal directions. Those conditions must relate to the notice period given to the applicant of his or her removal and/or the reasons for the particular notice period being given.

The amendment at line 39 retains the meaning of ‘an issue relating to immigration’ that was contained in the previous sub-paragraph (5).

Briefing Note

New sub-paragraphs (5) and (7A) constitute important but modest improvements. The Bill, however, continues to single out immigration for the exclusion of legal aid for judicial review claims in contravention of the fundamental principle generally advanced by the Government that that these proceedings:

“...represent a crucial way of ensuring that state power is exercised responsibly”¹

No sound justification has been advanced for singling out immigration in this way. In Lords’ Committee, Lord Wallace of Tankerness argued that this is to be done because *“it is wrong in principle for [unmeritorious] cases to remain in scope for funding”* (Hansard HL, 18 Jan 2012 : Column 619). But legal aid is not provided for unmeritorious cases. Unlike the great majority of judicial review claims, which are not brought on legal aid, there is a merits test necessary for such a case to proceed on legal aid. Moreover, nothing in the

¹ *Proposals for the Reform of Legal Aid in England and Wales*, Ministry of Justice, November 2011, p33 (CP 12/10)

exclusions set out in sub-paragraphs (5) and (6) of paragraph 17 of Schedule 1, Part 1 addresses merits.

These sub-paragraphs instead focus solely on whether the judicial review claim is brought within 12 months of a previous event. There is no recognition that, even in 12 months, an individual's circumstances, the evidence that may be available to him or her and the state of the law (whether in statute or caselaw etc.) may change.

Particularly egregious is the provision in sub-paragraph (6)(a) of paragraph 17 whereby legal aid to challenge removal directions is to be excluded because a decision to remove has been made. In Lords' Committee, Lord Wallace of Tankerness said in relation to this that such cases concern:

"...judicial reviews of removal directions rather than the underlying immigration decision. Such proceedings are often brought last minute – sometimes literally as people are being put onto a plane."

But an individual may not have had an effective opportunity to challenge 'the underlying immigration decision' – particularly given the Bill's intended exclusion of immigration generally from legal aid scope, and the dearth of not-for-profit agencies permitted to provide immigration advice or services at the requisite level of competence². Even if an in-country appeal (i.e. before the individual's removal or departure from the UK) is permitted against the underlying immigration decision, without legal aid, there is a very real likelihood that a person unable to pay for legal advice or representation will not be able to find any advice agency that is lawfully permitted to advise or assist. Moreover, the statutory provisions governing whether an appeal right exists are highly complex and both the UK Border Agency and immigration judges have fallen into error in thinking a person does not have such a right when in law he or she does³. ILPA is all too familiar with examples of the UK Border Agency serving notices of immigration decisions giving incorrect information on rights of appeal.

The scope for injustice is, therefore, extremely high because the individual is at very grave risk of not understanding that he or she has an opportunity to challenge the underlying immigration decision until it is too late, or how to do so; and without any advice or representation at similar risk of being unsuccessful simply by reason of not understanding the relevant legal tests or the evidence that is required and/or being unable to obtain and present this.

While judicial reviews of removal directions are sometimes brought last minute, this is a consequence of the very short notice period (until recently,

² See the briefing for the February 2012 All Party Parliamentary Group on Migration meeting at: http://www.appgmigration.org.uk/sites/default/files/APPG_Migration-Legal_Aid_BP-Feb_2012.pdf and in particular the table in that briefing (though note that a later search on the OISC website revealed one permitted advice agency within 50 miles of Newcastle).

³ For example, two of the case examples provided among those given by ILPA in response to the Ministry of Justice Legal Aid consultation were cases where the UK Border Agency had wrongly issued a notice with its decision stating there was no right of appeal or had simply not informed the recipient of its decision of his appeal rights.

sometimes absence of any notice⁴) that people are habitually provided from the point of service of removal directions to the point of removal.

As regards the removal directions, these include information (in particular, the destination to which the person is to be removed) which is generally not provided at any earlier time, and hence which cannot itself be challenged prior to the removal directions⁵.

As regards sub-paragraph (7A), to be introduced by Government Amendment **54**, while this would provide an opportunity for provisions to be introduced to provide some protection by way of legal aid where removal directions are given with short notice, the sub-paragraph offers no guarantee that any such provisions will be made, nor what provisions would be made and when they would apply if any were to be made. To date, the Government has given no indication of what is intended.

ILPA is strongly opposed to the exclusion of legal aid in these immigration judicial review cases.

The Annex sets out the current provisions of paragraph 17 in Schedule 1, part 1 with all the Government Amendments to this paragraph marked in tracked changes. These changes include Government Amendments **48 & 56** which are not addressed in this briefing.

For further information please get in touch with:

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⁴ See *R (Medical Justice) v SSHD* [2010] EWHC 1975 (Admin); [2011] EWCA Civ 1710

⁵ See *GH v Secretary of State for the Home Department* [2005] EWCA Civ 1182

Annex

Paragraph 17 of Schedule 1, Part 1 Showing in track changes the effect of these Government amendments

Judicial review

17 (1) Civil legal services provided in relation to judicial review of an enactment, decision, act or omission.

General exclusions

(2) Sub-paragraph (1) is subject to—

(a) the exclusions in Part 2 of this Schedule, with the exception of paragraphs 1 to 5, 6, 8, 12, 15 and 16 of that Part, and

(b) the exclusion in Part 3 of this Schedule.

Specific exclusion: benefit to individual

(3) The services described in sub-paragraph (1) do not include services provided to an individual in relation to judicial review that does not have the potential to produce a benefit for the individual, a member of the individual's family or the environment.

(4) Sub-paragraph (3) does not exclude services provided in relation to a judicial review where the judicial review ceases to have the potential to produce such a benefit after civil legal services have been provided in relation to the judicial review under arrangements made for the purposes of this Part of this Act.

Specific exclusions: immigration cases

~~(5) Where an issue relating to immigration (including an issue relating to rights described in paragraph 26 of this Part of this Schedule) has been the subject of judicial review or an appeal to a tribunal or court, the services described in sub-paragraph (1) do not include services that are provided in relation to judicial review in respect of the same issue or a substantially similar issue in the period of 1 year beginning with the day on which the previous judicial review, or the appeal, was determined.~~

(5) The services described in sub-paragraph (1) do not include services provided in relation to judicial review of an issue relation to immigration where

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(a) the same issue, or substantially the same issue, was the subject of a previous judicial review or an appeal to a court or tribunal,

(b) on the determination of the previous judicial review or appeal (or, if there was more than one, the latest one), the court, tribunal or other person hearing the case found against the applicant or appellant on that issue, and

(c) the services in relation to the new judicial review are provided before the end of the period of 1 year beginning with the day of that determination.

(6) The services described in sub-paragraph (1) do not include services provided in relation to judicial review of ~~a~~removal directions in respect of an individual where the directions ~~was~~were given not more than 1 year after the latest of the following—

(a) the making of the decision (or, if there was more than one, the latest decision) to remove the individual from the United Kingdom by way of ~~such~~ aremoval directions;

(b) the refusal of leave to appeal against that decision;

(c) the determination or withdrawal of an appeal against that decision.

(7) Sub-paragraphs (5) and (6) do not exclude services provided to an individual in relation to—

(a) judicial review of a negative decision in relation to an asylum application (within the meaning of the EU Procedures Directive) where there is no right of appeal to the First-tier Tribunal against the decision;

(b) judicial review of certification under section 94 or 96 of the Nationality, Immigration and Asylum Act 2002 (certificate preventing or restricting appeal of immigration decision).

(7A) Sub-paragraphs (5) and (6) do not exclude services provided in relation to judicial review of removal directions in respect of an individual where prescribed conditions relating to either or both of the following are met –

(a) the period between the individual being given notice of the removal directions and the proposed time of his or her removal;

(b) the reasons for proposing that period.

Definitions

(8) For the purposes of this paragraph an individual is a member of another individual's family if—

(a) they are relatives (whether of the full blood or half blood or by marriage or civil partnership),

(b) they are cohabitants (as defined in Part 4 of the Family Law Act 1996), or

(c) one has parental responsibility for the other.

(9) In this paragraph—

“EU Procedures Directive” means Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status;

“an issue relating to immigration” includes an issue relating to rights described in paragraph 26 of this Part of this Schedule;

“judicial review” means—

(a) the procedure on an application for judicial review (see section 31 of the Senior Courts Act 1981), but not including the procedure after the application is treated under rules of court as if it were not such an application, and

(b) any procedure in which a court, tribunal or other person mentioned in Part 3 of this Schedule, or responsible for determining proceedings under paragraph 23 of that Part, is required by an enactment to make a decision applying the principles that are applied by the court on an application for judicial review;

“removal directions” means ~~a~~ directions under—

(a) paragraphs 8 to 10A of Schedule 2 to the Immigration Act 1971 (removal of persons refused leave to enter and illegal entrants);

(b) paragraphs 12 to 14 of Schedule 2 to that Act (removal of seamen and aircrew);

(c) paragraph 1 of Schedule 3 to that Act (removal of persons liable to deportation);

(d) section 10 of the Immigration and Asylum Act 1999 (removal of certain persons unlawfully in the United Kingdom);

(e) section 47 of the Immigration, Asylum and Nationality Act 2006 (removal of persons with statutorily extended leave).