

**ILPA BRIEFING
House of Lords – Report****March 2012****LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –
HL Bill 129****Clause 9 (Exceptional Cases Funding)
Amendments 93, 93A & 94****Lord Thomas of Gresford
Lord Carlile of Berriew****93**

Page 6, line 20, at end insert “, or

(c) that it is in the interest of justice generally”

Lord Avebury**93A**

Page 6, line 20, at end insert “, or

(c) that it is appropriate to do so, in the particular circumstances of the case,
having regard to:(i) any risk of the individual’s being unrepresented as a result of the prohibition in
section 84(1) of the Immigration and Asylum Act 1999 on providing immigration
advice or services in the course of a business, whether or not for profit, (unless a
qualified person: a solicitor, barrister, legal executive or person regulated by the
Office of the Immigration Services Commission etc.) and the individual’s inability
to pay for representation;

(ii) the complexity of the case; and

(iii) any risk of injustice if the individual is not represented.”

**Lord Bach
Lord Judd****94**

Page 6, line 20, at end insert –

“() that it is appropriate to do so, having regard to the particular circumstances of
the case, including –

(i) the client’s vulnerability;

(ii) the client’s capacity to represent himself or herself;

(iii) the client's health (including mental health) issues;

(iv) the actual availability of alternative sources of advice and assistance and the impact and consequences on the client, or his family, of failing to receive advice and assistance under this Part;

() that the client is under the age of 18; or

() that it is otherwise in the interests of justice.”

Purpose

These Amendments seek to extend the scope of exceptional cases funding under clause 9 of the Bill. Amendment **93** would permit the Director of Legal Aid Casework to grant legal aid where it was in the interests of justice to do so. Amendment **94** would make similar provision, with emphasis on factors relating to an individual's vulnerability, capacity to represent himself or herself, health and age, and the availability of alternative sources of advice or assistance. Amendment **93A** focuses on immigration cases, and would permit the Director to grant legal aid where appropriate having regard to the risk that an individual is unrepresented, the complexity of the individual's case and any risk of injustice if provisions is not made.

Briefing Note

ILPA supports these amendments. Clause 9 is in need of amendment, particularly as regards immigration cases, by reason of two factors:

- The Government has said that immigration cases will be generally excluded from exceptional cases funding as clause 9 is currently drafted, whatever the complexity of the case and whatever the risks to the individual.
- Whereas the Government has generally indicated that it expects the not-for-profit advice sector to fill any gap left by the withdrawal of legal aid, immigration is uniquely regulated such that agencies not within the regulatory scheme are prohibited from providing advice or assistance. Of those not-for-profits currently permitted to provide services within the scheme, hardly any are permitted to do work above the most basic level (level 1) – i.e. do what is now done on legal aid.

ILPA has explained this to the Ministry of Justice. However, in response, the Minister of State, Lord McNally, has said¹:

“We have decided that immigration cases... are not a priority for legal aid funding, given the scarce resources available. We also do not consider that specialist legal advice will generally be required, though we recognise that occasionally there will be more complex cases where such advice is needed. We have reflected on this point, but remain of the view that if a category of case is low priority, that remains so even if certain cases are complex. Some legal support may be found from law centres and through pro-bono legal representation.”

The immigration cases affected include those of victims of trafficking, children and the mentally ill, unless they are pursuing asylum claims. The individuals affected include those facing potentially permanent separation from the family, home and community by their removal from the UK. Court of Appeal judges have, in recent

¹ Letter to ILPA of 29 February 2012

cases, described some of the legal issues involved as constituting “*an impenetrable jungle*”² and such that they are “*perplexed*” as to how anyone could be expected to understand without legal assistance³. A one-page briefing note on complexity in immigration cases is available at: <http://tinyurl.com/7z3dtn5>

The Ministry of Justice response to ILPA underestimates the complexity in immigration cases. Family reunion cases, the cases of illegal entrants or overstayers, removals and deportation cases, applications outside the rules, and applications under Article 8 (private and family life) of the European Convention on Human Rights are all matters that are too complex for agencies in the regulatory scheme to work upon unless they are approved at the higher level (level 2 or above). Similarly, lodging notices of appeal is not permitted below level 2.⁴

The introduction of regulation by the Immigration and Asylum Act 1999 received cross-party support. At the Bill’s Second Reading in the Commons, the now Chair of the Home Affairs Committee, Keith Vaz MP, said⁵:

“Immigration is a very complex and complicated subject. Even if people offer free advice, it is not easy to give the sort of detailed advice that is necessary on immigration cases. I pay tribute to those organisations because they provide a service, but people with genuine problems in the complex area of immigration law need to go to those who know what they are talking about. I hope that the message that will come out of the Bill... is that people should not touch the subject until and unless they know about it, and that they will not be allowed to deal with it unless they are regulated.”

Many others who spoke in the debates in the Commons and the Lords emphasised the considerable, and sometimes irretrievable, harm that is done by immigration advice from the unscrupulous or incompetent. Immigration has not got any less complex since 1999, indeed new complexities have been added to the immigration rules⁶ and immigration legislation has been complicated by the addition of five immigration Acts since the passing of the 1999 Act.

The Ministry of Justice response largely ignores these concerns, and fails to address their substance. The assertion that “*specialist legal advice will [not] generally be required*” is emphatically contradicted by the regulatory scheme requiring level 2 approval for work on a wide range of cases, and by the response of the Administrative Justice and Tribunals Council to the Ministry of Justice legal aid consultation, which described immigration as an area of “*extraordinary complexity*” involving “*highly complex process[es] with potentially life-changing consequences*”⁷.

² [2011] EWCA Civ 1320, November 2011 (*per* Jackson LJ)

³ [2010] EWCA Civ 773, July 2010 (*per* Longmore LJ)

⁴ The scheme is operated by the Immigration Services Commissioner. Her guidance on competence is available at http://oisc.homeoffice.gov.uk/how_to_become_an_immigration_adviser/guidance_on_competence/

⁵ *Hansard* HC, 22 Feb 1999 : Column 77

⁶ Such as the additions to the general grounds for refusal introduced in April 2008 (para. 320(7B) & (7C)) and October 2011 (paras. 320(22) & 322(12)), including complex provisions for re-entry bans where someone falls foul of certain provisions of immigration control.

⁷ The response is available at <http://ajtc.justice.gov.uk/news/450.htm> (see para. 75).

The suggestion that law centres and pro-bono representation can fill the gap to be left by the withdrawal of legal aid ignores both the scale of the gap that will be left by the Bill and the aggravation of the already fragile state of provision from these sources⁸.

The only other suggestion made by the Ministry of Justice is that the regulatory scheme be relaxed so as to allow social workers to provide 'immigration advice' to separated children in their care. The importance of social workers in the lives of such children is not to be underestimated, but the suggestion that they become immigration advisers shows a lack of respect to both the children and social workers concerned. Social workers are not trained or competent to provide such advice, and any inevitable failing in providing such can be expected to have serious ramifications for trust and confidence as between child and social worker. Moreover, as in cases of age disputes, there can be conflicts of interests between the two. A recent case highlights the dangers of the Ministry of Justice suggestion:

D was brought to the UK when aged six and abandoned here aged 11, when he was taken into social services care. At no time up until his approaching his eighteenth birthday was an application made to regularise his stay, which would certainly have had better prospects while he was still a child. His lack of lawful status to remain in the UK was a factor in the Court of Appeal's judgment dismissing his challenge to removal after he had turned 18.⁹

As ILPA highlighted to the Ministry of Justice, there is a near dearth of not-for-profit agencies permitted to do level 2 immigration work¹⁰. Without legal aid, those who cannot afford to pay are likely to be left without access to justice and at risk of exploitation, whether in seeking to acquire funds to pay for legal advice or in paying sums of money they or their families can ill afford to those purporting to offer advice on the cheap. In the circumstances, clause 9 is in urgent need of amendment. Amendment **93A** most particularly highlights the pressing need in immigration cases, though amendments **93** and **94** each have potential to address some of this concern. ILPA also supports the joint briefing at: <http://tinyurl.com/6s4aqz6>

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⁸ In its March 2011 response to the Cabinet Office (see <http://www.lawcentres.org.uk/policy/detail/policy-responses/>), the Law Centres Federation identified that some Law Centres were already facing closure by reason of local authority cuts in funding. This can only be gravely exacerbated by the loss of legal aid funding to such centres (see <http://www.lawgazette.co.uk/news/law-centres-warn-legal-aid-cuts>). As the Civil Justice Council November 2011 report *Access to Justice for Litigants in Person* makes clear, pro bono provision will be damaged by the damage being done to the advice sector, pro bono cannot replace legal aid and is dependent on infrastructure being in place upon which pro bono provision can build (see e.g. paras. 16, 17 & 23 of the report available at <http://www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc/self-represented-litigants.htm>).

⁹ [2012] EWCA Civ 39

¹⁰ More information is available from the APPG on Migration briefing available http://www.appgmigration.org.uk/sites/default/files/APPG_Migration-Legal_Aid_BP-Feb_2012.pdf at though note that a further search of the Immigration Services Commissioner's register since that briefing did reveal one not-for-profit within 50 miles of Newcastle.