ILPA BRIEFING
House of Lords – Third Reading

March 2012

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL – HL Bill 135

Children
(Schedule 1, Part 1)

BARONESS GREY-THOMPSON
BARONESS BENJAMIN
BARONESS EATON
LORD NEWTON OF BRAINTREE

Page 140, line 5, at end insert—

"Children under 18

1 (1) Civil legal services in relation to advice and proceedings where a child is, or proposes to be, the applicant or respondent in proceedings, or where the child is represented by a legal guardian, including—

(a) private family law;

(b) any benefit, allowance, payment, credit or pension under—

(i) the Social Security Contributions and Benefits Act 1992,

(ii) the Jobseekers Act 1995,

(iii) the State Pension Credit Act 2002,

(iv) the Tax Credits Act 2002,

(v) the Welfare Reform Act 2007,

(vi) the Welfare Reform Act 2011, or

(vii) any other enactment relating to social security;

(c) all areas of education law not otherwise covered in this Schedule;

(d) all areas of housing law not otherwise covered in this Schedule;

(e) all areas of debt-related disputes not otherwise covered in this Schedule;

(f) all areas of immigration and asylum law not otherwise covered in this Schedule;

(g) all areas of clinical negligence law not otherwise covered in this Schedule;

(h) all areas of consumer law not otherwise covered in this Schedule;

(i) appeals to the Criminal Injuries Compensation Authority;

(j) civil legal services relating to a review or appeal under sections 11 or 13 of the Tribunals, Courts and Enforcement Act 2007; and

(k) civil legal services relating to an appeal to the Supreme Court."

Purpose

To preserve legal aid for children, who are party to or propose to be party to the specified legal proceedings.

Briefing Note

ILPA supports this amendment. This briefing focuses on children in immigration proceedings, since that is our area of experience and expertise.

At Lords' Committee and Report stages[1], the Government has responded to support for similar amendments in much the same way. At Report, Lord McNally said that a similar amendment[2]:

> "*...seeks to keep funding across the board for children in all civil disputes without regard to their relative priority or alternative means of resolving them...* [The] *Government recognise the importance of funding in a range of cases where children's interests are key. That is evidenced in how we have proposed to allocate legal aid funding by protecting funding in those areas that specifically involve children.*"

The comfort offered by the Minister goes too far. Children facing separation (possibly permanent separation) from a parent by reason of their or their parent's removal from the UK, and unaccompanied children facing the prospect of removal from the UK (including where they have lived here for many years, or even nearly all their lives) are cases where children's interests are key and in which the Bill does not currently provide for funding. There are no alternative means to resolving disputes with the UK Border Agency. The Minister continued:

> "*...claims brought in the name of a child are usually conducted by their parents acting as the child's "litigation friend" rather than the child themselves.*"

This is not what happens in the cases of unaccompanied children in immigration proceedings; and as Baroness Eaton highlighted at Report, the removal of legal aid in these cases will result in "*extra costs to local authority social services departments*", a quantification of which the Baroness asked for

[1] See *Hansard* HL 16 Jan 2012 Columns 447-448; 7 Mar 2012 : Columns 1813-1814
[2] *Hansard* HL, 7 Mar 2012 : Column 1813

but not receive in the Minister's response[3]. Moreover, that a parent in immigration proceedings may raise the interests of the child provides no answer to the situation where the interests of the child and parent conflict or in certain other circumstances such as those considered in recent years by the House of Lords and Supreme Court in respectively *EM (Lebanon)* [2008] UKHL 64 (where a child faced being permanently separated from his mother if they were both returned to Lebanon) and *ZH (Tanzania)* [2011] UKSC 4 (where British children faced being separated from mother or father if their non-British mother was removed to Tanzania). The courts in these cases expressly held that separate representation for the child had been important to the resolution of the issues before the court[4].

The Minister next offered the comfort that:

> "*We have also made it clear that one of the key criteria for the exceptional finding scheme is the ability to represent yourself. This will obviously be relevant where a child is bringing an action without a litigation friend.*"

However, as Lord Wallace had previously made clear[5], this does not, in the Government's view, apply in the immigration cases. These cases are to be excluded from the exceptional funding scheme by reason of its focus on Article 6 of the European Convention on Human Rights.

Finally, the Minister stated:

> "*We must also ensure that we do not create a loophole in the system through which lawyers might encourage parents to attempt to bring civil litigation in their children's name purely to secure funding that is otherwise outside the scope of this area of the law.*"

Again, this has no relevance to the cases of unaccompanied children currently to be excluded by the Bill from legal aid. Nor can it properly be relevant to the cases where there is a conflict of interest between child and parent, or cases such as those in *EM (Lebanon)* [2008] 64 and *ZH (Tanzania)* [2011] UKSC 4 in which the UK's highest courts have identified the need for distinct representation of the child[6].

Later at Lords' Report, Ministers expanded on their intentions as regards immigration cases. Lord Wallace said[7]:

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[3] *Hansard* HL, 7 Mar 2012 : Column 1799

[4] At paragraph 43 of the former, Lord Bingham of Cornhill said: "*The Court of Appeal and the courts below were disadvantaged by the absence of representations on behalf of* [the child]."

[5] *Hansard* HL, 18 Jan 2012 : Column 668 (in response to Baroness Gale); see also *Hansard* HL, 12 Mar 2012 : Column 129

[6] In the latter, Lady Hale gave examples at paragraph 35: "*There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact.*"

[7] *Hansard* HL, 12 Mar 2012 : Column 129

> "*Children will rarely be applicants in non-asylum immigration cases and will normally be considered as part of their parents' application. Child applicants are much more likely in asylum cases for which legal aid will remain available.*"

The Minister's assessment is flawed. Many unaccompanied children who seek asylum are refused asylum, but granted discretionary leave to remain for three years or until they are 17½ years of age (whichever is the shorter period). Applications to extend this leave, or appeals, not brought on asylum grounds will not qualify for legal aid; and there are many such cases where the question of the child's best interests raises complex legal and evidential issues. Similarly, children abandoned in the UK, often at a young age, have non-asylum immigration cases. Lord Wallace continued:

> "*Unaccompanied children with an asylum or immigration issue would have a social worker assigned to them. Their role includes helping the child to access the same advice and support as a child permanently settled in the United Kingdom...*"

While ILPA agrees with that assessment, it merely confirms the fears of Baroness Eaton and the Local Government Association that the Bill will result in extra costs to local authorities[8]. Moreover, the legal services these children will require, if not available on legal aid, will have to be paid a private rates. The cost to local authorities may very well be considerably higher than the current legal aid expenditure on these cases. The Bill thus transfers and increases costs. Lord Wallace suggested an alternative:

> "*...and* [social services] *could also offer assistance in filling in forms, explaining terms and providing emotional support.*"

In response to the concern that social workers were not within the regulatory scheme so as to be permitted to provide immigration advice or services, he said:

> "*...we intend to work with the Immigration Services Commissioner to exempt local authorities from regulation so that they can offer low-level advice and assistance.*"

The Government's position is inadequate, and appears to be founded on a misunderstanding of both the immigration proceedings in which these children are involved and the role and responsibilities of the social workers supporting them.

The relevant immigration proceedings are immigration appeals and applications brought outside the rules and/or on Article 8, European Convention on Human Rights grounds (by which the UK Border Agency's statutory duties regarding these children and the best interest of the children under Article 3 of the UN Convention on the Rights of the Child are each engaged). The Immigration Services Commissioner regards such

[8] See e.g. *Hansard* HL, 7 Mar 2012 : Column 1799

proceedings as beyond 'low level' and hence work on such matters is not permitted at level 1 of her scheme[9]. The sort of work required, therefore, could not lawfully be provided at the level the Government is contemplating. If a social worker were to operate beyond the level of any exemption, he or she would commit a criminal offence[10].

In any event, social workers are not trained, supported or supervised to provide immigration advice or services. There can be and sometimes are conflicts of interest between a local authority and a child the authority is supporting, e.g. arising out of the authority's obligations to support the child and disputes as to the child's age. Moreover, a social worker's primary responsibility is to the welfare of the child in his or her care, and the relationship between social worker and child is critical to this. This can be a difficult relationship. If a social worker were to provide advice that was wrong (or just unwelcome), not only might that have disastrous consequences for the child's immigration status; it might have disastrous consequences for the relationship between social worker and child. The risks that children in local authority care go missing and/or are exposed to exploitation are already significant, and any undermining of that relationship can only exacerbate these risks[11]. Regrettably, there are already examples of local authorities failing to understand that children in their care have immigration problems that need resolving, and by not doing so prejudicing the child whose immigration application to regularise his or her status is likely to be stronger when still a child[12].

At Lords' Committee and Report stages, several peers drew attention to the UK's obligations under the UN Convention on the Rights of the Child[13]. The more the Government has revealed of its understanding and expectations in relation to children being deprived of legal aid in immigration proceedings, the clearer it has become that the Government is failing to meet its Convention obligations, such as to ensure that a primary consideration is the best interests of children (Article 3.1), to take all appropriate legislative measures so as to ensure the well-being of children (Article 3.2) and to ensure the children's Convention rights (Article 4).

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

[9] More information is given in the Commissioner's Guidance on Competence, see: http://oisc.homeoffice.gov.uk/how_to_become_a_regulated_adviser/guidance_on_competence/summary_of_oisc_levels/

[10] Section 91, Immigration and Asylum Act 1999: the offence is punishable by a maximum prison sentence of two years

[11] In December 2011, the Government published its *Missing Children and Adults: a cross Government strategy*. That document identifies a range of issues, including children going missing from care and the very serious risks to children if and when then do go missing. Prevention is necessarily a key pillar of the objectives, and it is accordingly particularly disturbing to contrast the cross-Government strategy with the response of the Ministry of Justice to children by this Bill.

[12] See e.g. Case of J (in Annex), and *D v SSHD* [2012] EWCA Civ 39

[13] See e.g. *Hansard* HL, 7 Mar 2012 : Column 1806 (*per* Lord Judd)

The following Annex provides three short case studies.

Annexe: cases

Case of T

T's mother died of cancer while her (the mother's) claim for asylum was pending. Nothing happened on T's case. When she turned 16, T was moved out of foster care and into a bedsit in a shared house, where she felt frightened and intimidated. Her former foster mother continued to be immensely supportive. T went to see a legal aid lawyer. T knew very little about the circumstances that had led her mother to leave their country. Some of the little that she did know appeared to confirm what her mother had said, but some did contradict it. This was confusing and frightening for T. It was clear that T could not make an application based on what little she knew of her mother's claim for asylum. Her lawyer put forward a claim for discretionary leave. Meanwhile, T became pregnant, her boyfriend, while staying with her, was in no position to support her. The claim for discretionary leave was eventually accepted on the basis of T's statement and the lawyer's detailed representations but the decision was never sent. Her case went from pillar to post in the UK Border Agency until the lawyer managed to track down the official who had made the decision on the grant of leave who tracked down the case to ensure that T was issued with the positive decision.

Case of A

A was 12 years old. Her mother was from Africa. No father was named on her birth certificate and while it was thought that her father was a British citizen, because her parents were unmarried, she was not a British citizen in any event. By the time her mother died of cancer her father's whereabouts were unknown. She was in the care of an aunt. Legal aid lawyers made an application for a residence order, as well as an immigration application under Article 8 of the European Convention on Human Rights. Following detailed representations, A was granted indefinite leave to remain.

Case of J

J was from a war torn country in Africa. He had been in care in the UK since the age of six. He was referred to legal aid lawyers as he approached 18 to represent him in an application to regularise his status on the basis of his best interests as a child. An application was made but was refused by the UK Border Agency on the basis that he would shortly be turning 18 and thus his best interests as a child were not the issue because he would soon be an adult. The lawyers represented him in his appeal which succeeded under Article 8 of the European Convention on Human Rights.