

ILPA GENERAL BRIEFING
House of Lords – Third Reading – March 2012**LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –
HL Bill 135**

“...this proposal to remove legal aid in immigration matters is proceeding on the fundamental misapprehension that these cases are somehow routine-they are not.”

Lord Pannick, House of Lords Report, *Hansard* HL, 12 Mar 2012 : Column 72

The Bill continues to make (non-asylum) immigration generally an area for which legal aid is to be excluded. In responding to concerns raised across the House at Lords' Report, the Minister sought to defend that position by arguing thatⁱ:

- *“...there has been a need to focus legal aid on those who need it most in the most serious cases”*; contrasting asylum, immigration detention, domestic violence and judicial review cases with *“foreign students who may wish to study here”*.

This dichotomy highlights the incongruousness of the Government's position. Is the family reunion application of a refugee's children and/or partner in a refugee camp or other insecure environment more akin to asylum or a student visa application? Is the victim of domestic abuse from her partner with limited leave more akin to the situation of a victim of abuse from her British partner or the student applicant? Is the torture survivor or unaccompanied child facing removal having lived in the UK for several years with vital support networks here properly to be equated with the student applicant? These and similarly vulnerable groups will be excluded from legal aid, including where their circumstances are compounded by mental or physical disability or illness.

The Bill provides legal aid for challenging detention. But people will be detained precisely because, without legal aid, they have been unable to deal adequately with their underlying immigration problem. The Government has identified the need to retain legal aid for judicial review because of the particular importance in holding the State to account.ⁱⁱ The Bill compromises that position in removal cases. Legal aid will be excluded for judicial review in cases where there has been no previous opportunity to appeal; and where legal aid has been excluded for all previous proceedings.ⁱⁱⁱ

- *“In general, we believe that many immigration cases... are relatively straightforward... Often they are about whether the facts of a particular case meet the Immigration Rules.”*

Many immigration cases are not brought under the rules (which are, in any case, not straightforward and subject to frequent change). The rules generally require applicants to have funds (by that reason they may be ineligible for legal aid). Evidentially and legally complex cases outside the rules, such as those of the victim of domestic abuse, the torture survivor and child highlighted above, are to be excluded from legal aid.

- “We have a tribunals system... [and] the original point of tribunals [] was precisely to allow the resolution of disputes by individuals without the need for complex and expensive legal advice.”

The tribunal brings its own complexities: not least among them, the statutory provisions on when, whether and to what extent an appeal can or cannot be brought against an immigration decision.^{iv} Whatever consideration a tribunal judge may extend to an unrepresented appellant, the appeal can only be determined on the basis of the evidence presented.^v Onward appeals against a tribunal judge’s decision may be brought by appellants or the UK Border Agency (if the appeal is allowed), but only on points of law. Legal aid is to be excluded in these onward appeals too.^{vi}

- “...practical, general advice and guidance can be available... citizens advice bureaux can give immigration advice to level 1, which is low-level advice and assistance [and we will look to] exempt local authorities from regulation so that they can offer low-level advice and assistance as well.”

Legal aid is currently available for family reunion, applications outside the immigration rules, the cases of illegal entrants and overstayers (which include victims of trafficking and abandoned children), removals and deportation, and appeals. None of this work is permitted at level 1.^{vii} Those exempted or registered at level 1 cannot lawfully do this work and could face criminal prosecution if doing so.^{viii}

- “Substantial savings are required. The change that we propose will save an estimated £20 million a year out of a total of £90 million spent in this sphere of law.”

This ought to be put in context. From 2004/05, immigration legal aid has already been reduced by £104 million.^{ix}

ILPA supports the amendment of Lord Pannick & others to clause 10, which would permit legal aid to be made available where necessary so as “to prevent specific injustice”. As currently drafted, clause 10 is intended to exclude all immigration matters from its scope. Thus, nearly all non-asylum immigration claims and appeals are to be excluded from legal aid, however complex the matter may be and however incapable the individual may be to understand or pursue the matter without advice and representation.

ILPA supports the amendments of Baroness Grey-Thompson & others concerning children (Baroness Grey-Thompson & others) and Baroness Howe of Idlicote and Baroness Massey of Darwen concerning vulnerable young people. Children and young care leavers are among those for whom the Bill would exclude legal aid for immigration. The Government says social workers may assist unaccompanied children by providing low-level advice and form-filling. This suggestion, which was roundly criticised at Report stage^x, fails to address the situation facing these children and young people, and could undermine the important relationship between social worker and child. As Baroness Eaton has observed, the Bill is set to transfer costs onto local authorities.^{xi} An ILPA briefing is available at <http://tinyurl.com/6llzqzs>

An ILPA briefing is also available on Government amendments concerning victims of trafficking at <http://tinyurl.com/73f2dao>

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ⁱ *Hansard* HL, 12 Mar 2012 : Columns 78-81 (*per* Lord Wallace of Tankerness)

ⁱⁱ See the original consultation paper from the Ministry of Justice, November 2011, p33 (CP 12/10)

ⁱⁱⁱ More information on legal aid for immigration detention is available from ILPA's Committee stage briefing on Amendments 68 & 70 at <http://tinyurl.com/d45skdl> and on immigration judicial reviews from ILPA's Report stage briefing on Amendments 49 *et seq* at <http://tinyurl.com/83uenjy>

^{iv} Part V of the Nationality, Immigration and Asylum Act 2002 sets out the immigration appeals statutory regime and is highly complex. More on complexity is provided by ILPA's one-page note on complexity for Report stage at <http://tinyurl.com/7z3dtn5>

^v For example, the following was said by Rimer LJ in *Muschett v MP Prison Service* [2010] EWCA Civ 25 in relation to employment tribunal judges: "...It is not their role to engage in the sort of inquisitorial function that Mr Hopkin suggests or, therefore, to engage in an investigation as to whether further evidence might be available to one of the parties which, if adduced, might enable him to make a better case. Their function is to hear the case the parties choose to put before them, make findings as to the facts and to decide the case in accordance with the law. The suggestion that, in the present case, the employment judge committed some error of law in failing to engage in the sort of inquiry that Mr Hopkin suggested is, in my judgment, inconsistent with the limits of the role of such judges as explained by this court in *Mensah v. East Hertfordshire NHS Trust* [1998] EWCA Civ 954; [1998] IRLR 531 (see paragraphs [14] to [22] and the cases there cited by Peter Gibson LJ). Of course an employment judge, like any other judge, must satisfy himself as to the law that he must apply to the instant case; and if he assesses that he has received insufficient help on it from those in front of him, he may well be required to do his own homework. But it is not his function to step into the factual and evidential arena."

^{vi} More information on onward appeals is available from ILPA's Report stage briefing on Amendment 78 at <http://tinyurl.com/6q4tlby>

^{vii} See <http://oisc.homeoffice.gov.uk/servefile.aspx?docid=239> (pages 13-14)

^{viii} Section 91, Immigration and Asylum Act 1999 (punishable by up to two years imprisonment)

^{ix} Taken from Justice Committee's Third Report of Session 2010/11, HC 681 (table 4)

^x See e.g. *Hansard* HL, 12 Mar 2012 : Columns 122-123 (*per* Baroness Lister or Burtsett)

^{xi} *Hansard* HL, 7 Mar 2012 : Column 1799