

Update re cuts to legal aid for immigration advice: The Legal Aid, Sentencing and Punishment of Offenders Bill

1. This note is to accompany a short presentation to the Kensington and Chelsea Advice Forum meeting on Thursday, 29th March at The Lighthouse, W11.
2. The key ongoing event is the passage of the Legal Aid, Sentencing and Punishment of Offenders Bill. This Bill makes provision for legal aid in relation to civil and criminal law, and particularly in relation to the former will establish a new regime for the provision of legal aid which will mean that several areas of law and types of case and legal proceeding, for which legal aid is currently available, will be without legal aid when the Bill is implemented. This note, therefore, focuses on the Bill, its current progress and what may still be done to influence it.

Implementation of the Bill:

3. The Bill is expected to be enacted (receive Royal Assent) before the end of April. Its final parliamentary stage is currently scheduled for 23 April. The Government has indicated that it will implement the legal aid provisions in the Bill in April 2013 – approximately one year after the Bill's passing.

Current progress through Parliament:

4. The Bill received Third Reading in the House of Lords on 27 March. Third Reading is the final of the formal standard stages of the Bill's passage through each House. It received Third Reading in the House of Commons on 2 November 2011. Thus, the Bill has now been through both Houses. All that remains is what is called 'Ping Pong'. Each House must approve the final content of the Bill. Thus, because the Lords considered the Bill after the Commons, the Commons must now consider the changes to the Bill made in the Lords. Any the Commons cannot agree upon (so any changes made to the Lords' changes) will go back to the Lords.
5. The Commons is scheduled to consider the Lords' amendments on 17 April. The Lords is scheduled to consider anything outstanding on 23 April. If necessary, the Bill can pass back and forth, but ultimately parliamentary convention means that, if there is no agreement reached, the Commons has its way.

Outstanding issues (i.e. those issues going back to the Commons):

6. There are several issues going back to the Commons. This partly arises because the Government made several changes to the Bill during its passage through the Lords. It partly arises because the Lords defeated the Government 11 times, and it is expected the Government will wish to overturn each of these defeats. Some of the key issues that are going back to the Commons are listed and explained in the following table:

Issue	Explanation and Note
Power to add (or bring back) areas of law into legal aid scope after the Bill is passed	This is very important. It was accepted by the Government in the Lords, so is not under threat. It means there is still the possibility of influencing the Government to change its mind before the Bill is implemented and not take certain areas (e.g. immigration or certain types of immigration case) out of legal aid scope. Even after the Bill is implemented, the Government could relatively easily make such changes.
Restrictions on legal aid for immigration judicial reviews	The Bill retains legal aid for judicial review generally, but restricts this in relation to immigration. Judicial review of removal is to be excluded from legal aid in many cases. The Government amended the restrictions so as to narrow these. A successful appeal or judicial review will not now be a bar in itself on legal aid for a future judicial review. However, what remains in the Bill means that some people who have not had an appeal and/or not had any legal aid (legal assistance) before removal, will continue to be without legal aid to challenge that removal.
Legal aid for victims of domestic violence	In the Commons, the Government amended the Bill to allow legal aid in immigration cases brought under the domestic violence rule (this allows those in the UK on what are sometimes called 'marriage visas' to apply for indefinite leave to remain if their relationship breaks down due to domestic violence – it applies similarly to civil partnerships). The Government extended this in the Lords so that there is similar provision for the abused partners of European citizens to make similar applications under European regulations. However, victims of domestic violence whose immigration status depends on someone with limited leave to remain will not benefit from what has been included in the Bill.

Legal aid for victims of trafficking	The Government has included provision for victims of trafficking to be eligible for legal aid with immigration proceedings, and employment law claims and damages claims against their traffickers. A key issue relating to this is that the provision regarding immigration is limited to where 'a competent authority' has made a decision that there are reasonable grounds for believing the person may be a victim of trafficking (or concluded the person is a victim). This may have particular problems in practice for those who do not wish to be or are not referred to the National Referral Mechanism or where that system is slow.
Legal aid for children	The Government was defeated in a vote that has (for the moment) brought back legal aid for children (under 18s) who are parties or propose to be parties to legal proceedings (including where acting through a litigation friend). This includes a wide range of legal areas, including immigration. <i>It can be anticipated that the Government will seek to overturn this in the Commons.</i>
Welfare benefits	The Government suffered defeats in two votes that together have (for the moment) brought back into scope advice and assistance in relation to reviews and tribunal appeals (both tiers), and higher courts (where legal aid is to be available for representation). <i>It can be anticipated that the Government will seek to overturn this in the Commons.</i>
Mandatory telephone gateway	The Government was defeated in a vote to prevent the introduction of a mandatory telephone gateway to legal aid – i.e. to prevent a requirement that to access legal aid everyone must contact a telephone call centre (and be assessed over the phone); and that some legal aid services may be provided exclusively by telephone. <i>It can be anticipated that the Government will seek to overturn this in the Commons.</i>
Asylum	The Government made some technical changes to ensure that all asylum cases will remain in scope for legal aid – that is claims under the Refugee Convention, Articles 2 & 3 of the European Convention (right to life, and prohibition of torture), the Qualification Directive (which includes a potentially small category of case beyond the former cases) and the Temporary Protection Directive (as yet not triggered).

7. All of these issues will technically go back. However, it is likely that most attention will be given to the issues on which the Government has been defeated and is seeking to reverse these defeats (nb. there are other issues going back, including new issues concerning the Bill's sentencing and punishment provisions).

If the Government overturns its defeats and there are no further changes:

8. The following table shows, in relation to immigration, the areas and types of case for which legal aid will or will not be available if the Government overturns its defeats and there are no further changes to the Bill:

Area/Case-type	Explanation or Note
Asylum	Legal aid is to be retained for asylum claims and appeals. However, if an asylum-seeker's claim is refused (or appeal dismissed) and he or she is no longer pursuing an asylum claim, his having been an asylum-seeker will not in itself provide a gateway to legal aid.
Refugee Family Reunion	Legal aid will not be available.
Asylum Support	Legal aid for advice and assistance (not representation at appeals) will be available where accommodation is required. Asylum support claims where accommodation is not sought will not be eligible for legal aid.
Special Immigration Appeals Commission	Legal aid will be retained for proceedings before the Special Immigration Appeals Commission. This concerns persons facing deportation (or whom the UK Border Agency wishes to deport) which raise (or are said to raise) issues of national security.
Immigration	Legal aid will not generally be available. There will be two exceptions. Certain (not all) victims of domestic violence may receive legal aid for immigration claims and appeals arising from the breakdown of the relationship on which their immigration status depends (but not if their partner has only limited leave). Victims of trafficking may receive legal aid for immigration claims and appeals arising from their having been trafficked (but there may be a difficulty accessing this for some, if a decision via the National Referral Mechanism is required as a gateway to legal aid).

<p>Detention</p>	<p>Legal aid will be available for advice about detention, bail and temporary admission (or release), to apply for bail or temporary admission or for bail hearings.</p> <p>However, the Government does not intend that detention itself should provide a gateway to legal aid, so a detainee may be unable to obtain advice or assistance to deal with the underlying immigration problem that is the cause of his or her detention.</p> <p>Legal aid will be available for unlawful detention claims brought by judicial review (see above); however, damages claims may be excluded if the detention was not deliberately or dishonestly unlawful/abusive.</p>
<p>Judicial review (immigration cases)</p>	<p>Legal aid is to be available for judicial review, but not for certain immigration cases.</p> <p>If, within the previous 12 months, the person has unsuccessfully judicially reviewed or appealed the same or substantially the same issue, legal aid will not be available (even if legal aid was not available – as will be the case in many cases – and the person had no legal advice or assistance).</p> <p>If the person wishes to challenge removal directions within 12 months of a decision that he or she is to be removed, or the conclusion of any appeal against that decision, legal aid will not be available (even if – as will generally be the case – the person had no legal aid for such appeal; and even if the person has had no previous advice or assistance, and/or has had no previous appeal opportunity).</p> <p>However, it is intended legal aid will remain available for judicial review of refusals to treat further representations as fresh asylum claims.</p>
<p>Mixed Cases</p>	<p>Where a case involves two or more issues, for one of which legal aid is available, it may be that the other issue(s) may also be progressed on legal aid – e.g. an asylum-seeker pursuing an appeal on asylum grounds (within legal aid scope) and on Article 8, family and private life grounds (not within legal aid scope).</p>
<p>Exceptional Funding for Complex Cases</p>	<p>The Bill includes provision for exceptional funding where to refuse legal aid would breach European Union or human rights law. This might assist some complex cases where an individual is incapable of achieving justice without assistance; but the Government has made clear it intends that immigration cases will not qualify for this funding.</p>

Ongoing arguments and anticipated problems:

9. A key element of the Government's arguments about removing or restricting legal aid in many areas, including immigration, is that general advice is all that is needed, the areas and issues are not complex, tribunals are 'user-friendly' and it is providing transitional funding to not-for-profit general advice agencies such as CABx. There are several problems with the Government's position, including:

- a. The transitional funding to be available to the not-for-profit sector is small compared to the loss of funding that sector is facing with the legal aid cuts; let alone the cuts in funding from other sources (in particular local authority funding). Moreover, it is time limited; and so the question remains – transition to what? A general ongoing concern for many in this sector is where to source core funding.
- b. Immigration is generally complex. The courts have in recent months described it as "*an impenetrable jungle*" and then questioned whether that description had not "*understated the problems*". The Government frequently says all that is needed is to show one meets straightforward immigration rules. Many of these rules are not at all straightforward, and they are frequently changing. Also, many cases (particularly many of those for which legal aid is currently provided) fall outside the rules.
- c. Immigration is regulated. It is a criminal offence for an advice agency (or anyone acting in the course of a business, whether or not for profit) to provide immigration advice or service unless regulated. Regulation (by the Immigration Services Commissioner) reflects the complexity, and thus is arranged according to various levels – level 1 (initial advice and assistance), level 2 (casework) and level 3 (advocacy at appeals).

CABx are generally exempted at level 1. Very few CABx, and very few not-for-profits generally, are permitted to work at level 2. Level 2 is required to work on family reunion, removal and deportation, those who have entered illegally or overstayed, those applying outside the immigration rules, to assist with lodging notices of appeal (representation on appeal is only permitted at level 3). Judicial review work is not permitted at any level – a solicitor is required. Thus, the key work done on legal aid currently is not permitted to be done by the great majority of the not-for-profits within the regulatory scheme.

- d. Many who have attended immigration tribunals would describe the experience as far from 'user-friendly'; and in any case, however sympathetic an immigration judge may be, he or she is restricted to determining the case before him or her on the basis of the evidence presented. More generally, as the Administrative Justice and Tribunals Council said in its response to the original consultation (emphasis in the original):

75. The AJTC also note the extraordinary complexity of immigration law and takes issue with the assertion that "individuals will generally be able to represent themselves"... these are cases where important issues arise including the right to family life. It is essential that appellants are properly advised and prepared before facing a highly complex process with potentially life-changing consequences.

73. As with other areas of administrative justice, immigration raises matters of fundamental concern. The issues faced by appellants may be more important to them than anything else. At the same time, the system is flawed and mistakes are often made by initial decision-makers. Legal aid in immigration is a cost-effective means of correcting systemic injustice. Furthermore, it is a highly regulated area. Even trained CAB volunteers are only permitted to offer basic advice and form-filling to immigration clients. All other matters require advanced training, qualification and legal skills. Removal of legal aid will leave vulnerable people even more prey to unregulated and illegal advisers than they are already.

77. For all these reasons, the AJTC strongly opposes the removal of legal aid for immigration advice. Further, it recommends that the government should seek savings through the administrative efficiency of getting immigration decisions right first time and finding ways to incentivise improvement in the quality of decision-making more generally.

- e. In response to concerns about the exclusion of legal aid for children in immigration proceedings (the Bill takes no account of age, nor mental or physical illness or disability, in its provisions to exclude legal aid generally in immigration cases), the Government has suggested that children can be assisted by their parent, carer or (if unaccompanied) their social worker. Following regulation being drawn to the Government's attention, it has begun to flirt with the idea of exempting social workers to permit them to do basic level 1 work. At other times, the Government has suggested law centres, *pro bono* representation or the Refugee Council can be expected to plug any gap.

Generally, when addressing concerns about children being without legal aid, the Government has suggested that exceptional case funding will be available. However, it is vital to recall (which the Government has not always made clear when making such general statements about children and funding) that the Government has been explicit (including in relation to children) that exceptional cases funding is not intended to be available in immigration cases.

What happens next and what can be done?

10. The Bill is now returning to the Commons. It will next be formally considered by the Commons on 17 April. Between now and then, there is opportunity for MPs (particularly those on Government benches – Conservative and Liberal Democrats) to speak to Ministers and seek to influence the final decisions that will be made on this Bill. Moreover, concerns expressed now may be influential (even if not immediately leading to changes) in the months ahead as the likely impact of the Bill becomes more fully recognised.

11. An assessment of what not-for-profit immigration services are currently available may be usefully undertaken and drawn to the attention of constituency MPs. What agencies are currently registered or exempted (within the Immigration Services Commissioner's regulatory scheme) to provide immigration advice or services? At what level, in particular how many are at level 2 (or above)? What is the current funding/financial situation facing such agencies? To what extent are they (or their immigration services) dependent on legal aid? What is the future provision of local authority funding – is this being made available for immigration advice or services (and at what regulatory level)? What about other funding, including the Government's transitional funding – is this being made available for immigration advice or services (and at what regulatory level)?

12. Currently, the future looks bleak. The Government says, essentially, 'everything will sort itself out and the voices of concern are in reality voices of (false) doom'. It will be vital to seek to follow developments to see who is right, and ensure that if the so-called doom-mongers appear to be more reliable soothsayers that this neither goes unnoticed nor unannounced. Many advice agencies are facing very substantial funding cuts, and several have closed already. The services these agencies provide stretch across a wide range of social welfare concerns, which are all facing being hit hard by legal aid cuts. There will be pressures in respect of what non-legal aid funding remains to address areas other than immigration. Advice agencies may not be in a position to meet the requirements or regulation (at any, or at higher levels) in relation to immigration; and there is no similar regulation in other areas. There is a real prospect that for many there is no lawful source of immigration advice or services remaining (save asking for assistance from the MP).

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