

ILPA BRIEFING**LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –
House of Lords Amendments*****Government Amendments tabled*****April 2012****Secretary Kenneth Clarke**

To move the following Amendments to the Bill in lieu of Lords Amendments Nos. 3 and 4:–

(a)

Page 3, line 22, leave out subsection (4) and insert –

“() But the Lord Chancellor –

(a) must not give a direction or guidance about the carrying out of those functions in relation to an individual case, and

(b) must ensure that the Director acts independently of the Lord Chancellor when applying a direction or guidance under subsection (3) in relation to an individual case.”.

(b)

Page 3, line 24, leave out “about the carrying out of those functions” and insert “under this section”.

Presumed Purpose

To provide for the independence of the Director of Legal Aid Casework when he or she is making a decision on funding, or carrying out another of his or her functions, in relation to an individual case.

Briefing Note

The Amendment constitutes an improvement on the Bill as it left the Commons, in that the provision at (b) of the Amendment constitutes a new duty in the Bill to ensure the Director acts independently in relation to individual cases. However, this does not address the situation where the guidance or direction to the Director itself compromises the Director's independence by so narrowly or inappropriately restricting a decision he or she is permitted to make in any individual case that may be affected by the particular guidance or direction. This concern was expressed at Lords' Committee, e.g. in the reply of Lord Pannick to the Minister's response to concerns raised in the debate, see the following extract:

Lord Pannick: My Lords, I am grateful to the Minister for the constructive approach that he has taken to the important issues raised by this debate. I would ask him to reflect with the Lord Chancellor on the central points which have been made by noble Lords on all

sides of this Committee, and to whom I am very grateful. A civil servant-the director-is going to have the crucial task of determining who has effective access to justice. The director is going to do that, often in contexts where the Government are the potential defendants. It is then striking, as many noble Lords have pointed out, that Clause 4 says nothing express about ensuring the independence of the director. This is a particular concern, as noble Lords have emphasised, in the light of the uncertainty as to the limits of Clause 4(3).

Clause 4(4), as the noble Lord, Lord Thomas of Gresford, has emphasised, is not sufficient protection because it does not prevent directions from the Lord Chancellor to the director about categories of cases, or indeed as to the general approach to be adopted by the director. As I understood it, the Minister's response to this was that the Government's position today-although the Minister emphasised that that may change-is that they are as keen on independence as everybody else. If I understood him correctly, he said that independence is a fundamental tenet of this arrangement. The position of the Minister and the Government today is that Clause 4 is designed to achieve that objective and therefore these amendments are unnecessary.

The noble Lord will appreciate, and I hope that he will communicate this to the Lord Chancellor, that around this Committee the view is taken that, with great respect, that is not good enough because noble

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Lords prefer an express statement of the basic constitutional principle on which we are all agreed as to independence. Noble Lords prefer the drafting of Clause 4 to contain clear limits on the powers, in this context, of the Lord Chancellor and clear safeguards of the independence of the director. I hope that the Minister will be able to ask his officials to look again at the wording of Clause 4 so as to achieve these objectives, otherwise we will undoubtedly be returning to this matter on Report. For the time being, I beg leave to withdraw this amendment.

Secretary Kenneth Clarke

To move the following Amendments to the Bill in lieu of Lords Amendments Nos. 169 and 240:—

(a)

Page 119, line 2, at end insert —

“Appeals relating to welfare benefits

6A(1) Civil legal services provided in relation to an appeal on a point of law to the Upper Tribunal, the Court of Appeal or the Supreme Court relating to a benefit, allowance, credit or pension under —

(a) a social security enactment,

(b) the Vaccine Damage Payments Act 1979, or

(c) Part 4 of the Child Maintenance and Other Payments Act 2008.

Exclusions

- (2) *Sub-paragraph (1) is subject to –*
- (a) *the exclusions in Part 2 of this Schedule, with the exceptions of paragraphs 1 and 15 of that Part, and*
 - (b) *the exclusion in Part 3 of this Schedule.*

Definitions

- (3) *In this paragraph “social security enactment” means –*
- (a) *the Social Security Contributions and benefits Act 1992,*
 - (b) *the Jobseekers Act 1995,*
 - (c) *the State Pension and Credit Act 2002,*
 - (d) *the Tax Credits Act 2002,*
 - (e) *the Welfare Reform Act 2007*
 - (f) *the Welfare Reform Act 2012, or*
 - (g) *any other enactment relating to social security.”.*

Page 137, line 30, at end insert –

(b)

- “(a) a social security enactment,*
- (b) the Vaccine Damage Payments Act 1979, or*
- (c) Part 4 of the Child Maintenance and Other Payments Act 2008.*

- (2) *In this paragraph “social security enactment” means –”.*

Presumed Purpose

To provide for legal aid for advice and representation in onward appeals in welfare benefits cases (including under the Vaccine Damage Payments Act 1979 and Part 4 of the Child Maintenance and Other Payments Act 2008). Onward appeals are appeals against decisions of the First-tier Tribunal, which can only be brought on points of law and by permission of a court or tribunal.

Briefing Note

This Amendment addresses onward appeals (Lords’ Amendment **169**), but does nothing in respect of advice for welfare benefits claimants before an appeal or for an appeal to the First-tier Tribunal (Social Entitlement Chamber) (see Lords’ Amendment **168**).

The Amendment constitutes a partial response to Liberal Democrat amendments tabled at Lords' Committee which sought to provide for legal aid in relation to onward appeals in relation to welfare benefits and immigration decisions. The Amendment addresses the former, but does nothing about the latter. This failure to address onward appeals in relation to immigration is of especial concern because:-

As was recognized by Conservative, Labour, Liberal Democrat and Crossbench peers at Lords' Report, immigration is a highly complex area; see:

<http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120312-0002.htm#12031237001108>

See also the ILPA one page note on complexity at:

<http://www.ilpa.org.uk/data/resources/14300/12.03.05-ILPA-complexity-briefing-note.pdf>

As was also highlighted in the Lords' Report debate, those who cannot afford to pay for legal advice or representation are peculiarly likely to find themselves at risk of exclusion from any source of legitimate advice or assistance with complex immigration matters by reason of regulation. This matter is also addressed by the short All Party-Parliamentary Group on Migration briefing at:

http://www.appmigration.org.uk/sites/default/files/APPG_Migration-Legal_Aid_BP-Feb_2012.pdf

The Government has recognized that some immigration cases are complex, and in response to Simon Hughes MP indicated that it would consider such cases further: see *Hansard* HC, Report, 31 Oct 2011 : Column 651, *per* Jonathan Djanogly. However, nothing has been forthcoming in relation to such cases.

Worse, having promised to consider such cases further, the Government has since uniquely announced that immigration cases are to be generally excluded from exceptional cases funding (the source of legal aid for complex cases in areas not within legal aid scope, but where the complexity of the case and the incapacity of the individual are such that funding should be available): see *Hansard* HL, Committee, 18 Jan 2012 : Column 668.

The position in immigration cases is that individuals are likely to find themselves with no advice or representation in appeals before the Upper Tribunal, Court of Appeal and Supreme Court, in cases which are only concerned with points of law, and against teams of lawyers representing the UK Border Agency/Secretary of State for the Home Department – including in cases where the appeal is brought by the UKBA/SSHD seeking to overturn the individual's success before an immigration judge on grounds that the individual may simply not understand. This will do nothing for the general integrity of the immigration appeals system.

Please also note ILPA's briefing on a wide selection of the Lords' Amendments for consideration tomorrow:

<http://www.ilpa.org.uk/data/resources/14539/12.04.10-Lords-Amendments.pdf>

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