ILPA BRIEFING

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL –

House of Lords Consideration of:

Commons Disagreements, Reasons, Amendments in Lieu and Amendments to Amendments in Lieu of an Amendment

April 2012

This Briefing addresses three issues, which will come back to the House of Lords on 23 April 2012. Those three issues are:

- Onward appeals (appeals against a decision of the First-tier Tribunal on a point of law before the Upper Tribunal, Court of Appeal or Supreme Court);
- Children; and
- Domestic violence.

The experience and expertise of the Immigration Law Practitioners' Association is in the areas of immigration, asylum and nationality law. This briefing, therefore, concerns immigration-related concerns and opportunities in respect of these three issues.

1) ONWARD APPEALS

The Commons have disagreed to Lords Amendment **169** and **240** (concerning welfare benefits appeals), but propose Amendments **240A** and **240B** in lieu. Amendment **240A** provides as follows:-

> ***240A*** *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 benefit, allowance, payment, credit or pension under –*
> *(a) a social security entitlement,*
> *(b) the Vaccine Damage Payments Act 1979, or*
> *(c) Part 4 of the Child Maintenance and Other Payments Act 2008.*
>
> *...*

ILPA proposes an amendment to Amendment 240A:-

> *In line 4, after "relating to" insert "rights to enter, and to remain in, the United Kingdom; or"*

Purpose

To retain legal aid for immigration appeals on points of law before the Upper Tribunal, Court of Appeal and Supreme Court.

Briefing Note

The Lord Chancellor explained, when addressing the reasons for Commons Amendment **240A** (and **240B**) which provides legal aid for welfare benefits appeals on points of law before the Upper Tribunal, Court of Appeal and Supreme Court:

> "*We did not wish to argue that in such cases, when the whole thing is a point of law, the applicant himself or herself should be expected to represent themselves without legal assistance... We are quite open to the argument for ensuring that we have legal representation when there is a legal issue that we cannot expect a lay person ordinarily to argue.*" (*Hansard* HC, 17 Apr 2012 : Column 226)

When Amendment **74** to retain legal aid for immigration was debated at Lords' Report (*Hansard* HL, 12 Mar 2012 : Columns 69-81) there was general agreement among crossbench, Conservative, Labour and Liberal Democrat peers speaking in the debate that many immigration cases are complex. That debate is available at: http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120312-0002.htm#12031237001119

Lord Bach gave examples from judgments from the Court of Appeal where senior judges have, firstly, referred to areas of immigration law as "*an impenetrable jungle of intertwined statutory provisions and judicial decisions*" and, secondly, questioned whether that was not an understatement. He also drew attention to the view of the Administrative Justice and Tribunals Council that this is an extraordinarily complex area. Lord Pannick referred to some cases being of "*extreme legal complexity*"; and he was supported in his view by Lord Woolf.

Others who spoke in the debate similarly referred to the complexity in this area, and drew attention to the regulation of advice and services which is unique to this area of immigration, which means that general advice agencies, including charities and other not-for-profits, are not free to simply give advice or provide representation if and when legal aid is withdrawn. The All-Party Parliamentary Group on Migration has provided a briefing on this: http://www.appgmigration.org.uk/sites/default/files/APPG_Migration-Legal_Aid_BP-Feb_2012.pdf

As was later discussed, on Amendments **93**, **93A** and **94** on exceptional cases funding (*Hansard* HL, 12 Mar 2012 : Columns 118-132), immigration is also singled out in that the Government's intentions in the narrow drafting of clause 10(3) (on when exceptional case funding is to be provided) include that immigration cases are to be generally excluded from such funding, whatever the complexity of the case and however incapable the individual is of pursuing the matter unaided (see e.g. *Hansard* HL, 18 Jan 2012 : Column 668; and 12 Mar 2012 : Column 129 *per* Lord Wallace of Tankerness).

Accordingly, it is generally acknowledged that immigration raises highly complex points of law, and that those with immigration cases are peculiarly disadvantaged if legal aid is not available because alternative sources of advice and representation are not widely available due to

regulation and the residual route to legal aid in particularly complex cases by way of exceptionally cases funding is intended to be closed in immigration cases.

Such concerns were reflected at Lords' Committee by Amendments **29** and **78** on onward appeals (that is appeals against decisions of the First-tier Tribunal to the Upper Tribunal, Court of Appeal and Supreme Court), which were tabled by Liberal Democrat peers. These sought to address two areas – welfare benefits (**29**) and immigration (**78**) – and were debated on the first day of Committee (*Hansard* HL, 20 Dec 2011 : Columns 1721-1734). Further information on the importance of legal aid for immigration onward appeals is available from ILPA's earlier briefing on Amendment **78**, which remains available at:
http://www.ilpa.org.uk/data/resources/14296/12.03.02-Briefing-on-Amendment-on-Onward-Appeals-Immigration.pdf

On 17 April 2012, the Lord Chancellor also agreed that he would consider how appeals in the First-tier Tribunal raising points of law could be identified, so that legal aid could be provided. Simon Hughes MP asked the Lord Chancellor to ensure that consideration of how to provide access to legal aid for appeals raising points of law (in the First-tier Tribunal and onward appeals) was not restricted to welfare benefits appeals. The Lord Chancellor indicated that further thought would be given to a wider range of areas of law:

> "*On the other matter involving situations in which the state is busily arguing against a successful appellant that some kind of law is involved, I will add that to the list of things we are studying...*" (*Hansard* HC, 17 Apr 2012 : Column 227)

ILPA asks that peers urge the Government to extend their considerations and make good on the general intention that litigants are not left to deal with complex points of law without legal advice and representation by ensuring that the approach developing in relation to welfare benefits (by Commons' Amendments **240A** and **240B**, and the further discussions the Government is to undertake with the Department for Work and Pensions) is also adopted in relation to immigration appeals.

2) CHILDREN

ILPA continues to support Lords' Amendment **171**, to which the Commons has disagreed. ILPA's briefing on this Amendment remains available at:
http://www.ilpa.org.uk/data/resources/14450/12.03.26-Briefing-on-Children-Amendment.pdf

A key issue that arose in the Commons' debate on 17 April 2012, was that (without Amendment **171**) unaccompanied children in the care of local authorities will be without legal aid for non-asylum immigration proceedings – e.g. proceedings dealing with whether their discretionary leave to remain in the UK should be extended after a maximum of 3 years. In relation to this, the Lord Chancellor expressed (at *Hansard* HC, 17 Apr 2012 : Column 232) the same reservation as was stated by Lord Wallace of Tankerness at Lords' Report in response to Baroness Lister of Burtersett that:

> "*Children will rarely be applicants in non-asylum immigration cases...*" (*Hansard* HL, 12 Mar 2012 : Column 131)

ILPA wrote to Lord Wallace of Tankerness on 15 March 2012, following Lords' Report. We explained:

> "*It was indicated that unaccompanied children bring very few non-asylum immigration claims and appeals. This is not correct. It is correct that the majority of unaccompanied children make asylum claims. However, a very large number of these claims are refused, and the children are granted what is known as discretionary leave to remain – for whichever is the shorter period of a grant for three years or until the child is aged 17½ years of age. At this point, the child may (and very many do) apply for further leave to remain. Many of these cases are not brought on asylum grounds. Moreover, where a child is refused asylum, he or she may (usually) appeal. Some of these appeals have sufficient merit on non-asylum grounds (but not on asylum grounds) for those appeals currently to be brought on legal aid, or to be continued on legal aid. There are a substantial number of children in the situations we describe here. As the Bill is currently drafted, those children not applying for further leave on asylum grounds or not appealing on asylum grounds would not qualify for legal aid.*
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> *Moreover, there are some children who never make an asylum claim but are in the care of local authorities and have good non-asylum claims to make. A recent example of such a case, where a good non-asylum claim likely could and should have been made (but was not) while the child was in the care of a local authority and before reaching his 18th birthday is provided by the judgment in D v SSHD [2012] EWCA Civ 39. Children, such as D, abandoned in the UK may fall into this category as may children whose parent dies, and sometimes such children will have been living here for many years (perhaps almost all their lives) before reaching 18 years.*"

It is a matter of considerable concern that the Government continues to fail to appreciate that many children bring non-asylum immigration cases and appeals. This is a matter that needs to be driven home to Ministers, and provision for legal aid needs to be retained for these children.

ILPA's letter to Lord Wallace of Tankerness also highlighted the situation of unaccompanied young people, who continue to be in local authority care with non-asylum immigration problems, beyond their eighteenth birthday.

3) DOMESTIC VIOLENCE

The Government has made further concessions relating to domestic violence. The Lord Chancellor stressed that the Government takes this issue "*extremely seriously*", stating "*...we think we are strengthening the support for victims of domestic violence*" (*Hansard* HC, 17 Apr 2012 : Column 619).

However, although the Government has provided some protection by way of legal aid for migrant victims of domestic violence who are afraid to take action to protect themselves or escape their abusive relationship for fear of the immigration consequences to them, this is restricted to migrants whose immigration status is dependent on their relationship to a British citizen, settled person or person exercising free movement rights.

We ask peers to urge the Government to reconsider its position on migrant victims of domestic violence whose immigration status is dependent on a person with only limited leave to enter or remain. These cases are being removed from the scope of legal aid by this Bill and victims are in a worse position, because without legal aid they are especially likely to remain trapped in an abusive relationship for fear of immigration consequences in respect of which they can obtain no advice or assistance. We do not anticipate the number of such victims to be especially large, but the risks to them are very great, potentially life-threatening. Further information is available from ILPA's briefing on Amendments tabled by Baroness Gould of Potternewton at Lords' Committee:
http://www.ilpa.org.uk/data/resources/14002/11.12.16-ILPA-LASPO-briefing-schedule-1-immigration-domestic-violence.pdf

4) FINALLY – THE MANDATORY TELEPHONE GATEWAY

We also draw attention to Commons' disagreement with Lords' Amendment **24** (to clause 26), by which peers had sought to ensure that the telephone gateway to legal aid would not be mandatory. ILPA continues to support opposition to the introduction of a mandatory telephone gateway for reasons advanced by peers at Lords' Report (*Hansard* HL, 14 Mar 2012 : Column 278), see debate at:
http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120314-0001.htm#12031470001287

For all that Jonathan Djanogly MP, Minster of State, insisted on 17 April 2012 that telephone advice and access to advice via telephone was better than face-to-face (see *Hansard* HC 17 Apr 2012: Columns 202-204), the Government has not shown that this method is suitable for all; and has not answered the concern that in some cases, without seeing the individual's paperwork, it is not possible to identify what legal problem or problems they may have. Such concerns are exacerbated where a person has language difficulties or needs to raise something of particular sensitivity to them; and where the person seeking to provide advice cannot see whether what he or she is saying is being properly understood or whether the person who has contacted him or her is holding something back.

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