# CHANGING AND CHALLENGING TIMES
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## 1. About ILPA

The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office Ministry of Justice, and other consultative and advisory groups.

## 2. Changes discussed in this paper

*Some* of changes that affect foreign nationals in prisons resulting from

- The Legal Aid, Sentencing and Punishment of Offenders Act 2012
- Legal aid contracts
- *Transforming Legal Aid* – the Government proposals
- The Justice and Security Act 2013
- The Immigration Bill session 2013-2014

## 3. The Legal Aid, Sentencing and Punishment of Offenders Act 2012

This was an act both about legal aid and about sentencing.

### *3.1 Conditional cautions.*

A conditional caution is "a caution which is given in respect of an offence committed by the offender and which has conditions attached to it with which the offender must comply."[1]

There are five requirements that must be met before a conditional caution may be given. These include that there is sufficient evidence to charge the offence, that the effect of the conditional caution is explained to the offender, and that the person given the caution is warned that failure to comply with any of the conditions may result in prosecution for the offence.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced foreign offender conditions. These came into effect on 8 April 2013. A seventh edition of the

[1] Criminal Justice Act 2003, s 22 (2).

Director of Public Prosecution's Guidance on Conditional Cautioning was issued that same month.

Foreign Offender conditions can be imposed upon offenders directions for whose removal from the United Kingdom have been, or may be, given under Schedule 2 to the Immigration Act 1971, section 10 of the Immigration and Asylum Act 1999 or against whom a deportation order under section 5 of the Immigration Act 1971 is in force.

They are imposed with the objects of bringing about the departure of the offender from the United Kingdom and/or ensuring that the offender does not return for a period of time.2

Conditions can include that a person:

- Report regularly to an immigration office, reporting centre, police station or other similar place, pending removal;
- Obtain or assist authorities in obtaining a valid national travel document;
- Comply with removal directions and any lawful directions given to effect departure;
- Not return to the UK within a specified period of time, normally five years as set out in the Immigration Rules.

A condition precedent to the giving of a caution set out in section 23 (4) of the 2003 Act is "that the authorised person explains the effect of the conditional caution to the offender".

### *3.2 Rehabilitation of Offenders*

Sections 140 and 141 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 brought into effect from 1 October 2012 by The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 2 and Specification of Commencement Date) Order 2012, SI 2012/2412 (C. 94).

The effect of the changes is to "*exempt the UK Border Agency from the Rehabilitation of Offenders Act* 1974 *enabling them to operate wholly outside the Act and take into account information relation to an applicant's spent and unspent convictions.*"[2] Immigration applications and applications for any other form of British nationality are made exceptions to the way the 1974 Act generally works, and disclosure of spent convictions can be required and spent convictions relied upon.

Section 140 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amends the UK Borders Act 2007 (c.30) to exclude immigration or nationality decision making, including initial decisions and any subsequent proceedings, from the operation of the Rehabilitation of Offenders Act 1974 (c.53). Article 2(f) brings into force section 141(7) to (9) and (12) of the Act. Those subsections make provision about the effect of section 140 in relation to convictions before the commencement date (which is specified by article 3 to be1 October

[2] See the impact assessment at http://www.justice.gov.uk/downloads/publications/bills-acts/legal-aid-sentencing/laspo-rehab-of-offenders-act-eia.pdf See also ILPA's briefing at http://www.ilpa.org.uk/data/resources/14162/12.02.07-Briefing-on-Rehabilitation-of-Offenders.pdf

2012). Section 141(7) provides that section 140 applies in relation to convictions before 1 October 2012 (as well to convictions on or after that date). Section 141(8) provides that this is the case whether or not the person concerned is treated as a rehabilitated person, or the conviction is spent, immediately before 1 October 2012.

The Legal Aid Sentencing and Punishment of Offenders Act 2012 provides for the period of time before a person may become a rehabilitated person and convictions are spent to be reduced in certain circumstances. Certain offences continue never to become spent, including offences for which the person is sentenced to a life term of imprisonment or to a term of more than four years. But in relation to any application for leave to enter or remain in the UK, in connection with any removal or deportation from the UK, or in relation to any British citizenship or nationality application, disclosure of any conviction, however minor and long ago spent, may be requested and required. This applies even to a conviction that was immediately spent at the point of conviction and to convictions when the person was a minor. In relation to these applications or proceedings, a rehabilitated person continues to be treated as someone who has been convicted or charged with the relevant offence, despite his or her conviction having been spent.

The provisions have a retrospective effect. Section 141(9) provides that section 140 does not affect any proceedings begun but not completed before 1 October 2012. Nor does it affect any application for immigration or nationality decisions made, but not finally determined, before 1 October 2012. Nor does it affect the validity of any proceedings, or any relevant immigration or nationality decision which is made before 1 October 2012. The Nationality Instructions continue to deal with the application of Rehabilitation of Offenders Act 1974 in such cases. However, someone whose conviction is now spent, but who applies for British nationality after 1 October 2012, can be required to disclose the spent conviction.

In the absence of the notion of a "spent" conviction, the Home Office is reverting to a free-standing approach that resembles the old "clear periods" approach. It looks like this:

| **Sentence** | | **Impact on Nationality applications** |
|---|---|---|
| **1.** | 4 years or more imprisonment | Application should be refused, regardless of when the conviction occurred. |
| **2.** | Between 12 months and 4 years imprisonment | Application should be refused unless 15 years have passed since the end of the sentence. |
| **3.** | Up to 12 months imprisonment in the last 7 years | Applications should be refused unless 7 years have passed since the end of the sentence. |
| **4.** | A non-custodial offence | Applications should be refused if the conviction occurred in the last 3 years. |

Those with a life sentence are to be treated as falling in category one while those who have exactly four years or 12 months imprisonment are to be treated in accordance with paragraph 1 for a sentence of four years, 2 for a sentence of 12 months (see for example Nationality Instructions, volume 1 Chapter 18, Annexe D. NB – this does contemplate (3.3.3) that there may be circumstances in which a person who has been sentenced to four years or more may nonetheless, exceptionally, be naturalised).

### *3.3 Legal Aid changes in the Act*

The Act sets out which cases will qualify for legal aid. In immigration, it looks like this:

*Cases for which there is still be legal aid* (set out in Schedule 1, Part 1.)

- A*sylum*

  Asylum cases still get legal aid. They are defined as claims under

  1. the 1951 Refugee Convention;
  2. Articles 2 and 3 of the European Convention on Human Rights;
  3. the Temporary Protection Directive (Council Directive 2001/55/EC of 20 July 2001);
  4. the Qualification Directive) Council Directive 2004/83/EC of 29 April 2004).

- *Challenges to Immigration Detention*

  Legal aid for bail, temporary release or temporary admission, including challenges to conditions applied on release. There is not legal aid for the detainee's substantive immigration application.

- *Victims of Domestic Violence*

  Applications for Indefinite Leave to Remain under the domestic violence immigration rule and for European residence permits on the grounds of retained rights of residence arising from domestic violence. This only include peoples with leave under the immigration rules as partners/spouses who have suffered domestic violence, not children or other family members who have suffered domestic violence.

- *Trafficked persons*

  Legal aid is available for an application for leave to enter or remain for someone who is trafficked. However the person must show that there has been a conclusive determination under the "National Referral Mechanism" that they are a victim of trafficking or that there is a 'reasonable grounds determination' that they are a victim and there has been no conclusive determination to say that they are not. A victim of trafficking is not therefore entitled to legal aid before going to the authorities, unless they begin their case as an asylum case. However if they never claim asylum, legal costs paid are restricted to £100 (paragraph 8.80(a)(ii) of the immigration specification).

- *Special Immigration Appeals Commission*

  All proceedings before the Commission.

- *Asylum Support*

  There is legal aid for asylum support cases where accommodation and subsistence are sought. Cases where only subsistence is sought will no longer be within the scope of legal aid. However legal aid is not be available for representation before the First-tier Tribunal (asylum support).

- *Judicial Review*

There is legal aid for judicial review in all areas of law, however there are some exclusions in immigration cases. Where there has been an appeal hearing or determination on the same, or substantially the same, issue within 12 months and the decision was not in favour of the appellant, legal aid is not be available. Similarly where an appeal against removal has been decided within 12 months of judicial review being sought against removal, legal aid is not be available.

*Exclusions*

All other immigration-related matters are excluded from the scope of legal aid. There are no provisions to include children specifically and in immigration cases if an adult is out of scope, a child is also. Thus, for example cases based solely on Article 8 of the European Convention on Human Rights, challenges to deportation, including following criminal conviction, where there is no asylum claim, and entry clearance applications and appeals. There are no provisions to provide legal aid funding where people have mental health or other problems or for those in immigration detention.

*Mixed Cases*

Areas out of scope are not funded where they are part of the same case as a matter within scope.

*Exceptional Cases*

There is a provision to grant legal aid in exceptional cases where failure to provide legal aid would amount to a breach of a person's human rights or a breach of EU law. Very few cases have qualified for funding on this basis.

## 4. Legal aid contracts

New legal aid contracts were let with effect from April 2013. The test for getting a contract was set relatively low and the available ration of legal aid cases ("matter starts") then divided up between those who got a contract. Thus in some areas, such as Manchester, Birmingham and London, legal aid firms have only 100 matter starts in immigration and asylum per office. This affects the number of initial cases they can take on. It means that firms are careful about which cases they take on, as they do not want to waste matter starts. The contracts are for three years. No specific provision was made for prisons.

The 2010 Immigration removal centre contacts continue to be extended. The Government has announced that it will run a tender in late 2014 for new contracts to start on 1 November 2015. At the moment it is still wedded to the idea of exclusive contracts for immigration removal centres and indeed the Legal Aid Agency has only offered the contract for HMP The Verne when it becomes an immigration removal centre to those who already have removal centre contracts. It has reached no final view on prisons. One possibility is that surgeries be provided in prisons with high numbers of foreign national prisoners with immigration cases, but attracting legal representatives to visit prisons where there are few people remains very difficult.

## 5. *Transforming Legal Aid* – the Government proposals

On 9 April 2013, only a few days after the Legal Aid, Sentencing and Punishment of Offenders Act 29013 came into force, the Government made further proposals to cut legal aid. The changes to criminal legal aid and prison came into force on 2 December 2013 and are discussed in the paper by Hamish Arnott of Bhatt Murphy.[3] But there were also a wide range of proposals to cut civil legal aid. Several cuts have been made to the funding for lawyers, including in immigration[4], which is likely to make them more reluctant to take legal aid work. This particularly affects judicial review.

The remaining proposals have been subject to some modifications, but not yet implemented and people are still working to change them. They currently look like this:

- a residence test for civil legal aid claimants;
- a reduction of legal aid for judicial review;
- amendments to the civil merits test to prevent the funding of any cases with less than a 50% chance of success.

### *5.1 Residence test*

Applicants for civil legal aid will be required to satisfy a residence test. They must be lawfully resident at the time of applying for legal aid, and to have been continuously lawfully resident for some 12 month period at some time in their lives before that date.

Exceptions are made for

- cases which broadly relate to an individual's liberty;
- where the case relates to the protection of children[5];
- serving members of the armed forces and their immediate family members[6];
- persons seeking asylum. The exception from the residence test for persons seeking asylum will extend to their getting help with preparing and submitting a fresh claim and the Government has clarified in Annexe B to the consultation response[7] that where the Home Office decides that their further submissions do not amount to a fresh claim, legal aid would continue to be available in respect of a judicial review of that decision (subject to means and merits tests). Such persons will be eligible for legal aid for any legal matter remaining in scope. This could usefully be clarified.
- recognised refugees from 12 months from the date of application for asylum
- babies under 12 months old
- cases under the following paragraphs of Schedule 1, Part 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2013:
  Paragraph 5: Mental Capacity Act challenges
  Paragraph 20: habeas corpus applications
  Paragraph 25: challenges to immigration detention
  Paragraph 26 challenges to refusals to grant temporary admission
  Paragraph 27 challenges to conditions on release from detention
  Paragraph 19 judicial review of the lawfulness of immigration detention
  Striking omissions from this list are paragraph 22: claims in tort or damages claims for breaches of the European Convention on Human Rights paragraph 21 of Part 1

[3] Criminal Legal Aid (General) (Amendment) Regulations 2013 - SI 2790/2013
[4] The Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422).
[5] In the limited sense described below.
[6] At paragraph 3.55.
[7] Paragraph 118.

of Schedule 1 which deals with claims for damages resulting from abuse by a public authority of its position or powers.

- trafficked persons in some circumstances (trafficked persons will be subject to the residence test in respect of applications for judicial review
- survivors of domestic Violence in certain circumstances. Like trafficked persons, will be subject to the residence test in respect of applications for judicial review.
- forced marriage cases
- protection of children cases (essentially protection of children from abuse or harm. There is no general exception for children.
- cases before the Special Immigration Appeals Commission

### *5.2 Removal of legal aid for borderline cases*

It is proposed that there will no longer be civil legal aid where the prospects of success in a case are borderline or less.

## 6. The Crime and Courts Act 2013: section 54 deportation on national security grounds: appeals

Amends section 97A of the Nationality, Immigration and Asylum Act 2002 (deportation on national security grounds: appeal rights) so that if the Secretary of State certifies, in the case of a person who has been convicted and sentenced to more than 12 months in respect of whom a deportation order has been made, that the person's removal from the United Kingdom would be in the interests of national security and would not breach the person's human rights, that person can be removed before the appeal has finished. The person could have to leave the UK to start the appeal, or the appeal could be stopped in mid-stream until the person had left.

## 7. The Justice and Security Act 2013

### *7.1 Transfer of certain exclusion and nationality cases to the Special Immigration Appeals Commission*

Extends the remit of the Special Immigration Appeals Commission to review on judicial review principles:

- Exclusion cases: where the Secretary of State orders the exclusion from the UK of a non-European Economic Area national wholly or partly on the ground that the person's exclusion is "*conducive to the public good*" and there is no right of appeal against this, and
- Cases where the Secretary of State has refused naturalisation or registration as a British citizen. There is no right of appeal in such cases.

Because these cases will be the subject of review in the Commission rather than judicial review in the high court they will be able to be subject to closed material procedures which judicial review cannot.

## 8. Immigration Bill Session 2013-2014

All clause numbers refer to the Bill HC 128 as amended in Public Bill Committee.

### *8.1 Bail (Clause 3 and Schedule 8)*

Clause 3 provides that tribunal procedure rules must make provision for the dismissal without a hearing of bail applications made within 28 days of a previous decision to dismiss a bail application unless the appellant can demonstrate a material change of circumstances. Disputes about whether a change is material are thus substituted for bail hearings.

The proposals demonstrate the increasingly casual disregard for the liberty of persons under immigration control.

The consent of the Secretary of State to a bail hearing will be required if removal directions in force require the person's removal from the UK within 14 days. Nothing in the Bill prevents the Secretary of State from repeatedly setting removal directions, thus ousting the possibility of applying for bail. Those who manage to find legal representation are likely to try to challenge the decision to withhold consent or the lawfulness of detention, substituting judicial review in the High Court for a bail hearing. The clause also bites on cases of bail before the Special Immigration Appeals Commission[8].

### *8.2 Clause 11 right of appeal to the First-tier Tribunal*

This clause will restrict rights of appeal in all cases so that a person can appeal to the First-Tier Tribunal against an immigration decision only on the grounds that the decision breaches their human rights or on "protection" (asylum or humanitarian protection) grounds. No one else will have a right of appeal and the only challenge will be by way of judicial review.

### *8.3 Clause 13 Place from which an appeal may be brought or continued*

This creates a new power for the Secretary of State to certify a human rights claim when the Secretary of State considers that it will not breach the UK's obligations under the Human Rights Act 1998 to remove a person before their appeal has been heard. The Secretary of State will be able to certify a claim *inter alia* ( for the definition is not exhaustive) on the grounds that to remove the person before their appeal has been heard will cause not them serious irreversible harm. In the Bill as presented to parliament only the appeals of those sentenced to at least 12 months in prison or convicted of offences that had caused serious harm could be so certified but the Bill was amended in Committee so that the clause now covers:

- Persons who are not British citizens who are 17 or over, have been
- convicted of an offence punishable by imprisonment and have been
- recommended for deportation by a court at the point of sentencing; or
- A person whose deportation the Secretary of State deems to be conducive

[8] In *Chahal v United Kingdom* (1996) 23 EHRR 188 (paragraphs 58-61), neither judicial review nor habeas corpus were held to provide an adequate basis for challenging a deportation on national security grounds because the closed material could not be disclosed in these proceedings.

to the public good

This raises the prospect of matters that could be resolved through an appeal being displaced onto a judicial review of whether removal would cause "serious irreversible harm". The assumption appears to be that only asylum cases and cases involving torture involve risks of serious irreversible harm but this is not a sustainable assumption given the range of persons, including children, the elderly, ill and dying and the range of interests involved in family cases. The power of one party to a case to certify that case while it is in train is inimical to the notion of equality of arms.

### *8.4 Clause 14* (Article 8 of the ECHR: public interest considerations)

Clause 14 inserts a new part 5A into the Nationality Immigration and Asylum Act 2002: which sets out matters to which the Courts must have regard in Article 8 cases.

The approach taken in the section to those with convictions is to look at length of sentence and say that when it is between 12 months and four years the public interest requires deportation unless particular exceptions apply. Where it is over the four years you need a particular exception and "very compelling circumstances" on top.

One of the exceptions is a relationship with a "qualifying child" or "qualifying partner" where the effect on that child or partner would be unduly harsh. This is the wrong test in the case of a child where, as a matter of law, the courts apply a best interests test. As to partners, the clause looks to whether there are significant obstacles to the couple living in the country to which one is to be deported.

Alison Harvey, Legal Director, ILPA , 13 December 2013