



HOUSE OF LORDS: REPORT March 2012

LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS BILL (BILL 109)

Page 107, line 23, delete entire Clause 126 Conditional cautions: removal etc of certain foreign offenders

Purpose: To remove from the bill the provision for a new type of conditional cautions for certain foreign national offenders. These new conditional cautions have the object of bringing about the departure of the relevant foreign offender from the UK, and of ensuring that the individual does not return to the UK for a period of time.

If this Clause is enacted, foreign nationals who commit one of the wide range of offences that may be disposed of by means of a conditional caution, and who are deemed at that point to have no right to enter or remain in the UK, could be offered a conditional caution that would effect their removal from the UK, and their exclusion for a specified period of time. We have a number of concerns about this proposal, which we set out below.

OUR KEY CONCERNS

- The inadequate provision of immigration legal advice in police stations, currently delivered as a 30 minute conversation via telephone with no sight of papers, carries a serious risk of bypass of due process.
- Without ready access to adequate immigration advice, the threat of prosecution may lead to some foreign nationals accepting the caution without having a full understanding of the consequences of agreeing to this course of action; it may also result in cautions being accepted by foreign nationals who do, in fact, have a strong claim to remain in the UK (e.g. long term UK residents and taxpayers)
- The removal of CPS oversight of the use of conditional cautions (see Clause 125 Conditional cautions: involvement of prosecutors), meaning that these types of caution, the consequences of which are severe, would be imposed on the authorisation of a custody sergeant alone.
- The lack of obvious protection from these provisions for vulnerable adults. Though PACE clearly states that custody officers should call an appropriate adult to support the detainee if there is any doubt about his or her mental state or capacity, there is wide variability in the identification of mental vulnerability in police forces across the country, as well as in the provision of appropriate adult services. Additionally, it is not clear what protection would be afforded other

vulnerable groups, including age-disputed foreign national minors, and foreign national victims of trafficking.

- The difficulties inherent in assessing removability from the UK (in immigration law terms) for custody sergeants in police stations.
- This clause appears to be an attempt to provide the exclusionary provisions found under the Immigration Rules at 320 (7B) but by operating outside the Immigration Rules and outside the protections afforded by appeal provisions relating to deportation (whether court-ordered deportation under Immigration Act (1971) or so-called 'automatic' deportation (UK Borders Act 2007)).
- No indication is given of the timescales that will operate for exclusion from the UK of those foreign nationals so affected, a number of whom will be long term UK residents and taxpayers, with children in the UK.

BRIEFING NOTE

Clause 126 of the bill is proposing the use of conditional cautions to dispose of specific types of criminal offences, divert foreign nationals from prison, and further the removal from the UK of foreign offenders against whom action to remove or deport them from the UK either has been taken or may be taken. This is potentially a very large number of people.

Bail for Immigration Detainees (BID) and Detention Advice Service (DAS) agree with the basic sentiment of diverting foreign nationals from prosecution and the prison estate. For those individuals that have no legal basis to remain here and as a result face administrative removal or deportation from the UK it appears sensible to remove a period of imprisonment, which comes with a financial cost to the state and a personal cost to the individual.

However, it is our opinion that this clause is a misplaced attempt to effect immigration control through the criminal justice system, in the context of already inadequate immigration legal advice within the criminal justice system. The Prison Reform Trust has noted separately in their response to the Green Paper that

“A system that used conditional cautions for people already living and working in the UK, on the condition that they left the country would be racially discriminatory and open to challenge under the Equalities Act”¹.

It appears that the overall effect of the proposal on the use of conditional cautions as a diversion scheme will be to shift responsibility for foreign nationals facing removal to the Home Office at the point they are transferred to immigration removal centres, but without in any way addressing or resolving the underlying immigration issues in individual cases.

¹ Prison Reform Trust, (2011) 'Response to *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*', p: 22

OUR CONCERNS

a. Access to adequate immigration legal advice

The bill at clause 126 states that “relevant foreign offenders” may be given a conditional caution with conditions attached to it that have one or more of the following objects: bringing about the departure of the relevant foreign national offender from the United Kingdom; and ensuring that the relevant foreign offender does not return to the United Kingdom for a period of time. Under clause 126, “relevant foreign offenders” are those that are deemed not to have leave to enter or remain in the UK.

We are extremely concerned that foreign nationals who may be offered these cautions will be unable to access adequate immigration advice which, given the nature of the caution, is essential. An unknown proportion of these foreign nationals will have entered and lived in the UK entirely lawfully, often for decades, as taxpayers, and parents and partners of UK citizens. Any person subject to immigration control (i.e. any non-UK citizen) is theoretically subject to removal or deportation under certain circumstances linked mainly to criminal convictions, but this appears to be an attempt to invite foreign nationals to agree to their removal from the UK in an additional and entirely new circumstance under threat of prosecution and imprisonment.

Criminal solicitors are not qualified to provide immigration advice. Immigration advice is currently available in police stations via the Police Station Immigration Advice Line Service but the ability of advisors to give full and detailed advice on a person’s right to stay in the UK is limited because they are unable to examine documents. Getting good advice in these circumstances is dependent on the ability of the client to remember all the details of their situation, and their willingness to disclose this information in front of a police officer. We have been advised by legal practitioners that the caveat to telephone advice from this service is always to find a local legal advisor to give detailed advice having had sight of case documents. It is not clear what attitude will be adopted by the police and UKBA towards the individual getting appropriate legal advice at some later stage – and before a conditional caution can be issued - if that is what is required and recommended by the telephone legal advice service.

We believe that the chances of getting sufficiently specialist advice in the time available to a telephone advisor working under a fixed fee scheme, unless the merits of the case are obvious, is extremely low. Cases that appear to be borderline to a telephone legal advisor with limited time and no sight of documents, especially those cases that might engage Article 8 human rights issues, are especially at risk of injustice.

Once in an immigration removal centre and able to access limited immigration legal advice under the Detention Duty Advice scheme (DDA), such cautioned foreign nationals may discover that they have unresolved legal issues or a strong claim to remain in the UK that understandably they may wish to exercise. There has to be concern that the threat of prosecution and imprisonment is being used as an incentive to people to make decisions which may be detrimental to or have consequences for their future immigration status, and which may be in breach of their human rights.

b. Human rights claims

Foreign nationals offered a conditional caution may have entered and been resident in the UK quite legitimately for months or years prior to the commission of a criminal offence which they admit to prior to accepting this type of caution with conditions attached that are directed to the object of their leaving the UK. Such individuals may have a strong Article 8 human rights claim to remain in the UK, but it appears that they face referral of their case back to the CPS for consideration of prosecution for their original offence if they later refuse to leave the UK and such a claim is made.

We are not convinced that adequate immigration legal advice to examine human rights claims properly is currently present in police stations, and there is clearly some disincentive for individuals to explore their legal rights if they are to face prosecution after all as a result.

c. Removability

We have concerns about assessments of removability at the time a person is considered for a conditional caution. It is not clear at what point the removability of a “relevant foreign offender” will be examined in the police station, or how custody sergeants will be trained and accredited in immigration legal advice in order to make an evaluation that is a matter of immigration law. It cannot simply be a matter of UKBA informing a custody sergeant that a person is removable. For a removal or deportation from the UK to take place, the individual concerned will need to be in possession of some form of travel or identity document acceptable to the receiving country, and removals to the country in question must not be suspended. In addition, where there are outstanding court hearings relating to immigration issues or family law issues, removal from the UK is not possible. It is not clear whether or not there will be a requirement to refer the issue of removability of an individual to the UK Border Agency before taking the caution process forward.

Those individuals subject to this process will be asked to sign a document containing details of their offence and their consent to being given the conditional caution, including the conditions of the caution, which the bill indicates will include their departure from the UK for a period of time, with no automatic right of return to the UK. Those individuals will then presumably be sent to a removal centre, where it may well transpire on the basis of inadequate assessment that they are not actually removable within a reasonable period of time. For example, individuals not in possession of travel documents will need to be re-documented, and for certain nationalities and for long term UK residents with weak ties to their country of origin this can prove difficult and take several months, or longer, creating a risk of unlawful detention and subsequent litigation.

d. Range of cautionable offences under this clause

The Crown Prosecution Service Guidance on Adult Conditional Cautions² states that the following specific offences may be considered for diversion by way of a Conditional Caution: summary only offences, and either way offences and attempts to commit these offences³. This is a wide range of offences, and raises the spectre of a foreign national

² Available at <http://bit.ly/zrgP7m>

³ Any summary only offence, including: Common assault (level 5), assaulting a police officer (level 5), Section 4 and 4A Public Order Act 1986 (level 5), unlawful taking of a motor vehicle (level 5), interference with

being encouraged - without adequate immigration legal advice - to agree to their removal from the UK for the possession of an amount of a Class C drug consistent with personal use, or for soliciting for the purpose of prostitution. We do not consider removal and exclusion from the UK for an as yet undetermined period to be a proportionate response in these circumstances.

The use of conditional cautions this way appears to be an attempt to provide the same exclusionary provisions which can be found under the Immigration Rules at 320 (7B) but by operating outside the Immigration Rules and outside the protections afforded by appeal provisions relating to deportation, whether court-ordered under Immigration Act (1971) or so-called 'automatic' deportation (UK Borders Act 2007).

e. Vulnerable adults

The policy statement attached to the simple caution pilot for foreign nationals accused of document offences, which operated during 2010-11 and is referred to in more detail below, noted that foreign nationals suspected of document fraud offences who came under the pilot would be interviewed under the provisions of PACE in the normal way. Assuming that the same requirement would apply to the use of conditional cautions we note that the Police and Criminal Evidence Act 1984 (PACE)⁴ requires that

“When the custody officer has any doubt about the mental state or capacity of a detainee, that detainee should be treated as mentally vulnerable and an appropriate adult called”.

It is not at all clear that the needs of foreign nationals with mental health and learning difficulties have been taken into account. It cannot be acceptable for vulnerable individuals to have their alleged offences disposed of in this manner while there is no indication how foreign nationals with mental health problems or learning difficulties will be identified in a police station, especially if they cannot speak English. Moreover, as we have set out above, research has highlighted wide variability in the identification of

vehicles (level 4), Section 5 Public Order Act 1986 (level 3), obstructing a police officer (level 3), drunk and disorderly (level 3), simple drunk (level 1), loitering or soliciting for the purposes of prostitution (level 2 or level 3 if previous conviction). The following offences triable either way specified in the Theft Act 1968: theft, removal of articles from places open to the public, abstracting electricity, false accounting, handling stolen goods, going equipped for stealing etc. The following offence triable either way specified in the Theft Act 1978: making off without payment. The following offences triable either way specified in the Fraud Act 2006: making a false representation, failing to disclose information, fraud by abuse of position, possession of articles for use in frauds, making or supply articles for use in frauds, obtaining services dishonestly. The following offences triable either way specified in the Criminal Damage Act 1971: destroying or damaging property, threats to destroy or damage property, possessing anything with intent to destroy or damage property. The following offence triable either way specified in the Misuse of Drugs Act 1971: possession of any class of drug (consistent with personal use). The following offence triable either way specified in the Road Traffic Act 1988 and Schedule 2 of the Road Traffic Offenders Act 1988: forgery of documents (including offences involving use of driving licence and insurance with intent to deceive). The following offence triable either way specified in the Vehicle Excise and Registration Act 1994: forgery and Fraud (including fraudulent use of excise licence).

⁴ Code C, 'Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers', Section 1D. Available at <http://www.homeoffice.gov.uk/publications/police/operational-policing/pace-codes/pace-code-c?view=Binary>

mental vulnerability in police forces across the country.⁵ As the National Appropriate Network has highlighted, there is also variability in the provision of effective appropriate adult services for vulnerable adults, as currently no statutory body has the responsibility to ensure the provision of this service.⁶

f. Trafficking

Under the UKBA/MoJ/CPS simple caution pilot of 2011, individuals reasonably believed to be involved in human trafficking, either as victim or perpetrator, were excluded from eligibility for disposal of their offences by means of a caution. By contrast, it is not clear what, if any, what groups of individuals may be excluded from eligibility for disposal by means of the conditional caution option proposed in this bill. Both BID and DAS have experience from their legal casework that demonstrates that the fact of trafficking in a case may not be immediately revealed.

A recent Ministry of Justice/UKBA/CPS pilot of the use of cautions with foreign nationals

During a six month period in 2010-2011 the UKBA, Ministry of Justice, and Crown Prosecution Service piloted the use of a simple caution as an alternative to prosecution for foreign national offenders who have no legal basis of stay in the UK, who committed specified travel document fraud offences, and who agreed to be removed from the UK” (emphasis added) .

In a submission to the consultation on the Green Paper, BID expressed concerns about the use of simple cautions while the pilot was in operation. Subsequently, the Immigration and Border Policy Directorate at the Home Office has told BID (letter 16th December 2011) that during the lifetime of the pilot 109 cases (75 cases at Heathrow, 25 cases at Stansted and 9 cases in the East Midlands Region) were adopted for investigation. Five cases met the criteria for the pilot exercise (3 cases in Stansted and 2 cases in the East Midlands Region). Five individuals accepted the simple caution in return for consent to removal from the UK on a voluntary basis. Of those, four individuals have subsequently been removed from the UK, and one case from the East Midlands Region was released on bail pending removal at the time the pilot came to an end.

It is not clear what lessons have been learned from this pilot as to date, for example on evaluating removability in police stations, since none of the agencies involved have responded yet to our requests for sight of their project evaluations. Both the absolute number of people removed, and the proportion of those considered who were eventually removed, seem very low.

⁵ National Appropriate Adult Network (2010) *Appropriate adult provision in England and Wales* – available at <http://www.appropriateadult.org.uk/Text/1273587966852-6106/uploadedFiles/1294311851790-3470.pdf>

⁶ National Appropriate Adult Network (2011) *Response to ‘Breaking the Cycle’* – available at <http://www.appropriateadult.org.uk/uploadedFiles/1298371456364-0184.pdf>

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Bail for Immigration Detainees is an independent charity that exists to challenge immigration detention in the UK through improving access to bail and reducing long term and indefinite detention. We work with asylum seekers and migrants across the entire detention estate and in a number of prisons, to secure their release from immigration detention. In the last year BID helped around 2000 detainees.

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Detention Advice Service (DAS) is an independent legal advice charity set up in 1992 providing immigration advice, support and information to foreign national prisoners and Immigration Act detainees. Based in Hackney, East London, DAS currently works in 14 prisons across London and the south of England, and has assisted more than 3,000 people in the last year alone.