

HOUSE OF LORDS: COMMITTEE

January 2012

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

Lord Thomas of Gresford, Lord Avebury, Lord Carlile of Berriew, Lord Phillips of Sudbury – Amendment 68*

Page 130, line 8, after “*Kingdom*” insert “*to a person who is liable to detention under immigration laws, or*”

Lord Thomas of Gresford, Lord Avebury, Lord Carlile of Berriew, Lord Phillips of Sudbury – Amendment 70*

Page 130, line 39, at end insert—“*“immigration laws” has the same meaning as given in section 33(1) of the Immigration Act 1971.*”

Purpose: To retain within the scope of legal aid cases of persons who are liable to be detained under immigration laws.

Briefing Note

We welcome the Government’s recognition, in their response to the Legal Aid consultation, that cases concerning an individual’s loss of liberty are of a high priority and that Legal Aid should continue to be routinely available in such cases subject to means and merits tests.¹ The Government also deems to be of high priority those cases where the individual faces intervention from the state, or seeks to hold the state to account.

As a result of the prioritisation of cases concerning loss of liberty, the Government proposes that people in immigration detention will continue to be able to access Legal Aid to apply for bail. However, we are extremely concerned that the removal of all immigration claims from scope for Legal Aid funding will mean that in practice large numbers of immigration detainees will no longer have any meaningful opportunity to challenge the Home Office’s decision to hold them in immigration detention.

¹*Proposals for the Reform of Legal Aid in England and Wales: Consultation Response* Ministry of Justice, June 2011, p4

The Home Office's decision to detain a person under Immigration Act powers is a direct consequence of an immigration decision. For example, where the Home Office has made a decision to refuse an applicant leave to remain in the UK, they may then detain them in order to effect their forced removal. This means that in immigration cases, and particularly in removal and deportation cases, the individual's liberty is immediately at stake. Challenging immigration detention is inextricably linked to challenging the immigration decision which is the justification for detention. If all cases of non-asylum claimants who are liable to detention are removed from scope for Legal Aid funding, detainees will, in very many cases, have no means of properly putting forward their immigration case and challenging their detention.

BID has worked with a number of clients who have ultimately been granted leave to remain in the UK despite the Home Office having previously detained them and attempted to forcibly remove or deport them. In many of these cases, the courts have found that it would not be lawful for these clients to be removed from the UK on account of the implications of removal for their or their children's human rights. In this context, BID considers it to be of crucial importance that migrants have the opportunity to challenge decisions by the Home Office to deport or remove them, where they pass the merits test for Legal Aid funding.

Alternatives to Legal Aid funding

The complexity of immigration law and the circumstances of applicants mean that it will not be possible in the vast majority of cases for them to properly prepare and present their own immigration cases. It is unrealistic to imagine that most applicants will have the knowledge of court procedures and case law, and the ability to advance complex legal arguments in an adversarial procedure, which would be necessary for them to properly prepare and present their cases. Their knowledge of English may be very limited. Applicants in detention are, by virtue of their situation, isolated and ill-placed to gather evidence, including witness and expert evidence, to support their cases. We note that the Government would be expertly represented in any proceedings taken by detainees or those liable to detention.

Alternatives to Legal Aid funding do not exist in these cases. Immigration detainees and migrants who do not have the right to work are unable to earn money to pay for legal costs. As immigration advice and representation are regulated, advice cannot be provided by charities or other bodies who do not meet the requirements of such regulation. In immigration cases, there are no alternative means of resolution. Immigration matters cannot be resolved by mediation, ombudsmen, complaint procedures or other dispute resolution methods.

Evidence from BID's casework

BID has assisted a number of clients who have been detained pending their removal or deportation, who have been resident in the UK for twenty, thirty and even fifty years, and face being returned to a country of origin of which

they have limited or no knowledge. They may have come to the UK as young children themselves. Many of these clients have UK citizen partners, children, and grandchildren from whom they face separation if they are removed from the UK.

BID has carried out initial research with a small case sample of 18 clients with 41 children for whom our family team has made bail applications since November 2010. In all these cases, the Home Office was seeking to deport the parents following a criminal conviction. While the parents were detained their children remained in the community, with another parent or in fostering placements. The majority of these families have been in the UK for over ten years, with children being born and brought up in the UK. To date, 16 of these clients have been released on bail, one has been released on temporary admission, and one remains in detention; those released were detained for an average of 236 days. The courts have overturned the deportation orders of four of these clients, while all the other clients for whom we have been able to obtain this data have ongoing immigration cases. Without the availability of Legal Aid to make such challenges, these clients could well remain in detention, separated from their children, or have been forcibly removed from the UK without having an opportunity to challenge the lawfulness of their deportation orders, and without the courts having the opportunity to properly consider the consequences of deportation action for their children's welfare.

Bridget successfully appealed her deport order after being held in immigration detention for five months. She is a single mother with two children in the UK who were aged eight and sixteen at the time when she was detained. While she was in detention, her children were in the care of their very elderly and seriously unwell grandfather, who was struggling to provide them with the care they needed and was hospitalised three times during this period. The son has severe special needs and learning disabilities, including difficulties walking and talking and incontinence. His behaviour deteriorated during his mother's detention, and his older sister left school in order to care for him.

Bridget's daughter, Rachel, made the following comments in an application for leave to remain in the UK:

'I didn't even know it was possible for something like this to happen to me. I know that because my Mum had committed a crime the immigration authorities want to send her back to [country of origin]. But they haven't asked me or my brother what we think about that. If they had I would have told them I have not been to [country of origin] since I was three years old. My friends, my school and my life is here in the UK. My life will be destroyed if I have to go to [country of origin], my chance at completing my education will be over. I want to go back to school and do my GCSEs.

[Since my mother has been detained] Social Services have been involved with my family because they are worried about how [my little brother] is coping. I don't really understand what they plan to do but I think they are worried because he is getting angry and behaving badly..he is confused and

misses his Mum so much. Because my grandfather does not speak English, I was interpreting for him to the housing solicitor, the benefits people, the people from the Council and later Social Services... it has been very stressful. All I really want is for my Mum to come home.'

If Bridget had not been able to access Legal Aid to challenge her removal from the UK, this would have been seriously detrimental to the welfare and best interests of her children, who had been living in the UK for over six years.

Ellen arrived in the UK as a sixteen year old over ten years ago, and gave birth to her son a year later. She was married to the child's father, a British citizen, the following year. She experienced domestic violence at the hands of her husband, and after four years divorced him and was granted leave to remain in the UK on the basis of the domestic violence concession. An injunction prevented her ex-husband from having access to her son on the basis of his aggressive and violent behaviour. Following her divorce, Ellen was convicted of a drugs offence. Ellen pleaded that her crime was motivated by her desire to earn money in order to look after her son, who was seriously ill. The trial judge imposed the shortest possible sentence in view of her family situation.

Following the completion of her criminal sentence, Ellen was detained under Immigration Act powers. During the time she was in immigration detention, her son was in the care of her ex-husband. Her son told Ellen that he had a bag packed in his room, waiting for her to come and get him and take him home, away from his father. In addition, this child had very serious health problems, and was receiving hospital treatment in the form of surgery. After several months in immigration detention, Ellen was released on bail. She has now been granted leave to remain in the UK.

The Home Office also has the ability to separate families by forcibly removing parents and leaving children in the UK, including where these children will be in Local Authority care following their parent's removal. BID knows of cases where there are no known child protection concerns about a detained parent, and yet the UK Border Agency caseowner has sought authority to split a family for removal. In such cases, it appears that this step is being taken despite the profoundly negative impact it could have on child welfare, because it serves the administrative convenience of the Home Office.

In the case of Marlyse Malla, which is before the ECtHR, a Cameroonian woman was forcibly removed from the UK without her one year old baby.² She was detained with her baby, but was separated from her child when she fell ill during her detention and was hospitalised. She was then forcibly removed from the UK without her child, who appears to be in the care of the

²ECtHR 15/9/10 Chamber Fourth Section Application No. 19159/08

father. The statement of facts on this case published by the court states that Ms.Malla 'complains that her daughter was taken away from her without her consent, that her rights to motherhood have been violated and that she has no possibility of future contact with or news of her daughter because her father is a national of the Democratic Republic of Congo whose whereabouts are currently unknown.' Ms.Malla has pursued this case from the Cameroon.

Perverse Consequences

The removal of Legal Aid funding for persons who are liable to be detained under immigration laws could have a number of unintended perverse consequences:

- Detainees may be able to obtain Legal Aid to apply for bail, but will not be able to obtain Legal Aid to resolve their underlying immigration matter if they are released from detention. This could result in people being repeatedly detained, without ever being able to resolve their underlying immigration issue.
- People may be held in immigration detention unlawfully in cases where errors have been made in the Home Office's handling of their immigration case, but will not be able to access Legal Aid to challenge the Home Office's immigration decisions and secure their release from detention.
- There is a risk that the numbers of judicial review applications will increase because claimants are not able to pursue their immigration cases in the tribunal due to the lack of Legal Aid funding. Judicial review proceedings will generally be more costly and time-consuming than tribunal proceedings.
- There may be an increase in the numbers of individuals applying for asylum because they cannot get Legal Aid for immigration applications and deport appeals.

For further information please contact:

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