

HOUSE OF LORDS: COMMITTEE

January 2012

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

Baroness Gould of Potternewton – Amendments 69A* and 70A*

Purpose: To preserve Legal Aid for children who are a party to any legal proceedings. To ensure that people who have experienced gender-based violence are able to access immigration advice and representation so that this vulnerable group are not placed at risk of further violence and abuse. To protect others whose ability to represent themselves in an immigration law issue is impaired because of their age, illness or disability. The amendment would also confer a power to specify other classes of person in regulations. The “specified person” definition is modelled on the definition in paragraph 3(7), but also includes children, victims of trafficking and victims of gender-based violence (men as well as women).

Briefing Note

In its response to the Legal Aid consultation, the Government states that one of the criteria for deciding whether to keep cases within the scope of Legal Aid is ‘the litigant’s ability to present their own case’¹ taking into account ‘the type of forum in which the proceedings are held, whether they are inquisitorial or adversarial, whether litigants bringing proceedings were likely to be from a predominantly physically or emotionally vulnerable group.’

It is wholly unrealistic to imagine that children and vulnerable adults will have the knowledge of legal procedures and case law and the ability to advance complex legal arguments in an adversarial procedure which would be necessary for them to properly present their immigration cases. We note that the Government would be expertly represented in any proceedings taken by children and vulnerable adults.

Alternatives to Legal Aid funding do not exist in these cases. Children and migrants who do not have permission 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

¹ *Proposals for the Reform of Legal Aid in England and Wales: Consultation Response*
Ministry of Justice, June 2011 p11

means of resolution. Immigration matters cannot be resolved by mediation, ombudsmen, complaint procedures or other dispute resolution methods.

Children

We are gravely concerned by the impact which removing all immigration cases from scope for Legal Aid funding will have on children in migrant families, and migrant children who come to the UK alone. In its response to the consultation on Legal Aid reform, the Government revised its proposals in relation to family law in recognition of the fact that 'children are not able to represent themselves'.² It is also the case that children are not able to represent themselves in immigration proceedings; Legal Aid should therefore be provided to them where they pass the merits test.

BID has particular experience of working with children in two situations:

- Children who are detained with their families while the Home Office seeks to forcibly remove them from the UK;
- Children who are separated from their parents when their parents are held in immigration detention, and/or removed from the UK without them.

In both cases, there will be instances where the child needs to be represented separately.³ If no publicly funded legal advice or representation is available to these children, they could well be forcibly removed from the UK or separated from their parent without having the opportunity to properly examine or present their immigration cases.

Children detained with their families for removal

BID and The Children's Society carried out detailed research into the cases of 82 families who were detained during 2009.⁴ We found that 48% of the 143 children in the study were born in the UK. 19 families, 23% of our research sample, had been in the UK for over seven years at the time when they were detained. Such cases raise serious issues in terms of Article 8 of the European Convention on Human Rights (the right to family and private life), international and domestic obligations concerning the best interests of the child⁵ and the safety and welfare of children.⁶ It is therefore vitally important that children whose cases pass the merits test have a meaningful opportunity to challenge decisions by the Home Office to forcibly remove them from the UK which may not be lawful.

² *Proposals for the Reform of Legal Aid in England and Wales: Consultation Response* Ministry of Justice, June 2011, paragraph 50, page 21; Bill Schedule 1, Part 1, paragraph 13.

³ See for example *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

⁴ *Bail for Immigration Detainees and The Children's Society 2011 Last resort or first resort? Immigration detention of children in the UK*

⁵ Article 3.1, 1989 UN Convention on the Rights of the Child.

⁶ Section 55, Borders, Citizenship and Immigration Act 2009.

Families separated by detention and removal

From September 2008 to June 2011, BID's family team worked with 64 families where children who were not detained had been separated from their parent (in many cases their primary carer) who was in detention. In most cases, the parent had committed a criminal offence, following which the Government was seeking to deport them.

In many of these cases, the children in these families were either born in the UK or had lived in the UK since they were very young. In some cases, they required legal representation in order to pursue their own immigration matters. Children in this situation may also require representation to challenge decisions by the Home Office to forcibly remove their parent from the UK without them. We have carried out more detailed data collection on the cases of 18 clients with 41 children for whom we have made bail applications for since November 2010. In 15 of these cases, children in the family have been granted British Citizenship, four are EEA nationals, one has leave to remain in the UK and five have applications pending.

In a number of the 64 cases mentioned above, the Home Office has sought to separate the family by forcibly removing a parent without their children. However, due to legal challenges to these decisions, a parent's detention only resulted in their forcible removal from the UK in one of these 64 cases; in that case, the parent was removed without their children.

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.

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, and who had been living in the UK for over six years. 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.'

It is of vital importance that children in such situations are able to access Legal Aid, so that their welfare and best interests are properly considered when decisions are made which affect them.

Vulnerable adults

Over the last ten years, BID has worked with considerable numbers of vulnerable adults in immigration detention, including physically and mentally ill detainees and victims of trafficking. BID has worked with a number of vulnerable adults who have ultimately been granted leave to remain in the UK despite the Home Office having previously detained them and attempted to forcibly remove them from the UK. Access to legal representation is an essential safeguard, without which there is little to prevent vulnerable adults being detained and forcibly removed from the UK, including in cases where removal is not lawful.

This point is illustrated by research carried out by the Poppy Project, a support service for female victims of trafficking. Their 2008 study found that 55 of their clients had been held in immigration detention or received custodial

sentences prior to joining the project or during their time as Poppy service users. 10 of these 55 women were trafficked more than once, after being returned to their countries of origin by the UK authorities.⁷ An asylum claim will not be the appropriate route to protection for a significant proportion of victims of trafficking. It is of crucial importance that this vulnerable group are able to access publicly funded legal representation in order to challenge decisions by the Home Office to forcibly remove them from the UK.

It is likely that the claims of vulnerable adults will be particularly complex, and that they will often require evidence from independent medical specialists, and expert reports concerning their country of origin. Without access to Legal Aid, these people will be unable to pay for such reports.

We are also extremely concerned that the removal from scope for Legal Aid funding of immigration claims by vulnerable adults will mean that in practice vulnerable adults in detention will no longer have any meaningful opportunity to challenge the Home Office's decision to detain them. The LASPO Bill would retain bail applications by detainees within scope for Legal Aid funding. However, in practice, 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. Challenging immigration detention is therefore inextricably linked to challenging the immigration decision which is the justification for detention. If all immigration claims by vulnerable adults are removed from scope for Legal Aid funding, vulnerable adult detainees who are not asylum applicants will, in most cases, have no means of properly putting forward their immigration case and challenging their detention.

For further information please contact:

Sarah Campbell, Research and Policy Manager, Bail for Immigration Detainees, sarahc@biduk.org, 0207 650 0727, Mobile: 07949 404505

⁷ Stephen-Smith, S. 2008 *Detained: Prisoners with no crime* Poppy Project, Eaves Housing for Women