

**HOUSE OF LORDS: COMMITTEE**

**January 2012**

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

**Lord Thomas of Gresford, Lord Dholakia, Lord Carlile of Berriew, Lord Phillips of Sudbury - Amendment 55\***

**Purpose:** To remove the immigration-specific exclusions of civil legal aid for judicial review claims.

**Lord Thomas of Gresford, Lord Dholakia, Lord Carlile of Berriew, Lord Phillips of Sudbury – Amendments 56\* to 59\***

**Purpose:** To narrow the immigration-specific exclusions of civil legal aid for judicial review.

**Briefing Note**

In its response to the Legal Aid consultation, the Government set out its intention to remove Legal Aid for judicial reviews in certain immigration and asylum cases.<sup>1</sup>

These types of judicial reviews are directly concerned with the loss of an individual's liberty, interventions they face at the hands of the state, and holding the state to account – all matters which the Government has identified as being of a high priority for Legal Aid funding. Under the current proposals, people could be held in immigration detention unlawfully in cases where errors had been made in the Home Office's handling of their immigration case - but would not be able to access Legal Aid to challenge their removal from the UK or secure their release from detention.

In its response to the Legal Aid consultation, the Government states that it is removing Legal Aid for judicial reviews in particular immigration and asylum cases in response to recommendations from the Judge's Council.<sup>2</sup> However, the stated aim of the Judge's Council's proposals was to exclude only unmeritorious cases from Legal Aid funding. But the Government now

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<sup>1</sup>*Proposals for the Reform of Legal Aid in England and Wales: Consultation Response* Ministry of Justice, June 2011, paragraph 16, p13

<sup>2</sup>*Proposals for the Reform of Legal Aid in England and Wales: Consultation Response* Ministry of Justice, June 2011, paragraph 13, p13

proposes to remove Legal Aid for all immigration judicial reviews except cases where the Home Office has not acted within a year of a final decision of a court or tribunal, regardless of the merit of the case. We are gravely concerned that this would lead to people being unlawfully detained and removed from the UK, as they will not be able to access Legal Aid to challenge the Home Office's decisions.

### **Case examples which demonstrate the need for Legal Aid funding**

BID has worked with a number of clients who have been held in immigration detention, and whom the Home Office has sought to forcibly remove from the UK, but who have been granted leave to remain after challenging their removal by bringing judicial review proceedings. For example, in research which BID and The Children's Society carried out with families detained in 2009, we collected post-detention data on 30 families. In the cases of three families who lodged judicial reviews in detention, it was subsequently found that errors had been made in the way their cases were considered, so they needed to be looked at again in full.<sup>3</sup>

A Sudanese mother with three children contacted BID in 2009, to seek our assistance with an application to be released from immigration detention. The family were detained for four months, and eventually released from detention on temporary admission. The client's case was based on her fear of return to Sudan – she reported that her husband had disappeared following political activities which drew disapproval from the government, and that she was followed, threatened and had her house raided by government security forces.

The mother had received poor quality legal advice before being detained, and her asylum claim had been refused. The fourteen year old daughter in the family also claimed asylum in her own right during the family's detention, on the basis of her fear that she would experience female genital mutilation if she was returned to Sudan. She was interviewed alone, without any appropriate adult present; the official considering her case interviewed her for 'about ten minutes', and subsequently refused her claim and certified it as clearly unfounded. Attempts were made to remove the family during their detention, which included the use of force against the mother at the airport; their removal was only prevented by judicial review proceedings. Several months after being released from detention the family was granted leave to remain in the UK.

A recent report<sup>4</sup> on enforced returns to the Democratic Republic of the Congo (DRC) underlines the fundamental importance of access to Legal Aid funding for judicial reviews challenging removal which pass the merits test. The report

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<sup>3</sup>Bail for Immigration Detainees and The Children's Society 2011 *Last resort or first resort? Immigration detention of children in the UK*

<sup>4</sup> Ramos, C. (2011) 'Unsafe Return: Refoulement of Congolese Asylum Seekers'. London: Justice First. [http://ncadc.org.uk/world/wp-content/uploads/2011/11/unsafe\\_return.pdf](http://ncadc.org.uk/world/wp-content/uploads/2011/11/unsafe_return.pdf)

revealed that those refused asylum and forcibly returned to the DRC by the Home Office were tortured, raped and imprisoned. Six children were imprisoned for periods between two days and up to three months, and a number of children experienced separation from their parents after being returned. The report sheds light on the serious problems with the government's monitoring of the situation in the DRC, the operational guidance notes and country of origin information used in deciding asylum cases.

Proper access to judicial oversight of decisions to remove a person from the UK, where the case passes the merits test, is an essential safeguard. Without this there is little to prevent vulnerable people being detained and forcibly removed from the UK, including in cases where removal is not lawful. This point is further 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.<sup>5</sup>

### **Alternatives to Legal Aid funding**

The Government has identified the following criteria as relevant to what should remain in scope for Legal Aid:

- the individual's ability to present their own case;
- the availability of alternative sources of funding;
- and the availability of alternative means of resolution.<sup>6</sup>

It is unrealistic to imagine that applicants, who may well speak limited English, 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. We note that the Government would be expertly represented in any proceedings taken by applicants.

Alternatives to Legal Aid funding do not exist in these cases. Asylum seekers and undocumented migrants 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.

For further information please contact:

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<sup>5</sup> Stephen-Smith, S. 2008 *Detained: Prisoners with no crime* Poppy Project, Eaves Housing for Women

<sup>6</sup> *Proposals for the Reform of Legal Aid in England and Wales: Consultation Response* Ministry of Justice, June 2011, paragraph 6, p11