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HOUSE OF LORDS: COMMITTEE **January 2012**

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

Lord Ramsbotham – Amendment 60

Schedule 1, Page 127, Line 33, after *"deliberate"* insert *", unlawful"*

Lord Ramsbotham – Amendment 61

Schedule 1, Page 127, Line 39, at end insert—*""harm" includes loss of liberty;"*

Purpose: To preserve Legal Aid for claims in which individuals seek to hold the state to account for unlawfully depriving them of their liberty.

The first amendment proposed would make it clear that the unlawful deprivation of an individual's liberty by the State is considered a serious abuse of power that justifies Legal Aid.

The second amendment proposed would make it clear that the loss of one's liberty is considered sufficient harm to merit the provision of Legal Aid.

Briefing Note

The consultation that preceded this Bill proposed to remove Legal Aid for claims concerned primarily with recovering damages, except for cases that concern a significant breach of human rights, or an abuse of position or power, and claims arising from allegations of abuse or sexual assault.

Paragraph 19 of Schedule 1 to the Bill concerns claims for damages brought against the State for abuse of power, and provides that Legal Aid will only be available for claims arising from acts or omissions that were "deliberate or dishonest" and caused "harm" to a person or property.

The Bill does not define what "deliberate" or "harm" mean. The concern is that the Ministry of Justice will seek to interpret "deliberate" as more than unlawful, and "harm" as injury. If so, this would result in the exclusion of most claims for damages for unlawful detention or false imprisonment brought by individuals who lost their liberty as a result of the unlawful acts of the immigration authorities or the police. In practice this would mean that the

unlawful detention cases listed in this briefing below would not secure funding, thus leaving those affected without any meaningful redress.

It is wholly unrealistic to imagine that detainees (or ex-detainees) would 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 represent themselves in unlawful detention actions. We note that the Government would be expertly represented in any proceedings taken by detainees or ex-detainees.

Alternatives to Legal Aid funding do not exist in these cases. Detainees 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. People who are or have been unlawfully detained cannot be meaningfully compensated for this through alternative dispute resolution methods, mediation, ombudsmen, or complaint procedures. Bringing such claims under a Conditional Fee ("no win no fee") agreement would be beyond most people's means now that legal expenses insurance premiums are no longer recoverable. Without access to Legal Aid, there would therefore be no meaningful mechanism for holding the State to account for infringements of such a fundamental right.

A British man spent 19 months in immigration detention, pleading with the Home Office that he was British, but lacking the documents to prove it. His deportation appeal (for which he was unable to secure representation due to cuts in immigration Legal Aid) was dismissed. A solicitor finally gave him the benefit of the doubt and wrote to the Home Office asserting that the onus was on them, as detainers, to prove that he was not British. Within 2 days of the letter he was released. At this point, under the new proposals, no further Legal Aid would have been available because it seemed as though it had all been an inadvertent and honest mistake, and no harm had been caused beyond a loss of liberty. After many hours of legal-aid funded work, however, evidence of prolonged deceit on the part of the Home Office emerged, and substantial damages were paid.

The same thing then happened to his brother, two years later, who was detained for 8 months despite being British. The hearing of the brother's case will take place in February 2012.

In the case of *Sino v SSHD [2011] EWHC 2249 (Admin),* the claimant was held in immigration detention for four years and eleven months, after being given a six month prison sentence for theft of an oyster card and a return to custody order. His solicitors took an unlawful detention action in the High Court. The court ordered that he be released from detention, and held that there was no prospect that he would be removed from the UK within a reasonable time and therefore no power to continue his detention. The entire period of his immigration detention was found to be unlawful. Philip Howell

QC, the judge in the case, found that '...the basis on which the Secretary of State had sought to justify the Claimant's ongoing detention was based on factual assumptions which were not true.' He records concern at an 'apparent lack of care when producing, the witness statements filed on behalf of the Secretary of State'. The decision to detain the claimant was influenced by an unlawful secret policy of automatically detaining foreign national ex-offenders which was operated by the Home Office between April 2006 and September 2008.

Underthe proposalsoutlined in the LASPO Bill, the claimant might well not have been able to access Legal Aid to challenge his detention, as the Home Office may have honestly believed that they would be able to remove him within a reasonable period, albeit that they were ultimately shown to be mistaken in this belief.

In the case of *Abdi&Ors v SSHD [2008] EWHC 3166 (Admin)*, the Administrative Court found that the Home Office'spolicy ofautomatically detaining foreign national prisoners pending deportation proceedings was unlawful. One of the claimants in this case, Walumba Lumba, went on to be held in immigration detention for 54 months.

During the course of the litigation, it was revealed that during the period when the claimants were detained, the Home Office was operating a 'near blanket ban on release [from immigration detention of foreign national prisoners (FNPs)] regardless of whether removal can be achieved and the level of risk to the public linked to the nature of the FNP's original offence.'[1] This policy was secret; the Home Office's public policy was that there was a presumption in favour of release of foreign national prisoners in immigration detention. In the case of *Abdi&Ors*, the court also found that the fact that Home Office had operated an unpublished for a period of eighteen months rendered the policy unlawful. However, without the many hours of legal-aid funded work which were carried out in this case, it would not have emerged publicly that Home Office was operating a secret policy which amounted to a 'near blanket ban on release' for a significant number of people who were, in fact, being detained unlawfully.

Under the proposals outlined in the LASPO Bill, the claimants might well not have been able to access Legal Aid to challenge their detention, as the considerable deliberate deceit on the part of the Home Office which was revealed during the litigation was not known to the claimants or their representatives until well into the proceedings.

For further information please contact:
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[1]Walumba Lumba v SSHD; Kadian Mighty v SSHD [2011] UKSC 12, paragraph 5