Briefing for oral questions, on 'Impact of cuts in legal aid on access to justice', House of Lords 3rd June 2013, from Bail for Immigration Detainees

LASPO cuts to legal aid – impact on access to justice for immigration detainees

Under the Legal Aid, Sentencing & Punishment of Offenders Act (LASPO) which came into force on April 1st 2013, a number of significant changes to the scope of legal aid were introduced by the coalition government with the intention of achieving £320m savings per annum in the legal aid budget 2014 – 15.

For immigration detainees it is already becoming clear that these cuts to legal aid will increase time spent in detention for those without financial means, as a result of:

- No legal aid now being available for work on the underlying immigration case that has led to detention, since all general immigration matters are now out of scope
- No legal aid for deportation appeals. This is despite the fact that pre-LASPO, the Independent Chief Inspector of Borders and Immigration found that between February 2010 and January 2011, 32% of appeals lodged by foreign national ex-offenders against UKBA's decision to deport them were successful, in other words there were grounds to overturn the decision to deport.
- Those in detention can currently still apply for legal aid for applications for release (bail and TA), and for challenges to legality of ongoing detention. However, legal providers are now severely hampered in doing this work without the ability to consider the underlying immigration case.

The impact on access to justice as a result of the LASPO cuts is already clear in BID's caseload. Foreign nationals of modest means who have lived in the UK, sometimes for decades, or who came to the UK as small children, and who face deportation as a result of conviction (sometimes for relatively minor crimes), are now simply unable to challenge their removal. A significant proportion of BID's clients fall into this category.

Removing legal aid from deportation work does not make it easier to deport long term residents with strong private and family life connections in the UK. As BID's legal work has demonstrated, such individuals ("quasi-nationals") are often unremovable due to weak links to their country of origin. The removal of any meaningful access to justice in deport cases simply means many of these individuals remain in detention for extremely long periods, often separated from their families.

Further drastic cuts to legal aid are now being proposed in 'Transforming Legal Aid'

These further reforms are being proposed with the intention of i) realising quick cost savings of only £4m] for civil legal aid, and ii) "restoring public confidence in legal aid" by giving it only to those with a strong connection to the UK. This will apparently be achieved through, among other things:

- The transfer of the financial risk of work on Judicial Review cases to lawyers unless the case goes to full hearing, despite the fact that many Judicial Review cases are settled before a full hearing and public benefit is achieved as a result.
- The introduction of a two-limbed residency test for foreign nationals in need of legal aid, with no exception for children, victims of trafficking or domestic violence, those held in immigration detention for administrative convenience, and those seeking to challenge unlawful detention and unlawful treatment while in detention. This will make Judicial Review of any detention-related matter impossible for detained foreign nationals with no means.

Access to justice will be unachievable for detainees with no financial means

For many if not most immigration detainees these changes will remove at a stroke any possibility of meaningful access to justice for those with viable and arguable cases unless they have the means to pay for advice and representation. There are no adequate alternatives for immigration detainees (such as mediation), so foreign nationals with both viable and unviable cases will have to do the best they can to bring their own case before tribunals and courts in this complex, rapidly changing area of law.

> The residence test will therefore leave foreign nationals held in detention for the administrative convenience of the Secretary of State with no legal aid for the immigration case underlying their detention, for the fact of their detention and any applications for their release from detention, nor for challenging their ongoing detention if they are not removed within a reasonable period or for any unlawful treatment while detained. This is despite the fact that around 40% of detainees are currently released to the community, their detention having served no purpose, and 32% of deport decisions being overturned at appeal.

Transfer of financial risk to lawyers for permission stages of Judicial Review work – severe impact on access to justice for detainees – Home Office and agents can act with impunity

Both the transfer of financial risk for permission-stage Judicial Review work (a powerful disincentive for lawyers to take on this work) and the application of the proposed residency test to immigration detainees will mean that the Home Office /UKBA and its agents can now act with near complete impunity in cases where detention and removal is involved. These two proposals in 'Transforming Legal Aid' will severely affect the ability of immigration detainees to exercise their rights in any meaningful way.

Judicial review is an essential tool for immigration detainees in two ways.

- To challenge their ongoing detention and conditions of their detention. This is especially important where people have been held for months or years and are not removable, are separated from their children by detention, or are severely mentally ill and are not receiving adequate treatment.
    - For example, the Chen case on use of force against children & pregnant women. Since 2001, BID has been representing families and pregnant women in bail applications, and carrying out policy advocacy on their behalf. Most recently, we have been involved in advocacy and litigation on the issue of use of force against children and pregnant women. Prior to the litigation outlined below, BID had been pressing the Home Office to publish a policy on use of force against children for over 18 months, and they had failed to do so. This placed children subject to immigration enforcement action at risk of serious harm. Despite calls by HM Prisons Inspectorate and the Home Affairs Select Committee for an end to this practice, and despite having no published policy governing the use of force, the Home Office continued with the practice of using force against children and pregnant women to effect removals. This situation only changed as a result of a judicial review application in the case of *R (on the application of Yiyu Chen and ors) v Secretary of State for the Home Department* CO/1119/2013. BID provided a witness statement for this case. Shortly before a hearing regarding an extension of this injunction, the Home Office re-published an old policy prohibiting the use of force against children and pregnant women save where absolutely necessary to prevent harm.
    - At the time of writing, the High Court has on two occasions found that BID's separated family clients were unlawfully detained. Despite the unlawful practices

highlighted by the Administrative Court in those cases, many of the flaws which were revealed continue to be features of further cases dealt with by BID's legal caseworkers . In addition, BID is aware of a number of separated family cases where legal proceedings were commenced but where the Border Agency has paid tens of thousands of pounds in compensation prior to the case reaching trial.

- To challenge the inertia of Home office caseowners. Judicial Review is an essential casework tool now required to force the Home Office (UKBA) to make a decision, or comply with the law or its own guidance and policies. A senior immigration solicitor has estimated that up to one third of immigration applications for Judicial Review are to challenge potentially unlawful delays in UKBA decision making. For immigration detainees, pre-action letters are often the only step left to force the Home Office (UKBA) to take steps required by its own policy. The Home Office routinely takes months to grant Section 4 (1)(c) bail accommodation to enable detainees to lodge an application for release on bail, when its own policy states this process should be completed within a couple of weeks. As a result the bail cycle is now months rather than days, adding hugely to the costs of detention. The Home Office (UKBA) itself has acknowledged to BID that only a pre-action letter will force them to issue bail accommodation after significant delay.

The residence test – fails to recognise strong connections to the UK, leaves vulnerable and mistreated with no remedy for loss of liberty, trafficking

- The consultation document states "We are…clear that someone should have a strong connection to the UK in order to benefit from civil legal aid" (at para 2.5). BID has evidence to the contrary which shows that families and children who are not lawfully resident may have extremely strong connections to the UK, and rights to private and family life under Article 8 of the European Convention on Human Rights. BID works with large numbers of families where parents have lived in the UK for a decade or more, and children have been born and brought up here. It is common for us to deal with nuclear families in which some members are British Citizens and others are not lawfully resident in the UK. Children may not be lawfully resident in the UK, but may have rights to British Citizenship as a result of their birth in the UK and length of residence.
- The proposed residence test, and subsequent ministerial statements show callous indifference to vulnerable foreign nationals who may have been treated unlawfully or who simply have not been lawfully present in the UK for the required 12 months. BID caseworkers encounter trafficking victims in immigration detention. Under the proposed residency test, victims of trafficking in detention would not be eligible for legal aid funding for advice on their case or to challenge their ongoing detention
- The residence test would leave detainees unable to access legal aid to apply for release on bail, regardless of how long they had been detained or their circumstances. For example, Christine who was detained for 160 days before she was released on bail by the Tribunal. Her seven year old son Daniel, who was being cared for by his grandfather during her detention, has very limited motor control and severe behavioural problems. Her son was made subject to a child protection plan during his mother's detention and was deemed to be at risk of emotional and physical harm and referred to Child and Adult Mental Health Services. Under the proposed residence test, this mother would not have been able to access Legal Aid to apply for bail.

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