

ILPA information sheet

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Legal Aid Bill 2

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On 21st June, the Government published the Legal Aid, Sentencing and Punishment of Offenders Bill. The Bill contains many measures relevant to criminal justice. However, a large part of the Bill is concerned with Legal Aid – including Legal Aid in immigration cases. This information sheet provides information about what the Bill would do about Legal Aid in immigration cases. See also the “Legal Aid Bill” information sheet.

Legal Aid in immigration cases

Generally, the Bill would mean that Legal Aid would no longer be available for immigration cases except:

- asylum cases
- challenges to immigration detention
- advice on claims for asylum support (but not representation at appeal)
- some judicial review cases (but these are subject to specific restrictions)

Importance of cases where life and liberty is at stake

The Government says that particularly important are cases where a person’s life and liberty is at stake (i.e. is at risk). On the day the Bill was published, the Lord Chancellor told the House of Commons that:

“...we will retain legal aid in cases where people’s life or liberty is at stake...” (Hansard HC, 21 Jun 2011: Column 166)

The Bill does not, however, do what the Lord Chancellor says. Unlike other decisions by the state, immigration decisions immediately put a person’s liberty at stake. When a decision is taken to remove or deport someone, he or she may immediately be detained because of that decision. Immigration cases in the UK are, therefore, cases where people’s liberty is at stake, including cases where there is no asylum claim.

Immigration decisions may be made without warning

In very many cases immigration decisions are made without any warning to the person against whom the decision is made. This includes decisions made against people who are lawfully in the UK. A shocking example was described by Lord Justice Sedley in the Court of Appeal in the case of two people lawfully pursuing their studies in the UK:

“Neither Ms Pengeyo nor Mr Anwar received anything remotely resembling a hearing, or even a notice of what was contemplated, from the Home Office. Each was presented out of the blue with a decision – as it turned out, a wholly unfounded one – that they had been guilty of obtaining leave by deception...” (Anwar & Ors v SSHD [2010] EWCA Civ 1275)

These decisions made Ms Pengeyo and Mr Anwar immediately at risk of detention. In many other cases when an immigration decision is made, the person is detained at the same time as the decision is made. If there is a right of appeal, the timescales for exercising this right are especially short in immigration cases (five days if the person is in detention, 10 days if not).

Immigration law is complex and changes frequently and rapidly

On 22nd June, the Supreme Court said of tribunals:

“...in general these tribunal systems share some common characteristics. They were set up by statute to administer complex and rapidly changing areas of the law.” (R (Cart) & Anor v The Upper Tribunal [2011] UKSC 28, para 13 (per Lady Hale))

In immigration, the law is changed many times each year. For example, in 2010 the Immigration Rules were changed 10 times; and since 1993 there have been nine immigration Acts. There are also many and frequent decisions of tribunals and courts in the UK and Europe that have important effects on immigration law. One Court of Appeal judge, Lord Justice Longmore, recently said:

“I am left perplexed and concerned how any individual whom the [Immigration] Rules affect... can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done.” (AA (Nigeria) v SSHD [2010] EWCA Civ 773)

Getting the evidence is also a difficulty

The evidence required to properly put forward an immigration case may be extensive, difficult to get and expensive. This is particularly so in cases such as those about a person's private and family life in the UK, his or her physical or mental health or the welfare of children in the UK. Preparing or getting witness statements or expert reports (e.g. independent social worker reports and medico-legal reports) is far beyond what can reasonably be expected of most of those who would qualify for Legal Aid at the moment.

General conclusions and risks

The UK legal system is adversarial not inquisitorial. This means that the role of getting the evidence and presenting the case falls to the person whose case is before the court or tribunal. Some other countries have inquisitorial systems where the court or tribunal is responsible for gathering evidence and investigating legal cases. In inquisitorial systems, the cost of the court or tribunal is generally much higher because of this additional work and responsibility. In adversarial systems, the cost of lawyers is generally higher. Immigration tribunals, like other tribunals in the UK, do not have the powers that an inquisitorial system would require. An immigration judge can decide a case only on the evidence put before him or her. Without legal advice and representation, very many appellants will not have the understanding of the law and procedures or the evidence needed to make their case.

This means that people may be detained and have bail applications refused because they cannot obtain legal advice or representation, and so cannot establish their immigration case. This will be so even though they may have a strong immigration case and good entitlement to stay in the UK. The Bill also risks creating other perverse or unnecessary effects, such as:

- There may be an increase in judicial review applications because matters which might, with legal advice and representation, have been pursued in the generally cheaper and quicker tribunal appeals are not or cannot be pursued by reason of lack of Legal Aid.
- Those subject to immigration decisions and/or detention may be driven to make asylum claims, which they would not otherwise have made, in the hope or expectation of thereby getting legal advice and representation.
- There may be an increase in the number of immigration detainees where proper consideration of their case would show there to be no good reason in law for their detention.