

ILPA information sheet

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Legal Aid Bill 6 – Update

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The Legal Aid, Sentencing and Punishment of Offenders Bill has now moved from the House of Commons to the House of Lords. Only those parts of the Bill that are changed in the Lords will come back to the Commons for any further consideration. This information sheet provides an update on the Bill. It sets out the changes made to the Bill concerning immigration. It also sets out some key issues concerning immigration, which have been discussed by Members of Parliament in the Commons. An ongoing concern is the Government's assertion that advice other than 'legal' advice is sufficient for many, including immigration, cases. This is despite the fact that immigration advice is regulated by criminal law. A generalist advice agency, not part of the regulatory scheme, may face criminal prosecution if it provides immigration advice or assistance.

Asylum cases

The Government has accepted that Legal Aid should remain available for asylum cases. However, the original drafting of the Bill did not fully capture all asylum claims. Following ILPA's discussions with the Ministry of Justice, the Government amended the Bill on 31 October 2011 to close two gaps which ILPA had highlighted. Those gaps concerned asylum cases based on a risk to someone's life or a risk to a civilian's life or person in certain situations of indiscriminate violence will continue to be eligible for Legal Aid. Such cases concern rights set out in Article 2 of the European Convention on Human Rights and Article 15 of the European Qualification Directive (2004/83/EC). The Government's amendments now mean these are now included in the Bill.

Immigration cases and family reunion

On 31 October 2011, the Liberal Democrats raised concerns about the Government's decision that refugee family reunion cases should be excluded from Legal Aid. Simon Hughes, a Liberal Democrat MP, spoke in the debate. The Minister for Legal Aid, Jonathan Djanogly MP, said:

"I certainly agree with my right hon. Friend [Simon Hughes] that some immigration cases are complex, and I think that the point that he has raised is one for me to look at after today. I will do so, and I will come back to him on that."

(Hansard HC, Report, 31 October 2011 : Column 651)

There will be an opportunity to seek to persuade the Government to make some concession on this when the Bill moves to the Lords. Having accepted that at least some of these cases are complex, having previously suggested they were all straightforward, there may be some possibility that the Government will agree to keep Legal Aid for some of these immigration cases.

Migrant victims of domestic violence

In debate on 19 July 2011, the Minister for Legal Aid said that the Government would amend the

Bill so as to retain Legal Aid for victims of domestic violence to make applications under the domestic violence immigration rule – see the August 2011 “Legal Aid Bill 3 – Update” information sheet. On 31 October 2011, the Government did amend the Bill to protect Legal Aid for this group. However, other migrant victims of domestic violence, who do not fall within the scope of the rule, are in the very same position – i.e. they may be trapped in an abusive relationship because their immigration status depends on that relationship. In the debate on 31 October 2011, Caroline Lucas, a Green MP, challenged the Government to extend the protection to all those in this position. Ben Gummer, a Conservative MP, also raised concerns about these cases. The Minister said, “...we are looking further at such cases.” (*Hansard HC, Report, 31 October 2011 : Column 650*)

The Government has given a strong indication that it will extend the provision in the Bill for Legal Aid for migrant victims of domestic violence. It is expected (though not guaranteed), therefore, that there will be a further Government amendment when the Bill is in the Lords. How far that may go to protect victims of domestic violence is yet to be seen.

Children

In immigration (and several other areas of law), the Bill treats children and adults in the same way – if Legal Aid is available, it is available for a child in the same way as an adult; if it is not available, it is not available for a child or an adult. Further information about Legal Aid in children’s cases is given in the “Legal Aid Bill 5 – Children” information sheet.

Immigration Judicial Review cases

The Bill currently provides for Legal Aid for judicial review, but would exclude it for many immigration (other than asylum) judicial review cases. ILPA has raised several concerns with the Ministry of Justice. On 31 October 2011, the Government made some small changes, which will retain Legal Aid for some judicial review cases where a person is precluded from bringing an asylum or human rights appeal before leaving or being removed from the UK. In debate on 31 October 2011, Elfyn Llwyd, a Plaid Cymru MP, set out several concerns about the exclusion of Legal Aid for immigration judicial review cases (*Hansard HC, Report, 31 October 2011 : Columns 667-668*). In response, the Minister for Legal Aid said:

“...people will still be able to appeal immigration decisions themselves and, as is often the case at the moment, they will still be able to get legal aid for a subsequent judicial review, as long as it is not on exactly the same or substantially similar issues, or on a removal direction. As I said earlier, we are making various exceptions to the exclusions, which will include ensuring that, when there has been no possibility of an appeal, legal aid will remain for judicial review.”

(*Hansard HC, Report, 31 October 2011 : Column 689*)

However, this is not correct because the Bill will exclude Legal Aid for many immigration judicial reviews, even where there has been no, and no opportunity for, a previous appeal. The Bill will also exclude Legal Aid where someone has never had Legal Aid before and regardless of the merit of any judicial review case.

Onward appeals

Simon Hughes, Tom Brake and Mike Crockart, all Liberal Democrat MPs, had tabled an amendment about ‘onward appeals’. Elfyn Llwyd also had tabled an amendment about ‘onward appeals’. Onwards appeals are appeals beyond the court or tribunal that first hears any appeal (sometimes referred to as the first-instance court or tribunal) against, for example, a decision of the UK Border Agency. Onward appeals are restricted in two ways. Firstly, to appeal against the decision of the first-instance court or tribunal, it is necessary to raise a point of law (e.g. that the first-instance judge misunderstood or misapplied the law). Secondly, an onward appeal can only be brought with permission of a judge. There was not enough time on 31 October 2011 for these amendments to be debated. It is hoped they will be considered in the Lords.