ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

3 October 2007

BRIEFING: Criminal Justice and Immigration Bill
Clauses 115-122, Special Immigration Status

ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups.

Introduction:
The Criminal Justice and Immigration Bill contains two discrete aspects concerning immigration:

- early removal of foreign national prisoners (clauses 19-20)
- special immigration status (clause 115-122)

This briefing only addresses the second of these – the new special immigration status. As regards early removal, ILPA does not regard these clauses as controversial. ILPA's view, however, is that the new status is wholly unnecessary and highly undesirable.

The new status is indefinite yet denies individuals and families, to whom it is given, any opportunity to work or access mainstream support, restricting them to a level of support similar to that provided to asylum seekers but delivered by means of vouchers and allows for the imposition of stringent conditions relating to residence and reporting, including electronic tagging.

The remainder of this briefing is in two parts. The first part provides a general commentary upon the new status these clauses would introduce. The second part provides a detailed analysis of how the clauses operate and the status that would be created.

Comment on the new status:
On the eve of publication of this Bill, the Government issued its consultation on a project to simplify UK immigration law[1]. In his short foreword, the Minister pointed out that currently our immigration laws are "*very complex*"; and that this led to lack of public confidence, contributed to administrative inefficiency and led to protracted legal challenges. The creation of a completely new immigration status, established by detailed and taxing provisions comprising eight clauses in this Bill, and including several and wide areas of discretion to be exercised by the Secretary of State, is objectionable in adding complexity and uncertainty where there is too much of both already.

The Explanatory Notes are remarkable for providing no reasoned explanation as to why the creation of this status is necessary or desirable. The Court of Appeal judgment in 2006[2], referred

[1] The simplification consultation was published on 6 June 2007. A copy of the consultation document is available at http://www.ind.homeoffice.gov.uk/6353/6356/17715/immigrationlawconsultation
[2] http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2006/1157.html

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to at paragraph 65 of the Explanatory Notes, concerned those Afghans prosecuted for hijacking a plane, by which they had fled the Taleban in 2000. The then Prime Minister and then Home Secretary were highly critical of the Court's judgment, a judgment which was inevitable given the persistent failure on the part of the Home Office to implement the decision of an independent tribunal that the appellants were at serious risk of harm in Afghanistan; and the fact that the Home Office had elected not to pursue appeal rights open to it. As the Lord Chancellor unequivocally accepted before the Joint Committee on Human Rights, the Court's judgment was undoubtedly correct and there was no basis for considering any of the appellants to pose a risk to the UK or the public:

> "*In the context of the reasoning of the Court of Appeal, I do not think their reasoning can be faulted. I think the bigger issue in relation to the Afghani hijackers was the proposition whether people who hijack should be allowed to stay here, and I think the answer to that is that if they face death or torture or something similar abroad then the law is that they should remain. The question of a balance does not arise because, as you rightly say, Mr Dismore, it was held that they posed no threat to this country.*"[3]

Those prosecuted for hijacking were not ultimately convicted.

The current position, and the one prevailing since before the time of the Court of Appeal judgment, is that individuals, who cannot be removed from the UK because of the Article 3 prohibition concerning persons who face serious harm in the country to which they would otherwise be removed, receive only six months discretionary leave. They may seek to renew that leave for periods not exceeding six months. On each occasion, the Home Office ought to actively review their circumstances to consider whether it may now be safe to remove them. They are precluded from any more substantial leave unless and until they have been in the UK with leave for at least 10 years; and even at this time it may be decided that only further periods of six months discretionary leave should be allowed.

The UK Borders Bill introduces new powers that could be applied (indeed the Government has expressly said are intended to apply) to those persons who would be subject to this new status. Clause 16 of that Bill would allow for restrictions on residence and reporting. There are other powers to impose other restrictions (e.g. relating to access to public funds and restriction on employment or occupation) under existing legislation[4]. There is, therefore, no need to introduce a new status to achieve the aim of maintaining close contact with those who have committed serious crimes or people posing a danger to the UK.

The Explanatory Notes estimate the cost of this new status to be £1.1 million per annum. This will be money spent for no better reason than satisfying the knee-jerk statements made by the then Prime Minister and then Home Secretary in 2006 in response to the Court of Appeal judgment in the Afghans' case.

The genesis of these provisions, therefore, is as unconvincing as is their timing. Nothing is improved on examination of the particular provisions.

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[3] Evidence given by the then Lord Chancellor on 30 October 2006: see the Joint Committee on Human Rights' Thirty-Second Report for the Session 2005-06, Ev 1-2, available at: http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27802.htm

[4] section 3(1)(c) of the Immigration Act 1971

An explanation of the new status:
Fuller detail regarding the relevant clauses is given under separate heading below. In brief, however, the relevant clauses can be broken down as follows:

- clauses 115 and 116 define who may be subjected to the new status
- clause 117 defines what the new status is, by distinguishing it from other types of status as recognised in UK immigration law
- clauses 118 to 120 set out various conditions that will apply to a person subjected to the new status
- clause 121 concerns how a person may cease to be subject to the new status
- clause 122 provides some interpretation for the purposes of these clauses

Clauses 115 and 116
These provide that the new status may be applied to a person, who cannot be deported for human rights reasons but who otherwise would face deportation either because of behaviour that excluded the person from the Refugee Convention by reason of Article 1F or because of criminal conviction. Seven key aspects are noted:

Firstly, the decision whether to subject a person to this status is left entirely to the discretion of the Secretary of State – see clause 115(1). This is all the more remarkable given (as is explained below) that:

- the status may be applied to individuals who pose no risk to the UK or the public and have been convicted of relatively minor offences
- powers to attach highly restrictive conditions (including several akin to control orders under counter-terrorism laws) are themselves left extraordinarily broad
- family members, including children, whose conduct may be entirely blameless may be subject to this status and these conditions

Secondly, as regards human rights reasons, this status could be applied whatever the particular article of the European Convention on Human Rights (incorporated into UK law by the Human Rights Act 1998) prohibiting the person's deportation. This could include Article 3 (which prohibits removing a person to a place where he or she faces a real risk of torture or other very serious mistreatment) or Article 8 (which prohibits removing a person where to do so would cause a disproportionate interference with the person's private and/or family life) – see clause 115(2)(b).

The inclusion of Article 8 cases is a major extension of the current powers to severely restrict a grant of discretionary leave. No justification is given for this in the Explanatory Notes. The extension is not justified because a finding on Article 8 will necessarily have balanced any concerns regarding the individual's continued presence in the UK against the private and family life he or she has established.

Thirdly, the spouse or civil partner and/or dependent children of someone subjected to this status may also be subjected to it – see clauses 115(3) and 122(3).

Fourthly, the Secretary of State's discretion whether to subject a person to this status is expressly subject to compliance with obligations under the Refugee Convention and EC law (though not human rights law) – see clause 115(5).

Fifthly, the criminal behaviour that will empower the Secretary of State to subject a person to this status is that set out in section 72 of the Nationality, Immigration and Asylum Act 2002 – see clauses 116(1) to (3). This will include:

- persons sentenced to imprisonment for at least 2 years on conviction in the UK
- persons sentenced to imprisonment for at least 2 years on conviction outside the UK (providing a sentence of 2 years could have been applied if convicted in the UK of such an offence)
- persons convicted in the UK of an offence listed by the Particularly Serious Crimes Order SI 2004/1910
- persons convicted outside the UK if the Secretary if State certifies that in his opinion the offence is similar to one listed by the Particularly Serious Crimes Order SI 2004/1910.

The Particularly Serious Crimes Order contains a very long list of offences, which include theft and criminal damage. Thus a person convicted of shoplifting or graffiti could be subjected to this status, and thereby (as explained below) subjected to extraordinary powers severely restricting their daily life.

Also included are persons to whom the Article 1F exclusion from the Refugee Convention applies – see clause 116(1) and (4). That exclusion applies to a person where there are serious reasons to consider he or she has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the UK or an act contrary to the purposes or principles of the UN. The statutory interpretation of the latter criteria[5], however, means that in UK law a person who is at risk of persecution because of political activities, which includes making threats against their home country or government, may be excluded from refugee protection here. Now such a person (who may very well be a refugee in international law) may also be subjected to this status.

Sixthly, regardless of the fact that a person may constitute no danger to the UK or the public, he or she may be subjected to this status – see clause 116(5)

Seventhly, a person may be subjected to this status during a period when he or she is appealing against the conviction or sentence that has empowered the Secretary of State to do this.

Clause 117

This clause for the most part defines the new status by distinguishing it from all other forms of status. Beyond this, a person subjected to this status remains "a person subject to immigration control" and is lawfully in the UK – see clause 117(2). The exclusion from "asylum-seeker" or "former asylum-seeker" status will exclude the person from forms of support, to which those who have claimed asylum may be entitled.

Clause 118

This clause allows various conditions to be imposed upon a person subjected to the new status. Four key aspects are noted:

Firstly, conditions may be applied which relate to residence, employment, occupation or reporting – see clause 118(2). The use of the term "relate to" means the powers are exceptionally wide, and would allow for several of the conditions that may be attached to control orders under counter-terrorism legislation[6].

Secondly, electronic monitoring (including tagging) may be applied – see clause 118(3).

[5] section 54 of the Immigration, Asylum and Nationality Act 2006
[6] section 1(4) of the Prevention of Terrorism Act 2005

Thirdly, failure to comply with any condition may result in a criminal conviction and sentence of up to 51 weeks – see clause 118(5), (6). In Scotland or Northern Ireland, the maximum sentence would be 6 months – see clause 118(8).

Fourthly, various powers of arrest (including without warrant), search and entry set out in the Immigration Act 1971 will apply in connection with this offence – see clause 118(7).

Clauses 119-120

The Government intention is to exclude persons subjected to the new status from working or receiving social security. Instead, clauses 119-120 empower the Secretary of State to support the person in ways, very similar to that provided to asylum seekers by NASS since 2000. However, there are four notable differences.

Firstly, the effect of clause 119(2), (3) is to provide less detail as to the type of support the Secretary of State may provide. However, in certain respects these clauses mirror (though do not precisely replicate) the language used in section 96 of the Immigration and Asylum Act 1999.

Secondly, by clause 119(4) support may not be provided wholly or mainly by way of cash. Support may be provided by way of vouchers – see clause 122(7).

Thirdly, the clauses create a whole new area of support appeals by adopting the sections in the 1999 Act establishing what is now the Asylum Support Tribunal.

Fourthly, to add to complexity, the Secretary if State is empowered, and does from time to time, by order bring in new provisions relating to NASS support. However, these clauses enable such changes to apply or not, or in the same or different ways, in respect of this status – see clause 120(4).

Clause 121

This simply provides for circumstances where a person will cease to be subject to this new status. As can be seen from clause 121(1)(a), it may be that in an individual case a decision is made to grant leave to enter or remain. If so, the special immigration status and the conditions that were attached to it will immediately lapse.

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