

5th June 2007

BRIEFING: UK Borders Bill Briefing Event in the House of Lords
Committee Room 2, 11.00am to 12.00noon on Wednesday, 6th June

ILPA is a professional association with some 1100 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 teaching, provision of resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

This Briefing supplements an oral briefing to be given on the deportation provisions in the UK Borders Bill. It provides a short analysis of how the provisions, as currently drafted, will work. Further explanation of our concerns, with these provisions and the Bill more generally, is set out in the two appended briefings:

- ILPA's Briefing on Amendments to Deportation Provisions
- ILPA's Briefing for Second Reading in the House of Lords

Deportation provisions – a general introduction:

The Bill sets out a mechanism whereby in certain cases an individual's deportation shall be mandatory. In other words, there shall be no discretion on the part of the Home Office and neither it, nor any judicial body, shall consider the particular circumstances of the individual or the case before the decision to deport is made and implemented.

Clause 31 – when deportation shall be mandatory:

This clause sets out two conditions called Condition 1 and Condition 2 relating to non-British citizens convicted of an offence in the UK. These conditions are:

- the person has been sentenced to a period of imprisonment of 12 months or more for any offence – Condition 1; and
- the person has been sentenced to any period of imprisonment for a specified offence – Condition 2

If either condition applies to an individual, he or she is subject to mandatory deportation. The clause has this result because of sub-clauses (4) to (6). These sub-clauses mandate that:

- the deportation is "*conducive to the public good*";
- the Secretary of State "*must make a deportation order*"; and
- the Secretary of State "*may not revoke [the] deportation order*"

Specified offences (Condition 2):

A specified offence is any offence that appears on the Particularly Serious Crimes Order, SI 2004/1910. This includes offences of theft (which includes shoplifting) and criminal damage (which includes graffiti).

Suspended and aggregated sentences – clause 37(1), (2):

Where a sentence of imprisonment is suspended, neither Condition 1 nor Condition 2 will apply. However, if a court orders that a sentence, to which either condition would have applied but for its being suspended, is to take effect, then the conditions will apply. This will include where the court orders the whole or any part of the sentence to take effect.

Where a sentence reaches 12 months of imprisonment only by way of aggregation of consecutive sentences, Condition 1 will not apply.

Clause 32 – exceptions:

This clause sets out certain circumstances where an individual will be exempted from the reach of mandatory deportation. The person may still be deported. However, he or she will have two critical advantages over those subjected to mandatory deportation:

- the Home Office must consider the particular circumstances of the individual and his or her case before any deportation order is made or implemented; and
- the individual may, as now, on appeal have his or her particular circumstances considered by an independent immigration judge of the Asylum and Immigration Tribunal

The exceptions are where:

- the person's removal would be contrary to either the Refugee Convention or Human Rights Act 1998 (Exception 1);
- the person was under 18 years on the date of conviction (Exception 2);
- the person's removal would be contrary to EU law (Exception 3);
- extradition arrangements apply (Exception 4); and
- certain provisions relating to mental health orders apply (Exception 5)

Clause 34 – appeals:

This clause excludes mandatory deportation orders made under the provisions in this Bill from the ambit of section 82(2)(j) of the Nationality, Immigration and Asylum Act. The significance of this exclusion is that section 82(2)(j) deportation orders always attract an in-country right of appeal.

The result is that where the Home Office make a deportation order under the provisions in this Bill, there will be no in-country right of appeal unless the appeal is brought on the ground that:

- the Refugee Convention or Human Rights Act 1998 precludes the person's removal; or
- the person is an EEA national or the relative of an EEA national

Even if the person brings an appeal on the ground that his or her removal would be contrary to the Refugee Convention or the Human Rights Act 1998, the Home Office may prevent that appeal being heard before the deportation is implemented. They may do so by certifying that the refugee or human rights grounds are clearly unfounded.

The relevant sections of the Nationality, Immigration and Asylum Act 2002, which will have this effect when read with the provisions in this Bill, are sections 92(1), 92(4) and 94(2).

Clause 35 – detention:

This clause authorises the Home Office to continue to detain a person, after he or she has completed his or her sentence, if:

- the Home Office are still considering whether the mandatory deportation provisions in this Bill apply; and
- the Home Office decide the provisions do apply and are yet to make the deportation order

There is no time limit on the detention authorised by this provision.

Retrospective application – clause 58(4)(d):

This clause empowers the Secretary of State, when bringing the commencement order for the mandatory deportation provisions in this Bill, to apply those provisions retrospectively so that at the time of commencement:

- a person who is serving a sentence may be caught by the new provisions;
- a person who has an outstanding suspended sentence may be caught by these provisions if a court subsequently orders the sentence (or any part of it) is to take effect

Further information:

A more detailed briefing note was provided by the Foreign National Prisoners Network to the Public Bill Committee. That note is available at:

<http://www.publications.parliament.uk/pa/cm200607/cmpublic/borders/memos/ukb10.htm>

It should be noted that the Bill has been renumbered since that briefing; and the Bill's mandatory deportation provisions have been amended – most significantly to apply where suspended sentences are ordered to take effect. Generally, however, the analysis and concerns set out in that note remain valid.

Steve Symonds

ILPA, Legal Officer

steve.symonds@ilpa.org.uk

020-7490 1553