

**UK BORDERS BILL****BRIEFING ON AMENDMENTS TO DEPORTATION PROVISIONS:**

The Immigration Law Practitioners' Association (ILPA) has the following fundamental concerns at the current provisions relating to deportation in the UK Borders Bill (clause 31-38):

- These provisions do not address the problem, which came to light last year – that IND had not been making decisions in respect of foreign criminals, who were then released from prison into the community without any consideration of whether a deportation order should be made. The Bill refers to automatic deportation, which is a misnomer. Deportation will not follow automatically. Officials will still have to apply the provisions, and if officials do not do so no deportation will follow.
- These provisions constitute an abrogation of responsibility on the part of the Secretary of State. He is empowered to make a deportation order, but currently has discretion not to do so if deportation is not justified on the particular facts of the individual case. As drafted, the Bill would remove the Secretary of State's discretion, and in the mandated circumstances he would be required to make the deportation order without considering the individual facts – however strong they may be. The effect is simply to legislate away responsibility for making a decision on the facts of the case.
- These provisions would constitute a dangerous and unnecessary interference in the criminal justice system. When a judge considers mitigation, before passing sentence, the judge will inevitably be invited to consider the consequences of the possible sentence he or she may pass. Given the very serious consequences that will follow if the judge passes a sentence of imprisonment (subject to whether Condition 1 or 2 in clause 31 applies), the judge will be asked to consider all manner of circumstances of the individual relevant to whether deportation is appropriate. The judge will now be required to consider these matters because the Secretary of State will be precluded from considering these matters for himself. It is no answer, as has been suggested to ILPA, that deportation is only a consequence rather than a part of the sentence.
- These provisions deny any effective right of appeal against a deportation order. This reinforces the defects highlighted above. Just as the Secretary of State will not be able to consider the merits of any particular case, so too will the Asylum and Immigration Tribunal be excluded from doing so before the deportation takes place.
- These provisions effectively allow for indefinite detention. While the Secretary of State seeks to absolve himself from the responsibility of decision-making, he also seeks to protect himself from the problems of last year by allowing for someone to be kept in prison or immigration detention while his officials take however long to consider the particular case.

### **AMENDMENTS TO CLAUSE 31:**

Page 16, line 23, delete “is” and insert:

*“shall be presumed to be”*

Page 16, line 25, at end insert:

*“unless he decides that the deportation is not conducive to the public good.”*

### **PURPOSE OF THESE AMENDMENTS:**

These amendments would ensure a robust approach to foreign nationals convicted of serious criminal offences in that: (i) there would be a statutory obligation on the Secretary of State to make a decision in relation to the individual’s deportation; and (ii) a statutory presumption that the Secretary of State’s decision should be to make the deportation order.

However, the amendments would allow the Secretary of State to make the right decision in the exceptional case where, on the merits of the case, deportation is not truly conducive to the public good.

The cases of Sakchai Makao and Ernesto Leal have been highlighted in debates in the House of Commons, and in evidence given by ILPA to the UK Borders Bill Committee (a short note on each case is appended to this briefing). These cases attracted Early Day Motions opposing deportation, which were supported by 113 and 60 Members of Parliament respectively. They attracted widespread public support also. They involved relatively serious crimes – culpable fire raising and assault occasioning grievous bodily harm respectively. Both crimes fall within Condition 2 in clause 31(3); and the sentences were of such length that Condition 1 in clause 31(2) would have applied in any event. It is not clear that either deportation would have been precluded by the Exceptions in clause 32 – particularly that relating to human rights or the Refugee Convention (Exception 1). Sakchai Makao’s appeal was won on general immigration grounds (not human rights or Refugee Convention grounds). Ernesto Leal’s appeal was also won on general immigration grounds, though the immigration judge indicated his view that Article 8 grounds would have succeeded.

These cases are good examples of where the Secretary of State might wish to exercise the discretion that clause 31, as currently drafted, will abandon. Moreover, as currently drafted, clause 31 would oblige the Secretary of State to make a deportation order even where the criminal offence was very much less serious than in these cases, including any theft (e.g. shoplifting) or criminal damage (e.g. graffiti) offence that resulted in a prison sentence, however short.

### **AMENDMENT TO CLAUSE 34:**

Page 18, line 27, delete “not”.

Page 18, lines 30 to 34, delete “but” and all which follows to end of clause.

## **PURPOSE OF THIS AMENDMENT:**

This amendment would enable appeals to be made before deportation to the Asylum and Immigration Tribunal. Given that the appellant could expect to remain detained (possibly in the prison in which he or she has served the sentence), there is little incentive for a speculative appeal as this will merely prolong detention. (Indeed, in her thematic report published in November 2006, HM Chief Inspector of Prisons identified a problem with IND failing to act on foreign prisoners' requests for their removal or deportation to be carried out!)

The decision that someone, who may be settled in the UK for very many years, should be deported is one that may have a considerable impact upon the life of the individual. That is not to argue against deportation in an appropriate case, but merely to recognise that such a decision deserves to have the attention of proper judicial scrutiny. The Sakchai Makao and Ernesto Leal cases demonstrate why appeal rights are important. Both successfully challenged their deportation decisions on appeal.

The ordinary route of appeal to the AIT is plainly preferable to leaving only the expensive and prolonged route of a judicial review challenge in the High Court.

The provisions as currently drafted would allow for human rights appeals (if not certified) to be brought, and this could include Article 8 (right to respect for private and family life). However, Article 8 is generally interpreted narrowly in immigration matters. Respect for private life is usually given very little weight. Although respect for family life is given more weight, it is often said that families may relocate together (even where this may cause real hardships) and hence that removal or deportation will not cause any interference with family life. For these reasons (particularly where there are no children involved), there is a real prospect that in some cases where individuals have been settled in the UK for long periods of time, human rights may not be sufficient to protect against deportation. Moreover, the Home Office may well certify to preclude any appeal before deportation.

## **AMENDMENTS TO CLAUSE 35:**

Delete clause 35.

## **PURPOSE OF THESE AMENDMENTS:**

The Secretary of State is already empowered to detain a person, whom he intends to deport. There is no reason why he should not make his decision on deportation during the term of the person's imprisonment. If he then needs time, in which to enforce the deportation, he may detain under his existing powers (see Schedule 3 to the Immigration Act 1971). Clause 35 merely invites delay on the part of the Secretary of State, or his officials, with the effect that a person remains detained (possibly in prison) for a further and indeterminate length of time. On its face, this provision is objectionable as contrary to the importance of the right to liberty – whether understood in common law or Article 5 of the European Convention on Human Rights.

## **CASES OF SAKCHAI MAKAO AND ERNESTO LEAL:**

### Sakchai Makao

Sakchai Makao was born in Thailand on 10 December 1982. When a few months old, his father died; and when still at a young age his mother married a British citizen and moved to the UK. In September 1993, he and his sister were granted indefinite leave to enter to join his mother (he was 10 years old). In 1994, the family moved to Shetland. After school, he became a lifeguard at the community sports complex. He obtained a number of qualifications in relation to this; and remained in employment in an increasingly senior capacity until his imprisonment in January 2004. His offence was of culpable and reckless fire raising to which he pleaded guilty and for which he received a 15 month sentence [we note that this would bring him within both categories to which the provisions in this Bill apply]. On his release, he returned to his former employment.

The decision to deport him precipitated mass protest amongst his community in Shetland. A petition was signed by over 8,000 Shetlanders, with a further 3,000 names on-line; and a determined campaign against the deportation was led by church leaders and other high profile members of the community, with witnesses ultimately travelling to North Shields to give evidence at his appeal.

His offence occurred after he had become seriously drunk on learning of the news that his father (the British man his mother had married, but in effect the only father he had ever had) had been diagnosed with cancer – his father subsequently died. It was accepted that so far as the offence was concerned he had been led astray by another who took the leading part in the events. He pleaded guilty; and it was accepted he was very remorseful and posed no serious risk of re-offending. As regards the prospect of return to Thailand, whereas he was no longer dependent upon his mother (being an adult at the time of the offence, let alone decision to deport), he did not speak Thai and had no subsisting knowledge or connection to that country

### Ernesto Leal

Ernesto Leal was born in Chile. In 1977, he fled to the UK as a refugee with other family. He was then 13 years old. More than 25 years later, having established a business (as an arts and music promoter) and settled in the UK with two children of his own, he became involved in a pub brawl. He was sentenced to three years for assault occasioning grievous bodily harm. Much of that was served in an open prison, and he was released after serving 18 months.

He faced deportation despite his family being settled here – including his elderly mother and father, for whom he cared (his father had heart and diabetes problems). The decision to deport him precipitated a sizeable campaign, and ultimately on appeal an immigration judge overturned the decision.

### **For more information please contact:**

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