ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 74

ILPA BRIEFING FOR LORDS THIRD READING 14 MARCH 2006

ILPA is a professional association with some 1200 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 high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

APPEALS

CLAUSE 4 ENTRY CLEARANCE

Proposed Amendments
ILPA supports the **amendment** in the name of the Baroness Anelay of St Johns and the Viscount Bridgeman that the points system should be reviewed 3 years after coming into Force and would like to see it strengthened, here or in the House of Commons, to provide for a review *before* the points system comes into force.
Amendment To give the Secretary of State wider powers to restore appeal rights by order.
Amendment To make statutory provision for a review independent of the department the contents of which should be set out in regulations requiring the consent of the Lord Chancellor
Amendment to provide that appeals can be abolished only by order and the order must be debated in both Houses of Parliament.
Assurances to seek:
- That the House of Commons will see the report submitted in November by the Monitor for Entry Clearance decisions without right of appeal before it debates this clause, as the House of Lords has been denied such opportunity.
- That the administrative review will be open to all who are refused, whatever the grounds of refusal, as the Minister promised the House at Report

The Command paper *A Points-based system, making migration work for Britain* (Cmnd 6741) was published on 7 March 2006. Despite having the Command paper, parliament has not yet had is a chance to debate Clause 4 in the light of the most recent report of the Independent Monitor for entry clearance cases with no right of appeal. The outgoing monitor's report has been with Ukvisas since the end of November and with Ministers since the end of January (a lengthy delay) but has yet to be published.

Examined closely, the document Command Paper is extremely thin on detail as to how the new system will work, and parts gainsay what parliament has been told to date.

Administrative Review
The Minister said at Report (7 Feb 2006 : Column 537):

> *"that the I can tell my noble friend Lady Warwick that the administrative review is available to anyone who is refused."*

The command paper says that decisions will be *"supported by administrative review **where appropriate**"* {Emphasis added, page 12, table at para.26] and that an applicant can request a review where s/he *"believes a **factual** error has been made"* (emphasis added, para 53).

What if the applicant believes that there has been an error of law? Will it be necessary to bring judicial review proceedings to deal with it? Will this not lead to an increase in judicial reviews? What if the applicant wishes to raise human rights? There is still a right of appeal on human rights, but it would be inefficient if such points could not first be considered at the review stage. The Command paper confirms that there will continue to be general grounds of refusal, such as being subject to a deportation order, or presence in the UK not being conducive to the public good (paragraphs 44 and 45). The latter is not a factual error. **Will the Minister confirm that her statement to the House on 7 February was correct and accurate: an administrative review is available to all refused, and will cover legal as well as factual errors.**

The Command paper says review will be conducted by a senior manager. This is precisely what happens now, according to the Diplomatic Service Procedures:

> *"**Chapter 26.2.2 - Review of non-appealable refusals***
> *All non-appealable refusals must be thoroughly reviewed by an ECM within one working day of the decision being taken…*
> *26.3.1 ....Action by ECMs*
> *As with non-appealable refusals, all family visit visa refusals must be reviewed by an ECM within 24 hours…"*

The Command Paper says of the criteria for an application and for the award of points:

> *"the applicant and decision-maker must be using the same interpretations of what the different factors.. mean. To achieve this we intend to write descriptors for each of the criteria…the descriptor needs to be clear and transpartentt while providing a framework to allow decision-makers to exercise judgment in the individual case. Drafting these descriptors is a challenge, and will take time to get it right"*
> (paragrapghs 50-51)

This is not a description of a task: it is an expression of a desire for a points system. It does contain an acknowledgement that the decision-paper will exercise judgment, and the limits of "objectivity" are recognised elsewhere in the Command Paper, with its references to "objective criteria ***where possible***" (para 26,emphasis added). We are not in a brave new world of nothing but tick-boxes.

Last year 53% of appeals against refusals of entry clearance were allowed. A sample of appeals success rates submitted to the Independent Monitor are set out in the House of Commons library research paper on this Bill. These shows consular posts where the success rate for family visitor appeals is over 80%, and even over 90%, and post where student success rates on appeal were between 70 and 90%. Despite recommendations by the Independent Monitor, UKVisas has not documented discrepancies in success rate on appeal between posts. **There must be demonstrable, independently verified improvement in quality before parliament is asked to contemplate the removal of appeal rights. As a minimum the government demonstrate that success rates on appeal have gone down, and that there is consistency in success rates on appeal between posts.**

The refusal to give applicants for entry clearance any redress independent of the department, indefensible on its own terms, cannot be reconciled with the DCA White Paper *Transforming Public Services: Complaints, Redress and Tribunals (*(Cm 6243, July 2004), from which the Minister quoted in a misleading fashion during the debate. We reproduce below what the Minister (7 Feb 2006 : Col. 537) quoted in Roman type, what the Baroness Warwick quoted earlier in the debate (a7 Feb 2006 Col.528) in italics, and what was not said in bold:

> "**Complaints to departments and agencies**
> 3.12 What can an individual do? The first and most direct remedy is to dispute decisions directly with departments and agencies.
> **3.13 But** *in a democracy ruled by law, and under a government committed to high quality and responsive public services, simply appealing to a department's sense of*

fairness is not, and never has been, enough. **There has to be redress beyond the department**"

A new home for subjectivity

Universitites will make decisions about whether a course is suitable for a particular applicant., employers about whether an applicant is able to do a particulr job (paragraph 58). All well and good. But read on.

> *"The job…will need to have passed a test to demonstrate that the applicant is not displacing a worker in the UK labour market"* (para. 91)

Who sets the test? Who determines whether the job has passed? The employer? Read on.

> *"an appropriate level of English for the job in question will be set by the employer…It will be for the operator and the employer to ensure that the selected migrants meet that requirement**, overseen by the compliance arrangements for sponsorship**"* (para 123).

Pause. What compliance arrangments for sponsorship?

A sponsor will be removed from the list of approved sponsors if there is evidence of large scale fraud or if they are "failing sponsors" (paragraph 67). No indication is given of what consistitutes a failing sponsor. Nor is it stated how failure, or large scale fraud, is detected. What checks will be made on decisions made by the sponsor? For example, if the sponsor says s/he has advertised a job, or confirmed the applicant's skills, will this be cross-checked?

- If sponsors are checked/managed - according to what criteria ?
- What penalties apply if the sponsor is found to have been negligent or acted in bad faith, or if the government otherwise disagrees with their assessments?

Many matters of judgement, or, if you prefer, subjectivity, are being moved from ECOs to sponsors. Will sponsors, like ECOs, simply have to satisfy their senior managers of their decisions? If not, if government is checking whether sponsors have dealt with an individual application accurately, and/ or in good faith, all questions of subjectivity re-enter the system.

Prior to removal from the list of approved sponsors there is an opportunity to make representations, but no indication is given of any form of review or redress available to a sponsor whose decisions are questioned in other circumstances

The paper describes a sponsor's rating as "an expression of their track record in sponsoring migrants" (before para 55). Full stop. There is no centralised record of compliance of sponsors to date. Yet the government proposes to divide sponsors into sheep and goats (A and B grade sponsors and, it would appear, those not permitted to sponsor at all) *ab initio* (paragraph 66). What redress for a sponsor wishing to challenge his/her grading, with all the commercial disadvantages, from reputational risk to inability to recruit desired staff, that this entails? How will it deal with companies wishing to expand in the UK, or employing their first person from abroad? These companies have no track record. Backlogs, inequalities and legal challenges loom.

A pig in a poke

Some of the complexity of the current system has not so much been eliminated, as been omitted. No mention in the Command paper of a range of significant categories of migrant: retired persons of independent means, sole representatives, domestic workers (save *"servants in diplomatic households*", para. 155). Sportspeople can enter under tier 2 (paragraph 95) – a tier leading to settlement, but there is no mention of artists (writers, painters etc) save in Tier 5, where the maximum period of leave is 12 months and it is not a category leading to settlement.

Parliament has no guarantees that the Points system will work.. Indeed, it will be very difficult to establish whether or not it is working, given that decisions will not be tested on appeal., It is no good the Minister saying that the new system can in no way be judged on

standards under the old: UKVisa's ability to deliver sustainable decisions and to try to ensure consistency of quality across posts, through training and support to staff is central to any system, the argument is that the abolition of appeal rights and lack of independent review means no one will know whether decision making is good or bad, so who cares?

The government should be a little less sanguine about the strengths of a system it has yet to design. It should take a broader power to restore appeal rights by order. Under the Bill the Secretary of State has no powers under Clause 4 to restore rights other than for visitors and dependants even if he wished to do so. Taking such a power would not force the government to do anything, but would allow it to subject failing parts of the points system to scrutiny as and when required. Is avoiding any such scrutiny the central aim of the new system or are the government prepared to be in any way accountable?

The Minister had proposed to take a power at large to restore appeal rights under the then original version of Clause 1 (new subsection 82(2)(fb), the one it was proposed to use for unaccompanied children). Of that provision the Delegated Powers Committee said:

> *"The Secretary of State is empowered to give rights of appeal to others by order subject to the affirmative procedure. We consider it appropriate that he should be empowered to do so, and that the exercise of the power should be subject to the affirmative procedure."* (10th Report of session 2005-06, HL Paper 87, para.1).

The Home Office memorandum making the case for the delegated power appears as Appendix 1 to that report. Thus there is no scope for the Minister to refuse the amendment on the basis that it puts a wide-ranging power to restore rights of appeal into secondary legislation.

EMPLOYMEMT

Amendments
ILPA supports the amendment in the name of the Baroness Anelay of St Johns and The Viscount Bridgeman requiring prior consultation with employers on the Code of Practice on factors to be considered in setting a civil penalty, and the taking account of that consultation in the order subsequently laid before parliament.
ILPA welcomes the government amendments removing the word "effluxion"

We would also suggest that it would be useful to consult with the CRE and to conduct a proper Race Impact Assessment to inform the drawing up of the order.

INFORMATION

CLAUSE 39 Disclosure to foreign law enforcement agencies

Proposed amendments
To limit the purposes for which information can be shared to the purposes for which it can be gathered: "police purposes" as defined in the Immigration and Asylum Act 1999
To tighten the drafting and remove the loose, meaningless and dangerous references in the definition of a "foreign law enforcement agency" to a person" and to "similar functions" and ensure that information can only be shared with State or international agencies (e.g. Interpol).
To provide that the Secretary of State must specify the agencies with whom it is proposed to share information, so that there is transparency and accountability

Clause 39 provides for the sharing of information with, *inter alia*, "foreign law enforcement agencies" which are very loosely defined as a "person" having "similar functions to" a UK police force.

In clauses 32 and 33, which provide for the gathering of the information to be shared under clause 39, there is a limitation on the purposes for which information may be gathered. It may be gathered only for "police purposes" (defined in s.21(3) of the Immigration and Asylum Act 1999 Act to mean the prevention, detection, investigation or prosecution of criminal offences, safeguarding national security and such other purposes as may be specified). The Minister confirmed in Grand Committee that no other purposes had been specified to date (17 Jan 2006 : Column GC218). Yet no limitations are imposed on the purposes for which information may be disclosed to foreign law enforcement agencies under this Clause, where the risks are far higher. Such a change to the Bill would be modest: "police purposes" is very broadly defined already, and orders could define it even more broadly.

Police forces have a whole range of functions and any number of people abroad may have functions "similar to" at least some of these. For example, under clause 40 and 41 of this Bill, private contractors as well as constables are to be given powers to detain and search. Presumably if such contractors were in another State, a case could be made that data could be shared with them under Clause 39. The definition in the Bill is so loose that it is not impossible to envisage information being shared with militia and paramilitaries under this clause: they have some "functions" similar to those of a police force, but, of course, they have others that are very different indeed. The minimum requirement must be to take out the reference to "a person" and to require that " a foreign law enforcement agency" be a State or international agency (such as Interpol). More than that, the list of agencies should be published in an order. Then, if for example the Secretary of State were contemplating sharing information with security forces of Burma or Zimbabwe, (two examples given in the debate, see *Hansard* HL Report 17 January 2006 GC 221), this would be known and there would be an opportunity to object.

CLAUSES 40 & 41 Searches contracting out

Proposed amendments
That the clauses should not stand part of the Bill. This will give the House the opportunity to take a view in the light of the Minister's report back on the meeting with the Children's Commissioner and information obtained from the French authorities.
To remove the power to authorise persons other than police officers and members of revenue and customs, i.e. to rule out authorising private contractors
To deny private contractors powers to detain and to use reasonable force.
customs and excise.
To set a higher threshold for authorisation of private contractors under this clause, modelled on powers to authorise detainee custody officers under the 2001 Act.

See also the briefing of the Refugee Children's Consortium, of which ILPA is a

At the moment only immigration and police officers can exercise powers of detention and search. The clause would extend these powers to officers of Revenue and Customs and, most controversially, to private contractors. The powers would be exercised in ports, most controversially at the juxtaposed controls in France.

Private contractors can already be authorised as Detainee Custody Officers under s.154 of the Immigration Act 1999 but their powers are far more limited than those proposed for private contractors authorised under this clause and are accompanied by safeguards wholly absent here, as follows:

- Detainee Custody Officers do not have the power to detain, only to take custody of a person who has been detained by an immigration officer.

- the powers of the Secretary of State to authorise detainee custody officers are more circumscribed than under this Bill. Clause 154(4) of the 1999 Act states "The Secretary of State may not issue a certificate of authorisation unless he is satisfied that the applicant (a) is a fit and proper person to perform the functions to be authorised and (b) as received training to such standard as the Secretary of State considers appropriate for the exercise of those functions". This clause uses different wording: it is phrased as a power ("may authorise"), rather than a restriction on a power, and the standard is that the Secretary of State "thinks" (see clause 40(5)(b)(ii)) that the person is "fit and proper for the purpose" and "suitably trained".

No reason has been given for the lower test here, nor the lower level of safeguards. Attempts have been made to justify the use of the word "thinks" as "plain English". The Minister has sought to contend that 'thinks' means the same as 'is satisfied that' and is merely plain English. How very odd then, that Clauses 32(7) and 33(7) of this Bill, which do not amend previous legislation (an excuse proffered for not using the "plain" "thinks" in other clauses) use "is satisfied that" and that the Minister herself, in the debate on Clause 40 in Grand Committee, instinctively reached for "is satisfied that:

> *" Individuals will receive training to ensure that they are fully competent in the care of children. They will not be authorised unless the Secretary of State is satisfied on that point"* (17 Jan 2006 : Column GC231.)

The House of Lords Select Committee on the Constitution questioned the use of the word "thinks" in their letter of 13 December 2005, as they had questioned its use in Clause 40, and noted that *"it would be unfortunate if a change in the language were inadvertently to alter the existing judicial approach to such statutory discretions."* The House will have to take a view on whether it shares the concerns of the Select Committee or is prepared to rely on the Minister's assertion that "thinks" and "is satisfied that" mean the same thing.

Parliament and others will have little, if any, opportunity to scrutinise the conduct of private contractors. The Minister said at Report

> *"We need contract regimes that are as transparent as possible within commercial confidentiality."* (7 February 2006, col 578).

In ILPA's experience of Immigration Service contracts, the plain English translation of that is that the contracts will be secret.

In the light of grave concerns expressed throughout the passage of the Bill from all sides of both Houses at the high level of risk, and in particular child protection risks that the provisions would entail, the Minister agreed in Grand Committee to meet with the Children's Commissioner. At Report stage, modifying this, she said

> *"My ministerial colleagues have not yet met with the Children's Commissioner, although that is no more than a diary issue. The meeting is being arranged and we await the outcome"* (7 February 2006, col. 578)

At Report the Baroness Ashton also indicated that the government would obtain further information on the French system and from the Défenseuse des Enfants, the equivalent of the Children's Commissioner, in France (*Hansard* 7 Feb 2006 : Column 578).

The Baroness Ashton said at Report:

> *"the French police will check all those who are to work in the Calais port area, regardless of the nationality of the employee. All persons will be checked for the existence of a criminal record in France. These records contain all charges or other issues around sex offences"*. (7 February 2006 col.577)

We have been in touch with organisations in France to seek to understand the position. They tell us that the applicable law at the juxtaposed controls is French law, thus French child protection standards apply. Private contractors or others accused of abusing children (or

falsely imprisoning or assaulting children or adults) would be subject to trial in the French courts, and decisions as to what support to provide to victims or people discovered would also be made under French law. We remain unclear as to whether immigration service contracts with private contractors (who could be French companies) would be governed by French or English law.

We are not in a position to assess the relative merits of the French and English systems. However, we do know that the French system, like the English one, has been the subject of serious criticisms. The Défenseuse des Enfants has issued a number of *Opinions* ("*Avis)* raising such concerns[1]. Last year she looked at what was happening to unaccompanied children from abroad held at Roissy airport in France, expressing concerns at their being held with adults, being at risk of being shuttled back and forth to and from countries of transit and being returned to their country of origin without arrangements having been made for their safety and care on return. She also drew attention to risks of abuse.

On 6 February 2006 a number of French human rights and refugee organisations wrote[2] to the Défenseuse and the French authorities about the plight of unaccompanied children from abroad in Calais, describing those who had not claimed asylum as having been left without support and subjected to harassment.

The particular difficulty is that neither parliament nor others will find it easy to scrutinise what is happening in France. The seriousness of powers to deprive people of their liberty is recognised in the Police and Justice Bill before parliament, which provides powers, in clause 38, to make Immigration Officers' exercise of such powers subject to the Independent Police Complaints Commission. The Lord Brooke drew attention in Grand Committee (17b January 2006, col 230-1) to the contrast between the powers given to private contractors, including foreign nationals, under this clause and those given to (uniformed) Community Support Officers of police under the Police Reform Act 2002. As he recalled, those limited powers were the subject of what the Lord Falconer characterised as "long and hard" debate (*Hansard* HL Report 22 07 02, col 94). A CSO may "require a person to wait for up to 30 minutes pending the arrival of a constable" or, with their consent, accompany them to a police station. The government agreed to pilot these limited powers and an evaluation has been undertaken (*Community Support (Detention) Powers Evaluation Research* Lawrence Singer, Home Office) 2004). The powers under this clause can be exercised abroad, and it is unlikely that much information about their use or abuse will find its way back to the UK. Is it because no one is likely to notice abuse that the same care has not been given here?

The powers should continue to be exercised, as now, by police and immigration officers. If private contractors are employed they should work under the supervision of such officers, who should be present in sufficient number to allow for the responsible exercise of that supervision. There should be no question of no immigration officer attending to a person

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[1] Communiqué de la Défenseure des Enfants sur les mineurs étrangers isolés maintenus à Roissy (January 2005). ; Enfants sans frontières (September 2004). Proposition de réforme : pour l'attribution de plein droit des prestations familiales au titre d'enfants étrangers dont les parents séjournent régulièrement en France (June 2004).L'avis de la Défenseure des Enfants sur la question des mineurs étrangers isolés (4 October 2000).

[2] Letter to Défenseur des enfants; Ministre de la santé et des solidarities; Président du conseil de Paris; Président du Conseil général du Pas-de-Calais; Préfet Pas de Calais; Procureur de la République de Paris; Procureur de la République de Boulogne-sur-Mer; Directeur de la DDASS de Paris; Directeur de la DDASS du Pas-de-Calais from C'Sur *(Collectif de Soutien d'Urgences aux Réfugiés)*, CSE-10 *(Collectif de soutien des exilés du Xe arrondissement de Paris)*, Gisti, LDH *(Ligue des droits de l'homme)*, Mrap *(Mouvement contre la racisme et pour l'amitié entre les peuples)*., see http://www.gisti.org/doc/actions/2006/mineurs/index.html

found for up to three hours and of a private contractor using "reasonable force", unsupervised, to control that person.

CLAUSE 56 Deprivation of Citizenship & CLAUSE 57 Deprivation of Right of Abode

Amendments
ILPA supports the amendments in the name of the Baroness Turner of Camden to Clause 56 to retain the current test for deprivation of citizenship and to clause 57 to use that test for deprivation of the right of abode, together with consequential amendments
Proposed amendment to clause 57 – to replace "The Secretary of State "thinks" with the Secretary of State is satisfied that" in the test for deprivation of the right of abode .

The Minister has to date coupled denials that the current test for the deprivation of citizenship, and of a fundamental right associated with citizenship, the right of abode, viz. having done something seriously prejudicial to the vital interests of the UK or a British Overseas Territory is, with examples of why a broader power is needed that falls fair and square within the current test.

The 2002 wording was taken from the European Convention on Nationality (Strasbourg 6 September 1997).

- The new 2002 powers to deprive people of their British citizenship have never been used and have not been shown wanting. The case for their extension is not made out.
- The provisions equate deprivation of citizenship with migration control because the test used for the deportation or exclusion of foreign nationals is being imported to be the test for deprivation of citizenship. People can be deprived of citizenship on grounds incompatible with civil liberties due to the breadth of the provisions.

The Minister of State said in Grand Committee

> *"it is fundamentally wrong for those who engage in such activities* [unacceptable behaviours] *and who have rights of residence elsewhere to be allowed to acquire and shelter behind their British citizenship"* (19 Jan 2006 : Column GC274)

But no one obliges the UK government to allow a person, whether a dual national or a British citizen, to shelter behind that citizenship. The UK can prosecute British citizens, and others. It can extradite British citizens and others. If people are allowed to shelter behind their British nationalty, then this is not because of the test for deprivation of citizenship.

The Minister said in Grand Committee

> *"Speaking personally, I am affronted that Abu Hamza has British citizenship—I wish that he did not. I think that all noble Lords would agree with me"*. (19 Jan 2006 : Column GC274).

They might. But they well feel the same way about a number of British citizens who are not dual natioanls: terrorists, rapists, murders, paedophiles, or merely people who do not share their political ideology. British citizens also commit crimes, including heinous crimes, and conduct themselves in numerous ways that their governments and other may deplore. The Minister stated in Grand Committee

> *"The difficulty with the higher test that we had is that we already know of situations in which people may not be caught. We believe that they should not continue to be dual citizens..One might argue that they were not necessarily a great danger in this country but that their behaviours were, in our view, completely unacceptable."* (19 Jan 2006 : Column GC274)

In summary, the case being made is that a person may pose no great threat, but if we do not find their behaviour acceptable we should be able to take away their citizenship. We reiterate

that it remains the right of the citizenry to change their government, not of the government to change the composition of the citizenry by banishment of its awkward elements.

The Minister said in Grand Committee

> *"For me the principal concept of citizenship is that people have a right to be a citizen and not to be stateless. That is fundamental, in my personal view, but it does not mean that you have a right to be a citizen of more than one nation. Citizenship may be given by another nation for various reasons, which is perfectly acceptable.* 19 Jan 2006 : Column GC276

We suggest that this personal view is not shared by most people. If peers received letters tomorrow saying that by arrangement with another nation: be it Iceland, the Dominican Republic, take your pick, their British citizenship was being removed but they were being made citizens of that nation, so that they would not be left stateless, we suggest that far from being reassured, they would be more than a little perturbed. The value is placed not merely on not being stateless, on having *a* citizenship, but on the particular citizenship one has. While some dual nationals have lived in the country of their other nationality, others may never have been there, not speak the language, and have no links there.

In Clause 57, there is the further problem of the use of the word "thinks" – see our briefing on Clause 40 above. The House of Lords Select Committee on the Constitution also expressed their concern at the use of the word "thinks" in this clause. This Bill contains "is satisfied that", even in the rare clauses that do not amend previous legislation (e.g. 33(2); 33(7) 36(5)). The House of Lords Select Committee also questioned the use of the word "thinks" in this clause in their letter of 13 December 2005, and noted that *"it would be unfortunate if a change in the language were inadvertently to alter the existing judicial approach to such statutory discretions."*

CLAUSE 58 Acquisition of nationality

Amendments
ILPA supports the **amendment** in the name of the Baroness Turner of Camden placing the emphasis on granting applications for registration and making the test for declining to grant the same as the current test (see above) for deprivation of citizenship.
ILPA supports the **amendments** in the name of the Baroness Turner of Camden to retain the registration by entitlement for children and proposes further amendments on this point. Government amendments go part of the way, because they are aimed at ensuring that children under 10 will not be subject to a good character test.
IlPA proposes **amendments** to retain registration by entitlement for those with a form of British nationality other than British citizenship and no other citizenship or nationality and supports the **amendments** in the name of the Lord Avebury to retain the right to registration by entitlement for those registering under the British Nationality (Hong Kong) Act 1997 and to make provision for British Nationals (Overseas) to acquire the right to register by amendment to section 4B of the British Nationality Act 1981.
Assurances to seek
That the government will exercise its discretion to register all children born to recognised refugees in the UK. To limit the purposes for which information can be shared to the purposes for which it can be gathered: "police purposes" as defined in the Immigration and Asylum Act 1999

Clause 58 Acquisition of British nationality & c.

Registration and naturalisation are the only two ways in which a person can become British. At the moment the "good character" requirement applies only to those seeking naturalisation

as a British Citizen and not to those seeking to register as British. Registration may be discretionary or by entitlement. The clause as originally drafted applied the "good character" requirement to all registration, as well as naturalisation, applications, save those where British Citizenship is granted because of the UK's ratification of the UN Convention on the Reduction of Statelessness. It would thus have ended the concept of registration by entitlement.

At Report the government amended the Bill to remove British Overseas Citizens, British Protected Persons and British Subjects with no other nationality, from the list of those who must pass a "good character" test, thus preserving their right to register by entitlement. Introducing the government amendment, the Minister said

> *such people frequently have no right of abode in any country… we owe a moral obligation towards them as holders of British passports.."* (7 Feb 2006., Col 623)

The government amendment shows how simple it is to lift certain groups out of the acquisition of nationality provisions. The Minister promised at Report to reconsider the position of children (7 Feb 2006., Col 623) , having said in Grand Committee:

> *"Concern has been expressed that we would extend the rule to very young children or even babies... Of course, the rules would state that that would be a silly thing to do, and it would not happen."* (19 Jan 2006 : Column GC279).

The government amendments to this clause provide that children under the age of 10 should not be subject to the good character test. This represents some progress. As explained below, we do not consider that the government has adequately addressed amendments consequential on this change because there appear to be provisions relating solely to babies under 12 months left on the face of the Bill. We think this must be dealt with on the face of the statute otherwise the statute would be internally inconsistent. Moreover, would an attempt subsequently to take all those in a particular group out of good character test (as for babies under 12 months) by guidance be *ultra vires* legislation the sole purpose of which is to apply test to them? We detail the relevant amendments on children below.

As to older children, while the Minister suggested at Report that she might wish to apply the test to older children, to refuse a child registration as British for something that they have done while a child seems far too harsh penalty. A failure to understand the importance and value of the right to register by entitlement to those who possess it seems to have led to confused thinking on this matter.

We should also like to take this opportunity to seek **assurances** on the treatment of **children born to those recognised as refugees.** The matter was raised at Report, but the Minister did not respond on the point.

When refugees got indefinite leave to remain as a result of recognition, their children were British because they were born to parents settled (i.e. with indefinite leave to remain) in the UK. One consequence of the decision to give refugees 5 years limited leave in the first instance (introduced in September 2005), is that their children will not be born British and will not be entitled to register until their parents get indefinite leave to remain at the end of five years. This places refugee children in a situation of particular difficulty – as refugees are not expected, for good reason, to approach the embassies or government of their own country. We recall how, in the more distant past, when refugees used to get four years limited leave before getting ILR, children born to them in those years would be in limbo. If parents had Refugee Convention travel documents it was sometimes possible to get the child put on it, but often families did not travel during that period. **We seek an assurance from the government that it will exercise its discretion to register the children of recognized refugees who are not yet able to register by entitlement.**

Of other adults, the Minister said

"when we consider groups such as the wives and widows of those who fought ine the defence of Hong Kong, we believe that we have brought them all into the system in one way or another. We do not believe that anyone remains outside. However, I am sure that the noble Lord and others listening to or reading our debate will let me know if that is not the case." (7 Feburary 2006, col 621)

If the government think there are no such cases, why apply a good character test to them? In any event, we have checked with ILPA members and the Minister's understanding is not correct. Members have seen such cases. For example, members have dealt with cases of British Nationals (Overseas), people from Hong Kong who would be subject to a good character test because of subsection (2)(d) of clause 58(1)(d). These people have to show not only that they have no nationality other than that of British Naitonal Overseas but also ordinary residence in Hong Kong at the date of handover to China.

Amendments
The Baroness Turner of Camden
Page 32, line 9, leave out ",(2)" (*Reference to section 3(2))*

The Baroness Turner of Camden, The Baroness Ashton of Upholland
Page 32, line 12, leave out ",(2)" *(reference to s. 17(2)))*

The Baroness Turner of Camden (and part of the
Page 32, line 18, leave out subsection (e).

Purpose
To exempt babies who heretofore have registered by entitlement from the good character test. The government has accepted one of these amendments; logic would seem to demand that they accept all three. S.3(2) of the BNA 1981 entitles babies born outside the UK to a British parent who is British by descent and thus do not automatically pass on their British citizenship to their children, to be registered within 12 months of birth. S.17(2) makes similar provision in respect of British Overseas Territories. Article 6 of the Hong Kong (British Nationality) Order 1986 is entitled "Provisions for reducing statelessness". Article 6(3) says:

" (3) A person born stateless on or after 1 st July 1997 outside the dependent territories shall be entitled, on an application for his registration as a British Overseas citizen made within the period of twelve months from the date of the birth, to be registered as such a citizen if the requirements specified in paragraph (4) below are fulfilled in the case of either that person's father of his mother"

Amendments

Proposed
Page 32, line 9, leave out "(3) and" *(in 1(3))*

Baroness Turner of Camden
Page 32, line 9 leave out "(2) and (5)" and replace with "and (2)"

Proposed
Page 32, line 12 leave out "(3) and"

Baroness Turner of Camden
Page 32, line 12 leave out "(2) and (5) and replace with "and (2)"

Purpose:
To exempt children aged 1 to 18 who heretofore have registered by entitlement from the good character test. Section.1(3) of the BNA 1981 allows children, and only children, to register if

their parents become British citizens or settle in the UK. S.15(3) makes similar provision for British Overseas Territories citizens. Section 3(5) makes similar provision for children, and only children, born outside the UK to a British parent who is British by descent and thus cannot automatically pass on their nationality to their child. The equivalent provision for British Overseas territories is s.17(5)

Proposed Amendment

Page 32, line 16, after "citizen)" insert –

"save where the person to whom that section applies does not have any citizenship or nationality or has only a British nationality other than British Citizenship"

Purpose

To ensure that those who hold only a "second class" British nationality and are otherwise stateless can continue to register by entitlement. Section 1 of the British Nationality (Hong Kong) Act concerns Hong Kong residents whose entitlement to register derives from their having a "second class" British citizenship and being, on 4 February 1997, stateless but for that citizenship and has not since renounced any other citizenship. The modified version of the amendment is provided so that it would not cover those who have acquired another nationality between February 1997 and the time of registering.

AFTER CLAUSE 59 – SAFEGUARDING CHILDREN

Safeguarding duties

Proposed amendment

ILPA supports the amendment in the name of the Earl of Listowel to extend the duties to have regard to safeguarding and promoting the welfare of children to those involved in asylum support and immigration enforcement.

See the briefing of the Refugee Children's Consortium, of which ILPA is a member.

Section 11 of the Children Act 2004 imposes duties have regard to safeguarding and promoting the welfare of children to a range of agencies. Some, such as **are agencies whose primary function is to do with welfare, others as the police, are not.

When the Children Act 2004 was passed, th Earl Howe endeavoured to amend what is now s.11 to include the agencies listed in the amendment and pressed his amendment to a vote which was lost by only 9 votes. He moved an identically worded amendment to the Children Act 2004. The Earl of Listowel cited in the debates on report (7 February 2006, cols 641 to 642) what Earl Howe had said:

> *" We have what appears to many, including me, a giant lacuna in the Bill. In the Green Paper, Every Child Matters, refugee children are specifically mentioned as being children in the greatest need, yet the agencies which are charged with looking after them are excluded from the duty…to safeguard and promote children's welfare. I have read what the Minister said about the amendment on Report. I still find the omission incomprehensible. Why on earth should refugee children be denied the same rights and protection as other children in the UK. The Minister argued that, 'a duty to have regard to the need to safeguard and promote the welfare of children could severely compromise our ability to maintain an effective asylum system and strong immigration control' She went on to argue that in undertaking its primary functions it would be unavoidable that the IND would do things that would be judged as inconsistent with a duty to safeguard and promote welfare.*

"We need to unpack this a bit. The first point is that Clause 8 is not an absolute duty, but simply requires agencies to make arrangements to have regard to the need to safeguard children and promote their welfare in the discharge of their functions.
"As the Minister said on Report,
'We have been very careful in the way in which we have worded this clause: we do not put a duty on agencies that would make them unable to fulfil their primary functions' . . .
Nobody would argue that the primary function of the Immigration Service is not to ensure effective immigration control just as nobody would dispute that the primary function of the police is to ensure public order and prevent of crime. Yet the chief officer of police is included in the new duty …"We might do well to look at the explanatory notes to the Bill, which state:
'This duty is intended to ensure that agencies are conscious of the need to safeguard children and promote their welfare in the course of exercising their normal functions'.
The Government have failed to explain how this duty would interfere with the normal functions of the agencies listed in the amendment".—[Official Report, 15/7/04; cols. 1460-1.].

The Minister stated at Report on this Bill that

> *"It is possible, legislatively, that if this were inserted it would become virtually impossible to return any family with children or any accompanied child or young person.* (7 February 2006)

We consider that this is scaremongering. We concur with Earl Howe. "Having regard to" is not an onerous duty – it does not imply that the duty trumps all other obligations. The Immigration Service is already obliged, for example, to respect the right to private and family life under Article 8 ECHR. This does not mean that it can never enforce an immigration decision against a person, nor even that it can never enforce such a decision against a family or child. Since s.11 came into force the police, on whom the duty is imposed under s.11(1)(h) of the Children Act 2004) seem to manage have not found themselves unable to arrest someone who is a parent, nor indeed unable to arrest a child. Nor have they been precluded from entering a house to arrest someone just because a baby was asleep in one room. Prison governors are also subject to the duty and prison governors ; they are not primarily a welfare agency either.

During the debates on the Children Act 2004 the same Minister, the Baroness Ashton, said:

> *"we are sure that the amendment would have an impact on what we would be able to do in terms of removals and the ability of people to use the Bill for judicial review. It is for those reasons—and those reasons alone—that I cannot accept the amendment. …ultimately, we have an asylum and immigration policy designed to support people in the best possible way—and that includes removing families on occasion and resettling them. It could be argued that that is appropriate and in the best interests of the children. Refusal of the right to stay on occasion could also be in their best interests.*
> *It is because we believe that the amendment would directly affect this policy that I urge the noble Earl to think carefully about pressing his amendment to a vote.* "(15 July 2004, col. 1464)

If removal is in the best interests of children, then how would the amendment impede the immigration service? If the amendment would found judicial reviews then these would be reviews to test whether due regard had been had to safeguarding and promoting the welfare of children. Why does the government fear that for its immigration service, and for NASS?

There might be a limited number of cases in which the duty did prevent the immigration service doing that which they would otherwise have done. One possible example that springs to mind would be an attempt to remove a family as a group where the children had been

separated from that family while in the UK because of abuse by a parent. If this is the type of case that could occur then first we would say that it would be quite right that the immigration service could not ignore safeguarding the child in these circumstances; secondly that in any event others involved in the case are already subject to the safeguarding duty, and thirdly that it would not necessarily preclude separate removals.

The Minister should be pressed on the wholly inadequate explanations given to date both to the Earl Howe and to the Earl of Listowel.

She should also be urged to address those covered by the amendment separately. Is she really contending that an agency whose name is the National Asylum *Support* Service should not be obliged to have regard to safeguarding and promoting the welfare of children? Yes, it might prevent their splitting up families under section 9 of the 2004 Act, which clause 44 of this Bill provides power to repeal, but social workers and the Association of Directors of Social Services have already pointed out in the very strongest terms that s.9 is incompatible with the Children Act.

We suggest that, contrary to what the Minister stated at Report, none of these duties ought to be carried out without "having regard to" safeguarding and promoting the welfare of children

ILPA

08 March 2006