ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 43
PART TWO EMPLOYMENT FOR GRAND COMMITTEE
11 JANUARY 2006
(briefings on amendments available on request)

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. ILPA briefings to date can be found at www.ilpa.org.uk.

INTRODUCTION

The law has made provision for the prosecution of employers of workers who are not permitted to work since 1996, under section 8 of the Asylum and Immigration Act 1996. The proposals now set out in clauses 15 to 26 envisage a more restrictive criminal offence, but introduce a new civil penalty for employing people who do not have the right to work.

ILPA does not oppose sanctions on employers in principle but is concerned that the provisions in the Bill impose upon employers a yet more onerous burden of making more stringent checks on the immigration documents of employees and potential employees, and attempt to pass the burden, and the cost, of policing immigration control onto employers. The provisions increase the risk of informal discrimination against all migrants whether here lawfully or not, or persons who may look to employers like migrants.

The solution to the vexed question of how to stop the exploitative employer without increasing the burden on other employers and discrimination against those under immigration control is not to be found in this bill. It lies in giving more rights and greater protection to migrants and to migrant workers so that their interest in colluding with the exploitative employer is reduced or negated, and the interests of the employers treating workers fairly and respecting the law are promoted. Debate on this part of the Bill provides and important opportunity to highlight this.

Economic Migration to the EU – House of Lords European Union Committee Sub-Committee F

ILPA gave evidence to the House of Lords European Union Committee (Sub-Committee F – Home Affairs). This evidence can be found in the Committee's report *Economic Migration to the EU* on 16 November 2005[1]. We noted that particular categories of employee are being placed in positions where they are being exploited because they know, and the employers know, that they must stay with that employer and in that employment otherwise they may have to leave the UK. A situation where there is unauthorised work is undesirable for a State, which finds its immigration, tax and labour laws undermined. It is also undesirable for legal workers and their employers, as they are forced to compete with others who breach those laws. It is also undesirable for unauthorised workers themselves, given their greater vulnerability to abuse by employers and intermediaries.

[1] HL Paper 58, 14th Report of Session 2005-06

Without the right to resign and change employer a migrant worker is vulnerable to exploitation, including in particular an employer failing to pay the going rate for the job, refusing to honour contractual commitments and the denial of labour rights. Those on temporary schemes are often the most vulnerable to such exploitation. There are precedents for giving such rights to change employer – in the EU-Turkey Association Agreement where permission to change can be sought after a given period, in the registration scheme for accession nationals where change must be notified, and for overseas domestic workers.

There should not be opportunities for employers to exploit an immigrant labour force by making it more attractive to use an immigrant labour force because it is cheaper or because there are fewer obligations associated with employing immigrants. Also, where a person knows that if they leave the UK they will be able to return, this reduces the risk of their remaining in an exploitative situation.

The House of Lords EU Committee in its report urged the government to reconsider the case for acceding to the Council of Europe Convention on Migrant Workers[2]. It also urged the government to examine the question of accession to the United Nations Convention on the Protection of Migrant Workers[3] and recommended that all third country national migrant workers should enjoy as a minimum:

- the right to change employers after 12 months continuous lawful employment;
- the right to a reasonable period (not less than six months) to seek employment in the event of termination of previous employment
- equality as regards social rights (at least core benefits)[4].

- **Will the government accept these recommendations?**
- **Does the government accept that without addressing the rights of migrant workers the new scheme will fail to protect either such workers or law-abiding employers?**
- **If so, what is it going to do about this?**

THE PROVISIONS OF THE BILL

There has been provision for the prosecution of employers of workers who are not permitted to work since 1996, under section 8 of the Asylum and Immigration Act 1996, which will be repealed by this act. Employers must carry out checks on the immigration status of prospective employees. Ministers have noted the low rate of successful prosecutions under s.8:

> *"The section 8 offence of employing someone without the relevant immigration status was introduced in 1995. Since it came into force, in January 1997, there have been 17 successful prosecutions."* (Andy Burnham MP, Standing Committee E, 20 10 05, Col. 146).

In 2003 there were 2 proceedings, and one conviction. Similarly for 2002. In 2001 there were five proceedings and one conviction. In 2000 there were 10 proceedings and 4 convictions[5]. Success rates are low, but prosecution rates are nugatory.

- **Are sufficient political will and resources are being devoted to this area?**
- **If not, are the changes in the Bill any more than extremely bureaucratic window-dressing?**

When asked about this at 2nd Reading the Parliamentary Under-Secretary of State replied

[2] *Op. cit.,* Paragraphs 99 and 126.
[3] *Op. cit*., Paragraphs 97 and 125.
[4] *Op cit.,*Paragraphs 106 and 129.
[5] HC Written Answers 10 January 2005 col. 308W

*"The noble Lord, Lord Dholakia, asked how many enforcement officers there are—we have some 1,200 in the UK and we are seeking to increase the level of arrest-trained staff. …"(*6 Dec 2005 : Col. 583)

The Bill replaces s.8 with a new offence (set out in Clauses 21 & 22) of knowingly employing a person subject to immigration control but without permission to work. Whereas s.8 permitted only fines, here the maximum penalty is two years imprisonment. The government have resisted amendments to increase the maximum period of imprisonment.

The Bill supplements the new offence with a new civil penalty, which is very similar to s.8 in that it does not require the employer to know that s/he was doing wrong, but does provide a defence for those who have complied with prescribed requirements to check employees documents. Clauses 15- 19 set out a new scheme for a civil penalty for employers of adults who are illegal entrants, who are overstayers or are in breach of their conditions. Clause 24 covers people on temporary admission or released from detention: where they do not have permission to work the employer can be liable to a civil penalty or to prosecution. Sadly the Bill does not suggest on its face that any more people on temporary admission will be given permission to work. The penalty is financial; the maximum being £2000 per employee, and can be adjusted depending upon the employer's behaviour.

The 'prescribed requirements' can include a requirement to carry out repeat checks, after the person has been recruited and while they are working for the company. There is a lack of clarity as to the standard of proof to be applied by the officers imposing these penalties, albeit that the employer could appeal. The burden is on the employer to show that s/he complied with prescribed requirements and prove that an exemption applies; the Secretary of State does not have to decide whether an exemption applies before opposing the charge, thus on the spot fines would be possible. The appeal against a civil penalty will be in the County Court: the suggestion is therefore that the relevant standard of proof as to whether the facts give rise to the imposition of a charge will be the civil one (the balance of probabilities) not the criminal one (satisfied so that you are sure). If charges are imposed, or seen to be imposed, in an arbitrary manner, then given the burden of challenging them, they provide a disincentive to hire people under immigration control, or who the employer thinks might be subject to such control.

The Bill is a mere framework for the scheme, the bulk of which has been left to regulations. The Illegal Working Taskforce *Regulatory Impact Assessment for Immigration Asylum and Nationality Bill*[6]*;* and draft codes: the *Immigration, Asylum and Nationality Bill Draft Code of Practice for all employers on the avoidance of race discrimination in recruitment practice while seeking to prevent illegal working*[7] and the *Immigration, Asylum and Nationality Bill Civil Penalty for Employers Draft Amount of Penalty Code of Practice*[8] have been published.

The Parliamentary Under-Secretary of State said at second reading:

"We are repealing the previous legislation regarding illegal working because it was unwieldy and it did not provide us with flexibility". (6 Dec 2005 : Column 582)

The similarities between s.8 and the civil penalty, are sufficiently great, although the burdens on employers are more onerous, that it is unclear why the civil penalty is expected to be any more effective than s.8 in stopping illegal working.

We have sympathy with the view expressed in the CBI Commons briefing that the penalty is likely to be directed at the "low-hanging fruit" Insofar as it directs enforcement efforts at those who are negiligent rather than exploitative, then it is unclear how it will do anything to tackle the worst of illegal working. The worst employers will not check documents. They

[6] Home Office, 22 June 2005
[7] Home Office, published in draft 13 October 2005
[8] Home Office, published in draft 13 October 2005

will not keep copies. They will not keep any records of employing a person, nor pay tax, national insurance, or the minimum wage. This part of the field is the underground economy pure and simple.

A civil penalty does not carry the same protections for the person liable as apply to a person accused in a criminal case. With every lowering of the protection for the employer comes an attendant increasing risk of discrimination against the potential employee

The risk of discrimination.

The discrimination in employment faced by those who are subject to immigration control or who employers think might be so subject, should not be under-estimated. Much of the problem is not a question of racism, but a result of having been exposed to the general impression that migrant workers are illegal workers; the fear of getting it wrong, and mistaken beliefs about what is and is not permitted. Existing codes of practice have not solved the problem. The Parliamentary Under-Secretary of State said at 2nd reading

> *"We are keen…to ensure that employers do not discriminate against workers, which would be utterly against the grain of what we want to achieve. …*"(6 Dec 2005 : Col. 583)

However this appears little more than an expression of pious hope, as does the draft of the Code published under Clause 24 the *Immigration, Asylum and Nationality Bill Draft Code of Practice for all employers on the avoidance of race discrimination in recruitment practice while seeking to prevent illegal working*[9], published under Clause 24 that does no more than restate the basics of equal opportunities recruitment practice. It recommends that employers have "clear written procedures for recruitment and selection", and that "All job selections should be on the basis of suitability for the post". It urges employers to "treat all applicants in the same way at each stage of the recruitment process". It recommends ethnic monitoring. All this is thoroughly unobjectionable; but it is no more than could be detailed by anyone who has ever sat on an interview panel.

The Draft code suggests that documents proving right to work could be required at first interview, second interview, or from those shortlisted. It reminds employers that if they ask for documents from one applicant, they should ask for them for them from all. It tells employers that applicants should not be treated less favourably just because they provide a document evidencing temporary leave and that they should only ask questions about a person's immigration status when it is necessary to determine whether this imposes limits on the hours they can work or length of time they are permitted to work. It states

> *"You will need to bear in mind that a person producing a document* [evidencing temporary leave*] will have a time limit on their ability to stay and work in this country, but it is possible for certain categories of entrant to apply to extend their entitlement to remain and work in this country."*

The employer will also no doubt be mindful of the provisions of clauses 1 and 11 of this Bill under which, if refused an extension the employee instantly becomes ineligible to work, and the employer is thus no longer allowed to employ them, but could be penalised. The Minister of State sidestepped the question when asked about this in Commons Committee by talking only of the current situation, ignoring that this is being changed by the Bill:

> **"***…. Leave to remain effectively continues while a further case is considered, if the application is made in time……. I give my hon. Friend the Member for Walthamstow the assurance that although subsection (1)(b)(ii) literally says "has expired", that does not relate to those who apply in time and carry on."* (Standing Committee E, 20 10 05, Col 149)

[9] Home Office, published in draft 13 October 2005

Despite the useful information on the Home Office website, and the employer's helpline, it is very difficult for employers to understand who is entitled to work and who is not. This is yet another reason to press for consolidating legislation. Even where their understanding, based on publicly available information, is correct, they are unlikely to feel confident that it is correct. Employers who take their obligations seriously rely heavily on specialist legal advice (for which they pay). The difficulties are acute for those who are but infrequently faced with employing people from abroad, or who have small workforces and only occasionally face the question of whether they can employ a person under immigration control.

The Home Office asks that people do not apply for a variation (including an extension) of leave more than 28 days before that leave is due to expire. Applications can take a considerable amount of time to decide. Therefore there is every chance that when an employer comes to conduct a repeat check, the employee will not be able to present the relevant documentation, as it will be at the Home Office. Earlier copies of documents in the employer's possession may show that leave was due to expire. What happens then? How can the employer discharge the obligations imposed on them[10]. How can the risk that the employer, fearing to breach the law, sacks the employee, be avoided? The Minister of State acknowledged the problem, but was short on offering solutions:

> *"...I recognise that there are continuing practical issues that need to be overcome….We are still considering the practicalities that are in place, not in terms of rules or legislation, but in terms of persuading an employer or anyone else that the other application has been made. "*(Standing Committee E 20 11 05. Col 14)

The Illegal Working Taskforce *Regulatory Impact Assessment* for the Bill[11] also acknowledges these problems. It notes:

> *"53. There will be a cost to IND in dealing with employees who have entitlement to work but require documents to prove their status and will be unable to sustain delays in receiving confirmation when faced with a follow-up check by their employer. In 2003, there were approximately 350,000 grants of extension of leave to remain in the UK. IND will need to assist these people in proving their entitlement to work while their applications are processed should their current documents expire during that process.*
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> *54. A further social cost may be a consequent reluctance on the part of employers to employ temporary migrant workers given the greater administrative burden of carrying out follow-up checks in relation to this group. This may result in employers passing up the opportunity to employ or retain productive workers, impacting on business efficiency. Strengthening the system of employer sanctions also carries with it the risk of employers acting in a manner contrary to the Race Relations Act. A code of practice would be issued to mitigate this risk."*

That is the theory, but how is all this to be achieved in practice? . What chance do employers have of feeling confident that they have got it right? The current employer's helpline deal with general queries – what is envisaged here is that employers will be making enquiries on individual files. Those who have had occasion to phone the Home Office with a query on an individual case will know what a challenge it is to manage to locate the file and/or speak to the person responsible for dealing with it. The current Home Office telephone enquiry bureau will as a matter of policy at best confirm that a case is 'under consideration'

The risk of discrimination against ethnic minority British citizens appears ill-understood by government. The Junior Minister, Andy Burnham MP, said at Commons *Report "…I would guess that the vast majority of those people are British born and British passport holders, so*

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[10] See the Home *Office Immigration, Asylum and Nationality Bill Civil Penalty for Employers: Draft Amount of Penalty Code of Practice* published in draft on 13 October 2005

[11] Published 22 June 2005

there will be no requirement for employers to check their documentation." (16 11 05 Col. 1042). This of course misses the point that until documentation has been checked, it has not been established that the employee is British.

AMENDMENTS

ILPA supports amendments:

To Clause 15

- to lower the burden on the employer: from showing that s/he complied with prescribed requirements to showing that s/he took reasonable steps so to do. The hope is that such an approach would reduce reluctance to employ people under immigration control and thus reduce discrimination.
- to ensure that the penalty notice contains information on further compliance. The aim of the civil penalty must be to support good practice on the part of the employer, not merely to punish mistakes.
- to probe how the requirement that employers conduct repeat checks on documents is supposed to work in practice.

To Clause 16

- to make explicit on the face of the statute that reasons must be given for a decision on a notice of objection.

To Clause 19

- providing for those setting the amount of a civil penalty to take into account the extent to which the employer has afforded the migrant worker treatment not less favourable than that which applies to national workers, by virtue of legislative or administrative provisions, collective labour agreement or custom, in respect of payment of earnings, deductions from earnings for the purposes of taxation and national insurance contributions, and the right to join, and organise in the workplace as part of, a trade union. Such an approach is likely to help to ensure that exploitative employers deliberately defrauding the system receive higher fines and thus target enforcement effort to the worst abuses.

To Clause 20

- to provide for the affirmative procedure in parliament for the Code of Practice on avoiding race discrimination.

To Part Two

- Providing that the provisions relating to the civil penalty shall not come into force until the government has signed and ratified the Council of Europe *Convention on the Legal Status of Migrant Workers*