ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 70

HOUSE OF COMMONS REPORT 16 NOVEMBER 2005

ILPA'S PROPOSED AMENDMENTS

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. For further information contact Alison Harvey, Legal Officer, alison.harvey@ilpa.org.uk, 0207 490 1553

OUR EXPERTISE

1. ILPA members see a wide spectrum of work on immigration and employment. Members practising in business immigration represent employers seeking to bring workers to the UK/employ those under immigration control and people wanting to migrate here and start businesses. Other ILPA members also work with employees/would-be employees abroad or in the UK and subject to immigration control. The caseload is very varied, ranging from questions about dependants, to cases of employees in dispute with their employers, to workers asking for advice for changing from one immigration category to another.

2. Some of the people with whom we work are at risk. They include survivors of the worst abuses, people who have been trafficked (see the criminal offences under the Sex Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, as well as people whose lives are blighted by the discrimination they face, not necessarily from employers who do not wish to employ them, but employers who are fearful of doing so in the (often mistaken) belief that they would be breaching immigration control. We see all sides: we appreciate the complexities of this field. We do not claim to have all the answers. We hope we have some good questions.

3. We have considered carefully the Illegal Working Taskforce *Regulatory Impact Assessment for Immigration Asylum and Nationality Bill*[1]*;* 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*[2] and the *Immigration, Asylum and Nationality Bill Civil Penalty for Employers Draft Amount of Penalty Code of Practice*[3]. We appreciate the way in which the authors of these documents have sought to map in detail the impact of the proposed legislation, as well as the briefings from the Confederation of British Industry (CBI) and the Commission for Racial Equality (CRE).

3. On the basis of the experience of members, we make the following general points:

- We find it difficult to understand the low level of successful prosecutions under the existing offence, and even the level of prosecutions and investigations. While

[1] Home Office, 22 June 2005
[2] Home Office, published in draft 13 October 2005
[3] Home Office, published in draft 13 October 2005

appreciating that it is difficult to secure a criminal conviction, we should still have expected to see more investigations, more prosecutions and more successes. We are not called in to advise those who exploit migrant labour, but we see their victims. We do not consider that exploitation is an isolated or rare problem.

  - **Are sufficient political will and resources being devoted to this area? How many enforcement officers are there working on it?**
  - **Will the government sign up to the European Convention on Action Against Trafficking in Human Beings (Adopted Council of Europe 3 May 2005) and make every effort to enforce its provisions?**

- Attention has been given during debates on this bill to the need for a consolidating act, and we welcome the Minister's enthusiasm for this. It is not merely a matter of employers being clear on their own responsibilities. They also need to feel confident in dealing with people under immigration control. If it were less difficult to understand current immigration law, it would be easier for them to establish who has a right to work and to have confidence in employing people under immigration control, or recruiting employees from abroad. We fear that this Bill only increases the complexity of the provisions.
- 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. 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 discrimination in employment faced by those who are subject to immigration control or whose name, or looks, makes people think they might be subject to immigration control, 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, 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 new provisions attempt to pass the burden of policing immigration control onto employers.

OVERVIEW OF THE PROPOSALS IN THE BILL

The worst employers will not check documents. They 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 sector is the underground economy pure and simple. The success rate in prosecution to date has been nugatory, even with strict liability.

  - **What prospects can the government give us of a better rate of prosecution under the new offence?**
  - **What evidence can they offer that they will achieve this?**

Employees who do not have the right to work, who perhaps do not even have leave to be in the UK, are very vulnerable. They fear, correctly, for the most part, that if they approach the authorities they will be made to leave the UK/or be detained and this results in their uneasy collusion with the exploitative employer who can deny their rights and damage the labour market with relative impunity. People who, although entitled to work, cannot find legitimate employment, because no one will employ them, are similarly poorly placed to report exploitative employers to the authorities. The risks associated with discrimination affect not merely the individuals concerned, but also the labour market as a whole.

However, we are wary of civil penalties, which provide less protection for individuals subject to them than the criminal law. We have sympathy with the view expressed in the CBI briefing that they are likely to be directed at the "low-hanging fruit" and support the view expressed in the CBI briefing for Committee stage, that there are risks of discrimination where employers who wish to comply with the law perceive that the risks associated with employing people under immigration control to outweigh the benefits. The Home Office have set out in detail their reasons for preferring a civil penalty[4] but **Amendment 7,** in the names of Mr Humpfrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham, probes the Government and forces them to defend their distribution of risk.

We are also concerned at the lack of clarity as to the standard of proof to be applied by the officers imposing these penalties, which can be substantial. If charges are imposed, or seen to be imposed, in an arbitrary manner, then, given the burden of challenging them, there will be a further negative knock-on effect from the civil penalty on all foreign looking/sounding employees, whether working lawfully or not.

We are concerned at how the requirement that employers conduct repeat checks on documents will work in practice. The Home Office discourages people from applying for a variation (including an extension) of existing 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 employers discharge the obligations imposed on them[5]?**
- **How can the risk that the employer, fearing to breach the law, sacks the employee, be avoided?**

The Illegal Working Taskforce *Regulatory Impact Assessment* for the Bill[6] 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 deals with general queries – what is envisaged here is that employers will be making enquiries on

[4] In the Regulatory Impact Assessment, see note above.
[5] 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
[6] Published 22 June 2005

individual files. MPs 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.

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 Home Office has published in draft the Code of Practice for which provision is made by this clause[7]. 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. There is no magic formula here that will obviate the real risk of discrimination.

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."*

Employers will be bearing in mind that if that if a variation (including an extension) is refused then under the operation of **Clauses 1 and 11** of this Bill the person will become an overstayer and lose their permission to work, if the refusal comes after the original leave would have expired. When a person is applying for the variation their documents will be with the Home Office, providing difficulties in repeat checking. **Amendment 13** in the names of Mr Humpfrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham, provides an opportunity to probe the difficulties associated with repeat checking, as it proposes to leave out this requirement.

[7] Home Office. *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.* Published in Draft on 13 October 2005.