ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 13
HOUSE OF COMMONS STANDING COMMITTEE E
Sixth Sitting Tuesday 25 October (Afternoon) & 8th Sitting Thursday 27 October (Afternoon)

CLAUSES 37 to 44 (CLAIMANTS AND APPLICANTS) and new clause 1

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

CLAUSE 37 Accommodation

1. Clause 37 is a sensible extension to local authorities of powers, currently delegated only to the private sector, to accommodate failed asylum seekers and other applicants granted temporary admission or bail pending decision or removal.

Amendment 127

Dr Evan Harris, Mr John Leech

ILPA supports the proposed amendment

Page 21, line 23, at end insert

( ) In section 99(4) (Provision of support by local authorities) after section, and before 95, insert "4"

Purpose

2. Clause 37 omits to extend to s.4 the provision in s.99(4) of the 1999 Act permitting local authorities to incur expenditure in preparing proposals for entering into arrangements to provide support. This should be rectified and that is what this amendment does.

Amendment 105

Mr Neil Gerrard
ILPA supports this amendment

Clause 37, page 21, line 44, at end insert-
(6) Section 9 (Failed asylum seekers: withdrawal of support) of the Asylum and Immigration (Treatment of Claimants etc..) Act 2004 (c.19) shall cease to have effect.

Purpose

3. ILPA strongly supports this amendment, the purpose of which is to repeal s.9 of the 2004 Act. That section, with the accompanying schedule, provides for the withdrawal of all

support from asylum-seekers whose claims have failed. When that clause was introduced the difficulties that it would cause were predicted. The facts have born out those predictions. . ILPA is a member of the Refugee Children's Consortium and draws attention to all that is said in the joint briefing from all members of the RCC on the effects of s.9 and the Schedule.

CLAUSE 38 Integration loans

Government amendments 61 & 62

Presumed purpose:

4. To allow integration loans to be made to a wider class than recognised refugees. ILPA supports this amendment which could allow loans to be made to, for example, those given humanitarian protection, although we should be even more pleased if they were named on the face on the legislation. We would also suggest that for clarity and ease of reference it would be helpful to change the title of section 13 if that is possible so that it read "Integration loans for refugees and others" as this might help people to spot this possibility.

CLAUSE 40 Removal: cancellation of leave

ILPA supports the proposal that Clause 40 should not stand part of the Bill

5. This clause takes us back to the debates on clauses 1 and 9. Section 10 is the power to issue removal decisions, and it is against the decision to issue removal directions that an appeal will lie for those refused variation of leave, once variation appeals are abolished. The committee is unlikely to be willing to spend much more time on these points, but we do think it worth probing to check that the extent to which are correct in identifying this provision as part of that package and, since attention is likely to be on support at this point, emphasising in passing that the concerns the Minister has agreed to look at in relation to Clauses 1 and 9.

6. The Minister noted that it is relatively rare that an overstayer be prosecuted and charged with the criminal offence of breaching immigration control. However, it is not rare but an everyday occurrence that once an overstayer a person is denied the right to work, the right to access benefits, many rights of access to the health service, the right to study and is liable to detention. It is also the case that the employers of an overstayer risk prosecution under Clause 11. There is also the confusion that will inevitability result from lack of clarity about entitlements. How are they who are about to be turned into overstayers, by refusal of extensions of previous leave to remain, to be accommodated and supported pending appeal (if any) or departure? Are they all going to be instantly detained or brought within the ambit of s.4 of the 1999 Act by service of notices of liability to detention? If so, has the government costed this or checked the feasibility of meeting the increased need for detention and accommodation places? If not, how does it imagine that these applicants, some of whom will have been working in the UK lawfully for years, are to subsist?

CLAUSE 42

7. ILPA has no objection in principle to having the requirements for making applications appear in the Immigration Rules rather than, as now, being confined to regulations, but we are concerned about the breadth of clause 42 with its reference to "whether or not under the rules...or any other enactment".

Amendment 129

Dr Evan Harris, Mr John Leech
ILPA supports the proposed amendment

Clause 42, page 23, line23, leave out lines 23 to 25 (subsection (c)).

Purpose

8. To deny the Secretary of State the power to specify, other than in regulations or the immigration rules, the consequences of failure to comply with specified procedures.

9. This amendment seeks clarification of the meaning of 42(2) and what scrutiny will be given to procedures created under it, as opposed to the rules under 42(1). Clause 42(2) troubles us. The Secretary of State makes laws as to immigration applications, and makes the immigration rules. New situations arise which require the development of practices and policies not yet embodied in the rules, although in the past some concessions have been very slow to find their way into the rules (domestic violence is an example). The concession or policy might be set out in a letter, or described at a meeting or noted in policy instructions. While the latter are available on the Home Office website, it is a brave non-specialist who can negotiate them. It is not easy for individuals in these circumstances to know what the law is, nor to conform their conduct to it. Thus while it might be embodied in a concession that the Secretary of State requires certain information, it would not be reasonable to give the Secretary of State powers to create a mandatory procedure, with serious penalties, if it were not followed. If a concession requires to be formalised in this way, it can be incorporated into the immigration rules or into regulations.

10. The amendment also provides an opportunity to probe the power in both sub-clauses to make provision for the "consequences of failure to comply". Could an inadvertent failure to comply with a technical requirement by a specified time result in refusal of an application? Current forms are complex, especially for people for whom English is not their first language, and access to legal advice is shrinking. The government must be pressed for assurances that people will not be turned into overstayers, with all the consequences that implies, by refusals of applications on technicalities or for delays or difficulties in providing documentation that are beyond their control. Failure to provide a system of reasonable requirements operated reasonably will, in the absence of statutory appeal rights in most cases, be a recipe for judicial review.

11. The *mere* failure to comply with a procedural requirement should *never* be allowed to create inadvertent overstayers of applicants who in fact meet the substantive requirements for the category in which they are applying.

12. The government should be invited to consider an amendment to require that in all cases procedural or documentation irregularities are to be brought to the attention of applicants, and opportunities given for correction, *before* a decision is made on an application. Provided the application was made in time, existing leave should be extended to cover the reasonable time needed to correct such irregularities, regardless of whether the Home Office brings them to an applicant's attention before or after the previous leave expiry date.

13. The Committee may be reluctant to revisit the questions raised by clauses 1 and 9. But it should be noted in passing that if clauses 1 and 9 are passed and become part of this bill through fairness will dictate even more loudly than before that the requirements to be met for a successful application must be clear, unambiguous and accessible to all. But clause 42(2) appears to have the opposite effect because it gives the Secretary of State an unfettered power

to lay down procedural requirements outside the rules, with no prescribed method of notifying or publicising those requirements and with no limitations on the power to dictate the consequences of failure to comply.

14. This carries a clear risk that ignorance of changed procedural requirements could result in refusals that lead to applicants becoming overstayers with the consequences already discussed at length for them, their employers and the institutions at which they are studying.

> *Hypothetical example:*
>
> *Imagine you run a small but booming business, let us say in IT, servicing highly specialised company clients. You employ a young man from overseas who has leave to remain with permission to work for 2 years on the basis of marriage. He proves to be invaluable, a lynchpin of your company, increasingly relied on by you and your clients as time goes by. No one else quite matches his technical flair and grasp of their needs. You entrust him with the major task of implementing a new computer network for your most valuable client. Time is of the essence. The work is just underway when he informs you that his application to the Home Office for indefinite leave to remain has been refused. He has no immediate right of appeal. If he stays until removal directions are issued he will acquire a right of appeal, but meanwhile presence would be illegal, and it is illegal for you to continue to employ him. What are you to do?*
>
> *Now factor in clause 42 - what are you to think when you learn that the reason you have been placed in this dilemma is that he was able to provide only 8 examples of official documents and correspondence addressed to him and his wife over the past 2 years but that the Secretary of State, using his powers under clause 42(2), has decreed that 10 items are mandatory? Or that he had made photocopies of his bank statements for his own reference and had inadvertently submitted them instead of the originals? Or that he overlooked the requirement to "staple all photographs to section 3 of the form" and instead attached them by paper clip to the front of the form? Or that his passport had expired and was with his embassy for renewal when it was time to submit his application and although he submitted it later the Home Office had already refused the application under clause 42(2) before it was linked to his file?*
>
> *You might decide to contact your MP. S/he might get the Home Office to reverse its decision, but at best that will take some time. Meanwhile, what are you to tell your client whose office is now at a standstill with a half-installed computer network?*
>
> *Let us assume that, rather than face civil penalties and criminal liability, you cease to employ this young man, and that you and your client manage to pick up the pieces somehow. How do you then feel as a tax payer when you learn that his wife, pregnant with their second child, will shortly be on benefit because the sole breadwinner of the family has been forced to leave the UK?*

CLAUSE 43 FEES AND CLAUSE 44 FEES: SUPPLEMENTAL

15. The power to charge fees as described in this section derives from section 5 of the 1999 Immigration and Asylum Act, amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The relevant provisions are repealed by this Bill. These frequent changes suggest a lack of considered policy objectives. The objective of making this part of the immigration system self-financing has never been fully justified; although individuals

may benefit from gaining permission to live or to study here, so does the rest of society, by ensuring that there are workers to do the jobs needed, students to be trained and to pay fees and spend money here.

16. From April 2005, the fee for making any immigration application in person at the Home Office is **£500** – a very substantial sum. Applications by post are **£335,** except for those from students, which are **£250** and applications to have existing conditions of stay endorsed on a new passport, which are **£155.** These are much higher than were envisaged in 1999, when the then Home Office Minister, Mike O'Brien, made it clear that fees 'will reflect the cost of processing applications' and said that 'I do not yet know the number of categories of fee, or the exact fees, but our current estimate for applications for leave to remain and similar applications is £90.' (Hansard, Special Standing Committee, 15 April 1999, col. 562). That Act gives the power to charge different fees for different applications and the explanatory notes made it clear that the reason for charges was to meet the actual costs of applications, which are of greatly varying complexity. There was no further consultation on this proposal after the Act was passed.

17. Fees were mentioned in passing in the Home Office's 2001 White Paper, *Secure borders, safe haven,* in para. 3.31, headed 'Charging for work permits', stating only 'there is already a power to charge for after-entry immigration casework and plans are being made for charges to be introduced, linked to improvements in customer service'. This paragraph also mentioned charges for work permits; in that case, there was a consultation process lasting nearly three months, to which ILPA responded, and the result was a flat fee of £95 in 2003, which is generally paid by the employer, and provision that the NHS and DfES are not charged.

18. When fees were introduced for all immigration applications in August 2003, at very short notice, there was a flat rate of £155 for all postal applications, £250 for those made in person. A consultation process about increasing the fees was held the very next year; although the vast majority of respondents made their opposition to fees, and to increases, clear, the fees were increased. The Home Office managed then to impose differential fees, charging less for students and less again for confirmation of people's stay, presumably in response to the strongest representations and, in the latter case at least, the lack of complexity of the operation. But an increase from nothing to £335 in under two years is huge.

19. Fees for immigration applications place a heavier burden on minority ethnic communities widely recognised to be suffering disadvantage and discrimination, in their families being able to stay here, their friends coming to study or to work here. Those applying for visas with a view to settlement have paid £260 for the visa and then will need to pay again some years later when they apply for settlement. In 2003, nearly 12,000 out of 19,500 husbands, 17,000 out of 38,000 wives and 15,600 out of 27,000 children granted settlement came from Africa or the Asian subcontinent. These fees will have a particularly serious effect on them on them. When proposing the 2004 increases, the Home Office suggested that it 'incorporates the cost of a more rigorous approach to tackling potential abuse'. This seems to suggest all people applying for leave to remain have the propensity to 'abuse' the system and therefore should be treated as though they will do so and be charged accordingly. The Minister has cautioned against attributing all changes to abuse, but this was the justification given by the Home Office in this case. If it is not the case that all those applying for leave to remain will abuse the system, why should costs fall on other people making applications rather than the taxpayer.

20. The Legal Services Commission generally allows solicitors up to 3 hours work for all the work involved in advising people and preparing and making an immigration application, that is to say £172.05 for those in London and £157.65 outside London. Checking the documents dealing with the application after it has been submitted is much less complicated

and is normally done by a less qualified person than a solicitor. The Home Office is a huge organisation and therefore will enjoy more economies of scale than a solicitor's firm. Why therefore are fees set at current levels?

21. After much lobbying the Home Office agreed that young people who had been granted exceptional or discretionary leave up to their eighteenth birthdays should not be charged fees, nor should children in the care of local authorities or spouses applying for leave to remain after a marriage had broken down due to domestic violence. Would the Minister indicate what consideration has been given for making similar provision for no charges to be levied in respect of :
- An application made under any claim under the Human Rights Act, ECHR, or other international convention
- Any application made by a child in his/her own right
- Any application made by a person who is in receipt of means-tested benefit

22. Application fees are expensive for people who have recently come to the UK for settlement and who are still in the process of establishing themselves here, in their first year or two of stay. They add another charge for international students, already having to pay higher level fees. They put a burden on people from abroad who have exceptional reasons for needing to stay longer than they originally intended. They will have a disproportionate effect upon people from ethnic minorities and their families and encourage the social exclusion of recently-arrived legally resident people, militating against the government's stated aims of social inclusion and racial justice.

Amendment 132

Dr Evan Harris, Mr John Leech

ILPA supports the proposed amendment

Clause 43, page 24, line 5, leave out subsection (c)

Purpose

23. This would continue the present situation, whereby the Home Office does not officially give advice to individuals and des not charge for advice. Its Telephone Enquiry Bureau and Public Caller Offices may give information about the rules and the evidence required to meet them, but it is wholly inappropriate for them to advise on whether to make an application.

24. It is inappropriate for the Home Office to give advice, as a party to an application or appeal, and especially to charge for it. It has a duty, as a government department, to provide correct information about the law which it implements to individuals and should not charge for this.

25. Also an opportunity to probe what the clause intends. The Explanatory Notes give no explanation of how this differs from the present fees requirements or the reason for the change.

Amendment 133

Dr Evan Harris, Mr John Leech

ILPA supports the proposed amendment

Clause 43, page 24, line 11, at end insert

", provided the fee is not greater than the actual cost to the Home Office of dealing with application made"

Purpose

26. To ensure that the government is not making a profit from these fees. When the Home Office first introduced charging for applications, the then Home Office Minister, Beverley Hughes MP, wrote to ILPA on 23 September 2003:

27. "The fees are set under Treasury rules to recover the full administrative cost entailed in considering applications and no more. This is calculated by taking the overall costs of processing applications divided by the number of decisions we expect to make."

Amendment 134

Amendment 132

Dr Evan Harris, Mr John Leech

ILPA supports the proposed amendment

Clause 43, page 24 line 13, at end insert-

"in particular that when leave is granted for a shorter period than requested, provided that the period requested does not exceed the maximum permissible for such an application, the fee may be reduced"

Purpose

28. To make provision to ensure that people who are granted shorter periods of leave and therefore need to apply for more frequent extensions do not pay disproportionately for this. The immigration rules state the most common periods of leave for which people will be allowed to stay. A student on a degree course, for example, should be give leave for the whole of the course, normally three years. A person coming to work with a work permit will normally be given five years. If students are given one year's stay instead of three, then they could end up paying three times what they would have paid if given a longer period of leave.

CLAUSE 48

Government amendments 53 and 54
Presumed purpose: Appear to be the usual "draft in haste repent at leisure provisions – providing powers to extend the application of the Act.

Government New Clause 1
Presumed purpose
To alter the definition of asylum and human rights claim for most appeal purposes. The changes are the subsections 2(b) and 3(d). The relevant part of the act, and of other Acts which refer back to this definition, deal with when a person has a right of appeal and also with the power to remove them from the UK while an application is pending. The provisions to certify claims as clearly unfounded may be relevant here, as may provisions to certify claims on the basis that matters could have been raised before. However, the new clause is pretty

opaque on its face and it would be helpful to question the Minister closely as to both its purpose and its likely effect.

Clause 23

Proposed amendment

Clause 23, page 10 line 33, leave out lines 33 to 41 (subsections (b) & (c)) and replace with

(b) if on examination of any document so produced or found the immigration officer is of the opinion that it may be needed in connection with proceedings on or for an offence.

Purpose

To deny the extension of powers under Schedule 2, paragraph (4) of the Immigration Act 1971, as set out in this clause.

Under Paragraph 4(AA) of that Act, inserted by Immigration and Asylum Act 1999 an immigration officer already has the powers set out in the new proposed subparagraph 4(b).

The new paragraph (b) suggested in the amendment reproduces powers in the existing paragraph (4). That paragraph also makes provision for passports to be detained if the immigration officer is of the opinion that they may be needed for proceedings in connection with an appeal under the Nationality and Immigration Act 2002 (following amendment by the Nationality, Immigration and Asylum Act 2002). Given the new plans to deny in-country rights of appeal in this bill we have not reproduced that power.

All passports are and remain the property of the issuing governments and traditionally government agencies have appropriately been given limited powers to retain them. Under the 1971 Act an immigration officer is permitted to retain any document revealed as a result of an immigration search for 7 days or, if the document is or may be needed for criminal proceedings until satisfied it will not be so needed. The Bill extends this power allowing passports or other documents to be retained 'for any purpose' until the grant of leave or the departure of the holder or until it is decided the person does not require leave to enter. People whose identity documents are held in this way will suffer real prejudice in their daily lives because they will be unable to prove their identity to landlords, doctors, hospitals, childcare etc. The person may wish to depart voluntarily to their home or another reception country and can be handicapped in making such arrangements if they do not have a passport or identity document. It is ILPA's experience that IND is often disorganised and slow in assisting such voluntary departures. Our members have experience where these documents are misplaced by the Home Office.

Passports – case of J
J was a long-term overstayer who had applied to stay in the UK with her husband, who is settled here. Nothing happened; it was taking forever to get a response. In June 2003 J decided to return to Gambia, with her British born, British Citizen children and apply for entry clearance from there. The Home Office promised to return the passport. They did not. Further enquiries were made, and they then said they would return her passport at the airport. She booked a flight, got to the airport: no passport. It took months before she was given her old passport (which by that time had expired) and was able to submit it to her High Commission and obtain a new one. She finally travelled from the UK in January 2004. She obtained her entry clearance, although this was not a speedy process either, and in

November 2004 was able to return to the UK with her daughters and with leave as a spouse to remain with her husband.

Questions:

- In what sort of circumstances is a passport required in connection with an appeal?
- When would a person described in paragraph (c) – i.e. a person whose passport is retained beyond the time when he or she "is about to depart or to be removed" - get their passport back?
- What will happen in the case of the new out of country appeals proposed under Clause 1, and existing cases in which the appeal is out of country? Could a passport be retained after a person has gone back to their country?
- What about human rights cases heard out of country because they are certified as clearly unfounded? Will it be possible to retain the passports of those people beyond the time when they leave the UK?
- If a passport is returned to a person after their plane has landed in another country or during the journey, who will have the passport in the meantime? Will it always be in the possession of an immigration officer or a consular official? What steps will be taken to ensure that the person does indeed get his/her passport back, and also to ensure that his/her safety is not compromised if the handover of the passport is witnessed by local immigration officials, who might take this as suggesting the person is in trouble with the UK authorities.

Clause 24

Amendment/Stand part

Page 11, line 11, leave out Clause 24

Purpose

Preserves the current position whereby all those required to attend for fingerprinting, are given seven days notice of the requirement to attend. To probe the government's intention in seeking to amend this clause and to raise the difficulties it may cause applicants by being given only three days notice (see proposed (2A)(b)) running from the date given in the notice as its date of issue, which could easily be more than three days before it reaches the applicant.

The people for whom it is proposed that three days, rather than seven, from issue of the document, should be the minimum notice period re people who have made sought recognition as a refugee or asserted that removal would breach their rights under Article 3 of the European Convention of Human Rights and their dependants. The people who will get a minimum of seven days[1] are those who have failed to produce a valid passport or identity document on arrival; a person refused leave to enter but on temporary admission whom it is feared will not comply with residence conditions and a person in whose case a decision has been made to make removal directions or to deport.

[1] Note that contrary to what is said in the House of Commons Library research paper at paragraph H.2, people in all categories can be required to attend at a specific date and time.

Questions:

- Why is it proposed to make this change and why in respect of people seeking asylum only?
- What will happen if a person can prove that the document did not reach him/her until the after the date on which s/he was required to attend? (for example because it was delayed in the post, or they were temporarily absent from their accommodation for a couple of nights or did not have the money to travel to attend). The consequences of failure to attend can be arrest without warrant (1999 Act s.142(3)).

Comments

- The same problems could arise in the case of a person given 7 days notice, given that the requirement that the days start running from the date of issue will also apply to them.
- The requirement that a person attend at a specified time of day or specified hour could still be inserted into the Act without shortening the notice period, if this was considered important for good administration. Will not the proposal to shorten notice periods and give fixed times for attending create a greater risk of missed appointments and wasted time of officials?

No amendments proposed to ***Clause 25****.*

Clause 26

Page 12, line 26, at end insert:

"( ) The Secretary of State may make an order under this paragraph only if satisfied that the nature of the information sought is such that there are likely to be circumstances in which it can be required under subsection (2) without breaching Convention rights (within the meaning of the Human Rights Act 1998 (c.42)."

Purpose

To probe the safeguards placed upon the exercise on these powers. The wording of the proposed subsection is taken from **Clause 27** of this Bill. If it was thought necessary to put it on the face of a Bill already certified as complying with the Human Rights Act in that section, why not in this one? Upon what other safeguards is the Secretary of State intending to rely that render its inclusion unnecessary?

Paragraph 27(2) of Schedule 2, which this paragraph amends, at the moment allows the Secretary of State to make an order requiring the captains of *arriving* ships or aircrafts to provide immigration officers with a passenger list showing names and nationality of those arriving, and particulars of the crew. Passenger information powers were contained in Schedule 7 to the Terrorism Act 2000 and the Information Order (Terrorism Act 2000 (Information) Order 2002 made under it. These specific powers oblige carriers to provide more detailed information: including full name of passenger, gender, date and place of birth, home address, nationality, type and number of travel document, country of issue and expiry date as well as information about the number of items in the hold. Where goods are carried on a vehicle it makes provision for a description of them, the address from which they were

collected and to which they are to be delivered, and the registration number of the vehicle to be provided.

The *Partial Regulatory Impact Assessment* mentions the governments intention to amend the *Immigration (Passenger Information) Order 2000* to allow immigration officers to request additional Advanced Passenger information, including biometric data from travel documents and additional reservation data to the extent that it is known to the carrier.

As set out in the Explanatory notes (paragraph 26), the new clause provides a new power to require carriers to pass on information about passengers on a ship or aircraft about to leave the United Kingdom. (26(2)). The House of Commons Library briefing states "If carriers collect and pass on embarkation data, there would be no need for immigration or other government staff to do embarkation checks – resulting in an estimated saving of £183 million over 15 years. A *Regulatory Impact Assessment* sets out the estimated costs to carriers."

Paragraph 35 of the regulatory inpact assessment estimates the costs of providing API (Advance Passenger Information) data at 4 million, with ongoing running costs net of data transport, of £470,000 per year.

The Conservative party's 2005 election manifesto calls for the reintroduction of "full embarkation controls." [2] To what extent are these new powers a substitute for reintroducing embarkation controls? If this is the case, are the reasons for doing so financial, or other?

CLAUSE 27

Amendment

[2] See e.g . *Hansard* HC Report 20 December 2004 Col 1964-5: **David Davis: ..**If the Government are to argue that immigration controls are a high-ranking priority, as I think that they will, embarkation controls and better border controls will be a necessary component…**Mr. Gordon Prentice:** Was it not the right hon. Gentleman's Conservative Government who scrapped embarkation controls in the smaller ports? **David Davis:** If I recall correctly, it was embarkation controls for the EU, which were no longer legal. It was the present Government who scrapped them for the rest of the world…" See also Embarkation Controls, *Hansard* HL Report, House of Lords Written Answer HL957 (the Lord Marlesford, response from the Lord Rooker on behalf of the government) 5 November 2001, which states "In 1994 the Government withdraw the embarkation control for passengers travelling to contintental destinations from ferry ports and small/medium sized airports. The residual embarkation control at large airports was reconfigured by the Immigration Srvice in March 1998 after a lengthy period of consultation with interested parties. The routine presence of imigration officers was replaced by a new arrangement based on an intellignece-led approach, with enhcnaced co-operation between the agencies and an increased use of CCTV technology. The reconfiguration of the embarkation control means that the Imigration Service now uses its resources more flexibly, concentrating on key delivery areas, while operating a targeted embarkation control any time there is an immigration-related operational need. It has a contingency plan for emergency, short-term targeted embarkation controls, which can be set up at one hour's notice if there was an urgent operation need. This involves setting up an embarkation control at the traditional point and an additional gate check embarkation control at airports. I do not think a return to a routine, manual embarkation control is a sensible use of Immigration Service resources, which is why we are considering as a matter of urgency a range of measures to enchance border security, including the us of new technology. "

Clause 27, page 13, line 30, leave out "generally or"

Purpose

The effect of the amendment is to prohibit the Secretary of State from making orders that apply generally. It provides an opportunity to probe the safeguards that will be associated with the exercise of these powers. It invites the Secretary of State to envisage a situation in which he could make an order that applied generally but also complied with paragraph (7) of the clause, requiring that the information could be sought without breaching human rights.

Questions

- Can the Minister clarify whether passenger information orders under Paragraph 17(2) of Schedule 7 to the Terrorism Act 2000, as amended and the Information Order (Terrorism Act 2000 (Information) Order 2002 made under it, include the power to make orders that apply generally, rather than requiring that a specific written order be made in respect of each vehicle?
- If this is the case, why was it felt necessary to take a different approach under this clause?
- Could a carrier be given a request that said simply "all your craft, or vehicles? Could this information be required for every single vehicle? The *Partial Regulatory Impact Assessment* says, at paragraph 54 "The timescales involved in bringing forward this legislation have meant that we have been unable to consult fully with industry on the specific detail of the provisions prior to introduction." This is repeated in the notes re these powers (no page number but see just past the middle of the Assessment "3.Consultation" and then 6. Small Firm's Impact Test, where it is noted that "Consultation with the Small Business is ongoing". What was the rush? Had the government waited, perhaps he would have been able to undertake the consolidation we have noted would make the deliberations of this committee, not to mention work in the field of immigration, whether as government official, judge or representative, much simpler. Moreover, had the government waited, it might have been possible fully to consult with industry on these measures.
- What has the Small Business Service said to date about these measures?
- The Partial Regulatory Impact Assessment mentions an intention (paragraph 59) to publish a report on Project Semaphore, the e-borders pilot in which carriers have been involved, "probably by September 2005" Is that report available and could the Committee have copies if so?
- How long would the data collected be kept and stored?
- With whom could it be shared?
- The *Partial Regulatory Impact Assessment* notes (unnumbered pages but middle of printed document 2.,(b) *"The powers to require information on outbound EU journeys were disapplied as part of the Single Market provisions but HMRC's experience has shown this to be a specific weakness in their ability to target and profile smugglers."* Could the Minister explain what this means and identify whether there is any risk of the new powers being struck down as incompatible with EU legislation?
- The *Partial Regulatory Impact Assessment* also states that "The existing legislation is monitored by immigration staff at ports of entry" What form does that monitoring take and in what form are the results collated? Is it possible to provide information about conclusions from the monitoring to the Committee?

Amendment

Clause 27, line 38, leave out "there are likely to be circumstances in which"

Purpose

The amendment rewrites the provision so that instead of stating that "The Secretary of State may make an order under this paragraph only if satisfied that the nature of the information sought is such that there are likely to be circumstances in which it can be required under subsection (2) without breaching Convention rights" it instead reads "The Secretary of State may make an order under this paragraph only if satisfied that the nature of the information sought is such it can be required under subsection (2) without breaching Convention rights". It is to probe the drafting of this clause. The drafting would appear to permit the Secretary of State to make an order if he can envisages circumstances in which requiring the information would not breach human rights, even if in the particular case he knows that this is not so. We should like the Secretary of State's assurance that this is not the case and that he must be satisfied that requiring the information in the cases covered by the order will not breach Convention rights.

CLAUSES 28 & 29

Amendment/stand part

Clause 14, page 14, line 3, leave out Clause 28.

Consequential amendment : Clause 29, page 15, line 3, leave out "or 28(2)

Purpose

To probe what a clause about "freight information" is doing in a bill on Immigration, Asylum and Nationality and whether this clause can properly be included in this bill given the long title. This is of particular importance given that by operation of Clause 29 it can give rise to criminal offences.

In the case of the 58 Chinese immigrants who died being smuggled into Dover in a sealed container, the type of freight normally carried would have given no clue as to the likelihood of the vehicle being used to transport people. They died because they were transported in a sealed container, and were therefore unable to breathe. Information about the freight seems unlikely indirectly to provide information about the people on board.

In the Terrorism Act 2000, paragraph 17 of Schedule 7 gave the Secretary of State power to make orders specifying information to be requested, provided that information related to passengers, crew or vehicles belonging to passengers or crew. When the order was made (Terrorism Act (Information) Order 2002, it also allowed information to be requested about goods carried on a vehicle, namely a description, the address from which they were to be collected and that to which they were to be delivered and the registration number of that vehicle. Here we see attention turning from people to goods on the face of the Bill, but it is far from clear that this falls within the short title of a bill which is to "Make provision about immigration, asylum and nationality and for connected purposes".

Clause 28

Government Amendments 108 & 111
Presumed purpose:
To broaden the ambit of the clause considerably so that it also covers road hauliers.

Government Amendments 109 and 110
Presumed purpose: To reflect the change effected by amendment 108, whereby road hauliers will also be within the ambit of the clause and to further broaden the ambit of the clause so that those connected with freight companies – ie sending the cargo rather than involved in the transport, can also be required to provide information.

Clause 29

Government Amendment 63 & 64
Presumed purpose: Drafting only – the effect of the final version appears to be the same: a lesser maximum period of imprisonment in Scotland and Northern Ireland than in England and Wales.

No amendment to **Clause 30.**

CLAUSES 31 & 32

Government Amendments 30 to 32, Govt 42, Govt 44, Govt 47 and Government 50 to 52

Presumed purpose:

All these government amendments have the effect of making the order making powers under this section powers to be exercised by the Treasury and Secretary of State jointly, rather than just by the Secretary of State.

Proposed Amendment

Clause 31, page 15, line 43, leave out from "or" to page 16, end of line 2.

Purpose

The effect of the amendment is to remove the catch all whereby there is a duty to share information relating to such other matters in respect of travel or freight that the Secretary of State may specify by order. Its purpose is to probe the effect of this clause. The clause imposes a duty, rather than a power to share information. What safeguards apply? The duty appears onerous given that the breadth of information is so broad – will orders be specific? – a particular flight? – or general? If so, how are agencies to spot what they should share? Moreover, as per the proposed amendment to Clause 31, it probes whether orders relating to freight are within the long title of this bill.

CLAUSE 31

Clause 31, page 16, line 17, at end insert

"( ) The Secretary of State may make an order under subsection (4) only if satisfied that the nature of the information sought is such that there are likely to be circumstances in which it can be required under subsection (2) without breaching Convention rights (within the meaning of the Human Rights Act 1998 (c.42)."

Purpose

To probe the safeguards placed upon the exercise on these powers. The wording of the proposed subsection is taken from **Clause 27** of this Bill. If it was thought necessary to put it on the face of a Bill already certified as complying with the Human Rights Act in that section, why not in this one? Upon what other safeguards is the Secretary of State intending to rely that render its inclusion unnecessary?

Government amendments 33 and 46

Presumed purpose: to ensure that there is no overlap between the order-making powers under this section and those belonging to HMRC under the specified sections. Where there is potential for such overlap, HMRC shall have the power.
Amendments 40 and 41 have the effect of retaining the Director General of the Security Service, the Chief of Secret Intelligence and the Director of Government Communications people *with* whom there is a duty to share information, but no longer people *on* whom there is a duty to share information. Amendments 38 and 39 are drafting changes consequential on this change.

Amendments 43 and 45 appear to be changes consequential on amendments 40 and 41. If the people mentioned in those amendments are under no duty to share information there can be no order specifying the information they must share. It is unclear why amendment 43 does not also delete subclause 3(c) which appears to be left hanging with the deletion of 3(b). It is also worth checking the effect of deleting subclause 4(b), which was a general "without prejudice to s.31(2) and not limited to the duties upon those persons. (For 48 and 49 see note under clause 33)

No proposed amendment to clause 33

Government amendments 48 & 49
Presumed purpose: Takes information sharing for security purposes under clause 32 out of the Code of Practice. It is unclear why this has been done. Nothing in the clause imposes a requirement to report on how the Code of Practice is used, or could otherwise require the Security Services to diclose information. The government should be pressed on why they consider these amendments necessary.

Amendment 100 Dr Evan Harris, Mr John Leech

Presumed purpose: to require the information commissioner to be consulted in the preparation of the draft code, make provision for receiving other representations and for a draft to be laid before parliament.

.**Amendment 101** Dr Evan Harris, Mr John Leech

Presumed purpose: to provide for the Code to come into force in accordance with an order made, by statutory instrument, as per the clause as drafted, by the Secretary of State.

Clause 34

Clause 34, page 18, line 17, leave out from line 17 or line 22"

Purpose

This is a probing amendment. Its effect is to remove the power to share information with "any other foreign law enforcement agency". The specific point we should wish to probe is what safeguards will be in place to ensure that information is not shared in a way that breaches the UK's obligations under the 1951 UN Convention relating to the status of refugees. Clause 27 contains provisions in sub-section (7) requiring the Secretary of State to be satisfied that the there are likely to be circumstances in which the information can be required without breaching the applicant's human rights. We should like an assurance that this will include all cases in which it will put a person at risk of persecution within the meaning of the Refugee Convention, because information will be shared with the person's home government. We note that some passengers on whom information is provided under Clause 27 will be transiting the UK, perhaps en route to their home country. We also note the risk that if information is shared in an inappropriate fashion, it may create a risk of persecution where formerly there was none: it may make a person a refugee.

Questions

- Can the Minister explain why it was decided not to specify by order the relevant "foreign law enforcement agencies" – whether by name of agency or by country, etc.? The clause refers not to police forces but to those with "functions similar to functions of" a police force?
- Can we also ask why the safeguard referring to breaches of human rights, which has come up in previous amendments, was not included here?
- Clause 27 refers back to the Immigration and Asylum Act 1999, section 21, for a definition of police purposes. That section defines police purposes as "the prevention, detection, investigation or prosecution of criminal offences, safeguarding national security and such other purposes as may b specified. Have any other purposes been specified?
- Can the Minister confirm that the sharing of information under this Clause will also be limited to its sharing for "police purposes" as defined in section 21 of the 1999 Act? Could that limitation as to purpose be specified on the face of the statute please?

CLAUSE 35 Searches contracting out

Amendment

Clause 35, page 19 line 1 leave out from line 1 to line 6 (subsection (5).

Consequential

Clause 35, page 19, line 13, leave out lines 13 to 16 (subsection (c)).

Clause 36, page 20, line 19, leave out lines 19 to 26.

Purpose

To deny the power to allow persons other than constables or officers of revenue and customs powers to search and detain, and to use reasonable force, under this clause. To probe whom it is intended to authorise, and provide an opportunity for expressing concerns about the ways in which private contractors used for detention and escort under Part VIII of the Immigration

and Asylum Act 1999 use those powers (see s.154 and Schedule 8 to that Act on which these provisions are modelled, although they do differ). Is there not a risk of creating an unregulated security force? Why not limit the power to the use of police and customs officers? They will be searching vehicles which may well contain frightened and desperate people - it is also likely that some will contain women and children – it is not appropriate for unqualified officers to undertake the search. There are particular concerns where the searching of Muslim women are concerned.

Here, unlike in the case of detainee custody officers under the 1999 Act, these officers are being used for operational duties. Why it is felt appropriate to do so – why are immigration and police officers not being used?

To note that under s.154 of the Immigration and Act 1999 detainee custody officers were authorised individually. Here a class of person can be authorised. To ask the Minister whether a reference to "suitably trained" in 36(5)(b)(ii) would include understanding of the PACE codes of practice, and the limitations placed on powers of search. To ask the Minister why it is necessary to give a private contractor the right to detain a person for three hours, when it is envisaged that these will be people discovered in port and why police constables would not or could not be on hand within a much shorter period to search a person and immigration officers to examine the person. (see the reference in 35(1) to Schedule 2 paragraph 2, which is a reference to people who have arrived in the UK by ship or aircraft). To ask whether these powers would be exercisable only in a port or in, for a example, a lay-by where a lorry that had arrived several hours before was waiting.

Clause 35

Amendment

Clause 35, page 19, line 28, leave out lines 28 to 30 (subsection (7)(c))

Purpose

To deny private contractors the power to detain. This is a new departure. Contractors under the 1999 Act are detaining or escorting people who had already been arrested or detained. There is no provision for a disciplinary system to ensure proper use of this new power or public accountability.

Clause 36

Amendment

Page 20, line 3, leave out Crown Servant and replace with "independent person"

Purpose

To probe the reasons for giving this role to a crown servant. To invite the Minister to comment on how it has worked having Crown Servants to monitor private contractors used for detention and escort under Part VIII of the Immigration and Asylum Act 1999 (see s.154 and Schedule 8 to that Act on which these provisions are modelled). These crown servants do not managerial responsibility for contracted out staff nor power to discipline them or

supervise them To ask the Minister what steps he intends to put in place, by the appointment of Crown Servants or otherwise to scrutinise how these powers are used.

Amendment

Page 20, line 27, leave out lines 28 to 33 (subsection (4)

Purpose

To prevent the authorisation of a class of person rather than named individuals and probe whether it is intended to create a specialised port force. The reference to a "specified class" of constable or Revenue and Customs officers is novel. Would these be distinct port forces? If so, why is this approach being taken rather than seeking the cooperation of the police forces in the areas? As to authorised persons, given that these people will have powers to use reasonable force, to search and to detain, they should be appointed individually as was done with detainee custody officers. It should not be possible to say, for example, all employees of Group IV or another private contractor.

Amendment

Clause 36, page 20, line 37 at end insert

"( ) The Secretary of State shall draw up a Code of Practice setting out the powers and appropriate practices for persons authorised under section 35. The Code:

(a) shall be made by statutory instrument
(b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament. "

Purpose

To make those authorised under s.35 subject to a code of practice. ILPA supports a detailed exposition of the powers and appropriate practices for authorised persons/constables to be included in a code of practice to be laid before and approved by Parliament. ILPA notes that if such private individuals are to have the status of authorised constable for certain immigration purposes then Parliament should be seen to set the standards for and regulate their conduct. (insert ILPA 2nd reading briefing note)

CLAIMANTS AND APPLICANTS

CLAUSE 37

Page 21, line 23, at end insert

( ) In section 99(4) (Provision of support by local authorities) after section, and before 95, insert "4"

Purpose

Clause 37 is a sensible extension to local authorities of powers, currently delegated only to the private sector, to accommodate failed asylum seekers and other applicants granted temporary admission or bail pending decision or removal. It omits, however, to extend to s.4 the provision in s.99(4) of the 1999 Act permitting local authorities to incur expenditure in preparing proposals for entering into arrangements to provide support. This should be rectified and that is what this amendment does.

Amendment 105 – Neil Gerrard

ILPA strongly supports this amendment, the purpose of which is to repeal s.9 of the 2004 Act. That section, with the accompanying schedule, provides for the withdrawal of all support from asylum-seekers whose claims have failed. ILPA provided extensive briefings when that clause was introduced on the difficulties that it would cause and the facts have born out those predictions. . ILPA is a member of the Refugee Children's Consortium and draws attention to all that is said in the joint briefing from all members of the RCC on the effects of s.9 and the Schedule.

No amendments to **clauses 38 or 39**.

Government amendments 61 & 62 to Clause 38

Presumed purpose: To allow integration loans to be made to a wider class than recognised refugees. ILPA supports this amendment which could allow loans to be made to, for example, those given humanitarian protection, although we should be even more pleased if they were named on the face on the legislation. We would also suggest that for clarity and ease of reference it would be helpful to change the title of section 13 if that is possible so that it read "Integration loans for refugees and others" as this might help people to spot this possibility.

Clause 40

Amendment/Stand part

Clause 40, page 22, line 40, leave out clause 40

Purpose

This clause takes us back to the debates on clauses 1 and 9. Section 10 is the power to issue removal decisions, and it is against the decision to issue removal directions that an appeal will lie for those refused variation of leave, once variation appeals are abolished. The committee is unlikely to be willing to spend much more time on these points, but we do think it worth probing to check that the extent to which are correct in identifying this provision as part of that package and, since attention is likely to be on support at this point, emphasising in passing that the concerns the Minister has agreed to look at in relation to clauses 1 and 9. The Minister noted that it is relatively rare that an overstayer be prosecuted and charged with the criminal offence of breaching immigration control. However, it is not rare but an everyday occurrence that once an overstayer a person is denied the right to work, the right to access benefits, many rights of access to the health service, the right to study and is liable to detention. It is also the case that the employers of an overstayer risk prosecution under Clause 11. There is also the confusion that will inevitability result from lack of clarity about entitlements. How are they who are about to be turned into overstayers, by refusal of extensions of previous leave to remain, to be accommodated and supported pending appeal (if any) or departure? Are they all going to be instantly detained or brought within the ambit of s.4 of the 1999 Act by service of notices of liability to detention? If so, has the government

costed this or checked the feasibility of meeting the increased need for detention and accommodation places? If not, how does it imagine that these applicants, some of whom will have been working in the UK lawfully for years, are to subsist?

No amendments to ***Clause 41.***

Clause 42

Clause 42, page 23, line23, leave out lines 23 to 25 (subsection (c)).

Purpose

To deny the Secretary of State the power to specify, other than in regulations or the immigration rules, the consequences of failure to comply with specified procedures.

ILPA has no objection in principle to having the requirements for making applications appear in the Immigration Rules rather than, as now, being confined to regulations, but we are concerned about the breadth of clause 42 with its reference to "whether or not under the rules..or any other enactment". This amendment seeks clarification of the meaning of 42(2) and what scrutiny will be given to procedures created under it, as opposed to the rules under 42(1). Clause 42(2) troubles us. The Secretary of State makes laws as to immigration applications, and makes the immigration rules. New situations arise which require the development of practices and policies not yet embodied in the rules, although in the past some concessions have been very slow to find their way into the rules (domestic violence is an example). The concession or policy might be set out in a letter, or described at a meeting or noted in policy instructions. While the latter are available on the Home Office website, it is a brave non-specialist who can negotiate them. It is not easy for individuals in these circumstances to know what the law is, nor to conform their conduct to it. Thus while it might be embodied in a concession that the Secretary of State requires certain information, it would not be reasonable to give the Secretary of State powers to create a mandatory procedure, with serious penalties, if it were not followed. If a concession requires to be formalised in this way, it can be incorporated into the immigration rules or into regulations.

The amendment also provides an opportunity to probe the power in both sub-clauses to make provision for the "consequences of failure to comply". Could an inadvertent failure to comply with a technical requirement by a specified time result in refusal of an application? Current forms are complex, especially for people for whom English is not their first language, and access to legal advice is shrinking. The government must be pressed for assurances that people will not be turned into overstayers, with all the consequences that implies, by refusals of applications on technicalities or for delays or difficulties in providing documentation that are beyond their control. Failure to provide a system of reasonable requirements operated reasonably will, in the absence of statutory appeal rights in most cases, be a recipe for judicial review.

The *mere* failure to comply with a procedural requirement should *never* be allowed to create inadvertent overstayers of applicants who in fact meet the substantive requirements for the category in which they are applying.

The government should be invited to consider an amendment to require that in all cases procedural or documentation irregularities are to be brought to the attention of applicants, and

opportunities given for correction, *before* a decision is made on an application. Provided the application was made in time, existing leave should be extended to cover the reasonable time needed to correct such irregularities, regardless of whether the Home Office brings them to an applicant's attention before or after the previous leave expiry date.

The Committee may be reluctant to revisit the questions raised by clauses 1 and 9. But it should be noted in passing that if clauses 1 and 9 are passed and become part of this bill through fairness will dictate even more loudly than before that the requirements to be met for a successful application must be clear, unambiguous and accessible to all. But clause 42(2) appears to have the opposite effect because it gives the Secretary of State an unfettered power to lay down procedural requirements outside the rules, with no prescribed method of notifying or publicising those requirements and with no limitations on the power to dictate the consequences of failure to comply.

This carries a clear risk that ignorance of changed procedural requirements could result in refusals that lead to applicants becoming overstayers with the consequences already discussed at length for them, their employers and the institutions at which they are studying.

Hypothetical example:

Imagine you run a small but booming business, let us say in IT, servicing highly specialised company clients. You employ a young man from overseas who has leave to remain with permission to work for 2 years on the basis of marriage. He proves to be invaluable, a lynchpin of your company, increasingly relied on by you and your clients as time goes by. No one else quite matches his technical flair and grasp of their needs. You entrust him with the major task of implementing a new computer network for your most valuable client. Time is of the essence. The work is just underway when he informs you that his application to the Home Office for indefinite leave to remain has been refused. He has no immediate right of appeal. If he stays until removal directions are issued he will acquire a right of appeal, but meanwhile presence would be illegal, and it is illegal for you to continue to employ him. What are you to do?

Now factor in clause 42 - what are you to think when you learn that the reason you have been placed in this dilemma is that he was able to provide only 8 examples of official documents and correspondence addressed to him and his wife over the past 2 years but that the Secretary of State, using his powers under clause 42(2), has decreed that 10 items are mandatory? Or that he had made photocopies of his bank statements for his own reference and had inadvertently submitted them instead of the originals? Or that he overlooked the requirement to "staple all photographs to section 3 of the form" and instead attached them by paper clip to the front of the form? Or that his passport had expired and was with his embassy for renewal when it was time to submit his application and although he submitted it later the Home Office had already refused the application under clause 42(2) before it was linked to his file?

You might decide to contact your MP. S/he might get the Home Office to reverse its decision, but at best that will take some time. Meanwhile, what are you to tell your client whose office is now at a standstill with a half-installed computer network?

Let us assume that, rather than face civil penalties and criminal liability, you cease to employ this young man, and that you and your client manage to pick up the pieces somehow. How do you then feel as a tax payer when you learn that his wife,

pregnant with their second child, will shortly be on benefit because the sole breadwinner of the family has been forced to leave the UK?

Fees

General note on fees

The power to charge fees as described in this section derives from section 5 of the 1999 Immigration and Asylum Act, amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. The relevant provisions are repealed by this Bill. These frequent changes suggest a lack of considered policy objectives. The objective of making this part of the immigration system self-financing has never been fully justified; although individuals may benefit from gaining permission to live or to study here, so does the rest of society, by ensuring that there are workers to do the jobs needed, students to be trained and to pay fees and spend money here.

Level of fees

From April 2005, the fee for making any immigration application in person at the Home Office is **£500** – a very substantial sum. Applications by post are **£335,** except for those from students, which are **£250** and applications to have existing conditions of stay endorsed on a new passport, which are **£155.** These are much higher than were envisaged in 1999, when the then Home Office Minister, Mike O'Brien, made it clear that fees 'will reflect the cost of processing applications' and said that 'I do not yet know the number of categories of fee, or the exact fees, but our current estimate for applications for leave to remain and similar applications is £90.' (Hansard, Special Standing Committee, 15 April 1999, col. 562). That Act gives the power to charge different fees for different applications and the explanatory notes made it clear that the reason for charges was to meet the actual costs of applications, which are of greatly varying complexity. There was no further consultation on this proposal after the Act was passed.

Fees were mentioned in passing in the Home Office's 2001 White Paper, *Secure borders, safe haven,* in para. 3.31, headed 'Charging for work permits', stating only 'there is already a power to charge for after-entry immigration casework and plans are being made for charges to be introduced, linked to improvements in customer service'. This paragraph also mentioned charges for work permits; in that case, there was a consultation process lasting nearly three months, to which ILPA responded, and the result was a flat fee of £95 in 2003, which is generally paid by the employer, and provision that the NHS and DfES are not charged.

When fees were introduced for all immigration applications in August 2003, at very short notice, there was a flat rate of £155 for all postal applications, £250 for those made in person. A consultation process about increasing the fees was held the very next year; although the vast majority of respondents made their opposition to fees, and to increases, clear, the fees were increased. The Home Office managed then to impose differential fees, charging less for students and less again for confirmation of people's stay, presumably in response to the strongest representations and, in the latter case at least, the lack of complexity of the operation. But an increase from nothing to £335 in under two years is huge.

Race discrimination

Fees for immigration applications place a heavier burden on minority ethnic communities widely recognised to be suffering disadvantage and discrimination, in their families being able to stay here, their friends coming to study or to work here. Those applying for visas with

a view to settlement have paid £260 for the visa and then will need to pay again some years later when they apply for settlement. In 2003, nearly 12,000 out of 19,500 husbands, 17,000 out of 38,000 wives and 15,600 out of 27,000 children granted settlement came from Africa or the Asian subcontinent. These fees will have a particularly serious effect on them on them. When proposing the 2004 increases, the Home Office suggested that it 'incorporates the cost of a more rigorous approach to tackling potential abuse'. This seems to suggest all people applying for leave to remain have the propensity to 'abuse' the system and therefore should be treated as though they will do so and be charged accordingly. The Minister has cautioned against attributing all changes to abuse, but this was the justification given by the Home Office in this case. If it is not the case that all those applying for leave to remain will abuse the system, why should costs fall on other people making applications rather than the taxpayer.

The Legal Services Commission generally allows solicitors up to 3 hours work for all the work involved in advising people and preparing and making an immigration application, that is to say £172.05 for those in London and £157.65 outside London. Checking the documents dealing with the application after it has been submitted is much less complicated and is normally done by a less qualified person than a solicitor. The Home Office is a huge organisation and therefore will enjoy more economies of scale than a solicitor's firm. Why therefore are fees set at current levels?

Waiving fees
After much lobbying the Home Office agreed that young people who had been granted exceptional or discretionary leave up to their eighteenth birthdays should not be charged fees, nor should children in the care of local authorities or spouses applying for leave to remain after a marriage had broken down due to domestic violence. Would the Minister indicate what consideration has been given for making similar provision for no charges to be levied in respect of :
- An application made under any claim under the Human Rights Act, ECHR, or other international convention
- Any application made by a child in his/her own right
- Any application made by a person who is in receipt of means-tested benefit

Application fees are expensive for people who have recently come to the UK for settlement and who are still in the process of establishing themselves here, in their first year or two of stay. They add another charge for international students, already having to pay higher level fees. They put a burden on people from abroad who have exceptional reasons for needing to stay longer than they originally intended. They will have a disproportionate effect upon people from ethnic minorities and their families and encourage the social exclusion of recently-arrived legally resident people, militating against the government's stated aims of social inclusion and racial justice.

Clause 43

Clause 43, page 24, line 5, leave out subsection (c)

Purpose
This would continue the present situation, whereby the Home Office does not officially give advice to individuals and des not charge for advice. Its Telephone Enquiry Bureau and Public Caller Offices may give information about the rules and the evidence required to meet them, but it is wholly inappropriate for them to advise on whether to make an application.

It is inappropriate for the Home Office to give advice, as a party to an application or appeal, and especially to charge for it. It has a duty, as a government department, to provide correct information about the law which it implements to individuals and should not charge for this.

Also an opportunity to probe what the clause intends. The Explanatory Notes give no explanation of how this differs from the present fees requirements or the reason for the change.

Clause 43, page 24, line 11, at end insert

", provided the fee is not greater than the actual cost to the Home Office of dealing with application made"

Purpose
To ensure that the government is not making a profit from these fees. When the Home Office first introduced charging for applications, the then Home Office Minister, Beverley Hughes MP, wrote to ILPA on 23 September 2003:

"The fees are set under Treasury rules to recover the full administrative cost entailed in considering applications and no more. This is calculated by taking the overall costs of processing applications divided by the number of decisions we expect to make."

Amendment

Clause 43, page 24 line 13, at end insert-

"in particular that when leave is granted for a shorter period than requested, provided that the period requested does not exceed the maximum permissible for such an application, the fee may be reduced"

Purpose
To make provision to ensure that people who are granted shorter periods of leave and therefore need to apply for more frequent extensions do not pay disproportionately for this. The immigration rules state the most common periods of leave for which people will be allowed to stay. A student on a degree course, for example, should be give leave for the whole of the course, normally three years. A person coming to work with a work permit will normally be given five years. If students are given one year's stay instead of three, then they could end up paying three times what they would have paid if given a longer period of leave.

CLAUSE 48

Government amendments 53 and 54
Presumed purpose: Appear to be the usual "draft in haste repent at leisure provisions – providing powers to extend the application of the Act.

Government New Clause 1

Presumed purpose

To alter the definition of asylum and human rights claim for most appeal purposes. Amends the Nationality, Immigration and Asylum Act 2002, and affects other Acts which refer back to this definition. These deal with when a person has a right of appeal. The new clause is pretty opaque on its face and it would be helpful to question the Minister closely as to both its

purpose and its likely effect. The Minister said in Committee (8th Sitting, 27 October 2004) Column 276 to 278

"In essence, new clause 1 is one of the less contentious or complex matters before us. It does two things. Section 113 of the Nationality, Immigration and Asylum Act 2002 states that an asylum claim and a human rights claim are claims made by a person to the Secretary of State at a place designated by the Secretary of State. In other words, all applications have to be made in person. We prefer to have the flexibility as expressed in new clause 1 that claims under this heading be made, but not necessarily and statutorily, in person. Not everyone can claim in person. We need the flexibility to accommodate seriously ill, for instance. Furthermore, it is not usually necessary for a person's identity to be examined more than once. That can be done in the first instance.

Swapping the primary legislation for immigration rules under clause 42 will give us the flexibility to provide that not all asylum or human rights claims need to be made in person. Immigration rules will also allow us to make explicit provision for special arrangements in exceptional cases such as serious illness, which we are not allowed to do under the existing statute.

New clause 1 also clarifies that further submissions made by a claimant after his asylum or human rights claim has already been decided will not amount to another asylum claim or human rights claim for appeal purposes, if it has been decided in accordance with the immigration rules that the further submissions do not amount to a fresh claim. They may amount to that, but it should not follow that in every instance that they do. The relevant provision of the immigration rules is paragraph 353.

To be regarded as a fresh claim, further submissions must be significantly different from the original claim. This means that the content of the submissions must not already have been considered and must, when taken together with the material considered previously, create a reasonable prospect of success. It is important that the legislation is clear that a claimant whose further submissions are determined not to amount to a fresh claim will not have another right of appeal. Underpinning the rule in primary legislation will create greater certainty in its application. Without trying to provoke cynicism and suspicion, we believe that this is a helpful new clause which tidies things up. We will come on to debate matters of more substance."