Briefing on the Immigration, Asylum and Nationality Bill from the Immigration Law Practitioners' Association Second Reading Debate, Tuesday 5 July 2005

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 opposes many of the elements in this Bill, which is restrictive, illiberal and unnecessary. In particular, we oppose the further restrictions on rights of appeal against immigration decisions, which remove further checks on executive powers. Some of these rights of appeal are little used but of importance to individuals, others are of fundamental importance. The Bill gives the Home Office the right to decide in the future, under secondary legislation, that further decisions will no longer have rights of appeal. We oppose the further rights of the Home Office and the police to demand information about passengers from ships and aircraft, even before they have reached the UK, and to share information between them and Revenue and Customs, without adequate safeguards. We oppose further powers for the Home Office to prescribe the way in which applications are made to them and the consequences of not meeting those requirements. Whilst understandable that exploitative employers may provide cause for concern, ILPA's objection to the drafted provisions on employment of illegal workers is that they are unnecessary and strike the wrong balance. We welcome the extension of the remit of the Chief Inspector of Prisons and the increased discretion to naturalise people as British citizens.

Appeals

The Bill proposes to remove all rights of appeal against refusal to vary leave to remain (clause 1(2) and (3)), except where a previous leave was granted as a refugee. Such appeals could only be argued on the basis that a person was a refugee, that the UK's obligations under the UN Convention on refugees had been breached, not on any other family or compassionate or human rights grounds. It then gives the Secretary of State absolute discretion to restore rights in 'circumstances of a kind specified by order' (clause 1(4)(fb)(i)) – or not to, as he sees fit. No indication is given in the Explanatory Notes whether any such rights would continue, indeed it is implied that none would, because there is a right of appeal against a subsequent removal decision. This is an unnecessary and draconian provision which ILPA opposes, not least since there is no indication whatsoever of abuse of variation appeals. The immigration rules make wide and varied provision for persons to remain lawfully in the United Kingdom (to give but a few examples those here as students, through to persons established in business, workers, ministers of religion or au pairs) and there is no reason whatsoever why those lawfully present – who have since 1969 enjoyed appeals against refusals to vary their leave – should now be deprived of such right. Still less is it justifiable in respect of those not recognised as

refugees but granted humanitarian protection or discretionary leave to remain on other compelling human rights grounds. Certainly nothing about the standard of Home Office decision making could justify such change, but even if the current decisions were all flawless the removal of any check by the Asylum and Immigration Tribunal (AIT) would lead to deterioration. The only just course is to let such people continue to challenge adverse decisions before the AIT. If they cannot do this, there will inevitably be an increase in resort to judicial review.

Entry clearance

The Bill would also remove rights of appeal against being refused entry clearance abroad from all those refused except those applying to visit specified (as yet undefined) family members or those applying as dependants of specific and equally undefined people. This would mean that no students, workers, working holidaymakers, ministers of religion, or any other categories of people, would be able to appeal. This is completely unjustified and again is not based on any evidence whatsoever of abuse. By definition, because these people are abroad, there is less scrutiny of what happens to them at British posts and it is more difficult for them to know how to appeal. ILPA considers that the standard of decision making as between different posts abroad is at best highly variable and there can be no justification whatsoever for this repeal of entry clearance refusals.

In her February 2005 report Fiona Lindsley, the Independent Monitor of entry clearance refusals without the right of appeal, stated that “extrapolating from my file samples in 2002 and 2003 I calculate that 28,000 applicants have been wrongly denied rights of appeal in these two years”. This is an alarming figure. There is no adequate mechanism for checking whether the decisions were right. Chipping away at appeal rights in the way this government has done, in an uncoordinated and piecemeal way and with no explanation of why it is thought to be necessary, shows the contempt in which those seeking to migrate to, visit or study in the UK are held.

But at the same time, the Prime Minister’s initiative to attract extra international students, the CBI encouraging workers, and the setting up of a new points system and new categories for potential workers show that other areas of the government and society are encouraging people from abroad to come here. If people in those categories are unable to appeal against refusals, and face refusals which without the right of appeal are likely to be more arbitrary and less well reasoned, the economic intentions of the government will not be met. Students and workers will vote with their feet and go to countries where their contribution is recognised.

Family appeals

The Home Office will also have the power to define by regulation who is a ‘member of the family’ of a person he or she is coming to visit, for the purposes of retaining an appeal right. (clause 4, 88A(2)(a)) The Explanatory Notes give no explanation of what is envisaged. ILPA argued when the right of appeal for family visitors was restored that the definition was unduly restrictive, and that friends or great-aunts may be emotionally closer than the relatives listed. There is no evidence of any abuse of the process by less close relatives, and much heartache for friends who are refused and who have no effective source of redress. To reduce even these appeal rights further shows that the government

is not serious in its commitment to the family and the maintenance of family ties when part of that family is abroad.

Even more ominously, the Home Office regulations may 'make provision by reference to an applicant's purpose in entering as a dependant' (clause 4, 88A (2)(d)). Again, no explanation is given. ILPA fears that this might be a way of the government attempting to reintroduce the concept of the 'primary purpose rule' – when spouses were refused entry clearance because they could not show that the primary purpose of their marriage was not immigration. It might also refer to a current bogey figure of elderly parents coming to the UK in order to use the facilities of the National Health Service. It might mean teenagers coming to join parents so that they have had three years' residence in the UK before applying to universities, so that they qualify as home students. It is incumbent on the government to explain precisely what it has in mind here.

The whole clause suggests that the government has not finally decided what it intends to do but has rushed out yet another Bill dealing with immigration and asylum issues in order to keep on showing that they are 'tackling a problem'. It could be that it is intended to leave the greatest possible room for manoeuvre in the future in removing so important a right as the right of appeal against almost all immigration decisions.

Proposals for Employers of Illegal Workers

This is an area in which 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. These provisions will be repealed by this Act.

Whilst ILPA does not oppose sanctions on employers in principle, it objects to the provisions contained in this Bill on the basis that they will:-

- pass to employers a yet more onerous burden of making more stringent checks on the immigration documents of employees and potential employees;
- increase the risk of informal discrimination against all migrants, whether here lawfully or not;
- provide an additional cost to business;
- increase the risk of employers being punished, but without giving parliament the opportunity to scrutinise the defences available to employers; and
- risk being passed without proper parliamentary scrutiny.

Clauses 11- 16 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 20 establishes that persons on temporary admission and with permission to work are to be treated like persons with leave to enter and permission to work so far as the civil charge and the new criminal offence in Clause 17-18 are concerned. Sadly it does not suggest on its face that any more people on temporary admission will be given permission to work. ILPA urges

MPs to press the government on this point.

Once again, as elsewhere in this Bill, too much of the proposed scheme is to be found in regulations to be passed later, rather than being on the face of the statute. This does not allow for proper debate at the scrutiny stage, and allows the Government to change the scheme significantly at a later date, without being properly accountable.

In particular, the clauses do not specify the level of civil penalty to be incurred. In ILPA's view, this should be in the statute, and the Government should be questioned about this now. Second, the clauses do not give a clear enough indication of what documents will have to be produced to establish a defence to the penalty, and what verification procedures will be required. In ILPA's view, these matters should also be in the statute, and the Government should be questioned about this now.

In addition:

- the burden of proof is placed on the employer to prove that one of the exemptions apply: the Secretary of State does not have to decide whether an exemption applies before opposing the charge; and

- 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 giving 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].

However the charge is effectively a fine, and the criminal standard of proof should therefore apply. The punishment could easily be part of the new offence set out in clauses 17-18, thus using the criminal law standard of proof.

Clause 17 and 18 introduce a new criminal offence for employers of adults who are illegal entrants, who are overstayers, or in breach of their conditions. But there is already a criminal offence for employers in s 8 of the 1996 Act, allowing for a level 5 fine, for a very similar offence. This new offence will also be punishable by a period of imprisonment as well as a fine, and whatever civil penalties are imposed.

Clause 19 sets out a power for the Secretary of State to establish a code of practice to prevent race discrimination when employers seek to avoid liability under section 11, and prosecution under section 17. ILPA welcomes the idea of a code, but of course has no idea of its content. ILPA is not convinced that the code will be an effective way of preventing informal discrimination by employers. A far better way of protecting employers would be to retain the criminal standard of proof for the charge.

The Bill contradicts this Government's stated aim in the *Five year strategy for asylum and immigration* presented in February 2005, to attract skilled and specialist individuals to work in the UK. Any employer faced with the option of hiring a very skilled and highly suitable overseas national, or a less skilled and less suitable resident employee, may favour employing the resident employee because in choosing this route, the employer will avoid the work permit process. This process will be complicated by the introduction of a system

delivered by Entry Clearance Officers abroad as opposed to the current system which is operated by caseworkers in Work Permits (UK) who possess specialist knowledge of the UK's labour needs having patrolled the work permit system for more than a decade. Following that hurdle, if the work permit is refused, which is likely since Entry Clearance Officers will be dealing with many other immigration categories in addition to employment visas, neither the employer nor the potential worker will have a right of appeal against a refusal decision.

By introducing these custodial sentences and on-the-spot fines, the Government, through the laudable aim of attempting to tackle more effectively the small numbers of employers who do abuse and exploit overseas workers, will in fact impact on the recruitment processes for the majority of perfectly legitimate businesses and will almost certainly lead to some taking the decision that the UK is simply not a viable business option. It is ILPA's opinion that if administered correctly, with resources put in to enforcement against the abusive employers as well as against those who are exploited, adequate and fair provisions are already in existence for tackling illegal employment under the 1996 Act.

Information Provisions

Clause 23

ILPA is concerned that this power to 'detain' a passport or other document is drawn too widely. 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. The retention of passports or identity documents for undefined terms and for any purpose invites abuse in respect of these significant identity documents. Persons 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 the IND is often disorganised, slow and uncooperative in assisting such voluntary departures. Our members have experience where these documents are misplaced by the Home Office. This power is so widely drawn, IND officers will have little incentive to relinquish the passport for good reason in appropriate cases. ILPA cautions against any or so wide an extension of the present powers concerning document or passport retention.

Clause 31- 36

In the new arrangements for information sharing and immigration searches by authorised constables, ILPA notes the constraints on such powers. ILPA welcomes the appointment of a Crown servant to monitor the exercise of such powers by authorised persons and notes that the monitoring should extend beyond the exercise of their devolved search powers. A great many of the

immigration control functions are privatised. The activities and practices of private firms engaged in the transport or detention or search of immigration detainees requires close scrutiny. In addition to the monitoring proposed by the Bill, 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. As these authorised persons/constables also may accompany deportees and failed asylum seekers to their home countries, their powers, responsibilities and practices should not be left as matters set by the private firm who is their employer. There should be agreed protocols concerning the hand-over of the removed person to the home authorities. The authorised constable may witness persecution of the person on arrival in their home country. 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.

Claimants and Applicants

This part of the Bill is a miscellany of the unobjectionable and the deeply worrying.

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 what of the new class of people unable to work or claim benefit which is to be created by proposed Clause 9 of this Bill, which removes the existing continuation of leave, including the right to work, while people appeal against a refusal? 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?

The provision for integration loans to refugees introduced in the 2004 Act was framed with reference to the common sense and humane policy introduced by the government in its1998 White Paper of granting indefinite leave to remain to refugees at the point of recognition. It is now proposed under the *Five year strategy for asylum and immigration* to renege on that policy, so the amendment in Clause 38 which ensures that integration loans can be provided to refugees with limited leave to remain is to be welcomed as at least limiting the damage. ILPA nevertheless deplores the proposed policy change which in itself is bound to mitigate against integration, and thus undermine the benefit of this clause, by deferring settlement for at least 5 years, thus placing the UK in breach of Article 34 of the 1951 Convention which obliges contracting states to “facilitate the assimilation of refuges” and “in particular” to “make every effort to expedite naturalisation”.

Clause 39 formally extends the remit of the Chief Inspector of Prisons to immigration detention facilities. ILPA welcomes the implied acknowledgement

of the value of her previous inspections of removal centres. We urge that her recommendations be implemented.

ILPA also welcomes the discretion in Clause 41 for the Secretary of State to naturalise people who are not of full capacity. The number affected will be small, but if exercised humanely this provision could alleviate the deep distress felt by families and friends of people with learning and other mental difficulties who wish to ensure that those who cannot apply for themselves can nevertheless have the security of British citizenship.

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 deeply concerned about the wide and undefined provisions of Clause 42. We request clarification of 42(2) and of the method of parliamentary scrutiny to be applied to regulations made under it, as opposed to the rules under 42(1). We are worried by the power in both sub-clauses to make provision for the "consequences of failure to comply" with these undefined rules and regulations. Could an inadvertent failure to comply with a technical requirement by a specified time result in refusal of an application? That would be a dire consequence indeed in view of the curtailment of rights of refused applicants if Clauses 1 and 8 are enacted. Extreme parliamentary vigilance is required. The government must be required to indicate the nature of the regulations intended under this clause. Requirements must be simple and flexible enough to ensure that people are able to comply even without legal advice. 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.

ILPA has made representations in the past about the high level of fees charged for immigration applications. We therefore welcome the discretion in clause 43 (3)) to reduce, waive or refund all or part of a fee. We hope that this will be used flexibly, and that the circumstances to be taken into account will include not only poverty but also the nature of the application and the length of time the Home Office takes to deal it. The most worrying aspects of this clause, however, are in 43(2)(c) which provides for the Secretary of State to charge for advice, and 43 (2)(d) for information, in connection with immigration or nationality. The Home Office is not an unbiased source of advice, but as a government department should provide information to the public as a matter of course. The Explanatory Notes are silent on what is intended by this clause. The government should be pressed to explain, and to confirm that it does not signal an intention to start levying commercial charges on people attending or telephoning the Home Office for information or to set up its own advisers, whether to compensate for the shortfall in competent immigration law advisers elsewhere brought about by its own legal aid policies, or otherwise.

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July 4 2005

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