ILPA Briefing

Asylum and Immigration (Treatment of Claimants, etc.) Bill A briefing and suggested amendments for Peers Committee Debate in the House of Lords

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About The Immigration Law Practitioners' Association

President Ian Macdonald QC

ILPA members are barristers, solicitors and advocates practising in all aspects of immigration and asylum. Academics, NGOs and others working in this field are also members. The Association exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. It represents members on numerous government and Tribunal Stakeholder and Advisory Groups.

ILPA has advised parliamentarians of all parties on five immigration and asylum acts in the last 10 years: drafting amendments, briefing; sitting in the Advisors' box – we are busy people, but this matters to our clients: we know your procedures, and we are happy to help.

ILPA can provide detailed written briefings for those wishing to speak in debates, or improve their own understanding of this field and experts to speak to individual and groups of parliamentarians.

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On clause 14: Unification of Appeals – Note dated 28.3.04

The Lord Chancellor's announcement at second reading that the ouster was to be withdrawn was welcome but gave no details of what might replace the version of clause 14 as drafted. Baroness Scotland indicated at second reading that precise details have

yet to be worked out.

ILPA supports retention of a two-tier appeals system, with onward rights of appeal to the Court of Appeal and House of Lords. We believe that this is the most effective and efficient system and that the Government has made no persuasive arguments to the contrary.

We believe that the following are crucial characteristics of the appeal system, which must be improved or retained:

- Full supervision by the courts of all decisions and procedures of immigration tribunals [and the Secretary of State]. This is needed to ensure the rule of law, and to ensure the quality of decision-making by the executive and by administrative tribunals. In this respect we welcome the announcement that the ouster of judicial review is not to be pursued.

- A right of appeal. It is fundamental that mistakes by immigration tribunals can be rectified. We believe this is best done through a right of appeal to the second tier tribunal, the Court of Appeal and the House of Lords. It would seem practical to have some mechanism to filter out unmeritorious cases at an early stage. This filtering function is currently carried out by the requirement to get permission to appeal

- A law making function. It is vital that an immigration appeal decision is able to set and be bound by authoritative legal precedent. This is fundamental to the needs of quality, consistency, justice and the development of a modern approach to immigration issues. The Court of Appeal and the House of Lords are law makers in other spheres and should remain so in immigration.

- Effective representation for appellants. We endorse Sir Andrew Leggatt " There was general agreement that the serious consequences of IAA decisions and a complex and rapidly developing body of case law meant that few appellants could realistically be expected to prepare and present their cases themselves". [1] To ensure an appellant's case is properly and fully articulated, it is vital to have a legal aid system which not only will adequately fund individual cases, but attracts and supports sufficient numbers of solicitors specialising in asylum and immigration to ensure representation is of adequate quality. Quality legal representation is needed not only at the appeal hearing, but also at earlier stages of the procedure. We believe such 'front loading' is the only way to ensure improved standards of decision making both at the Home Office decision stage and at appeal. We are very concerned at the new restrictions of legal aid, which prevent attendance at the asylum interviews that the Home Office will advise new asylum seekers is the 'only chance to explain why you fear return to your own country'.[2] We also note with concern that they are to advise asylum seekers they do not need legal advice at all.[3]

- Proper and full independence of appeal decision makers must be preserved. This is both in the carrying out of their day-to-day functions and their management and selection. There should be immunity from interference from the Home Office and protection from political influence.

- Administrative efficiency. It is important that the system balances speed, quality and cost; but always with due regard to the paramount need to safeguard against error in this area of fundamental human rights. Undue administrative delays are not in the interests of users, who are often in situations of great stress and financial hardship. We believe that in most cases delay can be largely resolved through proper case management and resourcing which is adequate and

responsive to rises and falls in the numbers of appeals.

- Rectification of inconsistent decisions. ILPA's members' experience is that an appellant's chances on appeal are too frequently determined by the luck of the draw of which adjudicator decides the case. Some adjudicators are renowned for refusing cases, others for allowing them. In this context the current breadth of possible grounds of appeal to the Tribunal, and the possibility of remittal by the Tribunal to another adjudicator are important safeguards

The following are our principal concerns with the single tier proposals in Clause 14 as published [HL Bill 36]:

1) ***Right of appeal****:* As drafted there is no right of appeal from the new Tribunal. There must be a right of appeal by both parties to the higher courts, most appropriately to the Court of Appeal and then to the House of Lords. The power of the President to refer to the Court of Appeal for an opinion prevents any review when the President is blind to his own error.

2) ***Single Tier Tribunal****:* ILPA does not believe that any single tier appeal system can be robust enough to protect asylum seekers against errors that could result in them being tortured or killed if removed from the UK. The second tier also fulfils the important role of filtering out weak cases from applying for appeals to the higher courts. There must be a second and transparent tier where oral argument is possible.

3) ***Internal review****:* If, and only if, an independent second tier is not possible, then there must at the very least be a robust and transparent internal review procedure. If such a review is to go any way to fulfilling the functions of a second tier it is vital that the grounds for appeal are broad enough to allow a full and fair reassessment of a decision, that there is a right of oral argument, and the review process is fully supervised by the High Court through judicial review, or statutory review with a right of oral argument.

   The Government's plan for an internal review process [Clause 14 (6)] is defective because:

   a) It does not amount to a fully *independent* review. The reviewer will be a colleague, a peer and quite possibly a manager of the first appeal decision-maker. This offends the basic principle of natural justice that 'no one should be a judge in his own cause.' It is difficult to see how sufficient independence can be achieved within a 'single tier'.

   b) It is very difficult to see what form this proposed review would take. On one reading it seemed that review would have to take place on any application by the parties that alleged an error of law. Without a filtering mechanism the Tribunal would have to undertake extremely scant reviews on all cases, without there being any filter of weak cases to prevent them applying for an onward appeal to the Court of Appeal. It is that filtering mechanism that needs supervision through external review by the courts (be it judicial review or statutory review). Without a filter of some sort, the courts will be flooded.

   c) The criterion for success in the internal review is draconian. The Tribunal can only consider whether the initial decision would have been different but for a clear error of law [clause 14 (6) new 105A section (2) and (3)]. We consider this test to be so high as to deny any realistic prospect of a review in practice.

      i) It is difficult to envisage how one could argue the hypothetical – that the Tribunal *would* have come to a different decision.

ii) There may be compelling reasons of fact that would require a review in the interests of justice – such as rapid political developments in the country of origin, or when an appeal has been dismissed because of an unforeseeable failure of notification to the appellant. Such reasons may even include matters that the appellant is unaware of - one recent example of such a grant of permission stated "in view of the fact that the tribunal is soon to consider new evidence on the risk of return to the DRC."

iii) Under the plans for internal review there is no opportunity to introduce further evidence to illuminate how a decision on credibility was clearly wrong on the facts or irrational. The drafting is likely to effectively prevent reviews of the country conditions and risk, or indeed of decisions where the main issue is the handling of evidence going to the credibility of the appellant – probably the most common point of dispute. In many cases findings on credibility are difficult to predict – they are strongly influenced by the individual approach of a particular adjudicator and are not limited to points raised by the Home Office in advance. For this reason appellants may quite reasonably wish to submit further evidence – such as expert opinions – that can counter the adjudicator's findings, but do not relate to a point of law.

d) Oral consideration is limited to exceptional cases [clause 14 (6) new 105A section (5) and (6)]. As worded this clause appears to impose an unnecessary constraint on the exercise of discretion by the Tribunal, who should be trusted to call parties for an oral hearing if the interests of justice require it. Further oral argument is frequently vital and the Tribunal may not be able to identify why this is so from the papers. Grounds of appeals do not prove themselves, and it is likely to be unrealistic to expect all evidence to be available and digestible in written submissions.

e) It is absurd and unjust that a case can be reviewed only once, with no onward appeal.

f) It is unjust that there is no power to remit the case for rehearing. In the first version of the Bill it was envisaged that the result of the review might be an order that the appeal be reheard – but this was deleted by amendment at Commons Standing Committee. It is notable that the Immigration Appeal Tribunal used its power to remit cases in over 44% of its decisions in the 12 months to September 2003, and clearly finds its power to do so an attractive one.

4) ***Powers of the President****:* As drafted, the President of the AIT will have huge powers, including the power to render certain AIT decisions as authoritative. We believe that the President should not have any enhanced law making powers or any other enhanced powers. The higher courts should supervise all exercise of the President's powers.

5) ***Law making****:* The bill envisages the President may refer a case to the Court of Appeal for an opinion, which will be non-binding [clause 14 (7) new 108B clause (3)]. At Commons Standing Committee the junior DCA minister Mr Lammy was persuaded to 'look again at the ability to bind the decision of the Court of Appeal'[4]. However no amendment to reflect this was put forward at Commons Report. All judgments (or opinions) of the Court of Appeal and High Court must be binding on any appeal tribunal, not simply persuasive.

6) ***Supervision*** (see Sched 2, Part 1, para 21)*:* The power to make procedure rules for allocating responsibility to some Tribunal members for supervising other members and staff of the Tribunal is contrary to open justice and to the responsibility of decision-making which all AIT members should assume.

7) ***Terms and conditions**:* The terms and conditions of appointment of members of the AIT must not include provisions that may in any way be perceived to compromise their independence or judicial discretion. We support Lord Woolf's remarks about this at second reading in the Lords on 15th March:

> *Under the proposals contained in the Bill, the role of adjudicators within the single tier would be even more important than it has been until now. The adjudicators would be the majority of members of the new tribunal. Their role would be judicial. It is therefore a cause of some concern that Schedule 1(3)(1)(c) provides that a member "shall hold and vacate office in accordance with the terms of his appointment (which may include provision for dismissal)".*
>
> *I am unaware of such a proposal for "dismissal" ever previously being included in a judicial officer's terms of appointment. The Council of Immigration Judges is concerned that this provision will be used as a justification for members of the new tribunal being dismissed because of dissatisfaction with their decisions. Their concerns are exacerbated because of the novel proposal that it should be a term of their engagement that they have to comply with practice directions. Judicial officers observe practice directions if they are issued by someone with such authority, but I am surprised that it should be felt necessary to have a term of appointment to that effect.*

8) ***Nomenclature*** [see Sched 4 para 4]: The Bill gives the Lord Chancellor power to make provision for the title of members of the AIT. We oppose the renaming of adjudicators as 'immigration judges': they are not judges of a court and to call them this is obfuscatory. It should be clear to the public and to appellants alike that the AIT is a tribunal and does not have the status of a court

9) ***Claimant's credibility - Clause 7***: Clause 7, although radically amended by the government in Standing Committee, has not yet received any debate. As originally drafted it required immigration tribunal members and other decision makers merely to take into account various behaviour when deciding credibility. On amendment the list of behaviour involved was extended and the wording was changed to say the matters *must* be taken into account *as damaging credibility*. This clause is now a blatant attempt by one of the parties to the appeals – the Secretary of State – to interfere with the independent function of tribunal members to assess credibility, as they feel fit in the light of all the circumstances of the case.

We support the recommendation of the *Joint Committee on Human Rights* that "the deciding authorities should at all times be conscious, when applying clause 6, that a claimant whose credibility is deemed to be damaged could well be telling the truth none the less"[5]. We believe this clause is pernicious and attempts to divert members of the Tribunal from such a balanced approach.

We also endorse *UNHCR*'s opposition in particular to clause 7(3): 'The fact that a refugee has transited a country regarded as "safe" bears no relationship to his or her credibility'.[6]

Clause 2: Entering the UK without a passport

Why is clause 2 important

- Clause 2 *automatically* criminalizes any person arriving in the UK without a valid passport or other immigration identification document.
- Clause 2 is aimed at asylum seekers but will affect *everyone* entering the UK,

including British citizens. It also affects those responsible for children without documents.

- Clause 2 *will not* solve the perceived problem of illegal immigration. It *will* further reduce routes to protection from persecution. It will put refugees at increased risk of harm and exposure to ever more dangerous means of entry into the UK.

- Clause 2 *will breach* the UK's international legal obligations contrary to Article 31 (1) of the UN Refugee Convention[7]

Brief comment on what clause 2 says.

There are a significant number of criminal offences that a person entering and exiting the UK without acceptable documentation can currently be charged with[8]. These criminal offences are prosecuted through the courts already. Clause 2 of this Bill duplicates and widens existing criminal offences and in effect creates a new offence of arriving at a UK port, or otherwise claiming asylum, without a valid passport.

Subsection (1) and (2) set out the circumstances in which a person will commit an offence. It is extraordinarily broad in its application – affecting all citizens regardless of their circumstances. It applies to any one responsible for a child without a passport. It is silent on the burden of proof regarding reasonable cause/excuse and upon whom this falls.

Subsection (3) disapplies the offence to one specific circumstance – when some one has an asylum interview after entry and can produce a passport within 3 days.

Subsections (4) and (5) provide a limited statutory defence for failure to provide satisfactory documentation. These defences are *inadequate* to protect even those people with a good reason for arrival if they have with them anything less than a valid passport or similar travel/identity document without good cause in the opinion of an immigration officer [see subsection 12]. These defences are subject either to an immigration officer's subjective decision as to what is reasonable and satisfactory, or they are excluded completely.

Subsection (7) (b) (iii) *denies* a statutory defence to people who destroy their documents on the instruction or advice of facilitating agents. This will affect asylum seekers and refugees.

Subsection (8) increases the powers of an immigration or police officer to demand production of documents "on request" from any person, at any time and to arrest without warrant.

Subsection (9) makes the maximum penalty for conviction 2 years in prison.

ILPA's concerns in brief

- Clause 2 in its entirety *significantly increases* the risk that refugees will be punished and detained contrary to contrary to the safeguards in article 31 of the 1951 UN Refugee Convention. [9] The government have resisted amendments to incorporate article 31 as a defence.[10]

- Convictions under clause 2 will exclude asylum seekers from the UN Refugee Convention's protection altogether if the maximum sentence of 2 years is imposed. [11]

- The new offence applies a lower standard and burden of proof than in crimes of

violence and terrorism. Although intended to target deliberately fraudulent activities, it will catch the innocent, the vulnerable and most deserving of protection.

- ILPA's fears that prosecutions will be brought without proper safeguards are heightened because:
    - Legal aid is being cut for both criminal *and* immigration representation
    - There is no proper guidance to Magistrates on such offences
    - Such guidance that exists for the CPS appears to be routinely misapplied
    - Past ministerial assurances, that proper guidance on the article 31 defences would be issued, have not been honoured.
    - New Home Office guidance is misleading and overly restrictive.
- The reality for very many asylum seekers is that they have no option but to escape from danger using the facility of agents. They usually have no access to a passport or a visa to allow regular travel. They must comply with an agent's instructions, often under fear of harm to self or to family left behind at home. They have to depend absolutely on agents in their flight from persecution. For those who are told to destroy their documents before arrival it is a decision beyond their control. Agents are economically and psychologically powerful and are able to dictate the terms of their agency. Asylum seekers should not be punished for being forced to make use of this relationship.
- The measure will be seen as discriminatory, and will feed rather than pacify anti-immigrant and anti-asylum seeker prejudice.
- This offence muddies the waters between refugee status determination and criminal investigation. The immigration authorities will have incentive to bring criminal prosecutions to assist the Secretary of State in asylum proceedings, rather than for the established evidential and public interest reasons for pursuing a prosecution. It compromises the asylum process which should provide an environment in which refugees can freely and openly set out their claims, irrespective of their means and method of arrival.
- ILPA questions the necessity of this clause at a time when prosecutions for a range of existing similar offences are on the rise.

A more detailed briefing on Clause 2 and suggested amendments is at Annex 1 below

Clause 7: Claimant's Credibility - Restricting Judicial Independence

"We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the Department concerned."

Franks Report on Tribunals and Inquiries[12]

"I am worried about the Department for Constitutional Affairs becoming a subsidiary of the Home Office"

Lord Woolf, 3 March 2004[13]

"A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case"

UNHCR Handbook on Procedures and Criteria for Determining Refugee Status[14]

"While an initial interview should normally suffice to bring an applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions…and to find an explanation for any misrepresentation or concealment of material facts…[I]t is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case"

Ibid[15]

"A woman's priority is to achieve safety and security (for herself and/or family members). She may not claim asylum whilst she is able to achieve safety, however temporary or illusory, through other means, whether legal or illegal. This may account for the delay in claiming asylum…Accepting that one is an exile is very difficult especially if it means leaving loved ones at home. This difficulty may be expressed as ambivalence about enduring exile; this is not an uncommon phenomenon among women asylum seekers"

Immigration Appellate Authority Asylum Gender Guidelines[16]

'The fact that a refugee has transited a country regarded as "safe" bears no relationship to his or her credibility'.

UNHCR[17]

'*The deciding authorities should at all times be conscious, when applying clause [7], that a claimant whose credibility is deemed to be damaged could well be telling the truth none the less.*'

Joint Committee on Human Rights[18].

"*...the shortest distance between a persecutor and a permanent safe haven is seldom a straight line. Perhaps it was never unusual for refugees to travel circuitous routes through several countries before reaching their intended final stops. It is certainly not unusual today*"

Prof. Stephen H. Legomsky, Washington University[19]

What clause 7 says.

Clause 7 constrains decision-makers, including Appeal Adjudicators and members of the Asylum and Immigration Tribunal and the Special Immigration Appeals Commission, in determining who is telling the truth about asylum claims. In essence, the clause requires decision-makers to treat certain behaviour as damaging the credibility of the asylum claim. The list of behaviours which must be taken as damaging credibility [by virtue of subsection 1], are set out in subsections (2) to (6). The exhaustive definition of the decision makers affected is in Clause 7(7).

The passage of the Bill so far.

Clause 7, radically amended by the government in Standing Committee, has not yet

received *any* debate. As originally drafted it compelled appeal tribunal members and other decision makers merely to take into account various behaviour when deciding credibility. On amendment the list of specified behaviour was extended and the wording was changed to say the matters *shall* be taken into account *as damaging credibility*.

Comment

This clause is now a blatant attempt by one of the parties to an appeal – the Home Office – to use statute to interfere with the independent judicial function of members of the Asylum and Immigration Appeal Tribunal and members of the Special Immigration Appeals Commission.

In the judicial context, it is well established that the judge who sees and hears a witness is in the best position to assess the truthfulness of the witness. This is a matter of common sense: a judge is a human being reacting to the testimony of another human being. It is unfair and unjust for the executive to utilise legislation to constrain this process and to take away powers from the independent judiciary.

There is no discretion. The decision-maker will not be able to put the behaviour into context or to assess the behaviour in the round. By setting down inflexible and unrefined rules for assessing credibility, judicial decision-making is reduced to an administrative act without the scrutiny and independent thinking that characterises the judicial system in this country.

When proposing the ouster of Court supervision over immigration appeals, the government was quick to say that the new tribunal will be truly independent and judicial in nature. In clause 7 they are proscribing independent judicial thinking.

ILPA regards clause 7 as yet another instance of the Home Office attempting to apply a blunt instrument in order to ensure that the immigration appellate authorities toe the Government's line. We are concerned and disappointed that the DCA appears willing to back this Home Office approach.

Clause 7 flies in the face of international jurisprudence and of the fundamental principle of individual status determination – that each asylum claimant is judged on the merits and evidence of *his own case* and not on some putative other case.

Under clause 7 the motive of the asylum claimant cannot be taken into account in any way when assessing many of the kinds of behaviour listed. For example no account can be taken of a reasonable explanation if a false document is produced [(7)(3)(a)], if an opportunity to claim in a safe third country is missed [7(4)], if a claim is made after service of an immigration decision (save if it relies on new facts)[7(5)], or after arrest (with limited exceptions) [7(6)]. One can easily think of examples where this is unfair. For example someone may decide to claim asylum in the UK rather than another country because of strong personal, family or cultural ties here. They may produce a false document, or delay making a claim, out of a fear of authority ingrained from a lifetime under a totalitarian regime.

Clause 7 is a charter for poor reasoning in initial decision making by the Home Office. Submissions on credibility, which should properly be argued by the Home Office on assessment of the individual facts of a case, will now effectively be made automatically at any appeal hearing, and will be binding by statute. This runs counter to the claims made by the Home Secretary at second reading in the Commons that he accepted the need to improve asylum decision making[20].

ILPA supports amendments to disapply this clause to those who are not Home Office officials.

Clause 12: Retention of documents

This was proposed by the government as New Clause 4 at Report stage in the House of Commons. It was not debated or mentioned there and the government has given no explanation for it.

It gives the Home Office the power to retain any documents in relation to a person it 'suspects' is liable to removal and if the document 'may' facilitate removal. This is an extraordinarily wide provision, as it is not limited to 'immigration documents' which are defined (in different ways) in clauses 2(12) and 3(3).

Thus this could authorise the Home Office or the Immigration Service to hold almost any documents of a person with limited leave to remain (who would be liable to removal if a future application were refused, or if he overstayed) as well as those here without authority. There is no time limit given for the retention – it is not even stated that the document should be returned to the person on removal, or on being grated leave. It also does not confirm that the document must be owned by the person; ILPA expects that this is because passports are generally the property of the issuing government, not of the holder, but it could also cover a wider spectrum of documents – driving licences, identity cards, student cards.

ILPA suspects that this clause is intended retrospectively to legalise current Home Office practice of retaining the passports of overstayers or alleged illegal entrants who have sent them to the Home Office in connection with applications for leave to remain even when the person has expressed the willingness and intention to leave the country. ILPA is concerned about the wider implications of this clause in making it harder for people who genuinely want to leave the country to do so, as well as the increased opportunities for the Home Office to lose documents when they hold them for long periods.

We urge the Home Office to give an explanation for this clause and confirmation of what documents it expects to hold and how they will be returned.

Examples: Mr C was an asylum seeker who married his British wife here in 2000 and applied to stay with her. The application was refused in December 2001, he and his wife made further representations to the Home Office, which were also refused. In June 2003 he wrote to the British High Commission in New Delhi to request an entry clearance interview to join his wife and was given a date on 10 September. His solicitors repeatedly asked the Home Office for his passport so he could travel; they did not reply and did not return it. He missed the interview. When the Home Office finally found his passport, in December 2003, they refused to return it, but said if he gave 'a few weeks' notice of his travel arrangements, they could arrange for him to collect the passport after he had gone through immigration controls on leaving.

Mrs J. applied to stay in the UK with her second husband and their two young children in early 2003. She had no reply from the Home Office and when she found that the immigration rules required her to get entry clearance, she wanted to go back to West Africa to apply for this. She requested the Home Office repeatedly to return her passport to enable her to do this, during the summer of 2003, but had no reply and missed several planned travel dates. Eventually the Home Office responded, refusing to return her passport, telling her it had expired and saying that they would make arrangements to get her a travel document. They failed to do this until January 2004.

Clauses 13 and 16: Control Of Entry and Appeal From Within The UK

The government proposed these as New Clauses 6 and 7 at Report stage in the House of Commons. They were not mentioned or debated at all and have the result of removing a right of appeal from within the UK on the basis of the belief

of the immigration officer. No explanation or justification for them has been given.

Clause 13 amends para. 2A of schedule 2 to the 1971 Immigration Act to allow immigration officers at the airport to interview people who have obtained entry clearance before arrival, which also acts as leave to enter the country, to establish whether their 'purpose in arriving in the UK is different' from that for which they were given entry clearance. This is not a new concept, but clause 16 amends section 92(3) of the 2002 Nationality, Immigration and Asylum Act (3B)(b) to remove the right of appeal in-country in these circumstances. Thus people who have been through the process of applying for entry clearance, have paid a fee for it, and have satisfied one immigration officer of their *bona fides,* can be refused by another similar officer with no chance of contesting the refusal until after they have been sent back.

This appears to be a further unnecessary, petty restriction, which will have a severe impact on a few people and with no scrutiny of the reasons for one officer setting aside the decision of another. This could include:

- a student who has changed her course while in the UK and who goes abroad for a holiday and returns to continue her new course

- a husband whose marriage is going through temporary difficulties who is not allowed in in order to try to sort things out

- a visitor who has spent some time in the UK and in mainland Europe and wants to return here for the final stage of her holiday

No justification has been given for the removal of the in-country right of appeal. The number of this particular type of immigration appeal is likely to be very small[21], a tiny proportion of all refusal of leave and removal directions, deportation decisions or revocation of leave, or refusals of certificates of entitlement made in non-asylum cases.

ILPA therefore urges that clause 16, page 17, line 43 to end of line 9 on page 18 be deleted.

Clauses 27 and 28: Fees For Immigration Applications

ILPA urges that these clauses should be deleted from the Bill.

The problem

Clause 27 of the Bill provides that the Home Office may charge fees for immigration and nationality applications and applications for certificates of entitlement to the right of abode over and above the cost of the application, in order to 'reflect benefits that the Secretary of State thinks are likely to accrue to the person who makes the application'.

Clause 28 provides that the Home Office may charge fees for endorsing a person's new passport with limited leave to remain. The 1999 Immigration and Asylum Act already provided for charges for endorsing indefinite leave. There is no stipulation about the costs or benefits of such a process.

These fees will add yet another burden to 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 to 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 impact disproportionately on people from ethnic minorities and their families.

- They are yet another mechanism for social exclusion of recently-arrived legally resident people, contrary to the government's stated aims of social inclusion and racial justice.

- They will impact disproportionately on people from ethnic minority communities and work against racial justice.

Most other administrative procedures used by all citizens are free. Obtaining a national insurance number happens automatically, and the cards are free. Driving licences and British passports are very much cheaper.

The existing power to charge for immigration applications

This is in section 5 of the 1999 Immigration and Asylum Act. The then Home Office Minister, Mike O'Brien, made it clear in Committee 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.'[22] The 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, consideration of which varies greatly in complexity. There was no further consultation on this proposal after the Act was passed.

Fees were mentioned in passing in the White Paper *Secure borders, safe haven,* of February 2002, 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'. When charges for work permits were proposed, there was a consultation process lasting nearly three months, mainly aimed at employers and businesses, but to which ILPA responded.

There was NO consultation on fees being charged for any other immigration applications. Employers in general expressed a willingness to pay a fee. But this was suggested to be in the region of £90-£115, not the huge sum now suggested. Smaller organisations and charities will not be able to pay this and it will discriminate against people from abroad taking up such jobs. These organisations should be exempted in the same way they are exempted from having to pay the fees for the criminal checks on their employees which commercial organisations pay.

Current charges

The Home Office has charged a flat rate £155 for making an immigration application by post, or £250 in person, since 1 August 2003. The Minister's announcement on 10 July 2003 stated that these were only to recover costs and that: "Charging will help us to continue to improve the efficiency and speed with which we process these applications, leading to ever higher levels of customer service." Yet the Regulatory Impact Assessment of the massive increases now being proposed states, "An increase in fees over and above cost recovery would not directly impact on the quality of service. But there may be an expectation from customers that service levels should be improved, this is unlikely to happen as a result of over-cost charging." The Home Office plans to charge increased fees with no commitment to improvements in service. The RIA shows

that a flat rate of £500 is seriously considered within five years, and makes it clear that there is NO BENEFIT to anyone outside the Home Office in imposing these charges.

The service received by applicants still often unacceptably poor. The Home Office frequently asserts improvements have been made, but practitioners still have too many cases which have been pending for two or even three years, in particular people who married when their immigration status was unclear and who have applied for leave to remain. Those who make in-time applications for settlement after a probationary period of marriage receive acknowledgements telling them not to inquire about progress for another year. Consideration of many work permit and business applications is getting slower. Documents and applications are still mislaid at the Home Office and expediting applications for exceptional compassionate reasons can still be impossible.

ILPA strongly criticised the flat fee of £155, imposed without consultation. The actual cost of dealing with an application for leave to remain indefinitely as an elderly dependent relative, or for an extension of stay as a student half-way through a course, or for a further period as a visitor for exceptional compassionate reasons will take widely varying times to process and require different levels of skills. Inflation has been running at around 2 – 3% since Mike O'Brien's estimate, there is no reason for costs almost to double, or for those making straightforward applications to pay the same high fee as those with more complex cases. The delays in processing immigration applications continue and charging people for the level of service they currently receive is indefensible.

Fees penalise poorer applicants and increase social exclusion. This will be even starker if the level of fees is raised. Applications for leave to remain are not valid without a fee, so people may be pushed into remaining illegally because they cannot afford to pay; this risk is mentioned in the RIA. The consequences of not having a few hundred pounds to spare are serious.

Entry clearance applications from abroad have needed a fee for many years, but these started at £10 and only gradually were raised for 'full cost recovery' and they are not time limited (or only by the age of children). If someone abroad cannot afford the visa fee there are no adverse consequences for not applying which can compare with the consequence in the UK of becoming an overstayer.

The Minister responded to ILPA's criticism on 23 September 2003, stating: "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. We are not able to introduce differential charging as our current accounting structure does not allow for this. … However this does not close off the potential for differential charges in the future and we will consider again when charges are reviewed at the end of the year."

No such review has taken place, or not in public, though consultation before the implementation of this clause has been promised.

Human rights

The Joint Human Rights Committee raised the question of what was then Clause 21's compatibility with the right to be free of discrimination in the enjoyment of Convention rights under ECHR Article 14 taken together with Article 8. The Joint Committee also thought that it could be contrary to the International Covenant on Civil and Political Rights, Article 26, which provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and

guarantee to all persons equal and effective protection against discrimination on any ground such as … property …

Article 26 binds the United Kingdom in international law, although the right to be free of discrimination on the ground of property is not part of domestic law.

The Home Office response, that it could make exceptions to charges through regulations, was unsatisfactory; the Committee thought it did not address 'the fundamental problem: the clause contemplates setting a fee by reference to a speculative future benefit rather than to either the cost of processing the application or the applicant's ability to pay. We do not regard a power for the Secretary of State to make subordinate legislation allowing an officer to waive a fee in case of destitution (or, perhaps, other hardship) as a satisfactory protection for the right to be free of discrimination. We draw this matter to the attention of each House.'

ILPA urges Lords to raise this point and to press the Home Office on its plans to meet it and to ensure that the clause does not discriminate illegally.

Consultation

ILPA urges Lords to seek further assurances, to ensure that:

- There will be extensive, formal consultation on the proposals before any change is implemented. The Minister, Beverley Hughes, stated (col. 385, Commons Standing Committee F, 22 January 2004) 'we would have to consult widely and on a timescale that conforms with normal Cabinet Office standards'. With whom will she consult and when?
- The consultation will include detailed explanations of how the Home Office has worked out the 'benefits likely to accrue' to applicants and how it has put a financial value on them (e.g. being able to live with one's family, doing a degree in medieval history, staying on for a few months after studies to attend a degree ceremony, becoming a working holidaymaker, becoming a British citizen) and how these financial estimates are connected to applicants. Does the 'benefit' of being permitted to work in the UK have the same financial value for a Canadian and a Cameroonian, or for an IT worker and a mushroom picker?
- There will be further consultation before any proposals to raise the fees from those first charged.

Transfer of leave stamps: clause 28

ILPA finds it particularly harsh and wholly unjustified that mere administrative acts – transferring existing leave to remain conditions into new passports - attract these fees. The only reason why this is considered necessary is that airlines will not carry returning resident visa nationals to the UK if they do not have a valid passport with their settlement confirmed on it. If it was accepted that an old passport with those conditions would not make a carrier liable to fines or if there was a general policy of embassies and High Commission to attach old passports to new ones, this extortionate charge would be unnecessary.

The new power, to charge the same flat rate amount for endorsing LIMITED leave on a new passport is almost incredible. People on limited leave will largely be students who are continuing their courses, or starting another one, or spouses within their probationary period, or short-term work permit holders. Few have up to £500 to spare in order to get a stamp on a passport – but few will also want to risk showing an immigration officer or a police officer an out-of-date passport with valid leave, or a new passport with no British stamps on it, and expect that the authorities will understand their position. In fact there is no legal requirement for a new passport to be endorsed –

the leave is valid on the old one, or on a Home Office letter - but the practicalities are that people will feel they will need this.

ILPA urges Lords to seek an assurance that any fees charged will be only at the rate to meet the cost of the actual application, not a flat rate fee for all. A simple administrative transfer cannot cost £155 or £250 and people must not be charged at this extortionate rate.

ILPA urges that clauses 27 and 28 should be deleted from the Bill.

Annex 1 – Clause 2 Detailed Brief And Proposed Amendments

[NB. This briefing should be read in conjunction with previous ILPA briefings provided for House of Lords 2nd Reading, House of Commons 2nd Reading, Standing Committee B, Report and 3rd Reading stages of the Bill.]

1. Prosecution of refugees contrary to the UK's international legal obligations, especially Article 31(1) of the 1951 Refugee Convention.

1.1. It is always worth restating Article 31(1): - *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

1.2. Nothing within Article 31 requires a refugee to bring with them an immigration document, legally valid or otherwise, to seek asylum.

1.3. The issue of Article 31 protection of asylum seekers has been well rehearsed in both Houses during the passage of previous legislation, particularly the Immigration and Asylum Act 1999. Section 31 of that act provides for Article 31 statutory defences to specified offences concerning documentation, illegal entry or illegal presence in order to claim asylum. It was not a government clause, but was introduced as a late new clause by Lord Williams of Mostyn[23] as a direct consequence of the finding of the High Court in the case of *R v Uxbridge Magistrates ex parte Adimi* and others.[24] In that case the court held that there had been unlawful prosecution of asylum seekers contrary to Article 31(1). A number of "Adimi" compensation claims for wrongful imprisonment have settled subsequently for around £40,000 + per claim[25] and higher.

1.4. The defences provided by IAA 99 s31 were meant to ensure that Article 31 refugee rights would be respected, and that unlawful prosecutions would thereby be eradicated. The reality, as is set out below, has been very different.

1.5. The Government has rejected amendments proposed to bring the Clause 2 offence into the statutory defences contained in s31 of the 1999 Act.[26] The Minister, Beverley Hughes, during Commons committee debate maintained that the "reasonable excuse" defence contained in clause 2 (4) and (5) will be sufficient protection. In light of the current Home Office instructions[27], only offences which are defined in s31 of the 1999 Act would benefit from Article 31 protection from prosecution and even then, only on a very narrow construction. This cannot be a correct interpretation of our convention obligations.

2. The inadequacy of Ministerial assurances.

2.1. The government sought to deal with Article 31 compatibility by way of

ministerial assurances and promises of written guidance during passage of the 1999 Act[28], and they seek to do the same again now. The reality is that *no* substantial procedural guidance has yet been made available to practitioners by the Home Office and the Crown Prosecution Service. We have the same profound concerns as in 1999 that written guidance rather than amendments to the Bill are *not* sufficient to protect against unlawful prosecution and to comply with our international legal obligations. The government's true intention must be reflected on the face of the statute itself and go no further. Any guidance to this Bill must be on its face prior to commencement.

2.2. Without a statutory defence to clause 2 set into s31 of the 1999 Act, the asylum seeker is left to rely on Ministerial assurances and the shifting interpretation of partial or inaccurate guidance by police, immigration officers and prosecutors. This is in a situation where asylum seekers will be likely to have received no legal advice at the initial interview, and either no, or inadequate, representation at court when prosecuted.

2.3. UNHCR share ILPA's view that the Home Office and the prosecuting authorities too restrictively interpret the Article 31(1).[29]

3. **The rise in prosecutions for deception/false documentation offences.**

Statistics

3.1. Government statistics published in November 2003 reveal that there has been a resumption in prosecutions, particularly those brought under section 24(A) of the Immigration Act 1971,[30] since Adimi and commencement of s31 of the Immigration and Asylum Act 1999. [31] For example, in the Magistrates Courts in 2000 only 17 prosecutions took place for section 24 (A) Immigration Act 1971 offences (leave to enter by deception) but by 2002 this had risen to 241. Early indications this year suggest that the figure will have risen significantly in 2003. For all offences the figures rose from 323 in 2000 to 643 in 2002, almost a 100% rise.

3.2. The vast majority of these cases are dealt with summarily in the Magistrates courts on a guilty plea often within 2 to 3 days of arrest. Such pleas are often advised by legal advisers to avoid lengthier sentences if pursued to trial.

3.3. Whilst not all these offences will be ones that would benefit from Article 31 protection, it is evident that immigration offence prosecutions are rising steeply. It is on a significant increase. It is therefore essential that proper guidance, training and appropriate criminal standards are applied to any new offences.

3.4. The government does not publish statistics on the number of cases in which the defendant raises an Article 31 or s.31 defence, nor figures on the number of cases where charges are brought where asylum claims have been raised at the investigating interview.

Missing guidance to Magistrates

3.5. Currently neither guidance on sentencing, nor advice on the statutory defences, is issued to Magistrates specifically on immigration documentation offences. As far as ILPA is aware, a custodial sentence is the norm, without the use of pre-sentencing reports for first offenders.

Misapplied guidance to prosecutors

3.6. The Code for Prosecutors[32] gives guidance on the evidential and public interest tests to be followed when deciding to prosecute. Amongst other factors *[33]* it sets out are:

- …the offence was committed as a result of a genuine mistake or misunderstanding
- *…a prosecution is likely to have a bad effect on the victim's physical or mental health*
- *…the defendant is elderly or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated.*

3.7. It is difficult to see how any asylum seeker should be prosecuted if this code is followed. Asylum seekers arrive, as Medical Foundation and many other refugee support organisations regularly testify, with an array of physical and mental injuries suffered as a result of their persecution and escape. Many arrive confused, frightened and alone in a foreign country, without knowledge of UK law nor its consequences nor the extent of their rights under the Refugee Convention. It is almost certainly a one off "offence" by that individual, with no intention of being repeated.

3.8. Probation Service staff who are used to seeing these cases in courts close to major airports advise us that a simple statement from a senior immigration officer on the file sent to the CPS that no Article 31 issues apply appears to suffice to decide that a prosecution should go ahead. Clear references to fears of return home being raised at the time of arrest by those prosecuted have been seen on criminal papers by immigration advisors who have been referred cases after sentence.

Current prosecutions in practice.

3.9. ILPA lawyers have recently come across an increase in women in prison serving sentences, typically of 4 – 6 months for false documentation offences yet who had raised fears of return to their home country at or soon after the time of their arrest and having come directly to the UK. People transitting the UK onward to Canada – the exact situation dealt with in Adimi - seem now to be frequently prosecuted. [34]

3.10. Vulnerable asylum seekers are still being prosecuted, rapidly sentenced and jailed because they do not meet the government's restrictive interpretation of Article 31 and because the current guidance and prosecutorial process is not followed with sufficent rigour. This is despite case law, etc.

3.11. ILPA has no confidence that written guidance, codes of conduct, protocols for joint working between immigration police and prosecuting authorities and assurances by Ministers will satisfy the protection needs of asylum seekers nor our international obligations. The Bill must have on its face, clear and detailed guidance and be incorporated into the statutory defences if it remains part of the Bill at all.

4. The dangers of lowering the standard of proof and the shifting of the burden of proof onto the defendant.

The burden and standard of proof

4.1. In Commons Standing Committee there was much discussion of the unfairness of the standard and burden of proof for the new clause 2 offence. The Minister's letter of 14 January 2004 to the Committee chair failed to resolve the issue. She stated correctly how the burden of proof is applied to other offences, without justifying its application to this particular new offence. [35]

Inadequacies of the defence of reasonable excuse

4.2. The clause provides for the specific defence of reasonable excuse. Why should this not be treated in the same way as the defences of self-defence and provocation? Those defences are commonly raised by those facing charges of the most serious crimes of violence, yet our criminal justice system offers them the protection that once sufficient relevant evidence has been adduced properly to raise the defence, then the arbiter is the jury, with the burden of disproving the defence on the prosecution.

4.3. The protection of leaving the legal burden on the prosecution is even extended to those charged with terrorist offences. Section 118 (2) of the *Terrorism Act 2000* expressly provides that "if a person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."

4.4. So why should someone charged under clause 2 of this Bill have less protection than an alleged violent criminal or terrorist? After all the circumstances in which such charges are likely to arise, on or shortly after arrival, are unlikely to be conducive to the production of evidence to the balance of probabilities standard.

4.5. Shifting the legal as well as the evidential burden on to the defendant loads the dice against the defence of reasonable excuse ever succeeding, and makes it more likely a prosecution will be brought.

4.6. Parliament should take the long view, and should be zealous to protect the safeguards built into our criminal justice system. However serious may be the ills which this clause aims to remedy, they are as nothing compared to the seriousness of undermining those safeguards.

5. New restrictions on legal aid.

5.1. New Legal Services Commission criminal contract amendments will reduce publicly funded advocacy in the magistrates courts and access to legal representation at police stations from May 2004

5.2. ILPA is very concerned at this development in respect of the safeguards needed for people charged with clause 2 offences. The effect of the criminal legal aid restrictions will prevent timely advice being given to asylum seekers. It will reduce the opportunity to be represented before a magistrate without specific guidance on the offence, and will add significantly to the potential for miscarriage of justice in clause 2 offence cases.[36]

5.3. Assurances are required from the Department for Constitutional Affairs that the legal aid regulations will make it clear that where a person is arrested for clause 2, and all other documentation offences, a publicly funded legal adviser will be available in person to the person charged, and that no person shall be required to attend a Magistrates court hearing without an advocate.

5.4. The Legal Services Commission (LSC) proposal to remove publicly

funded legal representation at asylum interviews[37] and the restrictions coming into force on 1st April 2004 on the provision of publicly funded legal advice and assistance in immigration and asylum cases generally.

5.5. These cuts affect the whole of the asylum determination process. However the absence of a legal representative at an asylum interview, where evidence will be obtained and potentially used in clause 2 prosecutions, credibility challenges and even exclusion from convention protection altogether, places the state in an all powerful position. The asylum seeker will be forced to rely totally on the good faith and integrity of the interviewing officer. Again, the scope for miscarriage of justice is significantly increased by these measures, which amplify the dangers inherent in making the asylum determination and criminal offence investigation one and the same process.

Clause 2: Proposed Amendments

NB In addition to the amendments set out below, ILPA supports those suggested by the Refugee Children's Consortium[38] in respect of clause 2, namely:-

- Page 2 line 2 – after "travelling or" insert with whom he travelled and is now"
- Page 2 line 2 - leave out "he does not have with him" replace with "he has, without reasonable excuse, destroyed or disposed of that document"
- Page 2 line 11 – after "citizenship" insert " and he has no reasonable excuse for the lack of such a document"

1. Amendment proposed:

Page 2 line 4 leave out "(a) is in force, and"

Page 2 line 9 leave out "(a) is in force, and"

Purpose.

1.1. There is no requirement in the Refugee Convention for an asylum seeker to be in possession of an immigration document nor indeed one which is in force.

1.2. This amendment complements the amendments (page 2 lines 3 and 8) tabled by Baroness Anelay of St Johns and the Viscount Bridgeman removing the requirement that the identifying document is specifically an "immigration" document. An expired political membership or student card, an expired passport or identity card or indeed many other forms of identity may be perfectly sufficient to identify the person which are no longer "in force". A person may arrive in the UK on false documents in order to avoid detection but then identify him/herself with other forms of documentation. It makes no sense to create an offence on the basis of the type of document presented rather than the motivation for doing so.

1.3. The same principle applies to the offence in relation to dependant children.

2. Amendment proposed:

Page 3, line 40 - Delete ", or" and insert "and"

2.1. Purpose of amendment: to ensure that this new offence does not apply to immigration interviews

2.2. This clause was debated in depth in Commons Committee and the government brought amendments to Report stage, to meet some of the points raised. In particular, it was argued that a person who did not have a passport when interviewed about an asylum application within the country could have many more good reasons for not having a passport than someone who had just embarked from a plane. At Report stage, the government proposed amendments to state that the offence was committed if a person did not have 'an immigration document' at 'a leave or asylum interview' and did not have a reasonable excuse. The Minister, Beverley Hughes, stated (col. 619, 1.3.04) that this would be defined by subsection (10) [now (12)] as 'any interview in which a person seeks leave to enter or remain *and*, [our emphasis] so far as they are not already covered, claims that removal would breach our obligations under the refugee convention or the European convention on human rights.'

2.3. The amendment, and now subsection (12), in fact connects the two requirements with 'or' so that a person who is being interviewed about any immigration application (for example a student, a family member, a person needing medical treatment) who does not have a valid passport, and whose explanation for this is not accepted by the Home Office, could be charged with the offence. For example:

- a student who has lost his passport in moving between flats but has no proof of this and cannot remember when it happened
- an overstayer whose passport was lost between a previous representative whose office has been closed down and the Home Office and who has not been able to apply to her Embassy for a new one, but who is now married to a British citizen

2.4. The government has given assurances that the intention of the clause is to enable prosecution of asylum seekers who have destroyed their identity documents. They have said nothing about people applying for other reasons. The clause should therefore be amended to ensure that it is not broader than stated to Parliament.

3. Amendment proposed:

Page 3, line 28 – after "that Act" insert new subsection (11)(c) to read

"an offence to which s31 of the Immigration and Asylum Act 1999 shall apply"

Purpose

3.1. To make available the Article 31 Refugee Convention based statutory defence provided to persons charged with other documentation offences contained so far in s31 of the 1999 Act.

4. Amendment proposed:

Page 3 line 28: at end insert new subsection (11) (c) to read

" an offence for which the prosecution shall be required to prove the case against a defendant beyond reasonable doubt"

Purpose

4.1. To ensure that the burden of proof remains for the prosecution to establish to the normal criminal standard.

5. Amendment proposed:

Page 4 line 8 – after end of line 8 insert new subsections (17) and (18) to read as follows:-

"(17)(1) The Secretary of State shall, before commencement of this section, and thereafter from time to time as he may decide necessary, publish detailed regulations on the implementation of this section and of s. 31 of the Immigration and Asylum Act 1999 (c.33)

17 (2) Part 7 of Schedule 3 , (which makes further provision as to guidance issued under s. 17 (1)) shall have effect.

(18) Guidance issued under subsection (17) shall not be made unless a draft has been laid before Parliament and approved by resolution of each House of Parliament".

Purpose

5.1. To ensure that guidance on this and other documentation offences is clearly set out in law and the safeguards required to prevent breaches of Article 31 are not reliant simply on assurances. That the offence does not commence until this guidance is published and understood by those bodies involved in the prosecution and trial of such offences.

6. <u>Amendment proposed:</u>

page 46 line 43 insert New Part 7 to Schedule 3 as follows:

"Part 7 – Prosecution of Documentation Offences

1. The Secretary of State shall by regulations provide guidance as to the implementation of section 2 of this Act and s.31 of the Immigration and Asylum Act 1999 (c.33) and all other immigration offences contained in this schedule.

Decisions to arrest and to prosecute

2. The regulations shall:

(1) set out in full Article 31 of the Refugee Convention;

(2) require those contemplating arrest or prosecution under s.2 of this Act to have special regard to the terms of that Article and to bring both Article 31 and s.31 of the Immigration and Asylum Act 1999 (c.33) to the attention of persons suspected of an offence under s.2 at the earliest opportunity; and

(3) set out the circumstances in which those contemplating arrest or prosecution for any of the offences set out in this schedule and s.31 of the Immigration and Asylum Act 1999 (c.33) must bring Article 31 of the Refugee Convention and s.31 of that Act to the attention of the person(s) suspected of the offence.

(4) Provide

(a) that arrests and prosecutions under s.2 of this Act shall only take place where a person is reasonably suspected of having deliberately destroyed or disposed of immigration documents;

(b) that if a person claims asylum or raises matters at any stage of questioning which amount to a claim for asylum, no prosecution is to be proceeded with under s.2 of this Act while that claim is still pending in accordance with the provisions of s.104 of the Nationality, Immigration and Asylum Act 2002 (c.41)

(c) for the circumstances in which, where a person has claimed asylum, no prosecution for any of the offences set out in s.31 of the Immigration and Asylum Act 1999 (c.33) or provided for in this schedule shall be brought while that claim is still pending in accordance with the provisions of s.104 of the Nationality, Immigration and Asylum Act 2002 (c.41)

(d) that no prosecution shall take place of any person for an offence under s2 of this Act, s31 of the IAA 1999 or any other immigration offences contained in this schedule if that person is suspected of having committed the offence as a result of having been trafficked as defined by sections 4 and 5 of this Act

(e) that the criminal offences in section 6 of this Act shall include the offences contained in this Act and all others referred to in this schedule and in s31 of the Asylum and Immigration Act 1999.

(f) that the Director of Public Prosecutions shall

(i) consider each decision to prosecute such offences in accordance with the guidance contained in regulations to this Act and the Code for Prosecutors and such other guidance on prosecution as from time to time shall be published and

(ii) where a decision to prosecute is taken, certify by way of a detailed written statement on the prosecution file that no breach of Article 31 of the Refugee Convention arises as a consequence.

Dissemination

3. (1) The regulations shall impose a duty on the Secretary of State to provide for the timely distribution of guidance required by this schedule to the Immigration and Nationality Directorate (IND), the Immigration Service, the Police and the Director of Public Prosecutions and for those bodies to disseminate the regulations among their staff/members. Such guidance shall be fully disclosed into the public domain.

(2) The regulations shall impose a duty on the Lord Chancellor or his successor to provide for the timely distribution of guidance required by this schedule to members of the judiciary, in particular to the Magistrates and Crown Courts. Such guidance shall be fully disclosed into the public domain.

Training and supervision

4. (1) The regulations shall make provision for training of IND, the Immigration Service, the Crown Prosecution Service, the police, the judiciary and legal representatives on

(a) Article 31 of the Refugee Convention;

(b) s.31 of the Immigration and Asylum Act 1999 (c.33);

(c) the offences of trafficking as defined under ss.4 & 5 of this Act and the Sex Offences Act 2003

(d) working with interpreters;

(e) working with children; and

(f) working with survivors of torture and organised violence

(2) The provision of training in accordance with s4 (a) – (f) above shall be the responsibility of each individual public and professional body.

(3) The regulations shall:

(a) provide that any decision to arrest or prosecute for an offence under s.2 of this Act be taken only by a person who has received training in accordance with subparagraph (1); and

(b) set out the circumstances in which decisions to arrest or prosecute for any of offences set out in this schedule or in s.31 of the Immigration and Asylum Act 1999 are to be made; and.

(4) All legal representatives advising a person arrested or charged with offences under s2 of this Act, section 31 of the IAA 1999 and all other immigration offences contained in the schedule to this Act must be accredited in accordance with the requirements laid out in the prescribed accreditation schemes of the relevant professional bodies and the competence requirements of legal aid regulations and provisions arising therefrom;

Children

5. The regulations shall contain detailed guidance on procedures in a case where a child is suspected of an offence under s.2 or any offence contained in the schedule hereto or in s31 of the Immigration and Asylum Act 1999 and in particular shall make provision for:

(a) a presumption that there will be no arrest or prosecution in the case of a child

(b) all children suspected of such offences to have the assistance of a legal representative prior to being charged with an offence and throughout the legal proceedings thereafter; and

(c) all children suspected of such offences to have the assistance of an advocate prior to being charged with an offence and throughout the legal proceedings thereafter; and

(d) no interviews with children to be conducted by police officers, immigration officers and/or members of Crown Prosecution Service unless those officers/members have received training in accordance with paragraph 4(1) of this Schedule.

(e) a responsible adult, who for the purposes of this Act shall be a parent, or a person with or has assumed parental responsibility in accordance with the Children Act 1989 shall be present at all meetings, interviews and proceedings involving a child in relation to such an offence.

Evaluation and Monitoring

6. (1) The regulations shall make provision for the Immigration Service, IND, the police, the Crown Prosecution Service and the judiciary to keep records of cases in which the defence under s.31 of the Immigration and Asylum Act 1999 (c.33) or Article 31 (1) of the Refugee Convention is relied upon.

7. (1) The regulations shall make provision for the Secretary of State to lay before Parliament at intervals of no less than 12 months a Report giving details of:

(a) arrests made for an offence under s.2 of this Act;

(b) prosecutions brought for an offence under s.2 of this Act;

(c) convictions for an offence under s.2 of this Act;

(d) sentences imposed upon those convicted under s.2 of this Act;

(e) the number of convictions of children under s.2 of this Act; and

(f) cases relating to all offences in which a defence under s.31 of the Immigration and Asylum Act 1999 (c.33) was offered and the outcome of those cases, with the sentences imposed in cases where the person was convicted.

(g) cases relating to all offences in which a defence under Article 31 (1) of the Refugee Convention was offered and the outcome of those cases, with the sentences imposed in cases where the person was convicted.

(h) cases relating to all offences referred to in the guidance to this Act which when considered by the Crown Prosecution Service were not prosecuted.

(2) The Report shall also provide an overview of

(a) dissemination of the Regulations in accordance with paragraph 3 above;

(b) training undertaken in accordance in paragraph 4 above.

Purpose

To ensure that the promised guidance exists and is in the public domain prior to the coming into force of this section so that the rights of persons accused under this clause are protected in practice. To ensure that those involved in potential or actual criminal proceedings understand their rights under Article 31 of the UN Convention relating to Refugees and the limitations the government have indicated that they intend to place on the use of clause 2 and other documentation offences. To ensure that Parliament and the public has a mechanism for examining the use of these offences from time to time by its relevant committees.

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[1] Leggat 2001, p150

[2] Induction process DVD script

[3] ibid

[4] Hansard Standing Committee B 20 Jan 2004 col 310.

[5] Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc.) Bill, Fifth Report of Session 2003-04*, HC 304, para 32.

[6] UNHCR briefing for second reading in the House of Lords.

[7] Article 31(1) of the Refugee Convention prohibits the penalization of refugees seeking our protection who come here directly, present themselves without delay and show good cause for use of false documents to obtain entry or remain in the UK to claim asylum.

[8] See Home Office Counting Rules on Recorded Crime, Immigration Acts Classification Code 78.

[9] Article 31(1) of the United Nations Convention relating to the Status of Refugees 1951 is as follows: *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

[10] Amendment 64 at Standing Committee B, debated 13.1.04. Hansard col 118 – 120.

[11] s72 Nationality, Immigration and Asylum Act 2002

[12] Cmnd 218, 1957

[13] Speech at Cambridge University

[14] Para 198

[15] Para 199

[16] Available on the web at www.iaa.gov.uk/32.htm

[17] UNHCR briefing for second reading in the House of Lords.

[18] Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc.) Bill, Fifth Report of Session 2003-04*, HC 304, para 32.

[19] Article commissioned by UNHCR, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection" 15 *IJRL* (2003) 567 at 568.

[20] Hansard 17 Dec 2003, Commons col 1590.

[21] There are very few of these; the Home Office statistics for 2002 (Cm 6053, page 99) give a total of 3,600 non-asylum, in-country appeals decided, out of a total 84,260 appeals dealt with. The immigration appellate authorities statistics are kept in a different way, (www.iaa.gov.uk) but those for 2003 show a total of 108,348 appeals disposed of, an increase on 2002 of some 24,000. They also show an increase of 17,000 asylum appeals and of 7,000 visit visa appeals, and give the total of other immigration appeals as 12,411, compared to 12,762 appeals in 2002.

[22] Hansard, Special Standing Committee, 15 April 1999, col. 562.

[23] Hansard 2 Nov 1999 Col 783

[24] 1999 INLR 490

[25] see Fiona Lindsley article re compensation cases – Tolley's Immigration Asylum and Nationality Laws Vol17 # 2 2003 p114 - 118

[26] Amendment 64 at Standing Committee B, debated 13.1.04. Hansard col 118 – 120.

[27] The Asylum Policy Instructions on the Home Office Immigration and Nationality Website.

[28] Assurances were given that the guidance on the prosecution of offences covered by the statutory defences in s31 IAA 1999 would be placed in the House Library (Hansard Vol 191102-20 col.787 Lord Williams of Mostyn)

[29] March 2003 UNHCR Position Paper "Comments on October 2002 Home Office Asylum Policy Instruction (API) on section 31 of the Asylum and Immigration Act 1999 and Article 31 of the 1951 Convention relating to the Status of Refugees" and UNHCR Briefing for the House of Lords at Second Reading

[30] Obtaining or seeking to obtain leave to enter or remain by deception

[31] see footnote 3 above regarding latest published statistics

[32] see 5 above

[33] http://www.cps.gov.uk/Home/CodeForCrownProsecutors/public-interest.htm

[34] Two such cases, both involving Nigerian women, both attempting to get to Canada to seek asylum were prosecuted in late 2003. One has two young children who had to be fostered during her imprisonment. The children were not returned to her from social services until 3 months after her release due to "lack of documentary evidence that she was the mother". DNA tests eventually proved she was the mother beyond any doubt.

The other, herself only a child of 17 years old was heavily pregnant when arrested. She gave birth in prison. On release she gave an account of rape, attempted murder and forced prostitution to her adviser. Both women were traumatised by the events they had suffered before arrival and which have undoubtedly been excacerbated as a result of prosecution and imprisonment.

[35] In the letter of 14 January 2004 the Minister correctly cites the case of *Carr-Briant* [1943] KB 607 as authority for the proposition that where the legal burden in a criminal case is on the defence then the standard required cannot be higher than the balance of probabilities. But this begs the question of whether or not the legal burden ought to be on the defence in respect of the of the clause 2 offences. In the same letter the Minister refers to the comparison made in Committee with defences such as self-defence in which, as she again correctly states, the burden on the defence is merely evidential. As *Blackstone's Criminal Practice* explains at F3.1 (both in the 2002 edition cited by the Minister and in the current 2004 edition), unlike the legal burden, this is not in fact a burden of *proof* at all, but the requirement that the defence adduce sufficient evidence to satisfy the judge that that the defence raised should properly be placed before the jury. It is settled law that in such cases the legal burden of disproving the defence is on the prosecution to the beyond reasonable doubt standard: the authority cited by Blackstone is *Lobell* [1957] 1 QB 547].

The Minister goes on to assert, again correctly so far as the current drafting is concerned, that the legal burden in clause 2 rests with the defendant. What she does not do is offer any explanation of why this should be so.

[36] DCA press release 2nd February 2004 number 48/04 and LSC Criminal Contract Amendment notice 2004 http://www.legalservices.gov.uk/cds/criminalcontract/contract_amend_notice_10_03_04 (22_03_04).pdf

http://www.gnn.gov.uk/gnn/national.nsf/CF/B5FBCF26F72243AC80256E2E0057BDB1?opendocument

[37] **The Community Legal Service (Scope) Regulations 2004**

[38] see Refugee Children's Consortium HL Committee stage briefing for purpose of these amendments.