House of Commons Report Crime and Courts Bill
Supplementary briefing

ILPA is a professional association the majority of whose members are immigration, asylum and nationality law practitioners. Academics and charities are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law and is represented on numerous Government consultative and advisory groups.

ILPA has proposed amendments to the Bill for House of Commons report and our proposals can be found at http://www.ilpa.org.uk/data/resources/17569/13.03.12-ILPA-briefing-for-HC-report-crime-and-courts.pdf . This is a supplementary briefing, providing ILPA's views on amendments touching on immigration that have been laid by others.

New Clause 10

Power of arrest for immigration compliance officers

Stella Creasy, Mr David Hanson, Jenny Chapman and Phil Wilson

NC10
To move the following Clause:—
'(1) In the course of their duties, a compliance officer may arrest without warrant a person—

(a) in breach of the conditions of their leave to enter;
(b) in breach of the conditions of their leave to remain;
(c) found to have entered the United Kingdom illegally.

(2) In this section—
"compliance officer" means an officer of the UK Border Agency tasked with the approval and compliance of institutions, companies or individuals that sponsor applications to enter in the United Kingdom as defined by UK Border Agency guidance.'

Presumed purpose: To extend powers of arrest without warrant of persons in breach of immigration control to the group defined in the clause.

Briefing

ILPA opposes this amendment. It is a matter of considerable gravity to arrest a person without a warrant and the powers should be narrowly confined. That is not the case here. The definition of "compliance officer" is vague.

There is nothing to prevent the UK Border Agency, when inspecting a sponsor's premises, persons trained and authorised to effect an arrest. There is nothing to prevent the Agency from seeking a warrant if needs it one although it is extremely difficult to envisage circumstances in

which it would, given the extensive powers of arrest without warrant set out in Schedule 2 to, and section 28A (Arrest without warrant) of, the Immigration Act 1971 supplemented by powers in sections 28C, 28FA of the Act. In short, those who are trained and authorised to effect arrests already have the power to do so; those who are not so trained and authorised should not be doing so.

The Agency's arrest work has been criticised. In the recent case *Chen & R & R v SSHD* CO/1119/2013, 12 February 2013, Sir Andrew Collins said "I hope the defendant will accept that the use of force against children and pregnant women is prima facie unacceptable." He barred the use of force against the defendants, pregnant women and children, save in circumstances where it was used to prevent harm to themselves or others.

In 2011 a short-notice inspection by the Chief Inspector of the UK Border Agency of the arrest team at Bexley Heath, Greenwich and Lambeth the Inspectorate described several arrests without warrant under paragraph 17(1) of the Immigration Act 1971, saying

> "5.32 We would expect all officers exercising powers of arrest, and the associated powers of entry, search and seizure, to be fully aware of their obligations when exercising these powers. While we noted that one officer did fulfil their obligations, the other two officers did not demonstrate sufficient awareness of their obligations when undertaking a search of person following arrest. There was some evidence to suggest that officers treated the power to search as a procedural requirement that automatically followed arrest, contrary to the guidance and the PACE Codes of Practice. "[1]

New Clause 13

Exceptions to automatic deportation

In the names of Mr Dominic Raab, Mr David Blunkett, Nick de Bois, Mr Frank Field, Nick Herbert, Hazel Blears and others

To move the following Clause:—

> 'In section 33(2)(a) of the UK Borders Act 2007, for "Convention rights", substitute "rights under Articles 2 or 3 of the Convention"

Presumed purpose

To allow a person subject to an automatic deportation order to be removed without an appeal although this would be a breach of their rights under the European Convention on Human Rights, provided that it were not a breach of their rights under Article 2 (right to life) or Article 3 (right not to be subject to torture, inhuman or degrading treatment or punishment). Whether the amendment achieves this is another matter, but this appears to be the intended effect.

Briefing

ILPA opposes this amendment which, we consider, confuses two different things: a breach of a person's rights under the European Convention on Human Rights and an interference with those rights.

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[1] http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/A-Short-Notice-Inspection-of-a-UK-Border-Agency-Arrest-Team-Bexley-Greenwich-Lambeth.pdf

A description of the automatic deportation provisions of the UK Borders Act 2007 (for non-lawyers) is provided in ILPA's information sheet available at http://www.ilpa.org.uk/data/resources/15384/12.09-Deportation-2-Automatic-Deportation.pdf. See also the House of Commons library research paper 07/2011 on the UK Borders Bill.[2]

Automatic deportation applies where someone, other than a British citizen, has been convicted of a criminal offence in the UK and is sentenced to imprisonment for a period of 12 months or more for that offence. It applies whether or not the person spends or will spend 12 months or more in prison, provided the sentence imposed was for 12 months or more.

The main effect of the automatic deportation provisions is take the decision as to whether a person should or should not be deported out of the hands of the Home Secretary and give it to the courts. Where automatic deportation applies the UK Border Agency is required to make a deportation order. There is no discretion. In general, bringing an appeal against an automatic deportation decision does not halt the removal process; in the jargon, the appeal is "non-suspensive".

There are a number of exceptions to the requirement upon the Secretary of State to make a deportation order. One is where the removal will breach a person's human rights. It is this exception that the amendment seeks to remove. If passed it would mean that that even if convinced that a person should be allowed to remain on human rights grounds, the Home Secretary would be bound to make a deportation order, with the result that the person would have to go to court to assert their right to stay.

This would force the Secretary of State to act in a way she knew was breaching human rights, even when she did not wish to do so. This would bring her office into disrepute. It would also present practical difficulties – what is the Home Office Presenting Officer to argue in an appeal against a decision to make an automatic deportation order if the Secretary of State agrees with the appellant. It would appear to create a waste of court time and money.

The tribunal if the person appealled would have to make a decision in accordance with the Human Rights Act. If it would be a breach of a person's human rights to deport them, the tribunal would have to decide that they could stay. The end result of the case, that a person whose human rights would be breached were they forced to leave the UK is allowed to stay would, provided our system of justice operated as it is designed to do, be the same, with or without this amendment.

There is of course the risk that our system of justice will not work properly. That the person will not succeed in appealing. If the clause makes a difference to final result in the case, it is likely to be for such reasons and no one who supports the rule of law can countenance that.

The automatic deportation provisions of the UK Borders Act 2007 do not stand alone. They must be read with the provisions on appeals contained in the Nationality, Immigration and Asylum Act 2002. The question of whether a person appealing on human rights grounds has a suspensive or a non-suspensive appeal falls to be determined under the 2002 Act and amending the automatic deportation provisions will not change yet.

[2] Available at http://www.parliament.uk/documents/commons/lib/research/rp2007/rp07-011.pdf.

Yet again, on the eve of legal aid being removed from immigration cases, including cases where a person asserts that to remove them from the UK would breach their human rights, we are reminded of the complexities of immigration law. What those who have signed up to this amendment think it will achieve and what it will achieve are probably two very different things.

Amendment 94 (to Clause 37 Appeals against refusal of entry clearance to the UK)

In the names of Stella Creasy, Mr David Hanson, Jenny Chapman and Phil Wilson

Page **38**, line **11** [*Clause 37*], at end insert—

'(6A) In section 50(2) (Procedure) of the Immigration, Asylum and Nationality Act 2006, after paragraph (c) the following shall be inserted—

"(d) may require an immigration officer to take reasonable action to obtain from the applicant additional relevant information or documents they consider not to be included in the original application before a decision is taken.
(e) must make provision for an immigration officer to contact the applicant with regard to the form, documents, information or fee specified in paragraphs (a), (b), (c) and (d).".

(6B) The Government will report annually to Parliament on the number of times an immigration officer has been required to obtain additional relevant information not included in the original application.

(6C) The Government will report annually to Parliament on the number of appeals against refusal entry clearance to visit the UK that are refused due to the nonsubmission of relevant information or documents.'.

Presumed purpose: To create a power (but not a duty) on the Secretary of State to require an immigration officer to ask for additional information from an applicant. To place the Secretary of State under a duty to make provision for an immigration officer to get in touch with an applicant.

Briefing
Clause 34 removes the right of appeal, save on human rights or race discrimination grounds, against the refusal of a visa to visit a family member. ILPA opposes this clause.

The Joint Committee on Human Rights, in its scrutiny of the Bill, said

> *The removal of an existing right of appeal in relation to family visit visas…requires careful justification. We cannot currently support removal of this right while there are still so many successful appeals. Notwithstanding our efforts to obtain such information, there is still no evidence before Parliament as to the proportion of appeals which succeed because new evidence is submitted on appeal as a result of an error by the applicant rather than the fault of the UK Border Agency. We ask the Government to make this information available to Parliament as a matter of urgency.*

In 2011, the Chief Inspector of the UK Border Agency (now of Borders and Immigration) carried out a global review of entry clearance posts and decisions.[3] He looked at entry clearance decisions where there is currently no right of appeal other than on human rights and race discrimination grounds. . Of the around 1,500 cases reviewed, in 33% the entry clearance officer had not properly considered the evidence submitted. In a further 14% it was not possible from the file to assess whether the evidence submitted had been properly considered. In 16% of cases, applications had been refused on the basis of a failure "*to provide information which* [the applicant] *could not have been aware* [was required] *at the time of making their application.*" ILPA recognises these same problems in family visit cases.[4]

If the full right of appeal is withdrawn, it will normally only be possible to challenge refusals by judicial review or administrative review. The latter is a process internal to the UK Border Agency. Essentially, it involves a review by an entry clearance manager of the decision by the entry clearance officer. As David Winnick MP put it in Home Affairs Select Committee,[5] this means the UK Border Agency is effectively "*judge and jury*" in its own cause. ILPA has no confidence in the internal review system. The Chief Inspector in his global review[6] looked at 475 such internal reviews, and found that in 30% of cases the entry clearance manager failed to pick up on poor decision-making by the entry clearance officer.

In debates in the House of Lords Ministers suggested that it was quicker and cheaper for a person to make a fresh application than to appeal.[7] Making a fresh application is often quicker than appealing. Many of those who appeal will also put in a fresh application in the hope of getting to the wedding, funeral etc. for which they wish to travel. However, a person who is refused a visa has to declare this, not only to the UK but to other countries. It is a blot on a person's copybook that they want need to remove if they are to travel in future. If the refusal is due to disbelief that a person will return at the end of the visit, etc., then a fresh application is likely to yield the same result.

At the time of *Family immigration, a consultation* we asked the UK Border Agency

> *At paragraph 7.7, the consultation paper states that in a sample of allowed family visit visa appeal determinations _new evidence produced at appeal was the only factor in the Tribunal's decision in 63 per cent of allowed appeals.' Please provide the following information:*
>
> > *(1) Of those allowed appeals, was the new evidence produced evidence that is clearly required on the application form or website?*
> >
> > *(2) Of those allowed appeals, was any contact made by the ECO making the decision with the applicant to request that the evidence be supplied?*[8]

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[3] See *Entry Clearance Decision-Making: A Global Review*, December 2011 at http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Entry-Clearance-Decision-Making_A-Global-Review.pdf

[4] See ILPA's October 2011 response to *Family migration: a consultation* especially the response to Q32, available at http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf . For the July 2011 consultation paper, see http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary

[5] HC 71-i, Q108-109.

[6] *Entry Clearance Decision-Making*, *op. cit.*

[7] See also the oral evidence given by Damian Green MP, the then Minister, before the Home Affairs Committee, see the transcript at HC 71-i, Q103-Q113.

[8] Letter from Wesley Gryk Solicitors to the UK Border Agency dated 7 September 2011.

The UK Border Agency responded that "The information requested was not collated when this sampling was carried out."[9]

An applicant will ordinarily not be able to anticipate a refusal under the "general grounds of refusal" which are not specific to an applicant but concern matters affecting any application, such as the use of false documents. For example, where an entry clearance officer decides the applicant has made a false statement or submitted a false document, the application will be refused yet the applicant will ordinarily not have been able to anticipate any need to submit evidence to support the veracity of the statement or document. A decision to refuse on these grounds is likely to mean that any future application for a visa is to be refused for ten years

The amendment will not provide the scrutiny of entry clearance officers that would be provided by an appeal. We fear that it may not prove straightforward to agree what exactly is being reported to parliament under subsections 6B and 6C to be inserted by the amendment. However, the attempt to provide applicants with some opportunity of meeting the Entry Clearance officers concerns is to be welcomed.

For further information please get in touch with: Alison Harvey, General Secretary (020-7251 8383) alison.harvey@ilpa.org.uk or Sarah Myerscough, Legal Officer, (020-7490 1553) sarah.myersoucough@ilpa.org.uk

[9] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011.