

## **ILPA submissions on the Joint Committee on Human Rights re Legislative Scrutiny Work for Session 2013-2014**

The Committee has identified the immigration bill as one of its priorities for legislative scrutiny in 2013 – 2014 and has called for submissions of no more than 1500 words on

- The significant human rights issues likely to be raised by each Bill or draft Bill; and
- Whether the Bill or draft Bill presents opportunities to enhance protection of human rights

The Immigration Law Practitioners' Association confines its submissions to this Bill.

### **Immigration Bill**

1. The Bill has not yet been published. It is expected in October. What is known of it is known from the Queen's speech and the briefing notes that accompanied the speech<sup>1</sup>. Based on these, the significant human rights issues likely to be raised by the Bill are:

### **The status of the European Convention on Human Rights in UK law**

2. It is stated that the Bill will attempt to place in primary legislation the Secretary of State's interpretation of Article 8 of the European Convention on Human Rights: the right to private and family life. Such a move may alter and limit the operation of the Human Rights Act 1998 because Article 8 as provided for in that Act will now be subject to a second Act purporting to narrow its application in the field of immigration. If it does alter the operation of the Human Rights Act 1998, there is a real risk that rights that have hitherto been available on the same basis to all persons within the jurisdiction will henceforth be accessible on an unequal basis and will provide uneven protection.
3. The Upper Tribunal has held, in *MF (Article 8 - new rules) Nigeria* [2012] UKUT 393 (IAC) (currently on appeal to the Court of Appeal) and subsequent case, that the Home Secretary's recognition in the immigration rules, as amended by Statement of Changes HC 194<sup>2</sup>, of only a part of the rights protected by Article 8 makes no difference to the UK's obligations under the Convention. It is the latter that are given effect by the courts. The Secretary of State's response to the judgments has been
  - to appeal *MF* to the Court of Appeal
  - to propose to enshrine her interpretation of Article 8 in primary legislation
4. The extent to which putting a preferred definition of Article 8 within primary legislation will change the way in which the right is enforced will be the subject of intense debate in parliament and would no doubt subsequently come before the courts. The ramifications of the debate go beyond Article 8 to the question of the status of the Convention as a whole. This may be the most important question with which the Committee has to deal in the next parliamentary session.

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/197434/Queens-Speech-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197434/Queens-Speech-2013.pdf)

<sup>2</sup> Into effect 9 July 2012. The immigration rules have been the subject of subsequent amendments.  
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5. Among the questions likely to be raised by the Bill are the meaning and content of “public interest” in Article 8 of the Convention<sup>3</sup> and the relative roles of the courts, the government and parliament in determining what this means and the weight to be attached to the public interests at play in a particular case.
6. ILPA submits that there are often multiple public interests in play in an Article 8 assessment, including the best interests of children, the prevention of crime, the protection of dignity and the preservation of the family.
7. The Bill also raises the question of the status of statements of executive policy and of parliamentary procedures in the interpretation and application of the Human Rights Act 1998 and the extent to which they can narrow the task given to judges under that Act. ILPA provided briefings for parliamentarians of all parties for the debate on 19 June 2012 in the House of Commons<sup>4</sup> which was largely concerned with whether holding the debate at all gave parliament’s imprimatur to the interpretation of Article 8 set out in HC 194.
8. ILPA submits that the question of the weight to be attached to competing interests is properly a matter exclusively for the judiciary, both as a function of its obligations under sections six and seven of the Human Rights Act 1998 and as a function of the statutory jurisdiction of the Tribunal<sup>5</sup>.
9. It is likely that the construction of Article 8 and of factors such as the best interests of children; delay and other questions relating to the conduct of the UK authorities; moral and physical integrity; the age of an offender at the date of entry into the UK and of offending, the duty to rehabilitate young offenders etc. and the status of thresholds such as exceptionality and ‘insurmountable obstacles will be debated.
10. It will be open to anyone refused protection of their rights under Article 8 in the UK to take their case to the European Court of Human Rights in Strasbourg once they have exhausted all remedies within the UK. The question of the implementation of Strasbourg judgments is likely to be debated.

### **Other matters**

11. From the information published at the time of the Queen’s Speech we identify that other matters in the Bill will raise questions of human rights. This will be the first immigration bill debated in the light of the Charter of Fundamental Rights of the European Union’s having become legally binding with the entry into force of the Treaty of Lisbon on 1 December 2009.

### **Appeal rights**

12. It is stated that there will be changes to appeal rights. Such changes are often matters of considerable complexity and benefit from detailed scrutiny by Committees to inform debate on the floor of both Houses. The loss of appeal rights may, as in past bills<sup>6</sup>, affect those asserting a risk of a breach of human rights at destination if returned, as well as the Article 8 questions described above. The rights of the child and the rights of adults and children subjected to human trafficking are also engaged.

### **New immigration Offences**

<sup>3</sup> *UE (Nigeria) et ors v SSHD* [2010] EWCA 975.

<sup>4</sup> HC Report, 19 June 2012 : Column 760.

<sup>5</sup> *Nationality, Immigration and Asylum Act* ss. 84(1)(c); 84(1)(g); 86. See further *Huang*.

<sup>6</sup> See for example the *Nationality, Immigration and Asylum Act 2002*.

13. It is stated that there will be new immigration offences. These may raise questions of interference with fundamental rights.

**Access to the National Health Service, driving licences, private rented accommodation**

14. It is stated that there will be new limits on access to the National Health Service and on access to driving licences. These go to the question of arms of the State other than the Home Office being involved in immigration control. It is also proposed that alongside employers and universities, private landlords should be involved in immigration control in that it would be a criminal offence to rent a room to a person without lawful leave to be in UK, separately from and in addition to, the offence of assisting unlawful immigration under section 25 of the Immigration Act 1971.
15. Any enforcement of immigration control by non-State actors raises the prospect that private interests will play a role in the way that decisions are reached and the risk of unlawful discrimination including breaches of Article 14 of the Convention read with articles such as Article 8.
16. Limits on access to the National Health Service may engage the right to life under Article 2 of the Convention and the right not to be subject to torture, inhuman or degrading treatment or punishment under Article 3 of the Convention. We recall that the Home Office has four times in two years been found guilty of breaches of Article 3 for its treatment of foreign national ex-offenders with mental health problems (see for example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) and *R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin)).

**Increases to penalties for employing persons without permission to work**

17. It is stated that there will be larger fines for businesses that employ persons without permission to work, and possibly other sanctions. This raises the question of discrimination in access to employment, including against British citizens who struggle to satisfy employers of their nationality, and of the protection of human dignity. It may also raise questions under Article 1 of Protocol 1.

**In addition**

18. This will be first bill wholly about immigration since the Borders, Citizenship and Immigration Act 2009 and we fully expect it further matters to be added to it before publication in October and possibly afterwards.

**Opportunities for the bill to enhance the protection of human rights**

19. Previous immigration asylum and nationality bills have provided the opportunity to address human rights matters of concern in these fields. See for example the Borders, Citizenship and Immigration Act 2009 where it proved possible to deal with the definition of human trafficking, the better to protect babies who were trafficked, and with the registration as British citizens of British Nationals (Overseas) with no other nationality or citizenship. ILPA is mindful that the first battle is always whether a matter falls within the long title of the Bill and awaits the long title before making specific proposals, other than to comment that the Bill provides an opportunity to put safeguards in place to address the violations of Article 3 in respect of mentally ill detainees that are described above.

20. The Bill is likely to provide one of the first opportunities to scrutinise the effects of section 15 of the Justice and Security Act 2013 which extends the use of closed material procedures in immigration cases by extending the remit of the Special Immigration Appeals Commission to two types of cases which come before the ordinary courts as judicial reviews, not as appeals. The Act extends the remit of the Commission to review on judicial review principles exclusion cases where the exclusion is wholly or partly on the ground that the person's exclusion is "*conducive to the public good*" and there is no right of appeal against this, and cases where the Secretary of State has refused British citizenship, by naturalisation
21. The question of access to justice is fundamentally affected by the changes wrought by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, most notably in this context the removal of the majority of immigration cases from the scope of legal aid and the removal of advice on asylum support from the scope of legal aid. Whether excluded cases receive exceptional funding over under section 10 of the Act is related to the question of Article 6's having been held not to cover immigration proceedings<sup>7</sup>. Current proposals<sup>8</sup> are to introduce further restrictions on legal aid, including a residence test and restrictions that will affect judicial review. These have profound human rights implications which are likely to be explored in the course of debates on the Bill.

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<sup>7</sup> *Maouiaa v France* Application 39652/98 [2000] ECHR 455 (5 October 2000)

<sup>8</sup> Ministry of Justice *Transforming Legal Aid*, May 2013.