# ILPA Briefing for the Immigration Bill
# House of Commons Second Reading 22 October 2013

**Introduction**

The Immigration Law Practitioners' Association (ILPA) is a professional membership association. The majority of members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other consultative and advisory groups and has worked with parliamentarians of all parties since its inception.

This briefing provides an overview of the Bill then addresses the parts of the bill in turn. We are happy to provide further explanations, information or briefing on request. We draw particular attention to Schedule 8, which makes additional, rather than simply transitional and consequential provision.

On 28 March 2013, the Home Secretary abolished the UK Border Agency. Her reasons for doing should be read in full but an extract gives a flavour:

> *… the performance of what remains of UKBA is still not good enough. The agency struggles with the volume of its casework ... has been a troubled organisation since it was formed in 2008… UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry instead of automated data collection, and they often involve paper files … The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies …UKBA has been a troubled organisation for so many years. … it will take many years to clear the backlogs and fix the system, …"*[1]

We agree. We now experience a demoralised management and workforce floundering. Ms Sarah Rapson, interim Director General of UK Visas and Immigration, told the Home Affairs Select Committee in June "Is it [the organisation] ever going to be fixed?... I think I answered that question from you earlier. I don't think so."[2]

This complex Bill is the latest stage in the vicious cycle described by the Home Secretary Immigration bills have long resembled lottery tickets, turning attention from the quotidian chaos to dreams of a future in which new systems produce perfect decisions. What we call, for reasons of space and clarity, "the former UK Border Agency" has better things to do than deal with this Bill. Parliament has better things to do than pass this Bill.

The Bill makes demands that the former Agency is not equipped or able to meet and gives it powers that it cannot be relied upon to exercise properly. The Bill will mean that where it

[1] Hansard HC Deb 6 Mar 2013 : Column 1500.
[2] Oral evidence given on 11 June 2013, published as HC 232-I, response to question 6, see http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc232-i/uc23201.htm

exceeds or abuses its powers, or simply fails to do the job, it will be shielded from challenge: there will in very many cases be no remedy and no redress.

It is perhaps surprising that in the Bill alternatives to judicial review as the way to challenge to decisions of the former UK Border Agency are stripped away, as are alternatives to human rights arguments as the grounds of challenge. The Bill foregrounds and increases reliance on judicial review and on human rights. Judicial review is a review of the lawfulness of a decision on public law principles. It is not an all-purpose substitute for a review of the merits of a decision. Human rights set important limits to the powers of the State, but cannot bear the full weight of the constitutional settlement. Not every illegal act, failing to respect the limits parliament has set, breaches a person's human rights.

The Bill cannot be read in isolation from the cuts in legal aid[3] including a proposed residence test that would deny legal aid to persons not in the UK or, with limited exceptions, without 12 months lawful residence in the UK[4]. No Government department gains greater protection from challenge under those proposals than the former UK Border Agency. The Secretary of State for Justice's proposals to restrict judicial review[5] would further insulate the former Agency from challenge. It is a reasonable assumption that if parliament does not put a safeguard into place it will be considerable time before that safeguard can be put into place through litigation.

Those affected by the former UK Border Agency's lack of resources, lack of competence or abuse of power or are not only immigrants and refugees. Do you want to prove your immigration status, your British citizenship, at every turn? Do you want to be on the receiving end of others' doubts as to whether you are British based on the colour of your skin, your accent and their prejudices? The Bill weaves a spaghetti of red tape that will entangle us all, including when it is inadequately and wrongfully administered. It makes provision for 41 new statutory instruments, 14 of them subject to the affirmative procedure. The hostile environment[6] that it strives to create is hostile to us all.

If the Bill is to proceed through both Houses of Parliament, then alongside what it already contains we propose amendments to:

- Make provision for a presumption of liberty and for regular automatic bail hearings;
- Make provision to stop the transfer of persons whose claims for asylum are refused from support under section 95 of the Immigration and Asylum Act 1999 to full board, cashless section 4 of that Act at the point of refusal and allow all persons, not only families with children, to continue to be supported under section 95;
- Provide for asylum support to be uprated in line with benefits uprating;
- Repeal Schedule 3 to the Nationality, Immigration and Asylum Act 2002 which restricts support local authorities can provide to persons under immigration control.
- Amend section 94 of the Nationality, Immigration and Asylum Act 2002 so that the Secretary of State cannot deem a country to be safe, regardless of the evidence to the contrary.

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[3] See the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the proposals set out in *Transforming Legal Aid: next steps for reform* Ministry of Justice, 5 September 2013. For ILPA's 5 September 2013 summary of the proposals, see http://www.ilpa.org.uk/resource/20909/ilpa-summary-of-the-governments-conclusions-on-the-transforming-legal-aid-consultation-5-september-2

[4] *Ibid*.

[5] *Judicial Review: proposals for further reform*, Ministry of Justice 6 September 2013.

[6] See e.g. *Ex-minister Sarah Teather: government wants to make UK 'hostile' to immigrants*, The Telegraph, 13 July 2013.

**Removal (Part 1 Clause 1 and Schedule 8 )**

Clause 1 makes new provision for administrative removal from the UK. Unlike deportation, which is used for those who have committed a criminal offence or whose presence is deemed not conducive to the public good, administrative removal is used for those who require leave but do not have it, for example because an extension of leave has been refused or leave curtailed, because they are overstayers or because they never had leave.

The 10 October 2013 Government factsheet about this clause says that a single decision will be made telling a person that they have no leave (and to see a lawyer sooner rather than later) and making it possible for an immigration officer to remove them. The face of the Bill simply renders a person liable to removal if they require leave but do not have it.

It is vital that notice be given of any decision affecting a person's status. Those facing removal under this clause, including family members, will be liable to arrest, search and detention[7] and force can be used against them. Consequences of the decision to remove could include not being entitled to rent property, open a bank account or retain a driving licence. If clause 11 of this Bill becomes law, many will have no right of appeal against the decision, however erroneous it is.

The new power is not the magic wand that the Home Office factsheet suggests. It will not bring instant efficiency or certainty. People do not vanish at the moment of refusal and decisions can be wrong. We recall the comments of Lord Justice Sedley in *R (Mirza) v SSHD* [2011] EWCA Civ 159:

> *…while many… reasons…for non-removal will already be known and can be advanced when leave is sought, those which by definition cannot yet be known include explanations of or excuses for factors which have brought about an unanticipated refusal of leave to remain...*

We draw particular attention to the provisions on removal of family members. As currently drafted, the power may be exercised against British citizens and EEA nationals. Clause 1 allows removal of 'a member of the person [being removed]'s family' with further particulars, including who is deemed to be a family member, whether they need be given notice of the decision to remove them and, if so, the effect of the notice, left to regulations subject to the negative procedure. Lord Steyn said in *R(Anufrijeva) v SSHD* [2003] UKHL 36:

> *Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system.*

Provisions as to family members should be placed on the face of the Bill and subject to scrutiny by parliament.

**Enforcement (Clause 2 and Schedule 1)**

Paragraph 5 of Schedule 1 would greatly extend immigration officers' powers to use reasonable force by allowing them to do so in the exercise of all powers under any of the Immigration Acts. Whether the force the Agency uses is reasonable has frequently been a matter of dispute. On 10th April 2013, Lord Taylor of Holbeach told the House of Lords that:

[7] Clause 1, s 10(5) inserting powers in Schedule 2 to the Immigration Act 1971.

*The recommendation in the report by HM Inspectorate of Prisons on Cedars pre-departure accommodation that force should never be used to effect the removal of pregnant women and children was rejected by the UK Border Agency*[8].

Instead the Agency offered a consultation. It was only in the face of a legal challenge that it backed down. A failing organisation inadequately resourced and managed should not be given additional powers to use force. Moreover, many of the functions of immigration officers do not properly involve the use of any force at all. Parliament should require the case to extend the use of force to be argued for power by power.

Similarly with powers of search and entry addressed in the rest of the Schedule. The Agency already has very extensive powers. The case for these powers has not been made out. Parliament should scrutinise how existing powers are being used and the case be made to it for each additional power sought.

**Bail (Clause 3 and Schedule 8)**

Clause 3 provides that tribunal procedure rules must make provision for the dismissal without a hearing of bail applications made within 28 days of a previous decision to dismiss a bail application unless the appellant can demonstrate a material change of circumstances. Disputes about whether a change is material are thus substituted for bail hearings.

Immigration detention is by administrative fiat, without limit of time, and without any independent oversight unless the detainee him/herself makes an application to a tribunal. The 28 day proposal is a hollow mockery of the provisions of the Immigration and Asylum Act 1999, repealed without ever having been brought into force, which would have given automatic bail hearings to all detainees after seven and thirty-eight days, while preserving their rights to make additional bail applications. The proposals demonstrate the increasingly casual disregard for the liberty of persons under immigration control.

The UK Border Agency has, not once but four times, been found to have breached Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman and degrading treatment, for its treatment of mentally ill persons in detention[9] and other cases have settled or are ongoing. In 2012 there were 208 incidents of what statistics call "self-harm" (which includes attempted suicide) requiring medical attention and 1804 detainees formally recognised as being at risk of such harm[10] . Statistics are not collected on those who in this category who do not require medical attention. We support amendments to introduce a presumption of liberty and automatic bail hearings.

The consent of the Secretary of State to a bail hearing will be required if removal directions in force require the person's removal from the UK within 14 days. Nothing in the Bill prevents the Secretary of State from repeatedly setting removal directions, thus ousting the possibility of applying for bail. Those who manage to find legal representation are likely to try to challenge the decision to withhold consent or the lawfulness of detention, substituting

[8] HL Deb, 10 April 2013, c313W.

[9] *R (HA) (Nigeria) v SSHD* [2012] EWHC 979; *R (S) v SSHD* [2011] EWHC 2120 (Admin); *R (D) v SSHD* [2012] EWHC 2501 (Admin); *R (BA) v SSHD* [2011] EWHC 2748 (Admin).

[10] Response to Freedom of Information of information requests, see http://www.ctbi.org.uk/96 . See also the evidence of the Association of Visitors to Immigration Detainees to the Home Affairs Select Committee for its report on Asylum, Seventh report of session 2012-2013, HC 71, 8 October 2013 http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VIRT_HomeAffairs_ASY-73.htm . See also HL Deb, 27 June 2012, c71W.

judicial review in the High Court for a bail hearing. The clause also bites on cases of bail before the Special Immigration Appeals Commission and here we question whether, given the use of closed material procedures, the availability of judicial review and habeas corpus provide an adequate substitute for bail hearings[11].

**Biometrics (clauses 4-10 and Schedule 8)**

Clause 4 introduces new requirements for those applying for transit visas or for documents as third country national family members of European nationals to provide biometric information. Clause 6 requires such information with applications for citizenship and naturalisation. Information is to be destroyed when the person is granted citizenship but otherwise can be retained. Even if citizenship is granted, photographs may be retained until a person gets a passport, and indefinitely if they never do so. Regulations under clause 7 could place the Secretary of State under a duty to refuse an application if biometric information is not supplied. Biometric information retained in connection with the exercise of immigration and nationality functions may be used for such other purposes are specified in regulations. A study of Part 4, Access to Services, gives some clue as to the range of uses to which information could be put and should be read with this section. Schedule 8 removes the 10 year limit on the retention of information taken under the Immigration Act 1999 and the Nationality, Immigration and Asylum Act 2002, opening the door to the indefinite retention of such information. The need to justify the collection and storage of biometric information applies to both citizens and third country nationals and these provisions are insufficiently justified and contain insufficient safeguards.

**Appeals (Part 2 and Schedule 8)**

The Bill removes rights of appeal on any grounds other than asylum and human rights. It denies any independent review to anyone else who makes an immigration application. It thus reduces the appellate process to questions of human rights and judicial reviews. Many of those arguing to be allowed to stay on the grounds of family life, rather than as persons in need of international protection, are likely, because of cuts to legal aid, to be tackling these cases unaided and the proposals are put forward against a backdrop of inequality of arms.

The Government says that those denied a right of appeal can purchase an "Administrative Review" instead. If a department has got a decision wrong then the decision should be looked at again, by someone capable of identifying the mistake. This is the case just as much to avoid a costly appeal as where there is no right of appeal. Administrative review is another name for the department doing its job. Table 8 in the Appeals Impact Assessment shows that 49% of "Managed Migration" (work and students) appeals are allowed, 50% of entry clearance appeals are allowed and 32% of appeals against deportation are allowed. At any stage before the decision on those appeals the former Agency could have reviewed, or did review, its own decision. The only conclusion to be drawn is that the former Agency continues to stand in need of independent oversight. The Appeals Impact Assessment itself tends to support this conclusion. It says that where a claim is made on the basis of Article 8 "…the refusal of that claim will have (sic.) a right to appeal unless the case in question relates to an overstayer, where there is no right of appeal[12]. This is wrong; an overstayer has a right of appeal on the grounds of Article 8.

[11] In *Chahal v United Kingdom* (1996) 23 EHRR 188 (paragraphs 58-61), neither judicial review nor habeas corpus were held to provide an adequate basis for challenging a deportation on national security grounds because the closed material could not be disclosed in these proceedings.
[12] Appeals Impact Assessment page 6.

Administrative review is described in the impact assessment as "still being developed" and therefore not able to be costed. On the one hand, the process has been in development for years: it is the process endeavouring to make correct decisions. On the other, we understand that work on a specific model has hardly started. We are mindful of the lengthy debates that took place during the passage of the Immigration Asylum and Nationality Act 2006, when an "administrative review" was introduced for entry clearance cases from which appeal rights were removed. There were only tantalising glimpses of Administrative review throughout the passage of the Bill and parliamentarians chased detail at the expense of debates on the fundamental question of the loss of appeal rights.

The 'Wilson Committee' said in 1967:

> *…"it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal'.*

A right of appeal against a range of immigration decisions was created by the Immigration Act 1971, following the recommendations of the *Report of the Committee on Immigration Appeals*[13]. The Committee said:

> *…however well administered the present [immigration] control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal…The safeguards provided by [a procedure requiring a clear statement of the administration's case, an opportunity for the person affected to put his case in opposition and support it with evidence, and a decision by an authority independent of the Department interested in the matter] serve not only to check any possible abuse of executive power but also to give a private individual a sense of protection against oppression and injustice, and of confidence in his dealings with the administration…themselves of great value.*

In *Asifa Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443 the then Lady Justice Hale said of the right of appeal to the Immigration Appeal Tribunal that:

> *In disputes between citizen and state [tribunals] are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review.*

If a decision is, to cite one of the grounds of appeal proposed to be abolished "not in accordance with the law", because it does not follow the former Agency's own immigration rules or deal with evidence properly, it should be possible to challenge that decision before an independent body. Under the Bill, either it will be reconfigured as a human rights challenge, or the only challenge will be by judicial review.

If it is reconfigured as a human rights challenge there will be no possibility of dealing with the case by a straightforward consideration of whether the decision accords with the immigration rules. Instead it will be necessary to look at proportionality, balancing the interests of the individual against those of the State.

As to judicial review, it is said in the Appeals Impact Assessment that displacement onto judicial review cannot be quantified and therefore cannot be costed. But the "sensitivity analysis" in the assessment models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission, which would be an extraordinary increase. In

[13] August 1967, Cmnd. 3387

2011 there were 8,711 immigration and asylum judicial reviews[14] and only 4,630 reached the stage of a decision on permission. Judicial reviews cost more than appeals, costs can be sought from the other party, and damages may be claimed.

The proportions of all immigration appeals to the First Tier Tribunal that were allowed appear below. Figures in parentheses are for "managed migration" appeals: appeals are appeals from people lawfully present in the UK, with leave to enter or remain, at the time the decisions refusing to extend their stays or revoking their permissions were made[15]:

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|---|---|---|---|---|---|
| 2007/08 | 34% (34%) | 2008/09 | 39%(43%) | 2009/10 | 41% (52%) |
| 2010/11 | 48%(51%) | 2011/12 | 45% (49%) | 2012/13(annual total) | 44%(49%) |
| 2013/14 (April – June) | 45% (52%) | | | | |

The very high proportion of appeals, especially "managed migration" appeals that succeed do not delay removal; they prevent unlawful removal in cases that frequently have a profound impact on a person's life. In such circumstances, to characterise reducing the number of such appeals that are brought as a "non-monetised benefit" as does the Appeals Impact Assessment[16] shows a scant disregard for whether a person continues their education or career in the UK or is able to make the UK their home.

The assertion that multiple, sequential appeal rights are available to the same individual is true in only exceptional cases, for, as acknowledged in the Appeals Impact assessment[17], the Secretary of State has powers to certify cases to prevent repeat applications and powers in many cases to determine whether subsequent appeals are heard in or out of country.

The right of appeal to the tribunal is generally a speedy remedy. The Government factsheet states that the current average time for an appeal to be resolved is 12 weeks[18]. The Chief Inspector of Borders and Immigration has repeatedly drawn attention to delays in entry clearance administrative reviews. For example, in his August to October 2010 inspection of the visa section in Amman, published in March 2011, he found no administrative reviews being completed within the 28 day target. The average was 74 days, over 10 weeks[19]. The Agency moved quickly following his inspection to address this; it had not done so without the independent scrutiny.

Where an appeal on asylum or human rights grounds remains it is proposed that a new matter can only be raised before the Tribunal if the Secretary of State consents to this. The factsheet on appeals says that this will ensure that these matters are considered by the Secretary of State before they are considered by the tribunal but the Bill does not appear to impose any obligation on the Secretary of State to consider a matter after having objected to the Tribunal's dealing with it. It is not fanciful to envisage persons being left in limbo: the Court of Appeal cases of *R (Mirza) v SSHD* [2011] EWCA Civ 159 and *R (Daley-Murdock) v SSHD* [2011] EWCA Civ 161 challenged the Secretary of State's practice of refusing

[14] See *Unpacking JR statistics*, V. Bondy and M. Sunkin 30.4.13 for the Public Law Project, available at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf

[15] *Tribunal Statistics Quarterly (including Employment Tribunals and EAT): April to June 2013* Ministry of Justice, 12 September 2013, Table 2.5 'Number of First Tier Tribunal (Immigration and Asylum) Appeals Determined at Hearing or on Paper, by Outcome Category and Case Type, 2007/08 to 2013/14. See *Annual Tribunals Statistics, 2011 – 12,* Ministry of Justice, 28 June 2012, 'Definitions'.

[16] Page 11.

[17] At page 7.

[18] Immigration Bill Factsheet: appeals (clauses 11-13), Home Office, October 2013.

[19] See the report at http://icinspector.independent.gov.uk/wp-content/uploads/2011/03/An-inspection-of-UKBA-visa-section-in-Amman-Jordan.pdf

applications but not making a decision (to remove) against which it would be possible to appeal finally to resolve the matter.

There is a new power in clause 12 *Place from which an appeal may be brought or continued* to certify the appeals of "foreign criminals" before they begin or while they are in train so that the "foreign criminal" can be removed while the protection claim is pending if to do so would not cause him/her "serious irreversible harm." This raises the prospect of matters that could be resolved through an appeal being displaced onto a judicial review of whether removal would cause "serious irreversible harm". The assumption appears to be that only asylum cases and cases involving torture involve risks of serious irreversible harm but this is not a sustainable assumption given the range of persons, including children, the elderly, ill and dying and the range of interests involved in family cases. The power of one party to a case to certify that case while it is in train is inimical to the notion of equality of arms.

As now, provision is made for appeals certified as clearly unfounded not to be brought until the person has left the UK. But the Bill is equally prescriptive about an appeal that can be brought within the UK being brought there. This appears to deny an appeal e.g. in cases of wrongful removal or where a person has otherwise to depart and should be changed.

Appeals in cases before the Special Immigration Appeals Commission are preserved but expressly limited to judicial review principles (Clause 13 Review of certain deportation decisions by Special Immigration Appeals Commission). The Explanatory Note makes clear that this is to avoid their being the subject of judicial review: "It is more appropriate for judicial reviews in national security cases to be conducted by SIAC than in open court." The right of appeal in these cases should remain, or judicial review should be provided on the same basis as is in any other case.

In *NS v UK* (C-411/10) the Court of Justice of the European Union criticised provisions that deem a country to be safe for all. It ruled out the use of conclusive presumptions that a person's fundamental rights would be respected upon return to another country, including a member State of the European Union. By section 94(8) of the Nationality, Immigration and Asylum Act 2002 the Secretary of State can certify a country to be one in which a person's life and liberty is not threatened for one of the reasons set out in the 1951 Refugee Convention and the person will not face onward *refoulement* in violation of the Convention. This provision, which deems a country to be safe, should be repealed.

***Article 8 (Clause 14)***

Clause 14 (Article 8 of the ECHR: public interest considerations) inserts a new part 5A *Article 8 of the ECHR: public interest considerations* into the Nationality Immigration and Asylum Act 2002: which sets out matters to which the Courts must have regard in Article 8 cases.

Human rights are rights of the individual against the State. The European Convention on Human Rights enjoins upon decision-makers a fact-sensitive analysis of each case. The general principles that govern decisions are those of articulated by the European Court of Human Rights. The Convention is a living instrument, constantly developing. If the Secretary of State wishes to take issue with the approach of the courts in those cases, it is open to her to do so, by pleading her case before the courts.

There is much to criticise in the Secretary of State's approach, apart from her putting the provisions in statute at all. Is it so obvious that it is always in the economic interests of the UK that a person be financially independent? What of a carer? It is contrary to the former UK Border Agency's obligations under section 55 of the Borders, Citizenship and Immigration

Act 2009 and the UN Convention on the Rights of the Child to substitute the tests of whether it would 'not be reasonable' to expect a child to leave the UK or whether the effect of a family member's removal on a child would be 'unduly harsh', for the test of the best interests of that child. It is equally contrary to those obligations to limit the children whose interests are to be taken into consideration to British children and those who have lived in the UK for seven years or more. No provision is made for settled children who have lived in the UK for less than seven years. We urge parliament to resist putting into statute one interpretation, fixed for all time, of an international instrument in this manner.

Those who will be trying to challenge these definitions will in many cases be unrepresented persons with no entitlement to legal aid.

**Access to services (Part 3 and Schedules 3 and 8))**

This part deals with the relevance of immigration status to whether a person can rent property, access the health service, open a bank account or obtain a driving licence. This means in practice is a system of identity checks for all, since it is necessary for British citizens or persons with permanent residence to prove that they are lawfully present in the UK. We recall the Home Secretary's introduction of the Identity Documents Bill at second reading:

> *The national identity card scheme represents the worst of government. It is intrusive and bullying, ineffective and expensive. It is an assault on individual liberty which does not promise a greater good...We are a freedom-loving people, and we recognise that intrusive government does not enhance our well-being or safety. In 2004 the Mayor of London promised to eat his ID card in front of "whatever emanation of the state has demanded that I produce it."*
> *I will not endorse civil disobedience, but Boris Johnson was expressing in his own inimitable way a discomfort even stronger than the discomfort to be had from eating an ID card. It is a discomfort born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government*[20]

and the words of Anuerin Bevan about the National Health Service in 1952

> *Are British citizens to carry means of identification everywhere to prove that they are not visitors? For if the sheep are to be separated from the goats both must be classified…"*[21]

It is not the mere fact of a card that produces discomfort or that landlords and landladies, for example, are remote emanations of the State: private citizens checking upon each other. British citizens, EEA nationals and third country nationals alike would be required to produce identity documents at many turns in schemes that would be intrusive, bullying, ineffective and expensive and likely racist and unlawful to boot .

These provisions must be read with the provisions of Clause 1 and the loss of appeal rights in Clause 3. A wrongful refusal by the Secretary of State could jeopardise a person's accommodation, access to health care and driving licence. All these could be denied while the person pursued a judicial review against the wrongful decision. This may lead to people pursuing an administrative review or human rights appeal in parallel with a judicial review, simply to preserve their entitlements during the period of challenge, increasing the work that must go into resolving the challenge. The consequences of refusal will increase pressure on courts and tribunals to conclude judicial reviews rapidly.

[20] HC report 9 Jun 2010: Column 345-350
[21] *In Place of Fear*, Bevan, A., (1952), chapter 5

***Private rented accommodation (Clauses 15-32 and Schedule 3)***

The idea of the scheme is that those who cannot prove that they have lawful leave to be in the UK (some of whom will be British citizens, without passports or whose passports are regarded by landlords and landladies as possible fakes) will not be able to rent property at all. Those who rent to them face fines, against which they can protect themselves by carrying out document checks. However informal an arrangement to let a room for a peppercorn rent, it will entail private citizens checking on each other.

The response to the consultation on private rented accommodation and the documents accompanying the bill make assertions based on the civil penalty regime that the new regime will not be onerous, and that landlords will operate it successfully. ILPA members have worked closely with employers and employees affected by the civil penalty regime for many years. It is onerous and our experience of it informed our detailed response to the consultation on private rented accommodation[22]. Our conclusion was that the proposals were unworkable. Nothing in the Bill or in the Government response to the consultation has changed that view.

The proposals are a recipe for discrimination against black and ethnic minority people, whether British or under immigration control, and will make it more difficult for anyone who does not hold a British passport (including many British citizens) to rent properties. Demand for rented accommodation frequently outstrips supply. It is normal if renting a property to be risk adverse and to prefer to let as quickly as possible to the person whom it is simplest to check: the British passport holder who, according to your own image of who is British, seems to you least likely to be presenting fake documents.

What is proposed is unworkable, resource intensive and beyond the capacity of the former Agency to deliver. It will not be implemented or administered successfully. If this system is enforced with all due checks it will make onerous demands on private landlords. We urge MPs to ask businesses in their constituencies whether they find checking immigration status for employment purposes straightforward and how long they spend on this. The guidance for employers comprises seven documents, the longest of which is 89 pages[23]. The Home Office employers' helpline frequently gives the wrong answer, including because the Home Office database is not up to date because of delays in putting information on to it.

If the system is not enforced, which seems more likely given the complexity of the proposals and the reference in the papers accompanying the Bill to "light touch" regulation, discrimination and unfairness will be allowed to flourish unchecked.

Pressure will be put on housing stock by those entitled but unable to find accommodation in the private rented sector, while those with no entitlement will be at the mercy of those who will rent properties without performing checks.

***National Health Service (Clauses 33 and 34)***

The Bill contains only enabling provisions on limiting migrants' access to the National Health Service and the Government's response to the consultations on the National Health Service

[22] ILPA's response to the consultation on the private rented sector is available at http://www.ilpa.org.uk/resources.php/20798/ilpa-response-to-the-home-office-consultation-tackling-illegal-immigration-in-private-rented-accommo

[23] See http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/

has yet to be published. ILPA responded to both the Department of Health and the Home Office consultations[24]. We argued against this extension of identity checks to the population as a whole. What we see on the face of the Bill are proposals to confine entitlement to the National Health Service to British citizens and settled persons (clause 34) with the entitlements of others to be controlled by regulations (clause 33). Some of those not automatically entitled will be able to secure entitlement to all or some services, as determined by the Secretary of State, by paying a levy.

The suffering of individuals and the risks to public health militate against the proposal. Checks risk preventing or deterring persons, including British citizens, who cannot prove their status at the time when this is needed from accessing health services for themselves and their children.

***Bank accounts (Clauses 35 and 36)***

Many banks, for anti-money laundering and other checks, require production of documents proving identity. The proposals in the Bill to put this on a statutory footing make still further demands on the overstretched former UK Border Agency.

***Work (Clauses 39 and 40 and Schedule 8)***

The Bill will increase the maximum civil penalty that can be imposed on an employer found to be employing a person without permission to work from £10,000 to £20,000. We doubt that this will deter any more persons than were deterred by a £10,000 maximum penalty. The Bill also restricts employers' ability to challenge any civil penalty imposed in ways that are likely to make the system easier for the Secretary of State but more difficult for employers including those on whom a penalty has been wrongly imposed. ILPA responded in detail to the consultation about these proposals[25].

***Driving licences (Clauses 41 and 42)***

Non EEA nationals can only obtain a UK driving licence if they have more than six months leave. The Bill puts this on a statutory footing. It will also give the former UK Border Agency new powers to revoke licences of overstayers. Some will continue to drive on their overseas licence for as long as possible. Others may drive without a licence. This invalidates their insurance. The Government factsheet states "We will also send a message to uninsured drivers that it is not worth the risk. The net is closing in on uninsured drivers, be they UK residents or illegal immigrants…" But is it? The "dire consequences" the factsheet describes are dire consequences for all of us, not just for those who drive without a licence.

Meanwhile if a person is wrongly refused leave, and has no right of appeal, they lose their licence while they pursue any judicial review. While debating driving licences parliament should consider the position of persons seeking asylum, who may have a lengthy wait for a decision and in the meantime lose skills that will help them as refugees, or on return.

[24] ILPA's response to the Department of Health consultation is available at http://www.ilpa.org.uk/resources.php/20831/ilpa-response-to-the-department-of-health-consultation-sustaining-services-ensuring-fairness-a-consu

[25] ILPA's response can be found at http://www.ilpa.org.uk/resources.php/19317/ilpa-response-to-the-home-office-consultation-strengthening-and-simplifying-the-civil-penalty-regime.

***Marriage and civil partnership (Part 4 and Schedules 4, 5 and 8)***

The Home Office already has power to deny a person an immigration benefit as a result of their marriage or civil partnership where finds that the marriage or civil partnership is one of convenience. The Bill does not increase those powers. Interviews and checks can all be carried out in the context of the immigration application interfering with the generality of couples' absolute right to marry and found a family under Article 12 of the European Convention on Human Rights. Whether a person gains an immigration advantage by marrying is a matter for Government; we suggest that the marriage itself is not.

The Bill extends the period for giving notice of all marriages and civil partnerships, not just those involving a non-EEA national, from 15 to 28 days. For the first time all marriages involving a non-EEA national, including those in the Church of England the Church in Wales, will be subject to civil preliminaries. The registrar must refer all marriages involving a non-EEA national to the Secretary of State. The Secretary of State must decide within the 28 day notice period whether to extend the notice period for the couple to 70 days to check the marriage. Non-compliance with the requirements she imposes during the 70 days will lead to refusal to allow the marriage to take place. Otherwise, whether or not the Secretary of State thinks the marriage one of convenience, she will allow it to take place but can if she chooses to do so, move to enforcement action.

The Government lost the case of *R (Baiai et ors) v SSHD* first in the High Court, then in the Court of Appeal then in the Supreme Court[26] and the case of *O'Donoghue et ors v UK* (Appl. no. 34848/07) in the European Court of Justice. It lost because it was held that in its efforts to crack down on an unquantified number of marriages of convenience, it was interfering disproportionately in all marriages to a non-EEA national. It was found to have acted in a discriminatory fashion, by treating marriages solemnised in the Church of England differently from marriage rites of other faiths. It lost the case of *R (Quila) v SSHD* [2011] UKSC 45, where it tried to ban entry for settlement of foreign spouses or civil partners unless both parties were aged 21 or over. In that case, Lord Wilson described the way in which it had interfered with all marriages to catch an unquantified number of suspected forced marriages as "On any view it is a sledge-hammer but she has not attempted to indentify the size of the nut."

The risk of interference with the generality of couples whose getting married or forming a civil partnership is increased if the former UK Border Agency is unable to detect which relationships are marriages of convenience. We have concerns about this. In the most recent consultation on the topic the UK Border Agency suggested that indicators included the age of the sponsor and the applicant at the time of the wedding; the nature of the wedding ceremony; whether the sponsor has previously been sponsored for a marriage or civil partnership visa or sponsored a marriage or civil partnership application and whether the applicant had a history of compliance with immigration law, none of which, we suggest, are reliable indices of a marriage of convenience. ILPA's responded to the consultation and set out its concerns in detail[27].

**Oversight** (regulation of Immigration advisors) (**Part 5 and Schedules 6 and 8)**

The Bill gives the Office of the Immigration Services Commissioner new powers of enforcement. These are in ILPA's view unobjectionable. Similarly, ILPA has no view objection to the Home Office taking over from the OISC the decision about which classes of organisations do not need to pay a fee for regulation. However, the best protection against

[26] **[**2009] EWHC Admin 3189; [2010] EWCA Civ 1482; **[**2008] UKHL 53.
[27] See http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf

poor advice is the ready availability of good advice. Good advice for those with limited means is difficult to obtain, impossible for some, given the restrictions on legal aid. Not for profits assist some, although not all, of those who have no other access to advice whether by providing advice for free, or on a cost-recovery basis. Everything should be done to encourage and support them to join and remain in the OISC scheme. If they are to invest in training and resources they need assurances that exemption from paying a fee, as proposed in the Regulatory Triage Assessment, will not suddenly disappear. The question of the time taken to satisfy the Commissioner on an annual basis that they are fit and proper persons to give immigration advice should be the subject of realistic assessments of the time and resources needed, not over-optimistic assumptions.

The Bill is silent on new powers we would like to see given to the office of the Commissioner, in particular to retain and store client files and ensure that the client can have access to these where a firm or company closes down. While the OISC requires this of those it regulates, there are no powers to enforce this and the OISC has not been given the resources to ensure that the files be placed with another organisation from which they can be retrieved. This has proved a problem in too many cases, including when the Refugee Legal Centre and the Immigration Advisory Service closed down with consequences for the then UK Border Agency, the tribunals and the courts which are still felt today. ILPA was closely involved in dealing with the Administrators for both organisations and went to court in 2012 to obtain a three month window during which Immigration Advisory Service clients could retrieve their files.

**Embarkation checks (Clause 56)**

These link with the provisions on biometric in Part 1 and also provide an opportunity for parliament to debate the costly eborders fiasco[28].

**Fees (Clauses 59 – 60 and Schedule 8)**

The Government factsheet sets out that the intention behind this clause is to make it easier to change levels of fees more rapidly and "in line with the government's objectives and priorities." No mention is made of adjusting fees in recognition of people's ability to pay or to reflect the level of service that they are getting. Fees have in general risen each year and bear no relation to the person's ability to pay. They now include, for example, £1051 per person to apply for settlement, £578 for partners to apply for further leave to remain and £851 for partners and children to apply for entry clearance, except elderly dependants who pay £1906. The fee for naturalisation as a British citizen is £874. As to limits on fees that can be set, Schedule 8 eschews the language of "cost recovery" fees for that of setting fees "to reflect costs referable to the exercise of any function". We do not know what that means. Many fees can be set at higher than cost recovery levels. This clause provides an opportunity to set limits on the circumstances in which fees can be set above a cost-recovery basis.

Clause 59(9)(b) provides for the Home Office to reduce, waive or refund all or part of a fee provided for in this clause. It is possible to secure a waiver of a fee, in particular following the judgment in *R[Omar] v SSHD [2012] EWHC 3448,* but it is very difficult and involves a persistent legal representative, even in cases of, for example, domestic violence. The possibility of a waiver of fee should be set out on the face of the Act.

***For further information please get in touch with Alison Harvey, Legal Director, Alison.harvey@ilpa.org.uk, 0207 490 1553.***

[28] See for example HC Deb, 15 April 2013, c38W confirming that £475 million has so far been spent and that future expenditure cannot currently be predicted.