IMMIGRATION BILL
ILPA PROPOSED AMENDMENTS FOR HOUSE OF COMMONS COMMITTEE STAGE

PART 1 REMOVAL AND OTHER POWERS

Removal Directions

Clause 1

PROPOSED AMENDMENT 1

Page 2 line 22, leave out subsection 6.

Purpose
Removes the power of the Secretary of State to make provision by regulation for the removal of family members under this section.

Briefing
This is a probing amendment to probe the Government's intentions as to the powers to remove family members under Clause 1 (6). ILPA considers that provisions as to family members should be placed on the face of the Bill and subject to scrutiny by parliament not left to secondary legislation.

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. It contemplates regulations that would allow family members to be removed without their ever having been notice of this. It also contemplates that any notice given would affect their current leave. The consequences could include their being excluded from employment and, as per this bill, from renting in the private sector, from the National Health Service and from driving.

As currently drafted, the power to remove family members may be exercised against British citizens and EEA nationals.

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.*

Powers of Immigration Officers

Clause 2 and Schedule 1 Enforcement Powers

PROPOSED AMENDMENT 11

Page 52, line 12, leave out paragraph 5.

Purpose
To maintain the status quo whereby immigration officers can use reasonable force only when exercising powers under the Immigration Act 1971 and the Immigration and Asylum Act 1999, rather than, as per this paragraph in the exercise of all powers under any of the Immigration Acts.

Briefing

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:

> *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*[1].

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.

Bail

Clause 3 Immigration bail: repeat applications and effect of removal directions and Schedule 8 part II

PROPOSED AMENDMENTS 3 and 4

Page 2 line 40, leave out subsection (2).

And the following consequential amendments

Page 3 line 10 leave out sub-clauses (3), (4) and (5)

Purpose
To maintain the current position that the First-tier Tribunal (Immigration & Asylum Chamber) retains its powers to grant bail where a detainee has been served with directions for removal from the UK to take effect within 14 days of the date of application.

Briefing

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

The Bill provides that 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 the judicial review in the High Court for a bail hearing. This does not appear to be an efficient way of proceeding.

PROPOSED AMENDMENT V

Page 3, line 9, leave out subclause (b)

Purpose
To retain the current position whereby statute (paragraph 25 of Schedule 2 to the Immigration Act 1971) provides that the Tribunal Procedure Rules "may" rather than "must" make provision as to particular matters.

Briefing
The Tribunal Procedure Committee is independent[2]. The Home Office argued that it should be allowed to set procedure rules for the Immigration and Asylum Chambers of the Tribunals[3], but its view did not prevail[4]. The independent committee is best placed to make decisions as to the appropriate rules for the First-tier Tribunal when dealing with applications. Moreover, the needs of the Tribunal may change over time and a prescriptive approach to the contents of the rules in primary legsilation

PROPOSED AMENDMENT VI

Page 3, line 31, leave out subclause 6

Purpose
To maintain the status quo rather than introduce the new provision proposed in this subclause whereby 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.

Briefing
As to the desirability of binding the independent Tribunal Procedure Committee, see above. This provision risks simply substituting disputes about whether a change is material are thus substituted for bail hearings.

An application for bail is different from a challenge to the lawfulness of detention, by an application for habeas corpus or for permission to bring a judicial review. However, persons in detention may opt for a bail application for reasons of

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convenience and cost where it is available ,rather than apply to the High Court. If the possibility of applying for bail is removed it is likely that they will apply to the High Court.

For the above reasons, the proposal is inefficient.

It is also unjust. 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 was, 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[5] 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[6] . Statistics are not collected on those who in this category who do not require medical attention. It is vital that it is possible to apply to get a person out of detention.

Schedule 8

Part 2 Provisions relating to bail

Schedule 8 Paragraph 6

PROPOSED AMENDMENT VII

Page 94, line 6, leave out part 2.

Purpose

To ensure that the proposed new provisions on bail do not apply to proceedings before the Special Immigration Appeals Commission

Briefing

Part 2 of Schedule 2 to the Immigration Act 1971 applies the new provisions on bail to proceedings before the Special Immigration Appeals Commission. By amendments effected by clause 4, paragraph 29 of Schedule 2 to the Immigration Act

[5] *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).

[6] 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.

1971 is amended to the effect that 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.

In cases before the Special Immigration Appeals Commission the Secretary of State would be required to consent in every case because it is a matter of settled law that the alternatives to a bail hearing, viz. an application for habeas corpus or judicial review of the lawfulness of detention, are insufficient to comply with Article 5 of the European Convention on Human Rights in cases before the Commission.

Article 5(4) provides that:

> 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

The Government's view is that:

> *The bail provisions in the Bill have the potential to engage art 5(4) ECHR but they are compatible because: i) the provisions requiring the FTT and SIAC to reject bail applications without a hearing limit, rather than remove, the power to grant bail; and ii) the provisions allowing the Secretary of State to prevent bail being granted within 14 days of removal do not require the Secretary of State to prevent bail in these circumstances, in any event bail applications in the FTT do not determine the lawfulness of detention – judicial review and habeas corpus are the appropriate remedies and even those subject to SIAC bail (which may review lawfulness) may still apply to the High Court for judicial review or a writ of habeas corpus.* See Immigration Bill, European Convention on Human Rights, Memorandum by the Home Office, paras 25-26.

The Secretary of State (and her agents) is not a 'court' for the purposes of Article 5(4). The question is, therefore, whether the remedies of judicial review and habeas corpus are sufficient to secure compliance with Article 5(4).

In *Chahal v United Kingdom* (1996) 23 EHRR 188 (paragraphs 58-61), the European Court of Human Rights held that neither judicial review nor habeas corpus provided an adequate basis for challenging a deportation on national security grounds because closed material could not be disclosed in these proceedings. These principles can be applied to challenging a decision to detain. The High Court would not be able to undertake a full review of the lawfulness of the detention sufficient to comply with article 5(4). The point is not addressed in the Government briefing which assumes that judicial review and habeas corpus provide adequate remedies. ILPA has already drawn this concern to the attention of the Home Office.