IMMIGRATION BILL
ILPA PROPOSED AMENDMENTS FOR HOUSE OF COMMONS COMMITTEE STAGE

PART 1 1 CLAUSE 14 (ARTICLE 8) clauses 14

For further information please get in touch with alison.harvey@ilpa.org.uk 0207 490 1553. ILPA is happy to provide further briefing to specific amendments if these are laid/and or selected or to assist members of the Committee in deciding whether to lay them. We shall also be providing briefings for stand part debates.

ILPA Approach

Article 8 of the European Convention on Human Rights reads:

> *Article 8 – Right to respect for private and family life*
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Broadly the approach in the amendments below is not to take issue with the Secretary of State's view of the public interest (Article 8(2)) but to amend provisions where she seeks to make general rules about private rights (Article 8(1)) or to engage in weighing the two, which is properly the job of judges. It is as much a part of the constitutional settlement that judges judge as that Parliament makes the law and indeed a part of the role of the courts is to ensure that it is Parliament's view, as enacted, that prevails and not that of the Government of the day.

ILPA is a member of the Refugee Children's Consortium and reference should also be had to the amendments proposed by the Consortium.

Clause 14 Article 8 of the ECHR: public interest consideration

PROPOSED AMENDMENT

Clause 14 Page 12, line 26, leave out lines 26-28A

Purpose
Omits the definition of the public interest question in subsection 117A

Briefing

The definition of the "public interest question" in section 117A(3) seems to be about weighing the private right against the public interest which is properly the task of the judiciary.
This is also a consequential amendment, in that in what follows we proposed removing those subsections that refer to the public interest question.

PROPOSED AMENDMENT

Clause 14, page 12, line 34 omit "enter or"

Purpose
To confine the statement that it is in the public interest that persons can speak English to cases where the person seekes leave to remain in the UK rather than to enter. A probing amendment.

Briefing
This amendment provides an opportunity to debate the merits of requiring persons to speak English before they come to the UK. English language tests may be expensive and inaccessible overseas. Persons may learn much more quickly in an English speaking country, surrounded by English speakers.

PROPOSED AMENDMENT

Clause 14, page 12,line 40 leave out "are financially independent" and insert "can maintain and support themselves without recourse to public funds as defined in rules laid before parliament under section 3(2) of the immigration Act 1971 (C.77)"

Purpose
To change the formulation in this clause so that instead of providing that it is in the public interest that persons are financially independent it provides that it is in the public interest that persons can maintain and support themselves without recourse to public funds, as defined in the immigration rules. A probing amendment.

Briefing
Provides an opportunity to debate the family immigration rules, and in particular the income threshold that must be met before a person can sponsor a spouse or partner to come to the United Kingdom. The income thresholds in the 9 July 2012 Statement of Changes in Immigration Rules HC 194 replaced the old test of being able to maintain and support oneself without recourse to public funds, which the courts had held to mean having access to the same funds and support as a person on income support would have.

The court in *MM v SSHD* [2013] EWHC 1900 found the income threshold to be unlawful in the particular cases before it, those of British citizen and refugee spouses and partners. Since then the Home Office has "paused" decision-making in cases that turn only on the income threshold and involve British citizen and refugee spouses and partners. Those people are waiting and have been waiting since mid-July. There is a risk of another backlog and it would be useful to here about how that is to be avoided and when decision-making will start again.

There is of course scope for a wider debate on whether it is indeed always in the public interest that persons are financially independent etc. – for example a carer may not be, but their coming to the UK to care may save the UK State tens of thousands. This illustrates the dangers of the clause 14 approach.

PROPOSED AMENDMENT

Clause 14, page 13, line 1, leave out lines 1 to 7.

Purpose
Omits subsections (4) and (5) of new 117B (Article 8: public interest considerations application in all cases) which prescribe the weight to be given to private life with a partner.

Briefing
The subsections deleted involve the Secretary of State in defining, not the public interest, but the extent of the private life. The determination of an Article 8 claim is a fact sensitive exercise, there is no one size fits all rule. This can be seen by considering possible scenarios. What if a person does not know their situation is precarious- for example someone brought to the UK as a domestic worker who was not told her employer had not kept her paperwork up to date? Or someone who has lived most of their life in the UK not realising that their country of origin's becoming independent of the British Empire while they were in the UK has meant that they are no longer entitled to a British passport – a far from uncommon scenario amongst, for example, London-based communities originating from the Caribbean. What if the British partner is too ill to travel, or is caring for an elderly parent? These scenarios illustrate that the relative weight to be accorded to family life and the public interest will vary from case to case.

It is ILPA's understanding, although this could usefully be clarified, that it is intended that "precarious" should mean not only persons with no leave or with temporary admission but also persons with limited leave, including those who, if they chose to extend their leave, could eventually settle in the UK. Many such people will qualify for leave as a spouse or partner under the rules but not all – for example where the requirements of the rules as to English language competence, or cannot be met.

PROPOSED AMENDMENTS

Clause 14, page 13, line 11, omit "qualifying"

Clause 14, page 13, line 12, leave out "not be reasonable to expect" and insert "in the best interests of"

Clause 14, page 13, leave out lines 44 to 45

Purpose
The first amendment ensures that a genuine and subsisting parental relationship with any child, not just a qualifying child is relevant to the question of whether a parent should be removed.

The second amendment replaces the rest of whether it would be unduly harsh expect a child to leave the UK with the test of whether it would be in the child's best interests.

Briefing

If the best interests of the child are to be a primary consideration in any decisions concerning children, as the UN Convention on the Rights of Child says that they are and as the UK courts have said in *ZH (Tanzania) v SSHD* [2011] UKSC 4 that they are, then a relationship with any child whose best interests dictate that his/her future lies in the UK is relevant to the question of whether the adult should be removed.

A qualifying child is defined in subsection 117D as being British or having lived continuously in the UK for seven years. But the question of the strength of the child's links with the UK is adequately considered in the second limb of the test (subsection 117B(6)(b)) which considers the question, in the original clause, of how harsh it would be to expect he child to leave the UK and in ILPA's proposed amendment, of whether it would be in the best interests of the child to have to leave the UK.

One example of the mischief that the first amendment is designed to address is that of the settled child, i.e. the child with indefinite leave to remain. Such a child is entitled to remain the UK for the rest of his/her life. Whereas a British citizen can return to the UK after an absence of any length, a settled person can lose that status if they stay out of the country for more than two years. Thus the effect on settled children is potentially more severe than that on children who are British citizens.

As to the second amendment, as a matter of law the test is not whether it would be "unduly harsh" to expect a child to leave the UK, it is whether it would be in the best interests of the child to do. The Secretary of State in trying to set out her view of tests for the operation of Article 8 is at best attempting to reify the current interpeteration as her view and failing to leave room for her view to develop. But here she is even managing that, she is putting forward an interpretation that is at odds with international consensus and can only cause confusion.

The international consensus is that what matters are the best interests of children.

The UN Convention on the Rights of the Child says

> *Article 3*
>
> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. …]*

The Supreme Court said in *ZH (Tanzania)*

> *44. There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The*

proper approach, as was explained in Wan v Minister for Immigration and Multicultural Affairs [2001] FCA 568, para 32, is, having taken this as the starting point, to assess whether their best interests are outweighed by the strength of any other considerations.

Lord Kerr in his concurring opinion stated

46. It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.

Other examples include the European Court of Human Rights in *Neulinger v Switzerland* (2010) 28 BHRC 706, para 131,

"the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of 'any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights". The Court went on to note, at para 135, that "there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount".

Adrian Berry, Chair of ILPA said in his oral evidence to the Committee (29 October, 2nd session, pm, col 78)

Clause 14, which deals with article 8 of the European convention on human rights, seeks to put down a legislative marker as to what factors should be considered in the public interest. In so far as it does that, Parliament has the right to specify what it considers to be in the public interest. Whether it should specify the measures that are specified in clause 14 is a different question. We have concerns about the way in which it has gone about that task. So long as power is reserved to the judges to decide substantively whether there has been a violation of article 8, which is a task granted to them under the Human Rights Act 1998, there may be a sufficient safeguard. In its operation, however, clause 14 directs attention to some measures at the expense of others.

To give you the most obvious example, the best interests of the child must be considered as a priority and must be considered first. The question is not whether the impact on the child is unduly harsh. The question is: what are the best interests of the child, and is there a sufficient public policy interest to swing against that? Clause 14, as currently drafted, is not compatible with that formulation, which is prescribed by the Supreme Court in the case of ZH (Tanzania).

PROPOSED AMENDMENT

Clause 14, page 13, leave out lines 19 to 39

CONSEQUENTIAL AMENDMENT

Clause 14, page 14, leave out lines 28 to 44

Purpose

The first amendment confines section 117C to stating a view of the public interest rather than weighing the public interest against the private right. It would remove subsections (3) to (7)

The second amendment is consequential. It removes subsection 117D(4) which defines length of sentence . Because we have already removed all references to length of sentence this is no longer required.

Briefing

Subsections (3) to (7) to new section 117C provide the Secretary of State's view of when the public interest in the deportation of a foreign national is outweighed by the strength of family life under Article 8. But this balancing exercise is supposed to be based on the facts of each case. A one size fits all test is incompatible with that.

The approach taken in the section is to look at length of sentence and say that when it is between 12 months and four years the public interest requires deportation unless particular exceptions apply. Where it is over the four years you need a particular exception and "very compelling circumstances" on top.

One of the exceptions is a relationship with a "qualifying child" or "qualifying partner" where the effect on that child or partner would be unduly harsh. We have dealt above with why this is the wrong test in the case of a child where, as a matter of law, the courts apply a best interests test.

As to partners, as set out by the Upper Tribunal in *Izuasu* [2013] UKUT 45 (IAC)

> "*ii) One size does not fit all. It is not possible to apply one set of criteria, such as whether there are 'insurmountable obstacles' to these divergent cases, where the case law indicates that a fact sensitive assessment is necessary. … The House of Lords has deprecated the test of exceptional circumstances in Huang and further explained why in EB Kosovo (see below at paragraph 56 below). In our judgment these observations remain as true after the new rules came into force, as before.*

The Upper Tribunal in *Izuasu*, on whose reasoning the Court of Appeal in *MF (Nigeria) 2013] EWCA Civ 1192* indicated that it was inclined to look favourably, although it was not called upon to decide the point, explained that it is thus the degree of difficulty the couple face that is the focus of judicial assessment but as a factor rather than a test.

As to the House of Lords cases relied upon to reach these conclusions, Lord Bingham said in *EB Kosovo* [2008] UKHL 41:

With reference to proportionality it was said (para 20 [of Huang v Secretary of State for the Home Department [2007] UKHL 11]):

> *"In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality."*

> *Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.*

Adrian Berry, chair of ILPA said in his oral evidence to the Committee (29 Octobr, second session, pm Column number: 79):

> *Adrian Berry: … the question is not whether Parliament can give a view of the public interest; the question is whether it should formulate it in the terms that are currently drafted in clause 14.*
>
> *... There is nothing wrong, in a society based on self-rule, with specifying the public interest. The question is whether you should do it in such a way as to cause variance with the convention rights as they are understood and applied under the Human Rights Act.*
>
> *If I can return to the example of the best interests of the child, it should not be about whether the impact on the child is unduly harsh. It should be: what are the best interests of the child, and is there a sufficient public policy interest to override them? Introducing alternative formulations, variable geometry in legal tests and a series of terms that are being loaded with meaning creates circumstances in which*

lawyers will pick over those meanings rather than simply applying article 8 in order to understand the first question—has the statutory meaning been satisfied?—before coming on to the second question: what does article 8 require?

PROPOSED AMENDMENTS

Clause 14, page 13, line 43 leave out "qualifying"

Clause 14, page 14, leave out lines 1-3

Purpose
Remove the definition of qualifying child leaving a simple definition of a child as a person under 18

Briefing
This amendment is consequential on our proposals above which remove references to a qualifying child. It focuses attention on what matters being the interests ofquali of any child involved in the case, not just a qualifying child.