IMMIGRATION BILL
ILPA PROPOSED AMENDMENTS FOR HOUSE OF COMMONS COMMITTEE STAGE

PART V OVERSIGHT, PART V1 MISCELLANEOUS AND PART VII FINAL PROVISIONS (WITH SCHEDULE 8)

Part V OVERSIGHT

PROPOSED AMENDMENT

Clause 57, Schedule 6, page 84, line 29, after "cases" insert-

> ; and
> ( ) require the fee for organisations which are charities, or which do not charge fees to clients, or which operate as not-for-profit organisations.

Purpose
To ensure that those organisations currently exempted from paying a registration fee to the Office of the Immigration Services Commissioner should not be charged fees to register.

Explanation

The best protection against poor advice is the ready availability of good advice. Good advice for those with limited means is difficult to obtain, impossible for some, particularly after the ending of legal aid for most immigration, as opposed to asylum, matters in April 2013. It is thus important to support all sources of good advice and representation to continue.

Not-for-profits assist some, although not all, of those who have no other access to advice whether by providing advice and representation for free, or on a cost-recovery basis, or both. Community groups may be able to provide basic advice. Everything possible should be done to encourage and support them to join and remain in the Office of the Immigration Services' Commissioners' scheme. If they are to invest in training and resources they need assurances that exemption from paying a substantial 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

PROPOSED AMENDMENT

Clause 57, Schedule 6, page 85, line 25, at end insert

4B (1) When the Commissioner cancels a person's registration, she must ensure that the case files of all the people represented by that person are

(a) returned to the individual represented;
(b) transferred to another person with the consent of the individual represented; or

(c) passed to the Commissioner to arrange secure storage and the possibility of retrieval for the files for a period of at least six years.

(2) The Commissioner must make such arrangements as she sees fit to ensure that individuals are aware of the cancellation of the registration of their adviser and how they may retrieve their files.

(3) After files have been kept in such storage for six years, the Commissioner may make arrangements for them to be securely destroyed.

Purpose

To ensure that when regulated immigration advice organisations close down, or are closed, their clients can retrieve their case papers

Briefing

The Office of the Immigration Services Commissioner has recently provided a list of over 200 organisations which it has ceased to regulate in the 18 months since April 2012. Although the Office of the Immigration Services Commissioner requires organisations to store their client files in these circumstances, it has no powers to enforce this and 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, especially 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.

This amendment would provide new powers for the Office of the Immigration Services 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.

This is vital for the person in obtaining advice in the future and for the new adviser to know what had happened. Although it is possible for people to make freedom of information Subject Access Requests to the Home Office for any papers that they hold, advisers are likely to hold additional documents, including attendance notes. This amendment would require further resources for the Office of the immigration Services Commissioner but these are resources that are essential for it to provide an adequate level of service. This issue has been highlighted by the Legal Standards Board .

Part VI MISCELLANEOUS

Embarkation checks

Clause 58 and Schedule 8 Embarkation checks

CLAUSE 58 STAND PART

Clause 58 appears to pave the way for the wholesale privatisation of embarkation checks. We are extremely wary of this approach following the experience of Capita Plc being tasked with urging persons with no lawful leave to leave the country. The information from the former UK Border Agency from it is working is not sufficiently up to date or clear for Capita staff accurately to determine a person's status. Many British citizens and persons with lawful leave have been were wrongly told, in some cases repeatedly, that they should leave the UK.

The Home Office factsheet says

> *These provisions will allow those who currently have a role in outbound passenger processes to be designated and trained to perform the basic checks required to establish a passenger's identity, to collect the data necessary to identify threats or persons of interest and to confirm departure.*

This involves highly technical decisions on a person's status. What record will there be of any interview etc. that could assist later in establishing

The immigration rules make provision for a series of "re-entry bans" for persons who have overstayed by more than 28 days. Their applications will fall for refusal for set periods of leave following their overstay, depending on their mode of departure. Therefore it is of tremendous importance that departures are recorded accurately and that there is an audit trail. Similarly, persons applying for citizenship and nationality are permitted a certain number of days absence from the UK in the years leading up to the application. Absences from the UK also have implications for liability to pay taxes. Embarkation controls can also assist in detecting victims of human trafficking, for example

The proposal in the Schedule, to outsource these functions and to impose criminal sanctions on carriers who do not comply looks like the Home Office trying to do embarkation controls on the cheap.

Schedule 7

Schedule 7 page 90, leave out lines 13 to 15

Purpose
Paragraph 4 is concerned with the duty of the person examined to furnish the person examining him/her with such information as s required by that person for the exercise of his/her functions. The amendment retains the current paragraph 4 rather than substituting the amendment proposed by the clause which would impose a duty in respect of the examiner or any other person's functions.

Briefing

These powers extend to all persons who "have arrived" in the UK, which the Home Office interprets as set out in the Enforcement Instructions and Guidance Chapter 31, following the judgment in *Singh & Hammond*, as authorisation for exercises within the UK, such as checks at tube stations. The clause would imposes a duty on all those examined, including British citizens within the country, that is too broad and open-ended. It if is necessary to assist another person, that person should be called over.

PROPOSED AMENDMENT

Schedule 7, page 90, leave out lines 30 to 41

Purpose
Removes subparagraph 6 which would permit a person who s not an immigration officer to take and retain a passport.

Briefing
This power is open to abuse and fraud. If a passport is required to be taken and retained, an immigration officer should be summoned. The amendment provides an opportunity to probe in what circumstances in which this would not be possible – for example is the case that designated persons could be operating at location where no immigration officers are present?

PROPOSED AMENDMENT

Schedule 7, page 91, line 33 at end insert:

( ) will not commit a criminal offence while carrying out the functions exercisable by virtue of the designation

() will comply and ensure that the Home Office complies with all laws relating to data protection in while carrying out the functions exercisable by virtue of the designation

Purpose
The matters in the amendment are additional matters of which the Secretary of State will need to be satisfied before designating a person for the purpose of this schedule. To probe the lack of safeguards in the schedule.

Briefing
The new paragraph on designated persons is drafted in broad and general terms that provide no reassurance as to who will be designated or how they will exercise their powers.

The Home Office's record in contracting out its enforcement functions is not as happy one, as witness the death of Jimmy Mubenga. There have been repeated criticisms of the management of contracted out detention and enforcement functions.

Where the Home Office has contracted out checking, for example in its contract with Capita Plc to text and phone persons identified as having no lawful leave, mistakes have been legion. ILPA members have seen and continue to see British citizens, investors, nurses, all people with every entitlement to be in the UK, receiving messages to say that they have no right to be in the UK and telling them to leave. These messages have caused considerable distress. The amendment provides an

opportunity to call the Home Office to account for the actions of those with whom it has contracted to carry out its functions.

PROPOSED AMENDMENT
Page 92, line 24, leave out lines 24 to 39.

Purpose
Omits Part 2 of Schedule 7 which makes it a criminal offence for an owner of a ship or aircraft or a person connected with the management of a port to fall to comply with a direction to furnish to the Secretary of State designated persons exercising functions under this schedule.

Briefing
The power to make directions contained in new paragraph 5A is broad and general. A failure to comply might take the form of a technical or more substantive error. Why has it been determined that it is appropriate to make compliance a criminal offence, as opposed to a civil infraction giving rise to a fine etc?

Fees

Clause 59 Fees

PROPOSED AMENDMENT 1

Clause 59, page 45, line 7, leave out lines 7-8

Purpose
Removes the power of the Secretary of State to make provision by order for a minimum fee in respect of a specified function. A probing amendment.

Briefing
To probe the reasons why it is considered desirable or necessary to set a minimum fee.

PROPOSED AMENDMENT

Clause 59, page 45, line 7, leave out lines 7-8

Purpose
Removes the power of the Secretary of State to make provision by order for a minimum fee in respect of a specified function. A probing amendment.

Briefing
To probe the reasons why it is considered desirable or necessary to set a minimum fee.

PROPOSED AMENDMENT

Clause 59, page 45, line 26, leave out lines 26-27

Purpose

Removes the power of the Secretary of State to have regard to the costs of exercising immigration or nationality functions other than the one for which is the fee is paid, in determining the amount of a fee.

Briefing

The Home Office in the exercise of its immigration and nationality functions has a history of making extremely costly mistakes, especially in respect of IT, one of latest examples of which is the e-borders project. As the Chief Inspector of Borders and Immigration wrote in his report on e-borders this year

> *The e-Borders programme has been in development for over a decade now, and has cost "nearly half a billion pounds of public money, with many millions more to be invested over the coming years."*

The report catalogues a litany of costly failures. For example

> *9. We found that the e-Borders programme had failed to deliver the planned increases in API and this had a detrimental impact on the delivery of all anticipated benefits. In light of these difficulties, revised data collection targets were set in early 2012, but by the time of our inspection even these targets had been dispensed with, primarily because of:*
>
> - *Legal difficulties surrounding the collection of API on travel routes within the European Union; and*
> - *a failure to test the e-Borders concept in the rail and maritime sectors.*
>
> *10. The failure to identify these risks in the 2007 business plan meant that the original data collection targets, set out in the e-Borders delivery plan, were unrealistic and were always likely to be missed. As a result, at the time of our inspection API was collected in respect of just 65% of total passenger movements; this is against an original target of at least 95% by December 2010. However, since April 2012, API was being received in relation to all non-EU flights.*
>
> *11. The failure to meet key programme milestones resulted in the contract with the IT supplier being terminated in July 2010. This meant that e-Borders continued to rely on the original pilot Semaphore IT platform, although enhancements had been made over time to ensure continuity of service.* (See http://icinspector.independent.gov.uk/wp-content/uploads/2013/10/An-Inspection-of-eborders.pdf)

Individuals should not have their level of fees affected by other expenditure that he Home Office chooses to incur, or incurs by managing projects badly.

PROPOSED AMENDMENT

> Clause 59, page 45, line 32, at end insert
>
> ( ) the quality of decision-making on the types of application for which the fee is charged and whether decisions are made within performance targets

Purpose

To include in the exhaustive list of matters to which the Secretary of State can have regard in setting fees the quality of decision-making and whether decisions are made within performance targets.

Briefing
People are paying enormous sums in immigration and nationality cases for poor quality decision-making and lengthy fees. It would seem appropriate, in setting fees, to look at the quality of service.

Many of the fees charged now are very much above the cost to the Home Office of dealing with the application.[1] For example, some fees from April 2013:

Fee for partner visa, abroad £851 Cost to Home Office £407
Fee for elderly dependants settlement visa, abroad £1906 Cost to Home Office £407
Fee for partners applying for leave to remain £578 Cost to Home Office £281
Fee for settlement, in the UK £1051 Cost to Home Office £403
Fee for naturalisation £874 Cost to Home Office £187

Partners now have to apply for an initial visa, which may be granted for 30 months, then for an extension of stay for a further 30 months, then for settlement, and ignoring any possible increases, would pay £2207 in fees if this all took please in the UK, and £2480 if this included entry clearance. People who have been granted discretionary leave to remain in the UK with their families will have to apply for four 30-month periods, to reach ten years before they can qualify for settlement, at a cost of £3363.

The November 2013 report of the Home Affairs Select Committee *The Work of the UK Border Agency* sets out just some of the problems with the standard of service that the former Agency provides, including detailing the enormous backlogs, each one composed of individual cases, people in limbo.

PROPOSED AMENDMENTS

Clause 59, page 45, line 34, leave out "may" and replace with "must"

Clause 59, page 45, line 38, leave out line 38 and replace with
( ) Regulations may make provision about-

Purpose
Changes the power to prove for exceptions, reductions, waivers and refunds of all or part of a fee by exercise of a discretion or otherwise from a power to a duty.

Briefing
There are certain circumstances in which regulations make provision for a fee to be waived, for example in respect of persons applying under the domestic violence rule who are destitute. If the rules made no provision for this, it would not be possible to waive fees. This would be unlawful as set out in the case of *R(Osman Omar) v Secretary of State for the Home Department* (Rev 1) [2012] EWHC 3448 (Admin) (30

[1] See table with latest announcement of fee rises, from April 2013, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/230717/HO_-_Immigration_Fees_Regs_Commons_-_2013.2.25.pdf

November 2012) where it was held that a fee could not be required where to do so was incompatible with the Convention right.. It is possible to secure a waiver of a fee, in particular following that case, but it is very difficult and involves a persistent legal representative, even in cases of, for example, domestic violence. If an application is made without the required fee, it may be rejected as invalid, and the person may thus become an overstayer through lack of funds.

PROPOSED AMENDMENT

Clause 59 page 45, line 37, at end insert taking into account

(i) the human rights of the person to be charged;

(ii) the need to safeguard and promote the welfare of children;

(iii) the likely ability of the person charged to be able to pay the fee without undue hardship;

Purpose
To make explicit that the Secretary of State should consider human rights, the best interests of the child and the effect on the person concerned when deciding whether to waive reduce or refund a fee.

Briefing

The government's Bill factsheet on fees 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." It also states that "we want to increase income from fees, to ensure that those who use and benefit directly from our services pay more towards them, while UK taxpayers pay less."

People under immigration control also benefit the UK, by working, by studying and researching, by caring for children and the elderly. The factsheet repeats a false dichotomy between migrants and taxpayers; migrants are taxpayers too, whether this is through working and paying income tax and national insurance, or in the future paying a new health levy, or VAT on most purchases they make.

Although the Home Office has recently set up a procedure for people applying outside the rules to ask that their fee should be waived, this is a cumbersome and insecure procedure and people cannot place any reliance on when they may qualify under it.

The fee for a dependent child's application for settlement is £788 (cost to Home Office, £403) and for an extension, £433 (cost to Home Office, £281). There is no provision to adjust this in relation to their family's ability to pay or to reflect the level of service that they are getting. ILPA is aware of families where a mother has applied for further discretionary leave but has not applied for the children because she could not afford the extra fees, or where a family has worked on the assumption that the children would not be threatened with removal were the parents granted leave.

Under section 55 of the Borders, Citizenship and Immigration Act 2009, the Secretary of State must have regard to the need to safeguard and promote the welfare of children who are in the UK in relation to 'any function in relation to immigration, asylum or nationality.' This must include making it affordable for the children and their families to make immigration applications for a secure status.

The Home Office repeatedly states that the fee is for the administration of an application, not for the granting of it; but when the administration does not meet Home Office published standards, then there should be at least a partial refund.

PROPOSED AMENDMENT

Clause 59, page 43, line 41, at end insert-

> ( ) Fees regulations must provide for the refund of a fee paid to lodge an appeal against an immigration decision when the Secretary of State withdraws the decision appealed against before the appeal is heard.

Purpose
To provide for the refund of appeal fees when the decisions appealed against are withdrawn and the cases do not have to go to a Tribunal.

Briefing

Since 19 December 2011, fees have been payable when certain immigration appeals are lodged, as provided in the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 (SI 2011/2841) and the rule 23A(2) of the Tribunal Procedure Rules. If an immigration judge allows the appeal, he or she may make an award to refund all or part of the appeal fee paid. The President of the Tribunal has written guidance to immigration judges on deciding on fee awards. This includes:

> *"If an appellant has been obliged to appeal to establish their claim, which could and should have been accepted by the decision-maker, then the appellant should be able to recover the whole fee they paid to bring the appeal."*

This guidance has been followed, and the practice has generally been that when an appeal is allowed because of new evidence submitted after the refusal, or to the judge, the fee will not be refunded, or only be partially refunded.

The fee refund is made by HM Courts and Tribunals Service, as this is the body to which the fee was paid, but HM Courts and Tribunals Service recoups the money monthly from the Home Office. But this Fees Order makes no provision for refunds when the immigration decision appealed against is withdrawn and the case never goes to hearing. Lord Avebury raised this omission in the debate on the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011 in the House of Lords on 12 October 2011,[2]

[2] House of Lords *Hansard*, 12 October 2011, cols. 1796 - 1808

> *"Where the UKBA decides to revoke the decision that it has made before the appeal has been heard, presumably on the basis that it cannot justify the refusal, it would be manifestly unfair not to refund the fee that has been paid, and in any case the administrative costs in these cases must be even less than in the cases that are determined on paper alone."*

Lord McNally's response did not fully address this issue:

> *"...the order provides that the tribunal may instruct UKBA to refund the fees of successful appellants, thus ensuring that they do not have to pay to correct the errors of the agency. That in itself will incentivise the agency to improve its initial decision-making - I take the point made by my noble friend Lord Avebury about that - and will reduce the rate of successful appeals to the tribunal."*

The Home Office has consistently refused to refund appeal fees paid when it has realised, without a case going to court, that its decision is wrong, as it does not go before a tribunal judge to make any award. Official correspondence has set out[3] the view that

> *"…fee awards are not payable when a decision is withdrawn. If a decision is taken to withdraw a case, it is not an acknowledgement that the case could and should have been accepted by the initial decision-maker. It does not follow that the initial decision was incorrect. Decisions may well have been taken correctly at the time of the original decision but been rendered unsustainable because new information has been received which was not available to the original decision maker. In situations where new evidence has been made available by the applicant, it is appropriate to withdraw the case so as to avoid the unnecessary public expense. It is for these reasons that it would not be reasonable for us to adopt a policy of refunding fees where a decision has been withdrawn."*

When the appellant or sponsor provides new information later, this refusal to refund the fee may be justified. But when the grounds of appeal reiterate the information and evidence which was put in with the application but not properly considered or understood, it is not. For example, a wife who was refused entry clearance because she had provided evidence of her English language exams, showing that she had passed the relevant listening and speaking and reading tests, but not the writing test. Reading and writing were not required under the rules but she was refused because of that failure, even thought she had achieved more than was required by the rules. After she lodged an appeal, and following repeated representations from her legal representatives, the entry clearance manager realised the mistake and withdrew the refusal. But as the case had not gone before an immigration judge the Home Office has refused a fee refund. This is unjust.

It would therefore be appropriate for this Bill to make provision for the Home Office to refund appeal fees in these circumstances.

Clause 61 and Schedule 8

[3] E.g. in a letter to Fiona Mactaggart MP of 2 October 2013

Clause 62

PROPOSED AMENDMENT

Clause 62, page 47, leave out lines 12 to 17

Purpose
Removes powers to amend, repeal or revoke enactments of the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales. A probing amendment.

Briefing
To probe the extent to which consent will be sought from the devolved administrations before amending, repealing or revoking enactments they have made, and to obtain assurances on these topics.

Schedule 8

PROPOSED AMENDMENT

Schedule 8, page 93, omit line 21

Purpose
To maintain the status quo whereby indefinite leave obtained by deception can be revoked only if the person would be liable to removal as a result of the deception but cannot be removed. The line omitted would otherwise provide a power to revoke any indefinite leave obtained by deception.

Briefing
It is unclear that the provision in line 21 is doing in Schedule 8. It does not appear to be consequential on anything within the body of the Act. It is unclear why the Secretary of State wants a power at large to revoke any indefinite leave obtained by deception, without consideration of whether this is a proportionate response.

Section 76, which is amended by this provision provides the Secretary of State with a power not a duty to revoke leave and assurances could usefully be sought as to how the power will be exercised We should expect, for example, the questions of whether the person with indefinite leave knew that it had been obtained by deception and the length of time that they had lived in the UK, as well as family ties, to be relevant considerations.

Schedule 8 Paragraph 6

PROPOSED AMENDMENT

Schedule 8, page 94, line 6, leave out lines 6 to 24.

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 8 applies the new provisions on bail to proceedings before the Special Immigration Appeals Commission. By amendments effected by clause 3, paragraph 29 of Schedule 2 to the Immigration Act 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) of the Convention 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.

PROPOSED AMENDMENT

Schedule 8, page 94, leave out lines 11 to 14

Purpose
To maintain the current position whereby the Special Immigration Appeals Commission can hear and grant an application for bail even if it has heard an application for bail with 28 days and no material change has been identified.

Briefing
Persons whose cases are being dealt with by the Special Immigration Appeals Commission are frequently held in high security provisions. They are held by administrative fiat, without limit of time and without being brought automatically before a court in conditions normally reserved for those serving lengthy criminal sentences. They have not been convicted of a crime. To bar them from the courts for 28 days would be oppressive indeed.

Biometrics

PROPOSED AMENDMENT

Schedule 8, page 94, line 27, omit paragraph 7

Purpose
Omission of paragraph 7 retains section 143 of the Immigration and Asylum Act 1999which provides for the destruction of fingerprints of Commonwealth citizens as soon as reasonably practicable and provides that they shall be retained for no longer than ten years.

PROPOSED AMENDMENT

Schedule 8, page 95, line 1, omit paragraph 10

Purpose

Omission of paragraph 10 retains section 126 of the Nationality, Immigration and Asylum Act 2002 which provides, inter alia, that regulations must make provision for information to be destroyed at the end of 10 years beginning on the day on which it is obtained.

Appeals

PROPOSED AMENDMENTS

Schedule 8, page 96, leave out line 5

Schedule 8 page 96 line 22 leave out 87 and replace with 88

Purpose
First amendment: Retains s 40(1)(a) of the Nationality Act. This is an important provision that can be used by an immigration judge hearing an appeal against deprivation of nationality to direct following a successful appeal that an order

depriving a person of his/her British nationality is to be treated as having had no effect.
Second amendment: retains section 87 of the Nationality Immigration and Asylum Act 2002 which gives a Tribunal judge power to make directions following a successful appeal.

Briefing
First amendment: It is unclear what this provision is doing in Schedule 9. This repeal does not appear to be consequential on any part of the Appeals section of the Bill. Indeed, the appeal against deprivation of British citizenship is preserved by the Bill.

There are important consequences to this power. For example, if a person has a child during the period when s/he is deprived of his/her British citizenship the child will not be born British through him/her (in some circumstances the child will be British through the other parent). Other rights and entitlements may be affected by the interruption of the British citizenship. The current law allows a tribunal judge or judge to preserve the position

Second amendment: insofar as this relates to s 40A, see above. More generally, see the briefing to this amendment, which has merit in its own right, below.

PROPOSED AMENDMENT

Schedule 8, page 96, leave out lines 6 to 9

Purpose
Retains the requirement that there be a monitor of entry clearance cases with no right of appeal other than human rights grounds (currently human rights and race discrimination grounds).

Briefing
Since the creation of the Chief Inspector of Borders and Immigration there had been no dedicated monitor of entry clearance cases without right of appeal other than on human rights and race grounds, but the Chief Inspector has carried out this function. The results of inspections of entry clearance posts abroad have provided vital information . As a result of this Bill, if clause 11 is passed, there will be more persons with only human rights grounds of appeal and the monitoring, for example of how any administrative reviews are being carried out, will become all the more important. This amendment provides an opportunity to confirm that the Chief Inspector will continue to be given the resources and the power to continue to monitor entry clearance posts abroad. It also provides an opportunity to highlight some of the findings in the reports of the Chief Inspector.

PROPOSED AMENDMENT

Schedule 8, page 96, line 33, leave out (3) and insert (4)

Purpose
Protects from repeal s 86(3) of the Nationality, Immigration and Asylum Act 2002 which states that the Tribunal must allow an appeal insofar as it thinks that

"(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules)

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently"

Briefing

Preserves the all important "not in accordance with the law" jurisdiction which means that an appeal can be allowed not because it breaches someone's rights, but because it is wrong. The decision-maker may have applied the rules wrongly, or misunderstood the evidence. We know from the Government's own appeals impact statement that the Home Office loses some 50% of managed migration appeals. These are appeals brought by workers, students or family members with lawful leave, applying under the immigration rules. It is Government policy that their applications should succeed when they fit within those rules, but they do not, because of poor decision-making. There must for the reasons discussed in our briefings to Part II, be redress beyond the department against such errors.

PROPOSED AMENDMENT

Schedule 8, page 96, line 34 leave out (87) and replace with (88)

Purpose

Retains section 87 of the Nationality, Immigration and Asylum Act 2002 which deals with the power of tribunal judge to give directions following a successful appeal.

Briefing

It is unclear why this repeal is found within the Schedule as there is nothing consequential about it. There will still (we trust) be successful appeals. A direction might demand that the Home Office do something within a particular timescale or take particular steps, for example to assist in bringing a person back to the jurisdiction. See above re its special place when it comes to appeals against deprivation of nationality (which will continue to exist) under the British Nationality Act 1981.

PROPOSED AMENDMENT

Schedule 8, page 97, line 39, leave out lines 39 to 42 and insert

() leave out subsections 1A, 2 and 2A to 2L

() in subsection (3), leave out "2D" and replace with (1) and leave out from "against the issue of the certificate" to the end of subsection (3).

Purpose

Removes the amendments effected by section 54 of the Crime and Courts Act 2013, the precursor to s 12 of this Act, which allows a person to be removed before or in the course of their appeal where the Secretary of State certifies that this would not breach their human rights. As amended simply provides that where a decision to make a deportation order was certified as having been made on national security grounds, the person may appeal to the Special Immigration Appeals Commission

Briefing
The amendment gets rid of the notion of certifying a human rights claim or of out of country appeals and simply says that national security cases should benefit from an in-country appeal to the Special Immigration Appeals Commission against any certificate on human rights grounds. Thus amended it replicates provisions elsewhere. Where a person contends that removal would breach their human rights, they should have the opportunity to challenge a refusal before they are removed. Someone independent of the initial decision maker (the Secretary of State) should In cases before the Special Immigration Appeals Commission applicants are contending with closed procedures and the use of special advocates and to add to this complexity an out of country appeal would be to court injustice.

PROPOSED AMENDMENT

Page 99, line (7), omit line (7)

Purpose
To retain in the interpretation of Part V of the Nationality, Immigration and Asylum Act 2002 the definition that a reference to varying leave to enter or remain does not include a reference to adding, varying or revoking a condition of leave. A probing amendment.

Briefing
To give the Minister an opportunity to explain why this change in definition was considered necessary and/or appropriate.

the complexity of Retains section 87 of the Nationality, Immigration and Asylum Act 2002 which deals with the power of tribunal judge to give directions following a successful appeal.

Briefing
It is unclear why this repeal is found within the Schedule as there is nothing consequential about it. There will still (we trust) be successful appeals. A direction might demand that the Home Office do something within a particular timescale or take particular steps, for example to assist in bringing a person back to the jurisdiction. See above re its special place when it comes to appeals against deprivation of nationality (which will continue to exist) under the British Nationality Act 1981.

PROPOSED AMENDMENT

Schedule 8, page 99, line 39 leave out line 39 to page 100, line 5.

Purpose
Removes the requirement that if P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them then P must serve a statement of additional reasons for remaining in the UK as soon as reasonably practical.

Briefing
How on earth is P, who is likely to be unrepresented given the removal of legal aid for immigration cases in April 2013, to know that s/he is supposed to provide such a statement. If s/he does know, for example because it was mentioned at the time of the first notice having been given and P understood that notice, how is P, unassisted, going to identify and articulate those grounds? The expectation in the subsection is not a reasonable one If there is no properly resourced system of advice and representation for persons under immigration control then there will be requirements with which they are unable to comply.

PROPOSED AMENDMENT

Schedule 8, page 100, line 15, leave out from "in subsection (2)(a)" to the end of line 21 and replace with is repealed.

Purpose
Repeals section 55 of the Immigration Asylum and Nationality Act which provides for a certificate on national security grounds to be considered before deliberations on a substantive asylum appeal.

Briefing
It is often very difficult to consider national security questions before the substance of the appeal has been heard and this is one reason for removing this section. But there are others. The section is flawed in that confuses Article 1F of the Refugee Convention which is about exclusion from protection in the first place with Article 33(2) which is supposed to be about the treatment of recognised refugees.

It is unclear why this repeal is found within the Schedule as there is nothing consequential about it. There will still (we trust) be successful appeals. A direction might demand that the Home Office do something within a particular timescale or take particular steps, for example to assist in bringing a person back to the jurisdiction. See above re its special place when it comes to appeals against deprivation of nationality (which will continue to exist) under the British Nationality Act 1981.

PROPOSED AMENDMENT

Schedule 8, page 101, line 30, leave out "and" and insert "or"

Purpose
To provide that a penalty given to an employer must explain how to object to a penalty and how to appeal against it, rather than one or the other.

Briefing
In one sense the amendment is uncontroversial, the wording is faulty as one would expect the penalty notice to spell out all ways of objecting to it. However, insofar as the wording is supposed to reflect that the employer can object or appeal, not both, see our briefings to Part III. Employers should be able to chose whether to go straight to an appeal or to object first and then appeal.