ILPA Briefing to amendments laid for Immigration Bill House of Commons Report and Third Reading as of the notice published 28 January 2014

The Immigration Law Practitioners' Association (ILPA) is a charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, nongovernmental 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.

At the time of writing this briefing we have not seen the groupings for the debate on 30 January. We are also aware that it is unlikely that all amendments will be called. We have briefed to groups of amendments where this seemed useful but this will not necessarily reflect groupings. We have tried to divide amendments by parts of the Bill, in order. We deal with the amendments pertaining to European Free Movement law at the end.

ILPA updated its second reading briefing for use for third reading and report. This is available at http://www.ilpa.org.uk/resources.php/25703/ilpa-briefing-for-house-of-commons-report-and-third-reading-immigration-bill-30-january-2014 . Time permitting we shall prepare a briefing for third reading and report.

PART 1

Removal and other powers

Powers of Immigration Officers

Schedule 1
Amendment 60 (Sarah Teather, Jeremy Corbyn)

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
ILPA supports this amendment. 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].

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

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.

On 18 November 2013 the immigration Minister wrote to members of the Public Bill Committee about the current use in-country use of force and complaints about it. The data does not cover removals, such as the Jimmy Mubenga case.

The Minister's letter identified that immigration officers had used force against persons in the course of enforcement visits 316 times in the financial year 2012-2013. That approaches daily use of force. It identifies that detention contractors used force 546 times during that period, escort contractors (in country) 414 times – i.e. more than daily. The letter said that during the period the Home Office Professional Standards Unit (PSU) examined five serious complaints relating to the use of force by Immigration and Compliance Enforcement (ICE) Team officers. None were upheld. Fifty-six of 73 serious complaints about detention and escorts powers were about the use of force. Two of these were found to be substantiated in whole or in part. These are not reassuring figures.

Bail

Amendments 56 and 57 (Sarah Teather, Jeremy Corbyn)

Amendment 56 purpose: To probe setting a maximum 28 day time limit on the period for which a person can be detained.

Amendment 57 purpose: To make provision for automatic bail hearings after eight and 36 days. A probing amendment.

Briefing

ILPA supports these amendments. Amendment 56 provides an opportunity to debate the increasing use of immigration detention in the UK and the length of time for which persons are held in immigration detention. According to UK Border Agency statistics, as of 30 June 2012, 174 persons in detention on that date had been detained for over a year, down from a peak of 255 at 31 December 2010. The Minister could be asked to provide the latest statistics.

According to UK Border Agency statistics, of detainees leaving detention after more than a year in 2011, 62% were released and 38% removed or deported. These proportions were exactly reversed, for detainees released after less than a year. Detention Action's September 2010 report "No Return No Release No Reason" monitored the cases of 167 long-term detainees, of whom only a third (34%) were removed or deported. Between 2007 and 2010, overall numbers of enforced removals and notified voluntary returns declined by 6%. Yet in the same period the number of persons detained at any one time increased by 38%.

The Bingham Centre for the Rule of Law's recent publication, written by Michael Fordham QC, *Immigration Detention and the Rule of Law: Safeguarding Principles*[2] has as principle 17

[2] Available at http://www.biicl.org/binghamcentre/activities/immigrationdetention/final_documents/

> SP17. MAXIMUM. The duration of detention must be within a prescribed applicable maximum duration, only invoked where justified.

It quotes, *inter alia*

> *UNHCR Detention Guidelines (2012), Guideline 6: "To guard against arbitrariness, maximum periods of detention should be set in national legislation.*
> *Without maximum periods, detention can become prolonged, and in some cases indefinite".*
>
> *UNHCR/OHCHR Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants andStateless Persons (2011), §2: "Maximum time limits on … administrative [immigration detention] in national legislation are an important step to avoiding prolonged or indefinite detention". §11: "Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons".*
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> *Report of UN Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, E/CN.4/2003/85, 30 December 2002, §75(g): "Governments should [ensure] that the law sets a limit on detention pending deportation".*
>
> *WGAD Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 7: "A maximum period should be set by law".*
>
> *Council of Europe, Committee of Ministers Recommendation (2003)5, §5: "Measures of detention … should be applied only under the … maximum duration provided for by law. If a maximum duration has not been provided for by law, the duration of the detention should form part of the review by the … court".*

Persons detained without limit of time suffer considerable distress. The Home Office paid out £3 million in 2008-09 and £12 million in 2009-10 in compensation and legal costs arising from unlawful detention and the costs of keeping persons in immigration detention are high.

Amendment 57 is modelled on Part III of the Immigration and Asylum Act 1999, never brought into force and repealed in 2002. They are in simplified form but what appears suffices to debate the principle of automatic bail hearings. Detention under Immigration Act powers is by administrative fiat, without limit of time and a detained person is not brought before a tribunal judge or a court unless s/he instigates this. The lack of any time limit adds greatly to the stress of the detention. It may render the detention arbitrary.

The Bingham Centre for the Rule of Law's The Bingham Centre for the Rule of Law's recent publication, written by Michael Fordham QC, *Immigration Detention and the Rule of Law: Safeguarding Principles*[3] provides as principle 21

> SP21. AUTOMATIC COURT-CONTROL. Every detainee must promptly be brought before a court to impose conditions or order release.

They cite, inter alia,

[3] Available at http://www.biicl.org/binghamcentre/activities/immigrationdetention/final_documents/

"Any asylum-seeker or immigrant placed in custody must be brought promptly before a judicial or other authority." (UN Working Group on Arbitrary Detention, Annual Report 1999 E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 3)

EU Agency for Fundamental Rights, Detention of third-country nationals in return procedures (2011), p.44: "The right to judicial review of the detention order must be effectively available in all cases. This can best be achieved by requiring a judge to endorse each detention order, as many EU Member States already do".

WGAD [UN Working Group on Arbitrary Detention] A annual Report 2003, E/CN.4/2004/3, 15 December 2003, §86: "… any decision to place [illegal immigrants and asylum-seekers] in detention must be reviewed by a court or a competent, independent and impartial body in order to ensure that it is necessary and in conformity with the norms of international law".

WGAD Annual Report 1997, E/CN.4/1998/44, 19 December 1997, §33(c): "Appeal and review procedures" should include "an automatic review by a judge after a specific period".

Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle VI: "Competent, independent, and impartial judges and tribunals shall be in charge of the periodic control of legality of acts of the public administration that affect, or could affect the rights, guarantees, or benefits to which persons deprived of liberty are entitled, as well as the periodic control of conditions of deprivation of liberty".

UNHCR Detention Guidelines (2012), Guideline 7 §47: "asylum-seekers are entitled to the following minimum procedural guarantees: … (iii) to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. The review should ideally be utomatic, and take place in the first instance within 24–48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release".

Amendment 73 (Diane Abbott, Jeremy Corbyn)

Presumed purpose

Clause 5 extends the power to take biometric information under paragraph 18(2) of Schedule 2 to the Immigration Act 1971 Act to persons who are liable to be detained. That paragraph reads "Where a person is [liable to be] detained under paragraph 16, any immigration, officer, prison officer, constable or person authorised by the Secretary of State may take all such steps as may be reasonably be necessary for photographing, measuring or otherwise identifying him".

Briefing

Persons liable to detained (i.e. whom there is power to detain) are set out in Schedules 2 and 3 of the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999):

- Persons being examined by an immigration officer to decide whether or not to grant leave to enter (includes those seeking asylum)
- Pending the giving of removal directions and removal for those refused leave to enter and for those determined to be illegal
- Pending removal of those served with notice of intention to deport, in respect of whom a deportation order has been signed and those recommended for deportation

- Crew members who overstay pending the giving of removal directions and pending removal or are reasonably suspected of intending to do so

The power to detain is thus very extensive. The clause also potentially envisages the use of force on persons other than those detained, particularly when read with paragraph 5 of Schedule1 which extends the power to use reasonable force.

PART 2 APPEALS

Amendment 1 Yvette Cooper and NC13 Mr David Hanson *Right of Appeal: Impact Assessment*

Amendment 1

Purpose: To maintain the current position whereby decisions can be appealed as unlawful, rather than restrict appeals to appeals on the grounds of human rights and asylum only.

NC13 Presumed purpose: A sunrise clause that would prevent the abolition of appeal rights other than on asylum and human rights grounds until the Secretary of State has assessed how many appeals will be affected and the costs (not defined) of such appeals.

Briefing

ILPA supports amendment 1. Clause 11 will remove all rights of appeal on any grounds other than asylum and human rights. However egregious any other Home Office error, there will be no means to subject it to independent scrutiny save by embarking on the costly remedy of judicial review. It will be possible to purchase an administrative review, but that will be a review from within the Home Office. Administrative review is simply another name for the Home Office doing its job. Table 8 in the Appeals Impact Assessment which the Government published alongside the Bill shows that 49% of "Managed Migration" appeals are allowed, 50% of entry clearance appeals are allowed and 32% of appeals against deportation are allowed.

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[4]:

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 Minister suggested in Committee that these figures should be read in the light of all the applications the Home Office grants at first instance, but those do not alter that nearly half the Home Office refusals are wrong. *** 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.

[4] *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'.

The people worst hit by the loss of appeal rights are those with lawful leave, who have applied to extend it, and have been wrongly refused. Adrian Berry, Chair of ILPA, said in his oral evidence to the Public Bill Committee:

> *What you have taken away are the rights of the ordinary Joes, who play by the rules and seek leave to enter and leave to remain, on ordinary administrative law points when they receive duff decisions. It is an extraordinary reversal of priorities from the intention to the outcome.*[5]

Why should such challenges have to be refracted through the prism of human rights, with no straightforward consideration of whether the decision accords with the immigration rules but instead a study of 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 an assessment of cost cannot be made. 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 2011 there were 8,711 immigration and asylum judicial reviews[6] 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. ILPA has drawn the attention of Ministry of Justice officials to the figures in the impact assessment and they have looked very surprised indeed.

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*[7]. 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.*

The right of appeal to the tribunal is generally a speedy remedy. The Government factsheet published alongside the Bill states that the current average time for an appeal to be resolved is 12 weeks[8]. 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[9]. The Agency moved quickly following his inspection to address this; it had not done so without the independent scrutiny.

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[5] Public Bill Committee, Second Sitting, 29 October 2013, PM, Col 82.

[6] 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

[7] August 1967, Cmnd. 3387

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

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

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 and now the Supreme Court case of *R(Patel et ors) v SSHD* [2013] UKSC 72 all concern challenges the Secretary of State's practice of refusing applications but not making a decision (to remove) against which it would be possible to appeal finally to resolve the matter.

Among rights of appeal removed are rights to challenge a decision on the grounds that it is not in accordance with the law, to challenge a decision vitiated by discrimination on the grounds of race and for British citizens to challenge a refusal to give them a document (Certificate of entitlement to a right of abode) that would confirm their citizenship.

The Joint Committee on Human Rights, in its legislative scrutiny report on the Bill, HL Paper 102, HC 395, has stated "…limiting rights of appeal to the extent that they are restricted in the Bill constitutes a serious threat to the practical ability to access the legal system to challenge unlawful immigration and asylum decisions" citing the broader context, including the loss of legal aid (paragraph 38). It has expressed the view that the Tribunal, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new power on appeal (paragraph 46).

Government Amendments 6 , 7 (and 11, amending Schedule 8)

Presumed purpose: These change the definition of which appeals must be brought from within the UK. There is a change to the word order. The references to Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 are new. These are references to "safe third country cases" where a person is removed to State other than the State in which they fear persecution, with the aspiration that that State will deal with the protection case. In safe country cases, challenges in such cases are by way of judicial review. There are different categories of safe country, hence the multiple paragraph references.

Briefing
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. Section 94(8), which deems a country to be safe, should be repealed.

CLAUSE14

Amendments 2 to 5 (Sarah Teather)

Amendment 2 purpose: To require the courts and tribunals considering the public interest first to establish the interests of any child affected by the decision subject to appeal before going on to consider any other public interest factors. ILPA supports this amendment.

Amendments 3 and 5: purpose
To remove the provision that precludes consideration of a relationship with a child who is not a British citizen or has not been in the UK for seven years. The definition of a qualifying child limits the term to British citizens or those who have been in the UK for seven years. This does not allow the circumstances of the child to be taken into account. Amendment 5 is consequential. Having removed the reference to a qualifying child there is no need to define such a child. ILPA supports these amendments

Amendment 4: purpose
To provide that when contemplating the removal of a parent/carer/relative the best interests of the child with whom they have a relationship, will be considered, rather than a lower test of whether it would be reasonable to expect the child to leave the UK being applied. Works best with amendment three, otherwise it is limited to British citizen children or children who have been in the UK more than seven years. The consequential amendment omits the definition of a qualifying child. ILPA supports this amendment.

Amendment 58 (Sarah Teatehr, Jeremy Corbyn)

Purpose
The Bill already provides that the deportation of foreign criminals is in the public interest. The amendment would ensure that the bill recognised that the promotion of the best interests of the child is not simply a matter of the rights to be interfered with in the public interest, but is itself in the public interest. ILPA supports this amendment.

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 considered in the second limb of the test (subsection 117B(6)(b))

Consider the position of a 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 a matter of law the test is not whether it would be "unduly harsh" (the wording of the bill) 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 interpretation as her view and failing to leave room for her view to

develop. But here she is going further and 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).

NC15(Mr Dominic Raab et ors) *Exceptions to Automatic Deportation* and Amendment 62 (Mr Dominic Raab et ors)

NC 15 presumed purpose: Changes the exceptions to the automatic deportation provisions of the UK Borders Act 2007 so that rather than a person's human rights being a bar to their being dealt with under these provisions only their rights to life and to be free from torture, inhuman or degrading treatment will form such a bar. A further exception is inserted where the interests of children (defined in terms of "manifest and overwhelming harm" outweigh the interest in removal.

Amendment 62 presumed purpose: Purports to create a procedure whereby a challenge to a decision to apply the exception in new clause 15 is made by appeal to the High Court on judicial review principles rather than on judicial review. The reason for adopting this approach in amendment 62 is unclear to us.

Briefing

New Clause 15 does not comply with the standards of human rights law and as such, if accepted, would mean that no Minister could certify the Bill as it entered the House of Lords as being compatible with human rights.

In Clause 11 the Secretary of State is demanding that the tribunal cannot hear a matter to which she has not given her consent. Automatic deportation appeals by contrast, decree what the decision of the Secretary of State must be and leave it to the tribunal and courts to sort out that the flaws in that decision. Nonetheless, the current provisions purport to retain exceptions that prevent the Secretary of State from breaching human rights. Not so the proposed new clause.

The exception for cases of manifest and overwhelming harm to children does not render the clause lawful. The lawful test, as explained above, involves the best interests of the child being a primary consideration. The exception simply stands with violations of the right to life and to be free from torture as treatment at which those who have framed the amendment baulk.

It is not acceptable to cause a child harm just because that harm falls short of being both "manifest" and "overwhelming". That should not need saying.

If passed into law, the provision will in our view be declared incompatible by the Courts. Such a declaration, even before Ministers came to parliament with amendments to rectify the defect, would obviate the need to exhaust domestic remedies before turning to the European Court of Human Rights .

PART 3 ACCESS TO SERVICES ETC

Chapter 1 Residential Tenancies

The raft of Government amendments to Part 3 Chapter 1 bears out ILPA's warnings as to the complexities of the proposed residential tenancies scheme. Schedule 3 which deals with those excluded from the scheme and thus able to occupy premises without falling foul of its terms has proven inadequate. Details are clearly problematic see for example amendment 22 which defines a building to include a part of a building. These provisions will affect every single person, British citizen or not, who tries to rent, or who offers for rent, any premises in this country. They need to be understood by landlords and landladies, by prospective tenants and by those working with persons at risk of exclusion from housing. Housing law is already more than complicated enough: Schedule 3 is testimony to this.

Amendments 63-66 (Sarah Teather, Jeremy Corbyn)

Amendments 63 and 72 presumed purpose These remove all provisions on residential tenancies from the Bill. (We understand that an amendment is to be laid substituting for **amendment 67** and removing Schedule 3)
Amendment 64 presumed purpose: This is a consequential amendment to legal aid on commencement which removes references to residential tenancies provisions from the clause on commencement.
Amendment 65 presumed purpose: This is a consequential amendment to Clause 65 on orders and regulations removing reference to an order in Part 3. If taken alone (i.e. if the residential tenancies provisions were not removed from the bill but the amendment were accepted), the effect of the amendment would be that the order under clause 33 appointing a day for the residential tenancies provisions to commence for a particular area would be subject to the negative procedure in parliament, rather than, as the bill stands, to no parliamentary procedure at all.
Amendment 66 presumed purpose: This is a consequential amendment to Clause 65 on orders and regulations removing reference to an order in Part 3. If taken alone (i.e. if the residential tenancies provisions were not removed from the bill but the amendment were accepted),, the effect of the amendment would be firstly that the order under section 65(3) would not be subject to the affirmative procedure. It would not, by virtue of amendment 65, be subject to the negative procedure and would therefore not be subject to any procedure at all. Secondly the amendment would mean that no order made under the Act could make different provision for different purposes or areas or make transitional provision.

Briefing
ILPA supports this amendment

Government amendments 17 to 19

Presumed purpose
Amendments the exclusion as to agreements granting a right of occupation in social housing. It narrows the exclusion and thus means that more tenants in social housing will be subject to the residential tenancies scheme. Those brought within the scheme under this arrangement appear to be those in Scotland and Northern Ireland whose immigration status would be considered before

they were even offered accommodation. Why is this provision as to Scotland and Northern Ireland being made at this late stage? Have the devolved administrations only just been consulted?

Amendment 59 (Sarah Teather)

Purpose
To provide that there will be no prohibition upon renting to persons in the categories specified. To highlight omissions from Clause 15 and Schedule 3.

Government amendments 20 and 21

Presumed purpose
Amendment 20 excludes an agreement that grants a right of accommodation in a refuge from the residential tenancies scheme, thus protecting those who wish to be accommodated in refuges, and those who wish to accommodate them from its provisions.
Amendment 21 Defines a refuge as a place (4) 2nd and as per the text of the amendment. Gives effect to the Government commitment to look at the position of refuges for survivors of domestic violence – see
http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131107/pm/131107s01.htm col 251ff.
Amendment 23 – ensures that for the purposes of the exclusion of hostels or refuges, part of a building is covered by the covered by the word building

Briefing
Clause 15 and Schedule 3 deal with persons who are (Clause 15) treated as having a right to rent or (Schedule 3) exempt from the requirement to have such a right. But there are significant gaps in the system of exemptions. The gaps above ILPA and others have highlighted, including to the Bill team although there are no doubt others and this highlights the difficulties with how the scheme would operate in practice. In brief:
Re (a) – while provision is made in Schedule 3 paragraph 7 for those accommodation by the Home Office no provision is made for asylum seekers who make their own arrangements for accommodation. Unless this is addressed, the State will be forced to provide for those who could otherwise provide for themselves
Re (b) while provision is made in paragraph 6 of Schedule 3 for accommodation from or involving local authorities it is drafted in terms of homeless legislation and will not cover other accommodation, e.g. that provided under the Children Act 1989.
Re (c) The government promised to look at an amendment to address the position of refuges for survivors of domestic violence. It had intended that they be exempt from the provisions on residential tenancies but had failed to achieve this. See now **government amendments 20 and 21**). That the Government could make this error illustrates the complexity of the provisions on residential tenancies and helps those reading the amendment to understand why the other areas addressed in amendment 63 have also been forgotten or overlooked.
Re (d) Students not in halls of residence. This proposes that accommodation arranged through a University, albeit not in halls of residence, be exempt from the checking given that universities already carry out checks on students. Laid as amendment 59 in the Public Bill committee by Mr Paul Blomfield MP and Ms Meg Hillier MP. See
http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131107/pm/131107s01.htm col 256. Ms Hillier MP indicated her intention to return to the amendment on report:. The Minister Mr Norman Baker MP said (col 259) that a student should be treated like any other tenant.

Re (e) Young people accommodated in homestay accommodation while undertaking language courses.

Government amendment 21 defines a refuge as a building used wholly or mainly to accommodate those subject to abuse or threats of abuse as defined. We question the extent to which it can be read with government amendment 22, which defines a building to include a part of a building, to ensure that where a survivor of violence is accommodated in premises that make provision for such a person, but mixed with other provision, s/he is still excluded.

Amendment 71 (Paul Blomfield)

Purpose: To exempt students and student visitors from checks.

Briefing

ILPA supports this amendment which originates from Universities UK. It raises the question of whether accommodation arranged through a University, albeit not in halls of residence could be exempt from the checking given that universities already carry out checks on students. Laid as amendment 59 in the Public Bill committee by Mr Paul Blomfield MP and Ms Meg Hillier MP. See http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131107/pm/131107s01.htm col 256. Ms Hillier MP indicated her intention to return to the amendment on report:

> *The Bill proposes an exemption for halls of residence and buildings where an agreement is in place with the university that the majority of occupants are students, but there is no similar provision for accommodation arranged through the university but which is outside the halls of residence.*

The Minister Mr Norman Baker MP said (col 259) that a student should be treated like any other tenant. Ms Hillier MP indicated that she would return to the amendment on report.

NC2 (Yvette Cooper et ors): *Pilot of residential housing provisions*

Presumed purpose: Gives the Secretary of State power to pilot the provisions of Part III Chapter 1 on residential tenancies and provides that the provisions of that Chapter can only come into force after the pilot has been evaluated and both houses of parliament approved a result on it. Such approval would have to take place before the end of the 2014-2015 session of parliament.

Briefing

The residential tenancies provisions affect us all. Every one of us will be required to provide evidence of our immigration status before renting private accommodation from each other, be it only for a peppercorn. Private landlords will face fines of up to £3000 if they rent to a person without the requisite status.

The class of persons who will no longer be entitled to rent will be broad. It will include all those unable to prove their status, for example because they have no passport. Those who live chaotic lives, for example because of mental health problems, will be among those affected.

On the face of the Bill there is absolutely no penalty for discrimination by a landlord, landlady or other person letting accommodation. Employees and would-be employees have routes of redress if they are treated badly, including if they are victims of discrimination. It is possible to challenge discrimination, victimisation and harassment by a private landlord or landlady under Part 4 of the

Equality Act 2010. Under the Equality Act s.136, in the county court the burden of proof shifts from the claimant to the defendant once the claimant has established a *prima facie* case that discrimination has taken place. Giving the code publicity will assist tenants in establishing this prima facie case, although we still consider that they will struggle. The Government consultation paper stated:

> *34. Many landlords will meet a number of prospective tenants. There is no requirement to check the immigration status of all of them – only the people with whom the landlord actually proceeds. Checks should be performed on a non-discriminatory basis (i.e. without regard to race, religion or other protected characteristics as specified in the Equality Act 201020) on all adults who will be living at the property.*

This paragraph perfectly encapsulates the risk that racial profiling will take place before a tenancy is offered.

A fine of three thousand pounds for letting to a person with no right to rent is a considerable sum and will cover the cost of many properties standing empty for months. It will cover a considerable amount of repair.

In other words, a landlord or landlady would have an incentive not to accept a person who otherwise appears to be a model tenant if there is any risk of having to pay the fine. Any stereotype or prejudice might weigh with a person with multiple offers on the property, not because they feared having a particular individual as a
tenant, but because they feared a fine, making the assumption that that person was more likely to be a person under immigration control whose documents would be complicated to check. When will a landlord perceive a risk of a fine? When will a landlady start worrying that a person's passport is false or otherwise unsatisfactory?

All too often this is likely to depend on what people look like, what they sound like, what their names are and how those names are spelt, and what place of birth is identified in their passports. Ms Caroline Kenny of the UK Association of Letting Agents, giving oral evidence to Public Bill Committee (see http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131029/pm/131029s01.htm) made clear that the major concerns of her association about the provisions were concerns about the effect on ethnic minorities. She said (col 54):

> **"Caroline Kenny:** It is illegal and abhorrent, but we can envisage a stage where more landlords will ask their agents not to show their properties to people of ethnic minorities. That is what we are extremely worried about…"

NC14 (Sarah Teather; Jeremy Corbyn) *Support for prescribed groups*

Purpose
To make it possible for the support provided under section 4 of the same type/level as section 95, while retaining the Secretary of State's power to make distinct regulations for accessing this support.

Briefing

ILPA supports this amendment. It was laid by Dr Huppert MP in the public Bill Committee and debated 19 November 2013 (See

http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131119/am/131119s01.htm) cols 404 to the end of the session. Moving the amendment, Dr Huppert explained

> ***Dr Huppert.*** *…Analysis from Still Human Still Here, which campaigns on a number of issues, estimates that if we got rid of section 4 support and provided the same people with section 95 support, not only would those individuals be better off, but it would save the Exchequer some £2 million to £4 million. The Select Committee on Home Affairs considered this matter in much more detail than I will have time to explain and concluded:*
>
> > *"We are not convinced that a separate support system for failed asylum seekers, whom the Government recognise as being unable to return to their country of origin, is necessary…*

The immigration Minister in reply (col 406) agreed to look at the Still Human Still Here report, saying that the Government had considered the idea of a single system before but was happy to look at it, at the report and at the financial analysis again.

The definition of support in the amendment is modelled on section 96 of the Immigration and Asylum Act 1999.

Section 4 of the Immigration and Asylum Act 1999 gives the Secretary of State the power to accommodate a destitute refused asylum seeker and any dependents, a person with temporary admission under the Immigration Act 1971 or a former immigration detainee. There are two routes to access section 4 support:

1. Any person who is granted temporary admission or released from immigration detention may qualify for support under Immigration and Asylum Act 1999 section 4(1) without meeting other conditions.
2. A refused asylum seeker may qualify under section 4(2) if he/she is destitute and meets one of five eligibility criteria principally relating to the existence of a temporary obstacle beyond the control of the applicant that prevents return to the country of origin.

The five eligibility criteria which apply to section 4(2) are:

1. The applicant is taking all reasonable steps to leave the UK;
2. The applicant is unable to leave the UK because of a physical impediment to travel or for some other medical reason;
3. There is no safe route of return;
4. The applicant has applied for judicial review of the decision on their asylum claim and has been granted permission to proceed (except in Scotland where there is no permission stage); or
5. The provision of accommodation is necessary to avoid a breach of the applicant's human rights. This criterion usually applies when the applicant has presented further submissions.

This very basic type of cashless support was received by 2,968 people (as at the end of quarter one 2013).[10] It is, in effect, a system of asylum support parallel to that provided under section 95 of the Immigration Act 1999, which costs £350,000 to run for less than 3,000 people.[11] The "section 4" system is an administratively complex system requiring the completion of a lengthy application form,

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[10] Home Office immigration statistics, January to March 2013. Available at: https://www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2013

[11] Hansard, 19 May 2009. Available at: www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090519/text/90519w0007.htm#09051969000085

often for the second time if the applicant has been in receipt of section 95 support, that must be faxed to the Home Office and assessed by a caseworker. Maladministration of the assessment process frequently results in destitution as applicants fall between the two types of support. Still Human Still Here has calculated that between £2 million and £4 million would be saved by abolishing section 4 and retaining asylum support recipients under section 95.[12]

Having examined section 4 in detail, the Home Affairs Select Committee concluded:

> *'We are not convinced that a separate support system for failed asylum seekers, whom the Government recognise as being unable to return to their country of origin, is necessary. The increasing period of time which asylum seekers have to wait for an initial decision suggests that staff resources could be better used by being allocated to asylum applications. Section 4 is not the solution for people who have been refused but cannot be returned and we call on the Government to find a better way forward.'*[13]

A refused asylum seeker with a child in the household at the point of refusal remains entitled to support under section 95 of the Immigration and Asylum Act 1999 until the child turns 18. This means that those supported under section 4 are either childless or have a child who was born after their asylum claim and appeal were finally determined. A pregnant woman may be eligible for section 4 under 'impediment to travel' when she is 32 weeks pregnant and consequently, families do constitute a significant proportion of the section 4 supported population. Although exact numbers are not available, it is estimated that there are almost 800 children on section 4 support.[14]

There are two very distinct differences between the type of support provided under section 95 and under section 4: the amount provided and the method of delivery.

Section 95 asylum support rates were set at a lower level than mainstream benefits on the basis that asylum support is only intended to meet the recipients 'essential living needs', that it would only need to be provided for a limited period of time during which the asylum claim is determined and that act as a disincentive for abuse of the asylum support system.[15] However, those on section 4 receive even less. Every person supported under section 4, regardless of age or family status, receives £35.39.[16] This translates as £5 per day. While there is no difference between the living needs of those on section 95 and those on section 4, a single adult on section 4 receives £1.23 a week less than they would on section 95, while a child under three is £17.57 worse off. Compared to mainstream benefits, the picture is even stark: a single adult on section 4 receives less than 50 per cent of that received by a single adult on Income Support. A lone parent with a baby under the age of one receives only 59 per cent of that received by her equivalent on Income Support and a pregnant woman receives just 54 per cent. The purported justification for further decreasing rates of section 4 support, is that it is intended to communicate to asylum seekers that they have reached the end of the process and will have to leave the UK very soon. However, the temporary nature of section 4 support is overstated: over half of section 4 recipients have been receiving it for more than

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[12] Still Human Still Here written evidence to the Home Affairs Select Committee inquiry into asylum, 2013. Available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71we-5.htm#footnote-31877-90

[13] Home Affairs Select Committee, Asylum, Seventh Report of Session 2013-14

[14] http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120621w0001.htm#120621460000176

[15] Home Office White Paper, Fairer, Faster and Firmer: Modern Approach to Immigration and Asylum, 1998, Chapter 8 Asylum Procedures. Available at: http://www.archive.official-documents.co.uk/document/cm40/4018/chap-8.htm

[16] http://www.ukba.homeoffice.gov.uk/asylum/support/apply/section4/

two years and, as at February 2013; over 200 people had been in receipt of section 4 support for over six years.[17]

The Immigration Act 1999 refers to 'facilities for the accommodation of persons' rather than 'support' and, as such, section 4 support is cashless, consisting of very basic accommodation and the "Azure" card – a prepaid card that can only be used in specified supermarkets and retail shops.[18] The balance of the Azure card has to be used within the week, with only £5 being carried over to the following week, meaning that it is impossible to save for items such as clothes and shoes. The card can also only be used to purchase essential items and, although according to Home Office guidance the only restricted items are fuel, gift cards, alcohol and cigarettes, users frequently report that supermarket staff refuse to allow cardholders to purchase socks, toiletries, children's clothing and cleaning utensils.[19] This is further compounded by reports of technical faults with the card which mean that the cardholder is unable to make any purchases. By restricting their access to cash, section 4 recipients are unable to for instance, pay for shoe repair, travel via public transport, or purchase food from markets or discount stores. Evidence provided to the Home Affairs Select Committee inquiry into asylum was that 82% of surveyed section 4 recipients were unable to buy fresh fruit and vegetables and more than 90% regularly missed a meal. [20] It also indicated that substantial numbers of those asylum seekers supported under section 4 are presenting with health problems. In 2011, Refugee Action found that 206 individuals raised issues related to Section 4 and health problems in casework sessions or were identified by the caseworker as having a physical or mental health problem. This is very high given that only 2,310 people were on S4 at the end of 2011.[21]

The criteria for receiving section 4 support include that the individuals concerned are temporarily unable to return to their countries of origin through no fault of their own. There is no evidence to show that the harsher regime under section 4 has met the intended policy objective of encouraging more people to return home.

As a result of the drafting of section 4 as 'facilities for accommodation', the Secretary of State does not have the power to provide section 4 support as 'subsistence only' as she does with section 95 support. Some 13% of asylum seekers on section 95 stay with family and friends and claim subsistence only support. There is no subsistence only option under section 4 and therefore the current system compels them to give up accommodation in order to claim section 4 and the Home Office then has to provide them with housing. Perversely, the section 4 system obliges the taxpayer to pay for accommodation that is not necessary.

A simplified asylum support system which unifies the levels and type of payment minimizes transfers between different systems and ensures that asylum seekers can properly meet their essential living needs, has the potential to deliver substantial financial and administrative savings to the Home Office and the Treasury. The additional cost of maintaining all those on section 4 on section 95 support

[17] http://www.theyworkforyou.com/wrans/?id=2013-10-14a.169647.h&s=%28asylum+OR+refugees%29#g169647.r0

[18] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/asylum/vouchers.pdf

[19] Your Inflexible Friend: the cost of living without cash, Asylum Support Partnership, November 2010, available at: http://www.refugeecouncil.org.uk/assets/0001/7057/ASP_-_azurecard-v4.pdf. Also cited in evidence to the Home Affairs Select Committee inquiry into asylum in 2013.

[20] Home Affairs Select Committee, Asylum, Seventh Report of Session 2013-14

[21] www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VIRT_HomeAffairs_ASY-18.htm

rates would be just under £692,000 a year.[22] Still Human Still Here estimates that the cost savings which would be made from removing this parallel support structure would outweigh the costs. These include:

Accommodation cost savings: If support recipients were able to stay on section 95, they would be likely to remain with their relatives or friends. The estimated savings from this would be in the region of £2 million a year. It is likely that the net savings would be less than this as some individuals who would otherwise not have claimed because there was no subsistence only support would do so.[23]

Administrative savings: If those who meet the criteria for section 4 are maintained on section 95, Home Office staff would only have to review whether a refused asylum seeker qualifies for section 4 and whether that person's financial circumstances have changed. The Home Office would not have to run a separate payment card scheme for some 2,400 people with an annual running cost of £350,000.[24]

Health

NC16 (Meg Hillier et ors)

Presumed purpose

Put the Secretary of State under a duty to have regard to the matters specified when calculating NHS charges.

Briefing

ILPA supports this amendment. Provides an opportunity to discuss the effect on these matters. There is evidence, including from the report *Treatment of Asylum Seekers* by the Joint Committee on Human Rights, that charges deter pregnant women from getting medical help or lead to their being denied help[25]. There is evidence that starting antenatal care after 20 weeks gestation is a risk factor for maternal death, as is not attending antenatal appointments, and screening[26]. There are also risks

[22] This uses the breakdown of those supported on Section 4 as of April 2012: 73% single adults, 18% children and 9% single parents (House of Lords Hansard, 22 June 2012) and applies it to the 2,757 on S4 at the end of 2012. These groups would receive £1.23, £17.57 (based on the child being under 3) and £8.55 a week extra respectively. This would amount to £13,310 a week or an annual cost of £692,120.

[23] 2,360 applicants were supported on section 4 in Q2 2012. 15% of those on section 95 receive subsistence only support. Assuming the same percentage of those on section 4 do not require accommodation, then savings would equal £97 a week (average accommodation costs per person on Section 4, (Hansard, 23 Feb 2009) x 399 cases: £38,703 a week or £2,012,556 a year.

[24] Hansard, 19 May 2009. Available at: www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090519/text/90519w0007.htm#09051969000085

[25] *The Treatment of Asylum-Seekers,* Tenth report of session 2006-07, HC 60-I and II, HL 81-I and II. Joint Committee on Human Rights, 2007, London, The Stationery Office Maternity Action and Medact (2009); *First do no harm: denying healthcare to people whose asylum claims have failed*, Kelly, N. & J. Stevenson, 2006, London, Oxfam and Refugee Council; *Money and Maternity: charging vulnerable pregnant women for NHS care* UK Public Health Association Conference, Brighton

[26] Lewis, G., J. Drife Why mothers die 2000-2003, Sixth *report of the Confidential Enquiries into Maternal Deaths in the UK London*: Royal College of Obstetricians and Gynaecologists, 2003. See also Centre for Maternal and Child Enquiries, 2011, *Perinatal Mortality 2009: United Kingdom*, London.

to the health of the child, and of increased infant mortality[27]. Amendment laid by Meg Hillier MP as amendment 97 in Public Bill Committee but too late to have been called. We recall the words of Aneurin Bevan:

> *One of the consequences of universality of the British National Health Service is the free treatment of foreign visitors. This has given rise to a great deal of criticism, most of it ill-informed and some of it deliberately mischievous. Why should people come to Britain and enjoy the benefits of the free Health Service when they do not subscribe to the national revenues? So the argument goes. No doubt a little of this objection is still based on confusion about contributions … The fact is, of course, that visitors in Britain subscribe to the national revenues as soon as they start consuming certain commodities…*[28]

Clause 33 Immigration Health Charge

Amendments 68 and 70 (Mr Paul Blomfield)

Presumed purpose: To exempt students and student visitors from charges

Amendment 69 (Mr Paul Blomfield)

Presumed purpose: to exempt highly skilled workers, skilled workers and temporary workers sponsored by institutions granted powers to award degrees by Royal charter or by Acts of parliament from the health charges. Such institutions are likely to be universisities, those benefiting academics and skilled staff.

MARRIAGE

The sheer volume of amendments to this part must give rise to concerns that there are sufficient problems with the way in which proposals have been presented in the Bill for parliament to be cautious about accepting them or the proposed scheme.

We are experts on immigration law but do not have the marriage acts at our fingertips. We have therefore set out our main comments on the Government amendments but these do not purport to constitute an exhaustive summary.

Government Amendment 23, 25, 26

Presumed purpose: Consequential

Government Amendment 24

Presumed purpose: Consequential upon making provision for civil partners in Scotland and Northern Ireland

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[27] Health Inequalities Unit (2007) Department of Health *Review of Health Inequalities Infant Mortality* PSA Target

[28] *In Place of Fear*, Bevan, A (1952), chapter 5.

Government NC11(Secretary of State): *Supplementary* provision amendment 27 and new Schedule 1 *Sham marriage and civil partnership: administrative regulations*

Presumed purpose
NC11 : To give the Secretary of State powers to make regulations for the operation of the Scheme proposed in the bill Scotland and Northern Ireland by giving her powers to make any regulations described in Schedule 4 for those jurisdictions.
Amendment 27: To make provision for an order under the provisions inserted by NC11 to be subject to the /affirmative resolution procedure.
New Schedule 1: These are concerned with administrative regulations for the scheme as they will affect Scotland and Northern Ireland.

Briefing
There is a duty to consult the Registrars General for Scotland and Northern Ireland although not to heed their advice or to seek any formal approval at the level of the Northern Ireland Assembly and Scottish parliament. The powers are wide-ranging: they can prescribe evidence that must be given (subclause (4)) and can amend primary legislation (subclause (5)).

It would be interesting to know whether the pressure of these provisions has come from the devolved administrations and if so whether they have only been consulted at this late stage.

Is it the case that the scheme as it applies to Scotland and Northern Ireland will now be regulated by primary legislation in ways that the scheme as it applies to England and Wales will not? If so, how is this differential treatment justified?

Why has the Government not produced explanatory memoranda to assist the House in grappling with these complex provisions?

Government amendments 28 and 29

Presumed purpose: To accommodate changes made by the Marriage (Same Sex Couples) Act 2013. Consequential on the passage of that Act.

Government amendment 30: Presumed purpose Consequential.

Government amendments 31 -33 and 38 to 40
Amendment 31 Presumed Purpose: Moves the requirement, where a party to a marriage holds neither a relevant immigration status as defined nor has a relevant visa as defined they must give details of aliases and former names and aliases from paragraph 4(8) (deleted by **amendment 32**) into the table. The effect of this is that only a non EEA national who is, or is party to a marriage with a person who is, without the relevant status or relevant visa, need provide aliases and former names. All non-EEA nationals would no longer have to do so. The changes effected by **amendment 33** *appear* to be consequential.

Amendments 38 to 40 repeat amendments 31 to 33 but in respect of civil partnerships.

Government amendment 34

Presumed purpose: Removes the provision that says that paragraph 2 does not affect the power of the Registrar General, in response to an application and if satisfied that there are compelling reasons for reducing the 15 day period because of the exceptional circumstances of the case, to reduce that period to such shorter period as s/he considers appropriate.

Briefing
It is unclear what the effect of the deletion is intended to be, whether it was thought unnecessary to spell it out or whether it is intended to affect the power. The latter would be objectionable: there may be compelling reasons such as a person's imminent death, or the imminent birth of a child, etc. for reducing the period.

Government Amendment 35

Presumed purpose: Consequential

Government Amendment s 36 and 43

Presumed purpose: We are unclear as to the effect of the "one party resident in Scotland" paragraph. As to the paragraph on proof as we understand it this goes to the situation where the registrar wrongly issues the certificate although an investigation is ongoing or a couple has failed to comply with that investigation. The marriage will not be void in these circumstances.

Government Amendment 43 is the same as amendment 36, but for civil partnerships.

Government amendment 37

Presumed purpose: Consequential

Government amendments 41 and 42
Presumed purpose: Consequential

Government amendment 44

Presumed purpose Allows registrars to disclose information held for immigration purposes as defined or for the purposes of referring marriages and civil partnerships to the Secretary of State to the Registrar General.

Briefing
The bill as it stands prohibits such disclosure although it allows reports to be disclosed to other registration officials. It would be helpful to know the reasons for the change of heart.

MISCELLANEOUS

Fees

NC 12 (Secretary of State): Powers to charge fees for attendance services in particular cases and amendments 45 to 54

Presumed purpose: Clauses 60 and 61 make provision for fees to be set above the level of the cost of providing the service. The amendments do not appear to signal a major departure from the intention behind the clauses as originally drafted.

Briefing
The drafting of these provisions is becoming increasingly convoluted. The amendments make clear that a fee could be made up of a fixed element and an hourly rate and that reference may be had to "other factors" to be set out in regulations. Parliament is being asked to buy a pig in a poke.

It is increasingly the case that applicants have to pay premium fees to receive a level of service that is no more than adequate. For example, many of the benefits associated with the £25,000 fee for premium sponsors are no more than those which sponsors were promised at the outset of the Points-Based System:

> *Sponsors will be at the heart of the new system and will have a formal role in the process. Trustworthy sponsors will find the system easier and less bureaucratic. They will also benefit from a close and customer-focused relationship with the Home Office.* [29]

People pay premium fees for same-day service at the Public Enquiry Office because if they do not then they have no idea how long it will take to deal with their applications and they are unable to obtain progress reports. It has taken quite simply years of advocacy by ILPA to supplement the Public Enquiry Office with a premium postal service, to address the problem of demand for premium appointments outstripping supply. We advocated for a premium postal service because clients were desperate for it. But we consider that persons should not be forced to use premium services simply because the ordinary service is so poor and so uncertain. The Home Office new service standards announced from 1 January 2014, if complied with, may help to improve the service received but it will take some considerable time to establish trust. When she abolished the UK Border Agency on 28 March 2013, the Home Secretary said:

> *… The agency struggles with the volume of its casework …* [and] *is often caught up in a vicious cycle of complex law and poor enforcement of its own policies …it will take many years to clear the backlogs and fix the system, …"* [30]

The temptation for such an organisation is to charge ever-increasing fees to cover for its own shortcomings and that is what we see happening in practice. Parliament should require to see improved levels of service before giving the Home Office power to charge still higher fees.

FINAL PROVISIONS

Clause 65 Commencement

Amendment 61 (Sarah Teather, Jeremy Corbyn)

Purpose: Provides that section 1 and Part II (Appeals) cannot come into force until an order has been made dealing with legal aid for removal under Part I and appeals covered in Part II. The nature of the Order is not addressed in this amendment save that it will be in connection with the provisions of clause 1 and Part II and that legal aid will be extended, not reduced.

Briefing

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[29] *A Points-Based System: making migration work for Britain* Cm 6741, Home Office, March 2006, paragraph 20.
[30] Hansard HC Deb 6 Mar 2013 : Column 1500.

ILPA supports this amendment. Under Part 1 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012, legal aid remains available for applications and appeals under the Refugee Convention and based on Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment) of the European Convention on Human Rights and related provisions. It is no longer available for other human rights appeals, including appeals on the grounds of a breach of Article 8, private and family life.

Under the residence test proposed in the Ministry of Justice consultation *Transforming Legal Aid*, legal aid will not be available for judicial review, other than for persons seeking asylum, for persons who are not lawfully present in the UK and have clocked up 12 months lawful residence in the UK at some time in the past. An exception is proposed in the Ministry of Justice document *Transforming Legal Aid: next steps* for persons seeking asylum and limited exceptions for some, but not all, refugees, some but not all trafficked persons and some but not all survivors of domestic violence.

Under this Bill, all appeals must be brought as asylum or human rights appeals. A person who has a wrong decision and on but who does not have a right of appeal on protection or human rights grounds will have no option other than not to challenge the decision before any independent decision-maker and suffer the injustice of a wrong decision or to bring a judicial review. Those who have grappled with these clauses, will understand the complexity of the cases involved. The issues at stake are whether a person can join or remain with a spouse, partner or child or Legal aid should be available for such appeals. Section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides a power to widen or narrow the range of cases for which legal aid is available. An Order under section 9(2)(a) could only add to the number of cases for which legal aid is available not reduce it.

Schedule 8 Transitional and Consequential Provisions

Part 4 Appeals

Government amendment 8

Presumed purpose:

- Name substitution in Schedule 2: consequential
- Amendment to Schedule 3: consequential (preserves rights to apply for bail, insofar as these are preserved by this Bill)

Government amendments 9, 15 and 16

Presumed purpose: Consequential upon the deletion of the current definition of an immigration decision in section 82 of the Nationality Immigration and Asylum Act 2002.

Government amendments 10 and 11

Presumed purpose:
To give effect to the intention that rights of appeal on human rights grounds where the applicant is outside the UK (e.g. entry clearance cases) be preserved

Briefing

The original drafting of the bill inadvertently denied those outside the UK a right of appeal on human rights grounds, a right preserved according to the Explanatory Notes and that must be preserved to meet the UK's obligations under the European Convention on Human Rights. This is yet another example of the tortuous complexity of immigration law. Multiple cross-referencing is required to understand any provision. In this case the Bill had cross referred to a definition that applied only to in-country appeals. ILPA pointed this out to the Home Office and now amendments 6 to 7 address it.

It remains the case that there will be no right of appeal for those outside the UK other than on human rights grounds and that no other provision is made for addressing their legitimate grievances with wrong and poorly reasoned decisions and this is why ILPA supports amendment 1 that would omit clause 11 from the bill.

Government Amendment 13

Presumed purpose: Consequential – deals with the definition of an asylum seeker for the purposes of section 17 of the UK Borders Act 2007 which is currently defined by reference to a provision being deleted. Thus immigration decision is substituted for a particular definition of immigration decision.

Government amendment 14

Presumed purpose: Consequential: Provides that an asylum seeker will remain (or again become) an asylum seeker after the asylum claim has been determined where a person can bring an in-country appeal against an "immigration decision". Such decisions are currently defined by reference to section 82 of the Nationality, Immigration and Asylum Act 2002which is being repealed by this Act. The amendment removes the definition, leaving the bare "immigration decisions"

NC1 Restrictions on Bulgarian and Romanian Migrants and amendment (a) to NC1, NC3 ***Review of labour market and Immigration*****, NC4** ***Duty to Access whether EU immigration is excessive,*** **NC 5** ***Duty to produce report if EU immigration is excessive, NC6 Interpretation*** [of NC5 and NC6], **NC7** ***Duty to access expected immigration effects of accession*** **NC8** ***Duties when conducting accession negotiations.*****NC9** ***Duties before ratification of accession treaties,*** **NC10** ***Interpretation*** [of NC8 and NC9]

NC1 Presumed purpose: A probing amendment that provides an opportunity to debate Bulgarian and Romanian accession. The amendment, which would have no legal effect on the text of the EU treaty, purports to change the latest date on which member States can impose restrictions on the access to the Labour market of Bulgarians and Romanians from 31 December 2013 to 31 December 2018.

Amendment (a) to NC1 Presumed purpose: New clause one having been drafted before 31 December 2013, amendment (a) changes its terms to recognise that that date has passed, although the revised wording will still have no legal effect on the text of the EU treaty.

NC3 Presumed purpose: To require the Government to produce "as soon as practicable" a report on the impact of migration from the EU accession States since 2004 and to make recommendations, with particular reference to labour exploitation and ill treatment.

NC4, NC5 and NC6 Presumed purpose: (NC4) To cause the Secretary of State periodically to assess as she (or he) sees fit, on whether EU migration is excessive and, if s/he determines that it is, to report upon this (NC5). There is no obligation to report if the Secretary of State does not determine EU migration to be excessive. EU migration is defined to include EEA nationals and family members (NC6). No definition of excessive is given.

NC7, NC8 and NC9 Presumed purpose: To require the Secretary of State to assess the migration that could be expected and its effect on the labour market were a particular State to accede to the European Union, during the negotiations on accession. The assessment must be laid before parliament (NC7). Regard must be had to the assessment in the UK's negotiating position on accession (NC8). Prior to ratifiying an accession treaty an independent (-ish) assessment of the migration that could expected and its effect on the labour market must be commissioned, laid before both Houses of Parliament (NC9). There is no requirement that the report be approved by parliament. Signing an accession treaty is not barred and indeed neither is ratification, but for the latter to be carried out, the report must first be tabled.

Briefing

These amendments have in common a focus on migration from the European Union, particularly in the context of the accession of new States. The most recent State to join the EU was Croatia on 1 July 2013.

As to NC1, the UK cannot unilaterally renegotiate the terms of accession nor set the terms for future accession and those terms go far beyond questions of free movement of persons to questions of the free movement of capital, goods and services.

The other amendments in this group are more straightforward and are mostly about monitoring and reporting obligations.

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