ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

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

Removal Directions

Clause 1 Removal of a person unlawfully in the United Kingdom

Amendment 74 (Dr Julian Huppert)

Presumed purpose: to probe and press the Government on the amendment on the detention of children that the Government has promised to provide.

Briefing
ILPA is supportive of enshrining protection for children against detention under immigration act powers in primary legislation. We urge the Government to lay an amendment at the earliest possible stage and in any event no later than House of Lords Committee so that it can be scrutinised.

Powers of Immigration Officers

Schedule 1
Amendment 60 (Sarah Teather, Jeremy Corbyn)

(Amendment 78* in the names of John McDonnell and Jeremy Corbyn appears to be in identical terms**)**

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].

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.

Clause 3

Amendment 79* John McDonnell, Jeremy Corbyn

Purpose: to maintain the current position that the First-tier Tribunal (Immigration & Asylum Chamber) retains its powers to grant bail where a detainee has been served with directions for removal from the UK to take effect within 14 days of the date of application and to maintain the status quo rather than introduce the new provision proposed whereby tribunal procedure rules must make provision for the dismissal without a hearing of bail applications made within 28 days of a previous decision to dismiss a bail application unless the appellant can demonstrate a material change of circumstances.

Briefing
The independent Tribunal Procedure Committee is best placed to make decisions as to the appropriate rules for the First-tier Tribunal when dealing with applications. Nothing in the Bill

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

prevents the Secretary of State from repeatedly setting removal directions, thus ousting the possibility of applying for bail. The Minister, Norman Baker MP, challenged on this point in Committee, was unable to explain why the power should vest in the Secretary of State and not in the Tribunal (col 163f http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131105/am/131105s01.htm). Those who manage to find legal representation are likely to try to challenge the decision to withhold consent or the lawfulness of detention, substituting the judicial review in the High Court for a bail hearing. This does not appear to be an efficient way of proceeding.
This provision risks simply substituting disputes about whether a change is material for bail hearings.

An application for bail is different from a challenge to the lawfulness of detention, by an application for habeas corpus or for permission to bring a judicial review. A detainee may be bailed if the Tribunal considers that detention is no longer proportionate, for example if the Home Office has failed to progress a case towards removal over several months. Persons in detention may opt for a bail application for reasons of ease of access and cost where it is available, rather than apply to the High Court. If the possibility of applying for bail is removed it is likely that they will apply to the High Court.

For the above reasons, the proposal is inefficient.

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

The UK Border Agency was, not once but four times, been found to have breached Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman and degrading treatment, for its treatment of mentally ill persons in detention[2] and other cases have settled or are ongoing. In 2012 there were 208 incidents of what statistics call "self-harm" (which includes attempted suicide) requiring medical attention and 1804 detainees formally recognised as being at risk of such harm[3] . Statistics are not collected on those who in this category who do not require medical attention. This type of case, where detention is immediately injurious to the health, including mental health of the detainee illustrates why it is important to preserve prompt access to the Tribunal.

The Bingham Centre for the Rule of Law's safeguarding principles, cited above, have as principle 23

> *SP23. JUDICIAL REVIEW. A detainee has the right to have the lawfulness of detention reviewed by a court empowered to order release.*

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

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

They cite, *inter alia*:

> *UN Commission on Human Rights Resolution 2004/39: Arbitrary Detention, 19 April 2004, E/CN.4/RES/2004/39, §3: "Encourages the Governments concerned: (c) To respect and promote the right of anyone who is deprived of his/her liberty by arrest or detention to be entitled to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful, in accordance with their international obligations".*
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> *UNHCR Detention Guidelines (2012), Guideline 7, §47(v): "… the right to challenge the lawfulness of detention before a court of law at any time needs to be respected … the authorities need to establish that there is a legal basis for the detention in question, that the detention is justified according to the principles of necessity, reasonableness and proportionality, and that other, less intrusive means of achieving the same objectives have been considered in the individual case".*
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> *WGAD [Working Group on Arbitrary Detention] Annual Report 2003, E/CN.4/2004/3/Add.3, 15 December 2003, §75: "Any person detained for reasons related to immigration should have an opportunity to request a court to rule on the legality of his or her detention before the expulsion order is enforced".*
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> *WGAD Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 8: "Notification of the custodial measure must be given in writing, in a language understood by the asylum-seeker or immigrant … it shall set out the conditions under which the asylum seeker or immigrant must be able to apply for a remedy to a judicial authority, which shall decide promptly on the lawfulness of the measure and, where appropriate, order the release of the person concerned". European Convention on Human Rights (1950), Art 5(4): "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".*
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> *Council of Europe, Twenty Guidelines on Forced Return (2005), Guideline 8(2): "In every case, the need to detain an individual shall be reviewed at reasonable intervals of time. In the case of prolonged detention periods, such reviews should be subject to the supervision of a judicial authority". Guideline 9: "1. A person arrested and/or detained for the purposes of ensuring his/her removal from the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful. 2. This remedy shall be readily accessible and effective".*

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*[4] has as principle 17

> 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".*
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> *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".*
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> *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".*
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> *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

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

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*[5] 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,

> *"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)*
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> *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".*
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> *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".*
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> *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".*
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> *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".*
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> *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

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

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[6]:

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.

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.*[7]

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[8] 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*[9]. 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*

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[6] *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'.

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

[8] 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

[9] August 1967, Cmnd. 3387

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[10]. 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[11]. The Agency moved quickly following his inspection to address this; it had not done so without the independent scrutiny.

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

Clause 12 Amendment 80* John McDonnell, Jeremy Corbyn

Purpose: To remove the provision whereby a person facing deportation could be removed before their appeal was finally determined (either by a certificate's being issued before the appeal started or to stop an appeal in progress), including on the grounds that removal would not cause "serious irreversible harm".

Briefing
See the Joint Committee on Human Rights legislative Scrutiny Report HL Paper 102, HC 935 at paragraphs 48 to 53.

[10] Immigration Bill Factsheet: appeals (clauses 11-13), Home Office, October 2013.
[11] See the report at http://icinspector.independent.gov.uk/wp-content/uploads/2011/03/An-inspection-of-UKBA-visa-section-in-Amman-Jordan.pdf

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The power to certify the appeals of persons to be deported before those appeals begin or while they are in train so that the person" can be removed while the protection claim is pending if to do so would not cause him/her "serious irreversible harm" was broadened in Committee. In the Bill as presented to parliament, it applied only to "foreign criminals" as defined, persons who had served a custodial sentence, normally of over 12 months. Now it will apply to anyone facing deportation.

This raises the prospect of matters that could be resolved through an appeal being displaced onto a judicial review of whether removal would cause "serious irreversible harm". The assumption appears to be that only asylum cases and cases involving torture involve risks of serious irreversible harm but this is not a sustainable assumption given the range of persons, including children, the elderly, ill and dying and the range of interests involved in family cases. The power of one party to a case to certify that case while it is in train is inimical to the notion of equality of arms.

Clause 13 Amendment 81* John McDonnell, Jeremy Corbyn

Purpose: To leave out Clause 13's standing part of the bill and thus retain the current position whereby challenges to deportation decisions certified as raising matters of national security are heard by way of judicial review in the High Court rather than by way of review by the Special Immigration Appeals Commission where, unlike judicial reviews, a closed material procedure could be used.

Appeals in cases before the Special Immigration Appeals Commission are preserved

but expressly limited to judicial review principles. The Explanatory Note makes clear

that this is to avoid their being the subject of judicial review:

> *"It is more appropriate for judicial reviews in national security cases to be conducted by SIAC than in open court."*

Not so. There are no closed material procedures on judicial review. The starting point is to keep cases involving national security out of the High Court, where any judicial review would be heard in open court. Giving a person a right of appeal rather than an opportunity to challenge the decision by way of judicial review would normally give them a wider challenge. This is because judicial review is a procedural remedy, which looks at the way in which a decision is taken and not at the substantive outcome whereas an appeal on merits of the decision looks at facts and law and at the substantive outcome. By clause 13 that benefit of judicial review is removed, because the appeal before the tribunal is limited to principles that would be applied in judicial review proceedings. Before the Special Immigration Appeals Commission, the adoption of a closed material procedure is required (not allowed, but required) not only "in the interests of national security" but also, "in the interests of the relationship between the United Kingdom and another country." In addition the Secretary of State can certify that the information on which the decision was based should not be made public because this is "otherwise in the public interest." These additional reasons for using a closed material procedure are not reasons that can justify the interference with a fair trial that a closed material procedure represents.

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)

See also amendment 84* (John McDonnell, Jeremy Corbyn)

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. Amendment 84* is an earlier version of this amendment proposed by ILPA. It includes reference to Approved Premises, but we are now satisfied that they are excluded from the residential tenancies provisions. Amendment 59 is to be preferred.

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…"

Amendment 82* John McDonnell and Jeremy Corbyn

Purpose To place the Secretary of State under a duty to bring the Code to the attention of landlords and ladies and those acting on their behalf and thus to probe how they are to made aware of the Code of Practice, let alone forced to comply with its terms.

Briefing

Under clause 28, there must be two stages of consultation on the Code of Practice, one with the Equality and Human Rights Commission, with the Equality Commission for Northern Ireland and with representatives of landlords and landladies and of tenants and then a consultation on a published draft code. No pilot should take place without the Code being in place.

We are under no illusion whatsoever that a Code of Practice will resolve the problem of discrimination to which this clause will give rise. However, for the lucky few who are able to bring a challenge, a clear, accurate Code of Practice targeted specifically at landlords and landladies and their obligations under the Immigration Act might encourage country court judges, who must sit with lay assessors who are knowledgeable about race discrimination, at least in some cases, to consider awarding aggravated damages as well as compensation for loss and injury to feelings.

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).[12] 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.[13] The "section 4" system is an administratively complex system requiring the completion of a lengthy application form, 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

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

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

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.[14]

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.'*[15]

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.[16]

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.[17] However, those on section 4 receive even less. Every person supported under section 4, regardless of age or family status, receives £35.39.[18] 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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[14] 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

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

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

[17] 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

[18] 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.[19]

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.[20] 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.[21] 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. [22] 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.[23]

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

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

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

[21] 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.

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

[23] 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.[24] 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.[25]

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.[26]

Health

Amendment 85* John McDonnell, Jeremy Corbyn

Purpose: to omit clause 33 and thus the health levy/surcharge

Briefing

Clause 33 empowers the Secretary of State to impose a levy on all or some persons making an application to come to the UK from overseas or to remain in the UK. The Secretary of the State has the power to impose a charge on anyone with limited leave.

The proposal is not that migrants should pay an additional sum for their health care. What is proposed is that migrants should pay an additional sum for their health care and that of other migrants.

The National Health Service is currently paid for through a system of general taxation, from each according to his/her liability to taxation to each according to his/her needs to use the service[27].

The proposal that a group be singled out and its members required to support each other is here applied to migrants. A similar approach could be taken to the elderly, the obese, smokers, those having children, or those with chronic conditions.

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[24] 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.

[25] 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.

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

[27] *Review of overseas visitors charging policy, Summary report*, Department of Health, April 2012, paragraph 7.

Not everybody makes a contribution to the National Health Service now. Babies and children do not and some children, including those who have made the most demands upon the health service in their childhoods, do not reach adulthood. Some severely disabled persons never make a contribution. Similarly with some persons with caring responsibilities. Persons who remain long term unemployed may never get the opportunity to make a contribution. As identified in the evidence paper that accompanied the Department of Health consultant, migrants are as likely, and given their demographic profile, may be more likely, than British citizens and the settled to contribute more than they put in[28].

The principles of a workable system and one that does not increase inequalities support each other and addressing health inequalities can bring "real economic benefits and savings[29]. The Government has long been on notice of the need to undertake a cost benefit analysis of charging for health care. The House of Commons Health Select Committee said back in 2006 that its members:

> *…were astonished that by the Department's own admission, these changes* [were] *introduced without any attempt at a cost-benefit analysis*[30]

Such cost benefit analysis as has been carried out does not appear to support charging. The evidence paper that accompanies the Department of Health consultation says that the effect of the charges deterring persons from coming to the UK is unlikely to exceed 0.5% of Gross Domestic Product in a given year.[31] But 0.5% of Gross Domestic Product in 2012 was eight billion pounds.[32] If, as per the consultation document, charges levied will total about one billion and will not all be collected, then it would appear that the costs look set starkly to outweigh the financial benefits. What is the point of spending funds the National Health Service does not have in levying charges that it cannot recover?

We reproduce the table 3 from the Department of Health evidence annexe[33]. It is a rough and ready calculation but it does serve to cast doubt on the £200 per year calculation and suggest that this is too high to accord with most notions of fairness. The justification for treating migrants differently from the resident population is stated to be the latter's long term connection with the UK. But if that is correct then over the course of a lifetime the British citizen or settled person will make the greater demands on the National Health Service associated with increasing age. Those migrants who remain in the UK long enough to make these demands will remain in the UK long enough to make contributions akin to those made by a British citizen or settled person. The figures for each age bracket are averages and include persons making very heavy demands on the National Health Service because of disability or chronic conditions. We suggest that such persons are under-represented among 'temporary' migrants and that a consideration of the demographic evidence as to

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[28] *Evidence to support review: policy recommendations and a strategy for the development of an Impact Assessment*, Department of Health, July 2013, page 14 and the references cited therein. See also Migration and health in an increasingly diverse Europe', Health in Europe 5, Rechel, B. et ors, *The Lancet*, Vol 381, April 6, 2013, pp1235-1243.

[29] *Fair society, healthy lives: the Marmot Review: strategic review of health inequalities in England post-2010*, Marmot, M., 2010. Accessed 22 August 2012 at http://www.marmotreview.org/AssetLibrary/pdfs/Reports/FairSocietyHealthy

[30] House of Commons Health Select Committee (2006) 'NHS Charges: Third Report of Session 2005-2006', HC 815-I, London: The Stationary Office. See also *Early Action: Landscape Review*, National Audit Office 2013.

[31] Department of Health, *Evidence to support review 2012 policy recommendations and a strategy for the development of an Impact Assessment*, July 2013, page 20.

[32] Gross Domestic Product for 2012 was £1,623.48 billion.

[33] *Sustaining services, ensuring fairness: Evidence to support review 2012 policy recommendations and a strategy for the development of an Impact Assessment,* Department of Health, 3 July 2013.

the health of migrants is required. Many migrants faced with, for example, a serious illness or an underlying health problem will chose to return to the country of origin to have it treated (as the Department of health consultation paper identified in Part Six is the case for British citizens). Against the spectre of health tourism, unquantified and ill-defined in the consultation and challenged by other careful studies[34], is the question of the circumstances in which migrants draw less heavily on the National Health Service than they are entitled to do.

Table 3: 2011-12 age- health care costs summary

Common Age Bands	Average HCHS[1] Cost / head 2011-12	Average Prescribing[2] Cost / head 2011-12	Average PMS[3] Cost / head 2011-12	HCHS + Mental Health + Prescribing + PMS £s/head	ONS 2011 Census based population (000s)	2011-12 Spend by Ageband (£000s)
0_4	489	24	210	722	3,329	2,403,519
5_14	457	28	56	540	6,058	3,274,101
15_44	559	66	88	714	21,511	15,348,081
45_64	1,213	193	152	1,558	13,480	21,006,649
65_74	2,993	401	253	3,647	4,592	16,748,065
75+	5,377	517	388	6,281	4,137	25,988,460
Total	**1,295**	**155**	**146**	**1,596**	**53,107**	**84,768,874**

Source: Estimates based on Nuffield G&A and Mental Health age cost indices and scaled to 2011 ONS Census population and spend from the 2011-12 DH Annual Report & Accounts.

The Government has long been on notice that it and its predecessors have failed to produce any evidence that would allow the existence of health tourism to be identified or its prevalence to be quantified. As long ago as 2007 the Joint Committee on Human Rights found that

> "*the Government has not produced any evidence to demonstrate the extent of what it describes as 'health tourism' in the UK*" .

As identified in the Department of health evidence document[35] a levy may lead to those who have paid it viewing themselves as having paid for National Health services and thus accessing these more than they would otherwise have done. While the evidence document inclines to conclude that this risk will not materialise, evidence from research should lead to caution[36]. The 2012 review identified that "…exempt visitors tend to use the NHS no more, and usually less, than the resident population.[37]" Those who have paid the levy may be anxious to get their money's worth, rather than, as is often the case at the moment, impressed at, and grateful for, the service they receive and keen to moderate their demands upon it.

We emphasise that very far from all those whom it is proposed to charge have a biometric residence document. Persons have an enormous variety of (non-biometric) different documents evidencing entitlement.

Many persons who do not yet have permanent residence are on a route to settlement and will settle in the UK. It is artificial to ignore this. It is not currently a requirement for UK nationals and the

[34] See, e.g. *The Myth of HIV Health Tourism*, National AIDS Trust, 2008.

[35] Page 18, disadvantages.

[36] 'A Fine is a Price', Gneezy, U & A Rustichini (2000) *Journal of Legal Studies*, Vol XXIX, January 2000. See 'Zero as a Special Price: The True Value of Free Products' Shampanier, K et ors (2007) *Marketing Science*, Vol 26, No. 6.

[37] *Op.cit.* page 15, paragraph 53.

settled that they have made sufficient contribution to UK tax and National Insurance before they can access the National Health Service, indeed many people cost the National Health Service more in their early years than they do again until they reach old age.

However, very many persons who will ultimately settle in the UK spend a very long time in the UK before they do so. Application fees are one reason: while paying for repeat applications for temporary leave could result in spending more than the settlement fee, a person may not have the larger fee at a given time. Some people do not manage to pass the English language test for many years, if at all. Others have criminal convictions. Criminal convictions that are spent are not treated as spent for immigration and nationality purposes[38]. A person sentenced to any period of imprisonment, however short, will have to wait at least seven years to be considered for indefinite leave to remain[39].

Changes to the immigration rules in July 2012[40] result in persons given leave to remain because of the UK's obligations under Article 8 of the European Convention on Human Rights being given limited leave and not being eligible for settlement until they have spent 10 years in the UK with limited leave[41]. In the light of this, it would appear inequitable to focus on immigration status and leave aside all considerations of length of residence.

It was suggested in the Department of Health evidence document[42] that permanent residents would be defined as those who have lived in the UK for a minimum of five years or those who have indefinite leave to remain in the UK and we consider that a cut-off is a necessary additional restriction in the light of the considerations identified above.

It is open to migrants to have private health insurance just as this is open to British citizens. We anticipate that many of those able to pay for private health insurance would chose to pay any National Health Service levy as well and we can think of few if any circumstances in which we should recommend that those able to do this did not do it.

If there is a health levy payable prior to arrival consideration should be given to tailoring it, through use of a multiplier such as those used in assessing earnings in the points-based system to ensure it does not present a barrier for those nationals of countries where earnings are low and currencies weak relative to the UK. This is also a reason for not making a person pay the levy for their entire period of leave up front: to do so exacerbates the effect of existing disparities. A person coming to work in the UK even from a poor country may see their earnings increase rapidly after arrival.

Any payment made as part of an application would have to be refunded if that application were unsuccessful.

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[38] UK Borders Act 2007, s 56A, see the Legal Aid Sentencing and Punishment of Offenders Act 2012, ss 140 and 141.

[39] See the Home Office Modernised guidance, General grounds for refusal, About this guidance: reasons for refusal and checks, Criminal history, Sentence thresholds, applications for indefinite leave to remain at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/general-grounds-refusing/about.pdf?view=Binary The "Modernised Guidance" is as hard to navigate and understand as it appears at first sight, if not worse.

[40] Statement of Changes in Immigration Rules HC 194.

[41] See e.g. the Immigration Directorate Instructions, Chapter 8, Annex, *Guidance on application of EX.1, Op cit. – consideration of a child's best interests under the family rules and in article 8 claims where the criminality thresholds in paragraph 399 of the rules do NOT apply*, Home Office, at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/IDIs/chp8-annex/ex1-guidance-1.pdf?view=Binary (accessed 23 August 2013).

[42] *Op. cit.* page 13.

Pregnancy

It was suggested in the consultation that additional charges would be levied for maternity services. We identify a risk of harassment in the context of identifying "pre-existing pregnancies". Pregnancy is not an illness and is thus arguably one area where people are most likely to attempt to manage alone. We have seen instances of this and there is evidence to support it in research among undocumented migrants[43]. Research has identified that some 83% of women first seek maternity care through their General Practitioner[44]. In their cross-European study, Doctors of the World found that on average 79% of respondents were not accessing antenatal care[45]. 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[46]. 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[47]. There are also risks to the health of the child, and of increased infant mortality[48].

Domestic violence

Women are more likely to be victims of domestic violence than men[49] and thus to be left without entitlement in the case of relationship breakdown on these grounds. Doctors may be the first people outside the home to learn of domestic violence[50]. Medical evidence may be needed by survivors of domestic violence whose relationship with their British or settled UK spouse or sponsor has broken down and who are seeking leave to remain under the domestic violence rule[51].

Amendment 87* John McDonnell, Jeremy Corbyn

Purpose: provides an exemption from all charges for services provided through Sexual Assault Referral Centres

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[43] Sigona, N., and V. Hughes, *No Way Out, No Way in, Irregular migrant children and families in the UK* Compas, 2012, (accessed 22 August 2012) at http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/NO_WAY_OUT_NO_WAY_IN_FINAL.pdf

[44] M. Redshaw, R. Rowe, C. Hockley, & P. Brocklehurst, Recorded delivery: a national survey of women's experience of maternity care 2006, National Perinatal Epidemiology Unit.

[45] Doctors of the World, *Access to Health Care for Vulnerable Groups in the EU in 2012*, 2012, page 10.

[46] *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

[47] 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.

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

[49] See the Office for National Statistics Statistical Bulletin: *Focus on violent crime and sexual offences* , 2011/13, England and Wales, 07 February 2013, available at http://www.ons.gov.uk/ons/dcp171778_298904.pdf (accessed 23 August 2013).

[50] See Identifying domestic violence: cross sectional study in primary care, Richardson, J., *BMJ* 2002:324.

[51] Immigration Rules, HC 395, paragraphs 289A to 289C.

Briefing
(from Rights of Women, which also supports proposals to omit the clauses on health from the Bill). Charging for NHS services creates a lacuna in which victims of sexual assault and rape who are subject to immigration control will faces charges for services provided in respect of after care, the gathering of forensic evidence and HIV prophylactics.

NHS England has direct responsibility for the commission of services for people who experience sexual assault and rape. In partnership with the police, the NHS provides sexual assault referral centres to enable victims of rape and sexual assault to undergo forensic examination for the purpose of evidence gathering, whether or not the victim chooses to report the matter to the police. In the Government's Call to End Violence Against Women and Girls, the Government highlighted the problem of rape and sexual assault as gendered violence, and in the Government March 2011 response to the Stern Review, stated that

> "The provision of multiple services in a safe and victim-centred environment should be the accepted standard." (page 13)

To expand sexual assault services, and in response to the Stern Review's highlighting of the patchy support available to victims of rape and sexual assault, the Government committed to transferring responsibility for gathering forensic evidence to the NHS (page 14). In the Call to End Violence Against Women and Girls, the Government highlighted their commitments to victims of rape and sexual assault. The initial strategic vision stated

> We need to improve our response to sexual violence overall and how we support the provision of services to victims of sexual violence to ensure they have access to adequate support. (page 15)

From 2013/14 commissioning for all sexual assault services falls to NHS England in combination with local authorities and police forces.4 These services therefore fall under the umbrella of public health services. However, in the consultation document in respect of the Immigration Bill, no mention was made in respect of an exemption to charging for sexual assault referral centres; nor was this raised in the public bill committee proceedings.

It is difficult to see how the Government's commitments to end violence against women and girls, and to improve services provided to victims of rape and sexual assault can be met when certain individuals will not receive either healthcare or forensic examination at the point of use.

The proposals for charging for health services at point of entry for those who are ineligible for free healthcare applies to victims of crime who access sexual assault referral centres.

The effects of charging for services include:
1. Charged services will limit the ability of the police to gather evidence, given that forensic examination takes place at a Sexual Assault Referral Clinic or GP regardless of whether the victim is self referred or reports the matter to the police.
2. This may lead to sexual offences that would otherwise result in conviction either not being charged, or not leading to conviction because of an absence of forensic evidence.
3. Those who have an irregular immigration status, such as victims of human trafficking, will be more reluctant to come forward at the risk of being charged for accessing services.

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[52]. 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[53]. There are also risks to the health of the child, and of increased infant mortality[54]. 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…*[55]

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.

New Clause 21 (Dr Stephen Lee and others) *Immigration: Prescribed Pathogens*

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[52] *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

[53] 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.

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

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

Presumed purpose Gives the Secretary of State power to make an order to requires persons applying for immigration permission to demonstrate that they do not carry Hepetitis B, HIV and such other "pathogens" as she may see fit to prescribe.

Briefing
No indication has been given as to why existing health checks, pre entry and by Port Medical Officers are felt to be inadequate to deal with any public health implications of different illnesses, nor how disability discrimination is to be avoided.

Clause 34

Amendment 86* John McDonnell, Jeremy Corbyn

Purpose: to omit Clause 34 and thus to provide that no charges can be levied for primary care or emergency services.

Briefing
In the case below, determined during the lifetime of the consultation, the Home Office had at the outset accused the appellant of health tourism.

***[…] (health claim: ECHR Article 8)* [2013] UKUT 00400 (IAC), 24 July 2013**

[…][56]… lived alone in Nigeria after being widowed … She was able to come to the United Kingdom in 2004 having secured, in the face of fierce competition, a scholarship … Soon after arriving in the United Kingdom to commence her studies… the appellant was diagnosed with end stage kidney failure. It is now accepted and no longer in dispute that she was unaware of this potentially fatal illness, or even that she was unwell at all, until after her arrival. The evidence establishes that to be unsurprising as the nature of that condition is such that a person in the claimant's position would most likely not have noticed any symptoms. …The claimant required dialysis…to remain alive … Her leave was progressively extended and, despite having to undergo dialysis several times each week, she graduated in 2008. Although granted a final extension of leave… so that she could attend her graduation ceremony, thereafter the respondent has refused all subsequent applications for further leave to remain…

In July 2009 the claimant received a kidney transplant and thereafter required carefully monitored medication to ensure that the level of that medication in her body is maintained at an appropriate level so that the transplanted organ is not rejected. Quite apart from that, monitoring is essential as too high a level of that medication in the body can prove fatal. She will always remain particularly at risk of infection, … While the claimant remains in the United Kingdom her life expectancy and her quality of life will be normal. It is, now at least, accepted by the respondent that she would not be able to access treatment in Nigeria and so would die within weeks. That is not because appropriate treatment and living conditions are not available in Nigeria but because she would not be able to afford to pay for them…

The issue at that appeal was a simple one but it was also a stark one: Was the refusal to grant leave, with the accepted consequence that the claimant would die soon after removal, such as to breach the claimant's right to respect for her private life, as protected by article 8 of the ECHR, or was it a proportionate

[56] We have omitted the name in this public submission.

interference with that right, given that the claimant is not a national of this country and had been admitted for a temporary purpose which has now been concluded?...

The appeal came before First-tier Tribunal Judge […] on 21 November 2012….the judge… allowed the appeal. Our task is to examine the challenge brought by the respondent to that decision…The judge summarised the respondent's case as it was argued before him as follows: "…. [The respondent's representative] *conceded that she could not afford the treatment in Nigeria and would therefore inevitably die… It was however proportionate to remove her"*[57]

The evidence demonstrated that the Home Office was wrong to accuse the appellant of health tourism. The Home Office then resisted the conclusion that were the appellant returned to Nigeria she would die within weeks from kidney failure. The evidence showed that the Home Office was wrong. For cases started after 1 April 2013, there has been no legal aid for immigration, as opposed to asylum, cases and thus it is very likely that there would have been no successful challenge to the accusation of health tourism. The Home Office then argued that the appellant's death was a proportionate price to pay for immigration control. This is a question that falls to be answered by reference to the law on Article 8 of the European Convention on Human Rights. Again, for cases started after 1 April 2013 there is no legal aid to assist an appellant in putting a case and this appellant, given her straitened circumstances, would have had to represent herself and herself make the case as to why she should be allowed to live.

The Health and Social Care Act 2012 placed duties upon the Secretary of State[58] and on Clinical Commissioning Groups[59] to go beyond not increasing health inequalities and to reduce health inequalities[60] . These obligations are not currently being met[61].

We have seen in the past year the Home Office subcontract to Capita Plc. to text and telephone persons who are allegedly migrants with no leave telling them to leave the UK. British citizens, nurses, investors with a million pounds invested in the UK, all have been recipients of these texts. Which is no surprise. Capita has been working from information from the Home Office database which both reflects the complexity of current immigration law and is not up to date[62].

The proposed system would increase inequalities, both among the population whose eligibility is limited and the British or settled persons, EEA and foreign nationals entitled to access to the National Health Service.

In recent months we have seen the Home Office launch a campaign with advertisements on vans in particular London boroughs saying that there are 106[63] "illegal immigrants" in the area and advising those persons to send a text to get in touch with the authorities to arrange to "go home" or face arrest. Following a legal challenge based on the Government's failure to comply with the public

[57] See endnote.

[58] National Health Service Act 2006, s 1C.

[59] National Health Service Act 2006, s 14T.

[60] Health and Social Care Act 2012, section 62(4); National Health Service Act 2006, s 1C, 13G and 14T.

[61] See, for example, *Growing up in the UK – Ensuring a healthy future for our children*, British Medical Association (2013).

[62] See further *Capita's work for the UK Border Agency*, Oral and written evidence *29 January 2013, Paul Pindar, Chief Executive, Andy Parker, Joint Chief Operating Officer, and Alistair MacTaggart, Managing Director, Secure Border solutions, Capita Plc* , report of the Home Affairs Select Committee HC 914-I, published on 11 April 2013.and ILPA's August 2013 response to the Home Office **consultation** *Strengthening and simplifying the civil penalty scheme to prevent illegal working.*

[63] In all the areas the same figure "106 arrests" was used, a matter that is now one of the subjects of an investigation by the Advertising Standards Authority.

sector equality duty under the Equality Act 2010, the Government confirmed that if any further campaigns of a similar nature are planned, they will carry out a consultation with local authorities and community groups[64].

Both the Capita exercise and the campaign involving the vans have been of questionable legality and the subject of considerable controversy[65]. Both are object lessons in how difficult it is to produce a workable and efficient system against the backdrop of an enormously complex immigration system, longstanding problems in Home Office record keeping and delays and backlogs in immigration casework. Both are object lessons in how a failure to promote equality can leave people, be they persons under immigration control or British citizens, vulnerable to abuse and victimisation.

A survey of 1449 people who visited the charity Doctors of the World in London found that 73% of these persons were not registered with a General Practitioner even though they were eligible for registration and that some 20% were deterred from seeking care for fear of the immigration control consequences[66]. This is in line with the experiences of ILPA members working with poor migrants.

Insofar as poor migrants live in poor areas, in poor housing, or work in exploitative environments, where they are poorly paid, they are likely to come into contact with poor British citizens and settled persons also living in that poor housing or work in those environments. Insofar as the proposals affect migrants' access to healthcare in respect of infectious diseases, they are likely disproportionately to affect those poor British citizens and settled persons. Thus not merely failing to reduce inequality but exacerbating existing inequalities.

Imposing charges hits those who have least money to pay hardest. These are also the people least likely to possess documents such as passports (because they cannot afford them and/or not need them because they cannot afford to travel.) Many of the protected characteristics are also relevant to a person's ability to speak up for themselves and negotiate complex bureaucracies. Those least able to negotiate officialdom will be hit hardest by the new bureaucracy[67].

Many persons in the UK without leave will be unable to pay. They may be persons whose claim for asylum has failed but who cannot be returned to their country of origin because they cannot be

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[64] *Home Office Agree Never To Run Van Adverts Telling Migrants To Go Home Again Without Consulting,* Press release by Deighton Pierce Glynn solicitors of 12 August 2013.

[65] Examples include: *Capita's work for the UK Border Agency, op.cit, supra. 'You are required to leave the UK': Border Agency contractor hired to find illegal immigrants sent them TEXTS"* Daily Mail 11 January 2013, available at http://www.dailymail.co.uk/news/article-2260667/UK-Border-Agency-contractor-hired-illegal-immigrants-send-TEXTS-warning.html#ixzz2bm4JCfg2 (accessed 12 August 2013); ICO to investigate SMS messages sent to immigrants by Capita, Computer World 15 January 2013; *Nigel Farage attacks Home Office immigrant spot checks as 'un-British'*, The Telegraph, 2 August 2013; *Vince Cable MP*, BBC 28 July 2013, available at http://www.bbc.co.uk/news/uk-politics-23481481 (accessed 12 August 2013), *Bishops condemn Home Office 'go home' campaign*, Ekklesia, 12 August 2013, available at http://www.ekklesia.co.uk/node/18785 (accessed 12 August 2012), non-governmental organisations such as Show Racism the Red Card (see http://www.srtrc.org/news/news-and-events?news=4511 accessed 12 August 2013) and Liberty *"Go Home" vans, nasty racist and likely unlawful* 1 August 2013, see https://www.liberty-human-rights.org.uk/news/2013/go-home-vans-nasty-racist-and-likely-unlawful.php (accessed 12 August 2013).

[66] Doctors of the World UK *The importance of equitable access to healthcare for people in England: a policy briefing*, 2013, see http://www.appgmigration.org.uk/sites/default/files/Doctors%20of%20the%20World%20-%20access%20policy%20briefing%2009072013.pdf (accessed 23 August 2013).

[67] See Stagg, H.R. et. al., *Poor uptake of primary healthcare registration among recent entrants to the UK: a retrospective study*, 2012;2:e001453, doi :10.1136/bmjopen-2012-001453.

documented or because travel to their country is too unsafe to be undertaken, or because of their own general health or circumstances: for example they may be dying and too ill to fly, or they may be unable to fly by reason of pregnancy. They may be overstayers or persons who have so far escaped detection. It is likely that if they face registration and if they face charges for treatment these people will not present for treatment[68]. If they are charged, they will not be able to pay. This is thus a policy question: how does the Department of Health want them to behave?

We recall that in 1999, when the Home Office was setting up the now notorious "National Asylum Support Service" it considered the circumstances of those who presented as destitute but had wealth about their person, for example in the form of a gold wedding ring. It was suggested by the Home Office that a person should sell their wedding ring to be treated as destitute. It was put to the Home Office: what did they want to achieve? What did they want to happen to the person who, although homeless and starving, would not sell their wedding ring?[69] In the end the Home Office opted for according a nominal value to wedding rings, etc. This proved too bureaucratic and the controversial proposals were never enforced.

The ordinary residence test has a complex history as it has developed through case law but the meaning now established by the courts gives effect to the policy intentions that shaped the definition and guidance addresses its application in a broad range of circumstances[70]. It is now a bespoke product. The guidance highlights that "The well being of people is paramount in all cases of dispute."

The current definition is not affected by changes in particular immigration categories. Such changes are extremely frequent as an examination of the statements of changes in immigration rules reveals[71]. For example in the first seven months of 2013 there were been statements of changes in January, February, March (twice), April and July. Changes often take place at very short notice because the Home Office is trying to avoid a flurry of people squeezing in "under the wire" between the announcement of a change and a change being made.

Trafficking

It was stated in the *2012 Review of overseas visitors charging policy*, that the majority of migrants charged by the National Health Service are persons without the required immigration clearance or documentation[72]. They include refused asylum seekers (some, but not all, of whom would benefit from an exemption for those receiving support under section 4 of the Immigration and Asylum Act 1999) and overstayers. Many will be unable to pay the charges for healthcare they receive. Charges

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[68] See *First do no harm: denying healthcare to people whose asylum claims have failed*, Kelly, N. & J. Stevenson, 2006, London, Oxfam and Refugee Council .

69 See Immigration and Asylum Bill, Special Standing Committee Tuesday 11 May 1999 http://www.parliament.the-stationeryoffice.co.uk/pa/cm199899/cmstand/special/st990511/am/90511s09.htm Ms Abbott: *Is the Minister suggesting that asylum seekers should sell their jewellery, perhaps their wedding rings, as an alternative to the Government meeting their moral and international responsibilities to provide a reasonable level of support?* Mr. O'Brien*: I certainly am suggesting that.*—[Interruption – *[recorded in contemporary accounts as a Conservative back bencher saying 'You'll be wanting the gold fillings out of their teeth next' – see for example* D Guttenplan's review of Louise London's book *Whitehall and the Jews 1933-48*, in the London Review of Books, Vol. 22, No. 13 , 6 July 2000 pages 28-29.

[70] See *ORDINARY RESIDENCE: Guidance on the identification of the ordinary residence of people in need of community care services,* Department of Health, April 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/185851/Guidance_on_the_identification_of_the_ordinary_residence_of_people_in_need_of_community_care_services__England_V2.pdf accessed 25 July 2013.

[71] See Statements of Changes in Immigration Rules (accessed 25 July 2013), at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/

[72] *2012 review of overseas visitors charging policy: Summary Report,* International Policy Team, Department of Health, 2013.

levied are likely never to be recouped. See the conclusion in the evidence document accompanying the consultation: debt recovery is difficult and "in most cases the burden falls on the state" [73]. Again, there is a risk that people do not access healthcare until they require a (costly) emergency intervention.

We highlight particular risks to persons unlawfully present who have been trafficked to the UK and have not yet been identified as trafficked. The UK Human Trafficking Centre in its 2012 baseline assessment identified that over half (54%) of all potential victims of trafficking in the UK were not referred for identification by the "competent authority" within the "National Referral Mechanism[74]. In the press release introducing the 18 April 2013 Department of Health guidance on trafficked persons[75] it is acknowledged that

> *In many cases, victims need treatment for health problems so NHS staffs are uniquely placed to spot, treat and support victims of trafficking* [76].

Similarly there is a risk that because families stay away from health professionals, child abuse and child neglect are not identified[77].

Other groups at risk

Children and care leavers/former relevant children 18-25 years old as defined under leaving care legislation[78].

Persons granted humanitarian protection or discretionary leave to remain. Persons with humanitarian protection are unable to return to their country of origin as are many people with discretionary leave whose claims are often founded on human rights.

Those persons whose claims for asylum have failed but who are not, or not yet, in receipt of section 4 support. There are people who remain in the UK after their claims for asylum have failed and all appeal rights have been exhausted, or when they are otherwise at the end of the line, for example because documents cannot be obtained on which they could be removed, because they are stateless, because it is not safe to travel to their country or because they are unable to travel, for example because they are in the advanced stages of pregnancy, or are very ill. Support is provided under section 4 of the Immigration Asylum Act 1999 to those persons in this situation who are destitute. As part of the application it is necessary to evidence that one is unable to leave the UK. Some persons would be eligible for section 4 support because they are destitute but are unable to evidence that they are unable to leave the UK without evidence of their current state of health. They are in a chicken and egg situation if they cannot get health care until they have obtained section 4 support; they cannot demonstrate eligibility for section 4 support without getting health care.

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[73] Department of Health, *Evidence to support review 2012 policy recommendations and a strategy for the development of an Impact Assessment*, July 2013, page 11.

[74] *A b aseline assessment on the nature and scale of human trafficking in 2011* UK Human Trafficking Centre 2012, Serious and organised crime agency Intelligence Assessment.

[75] See https://www.gov.uk/government/news/help-for-nhs-staff-to-spot-and-support-trafficking-victims (accessed 22 April 2013).

[76] *The* guidance is *Help for NHS staff to spot and support trafficking victims:* Department of Health, 18 April 2013.

[77] *Safeguarding Children Across Services: Messages from research on identifying and responding to child maltreatment,* Davies, C., and H. Ward, H, 2011 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184882/DFE-RBX-10-09.pdf (accessed 22 August 2013) and see the Department of Education 's *Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children* , 2013.

[78] The Children Act 1989 as amended by the Children (Leaving Care) Act 2000.

New Clause 19 Exception to charging for accident and emergency services (John McDonnell, Jeremy Corbyn)

Purpose: Prohibits the imposition of charges for accident and emergency services unless and untl the person is accepted as an inpatient or is given and attends an outpatient appointment

Briefing

The amendment closely replicates the current exemption in the 2011 charging regulations (SI 2011/1556) on accident and emergency. ILPA supports this amendment.

Bank Accounts

Clause 35 Prohibition on opening an account for disqualified persons

Starred amendment in the name of John McDonnell (number not known)

Clause 35, page 28, line 36 at end insert-

> "or has made a claim for asylum which has not yet been determined by the Secretary of State or has been refused and an appeal against that refusal is pending
>
> ( ) claim for asylum has the same meaning as in section 94 of the Immigration and Asylum Act 1999;
>
> ( ) an appeal is pending for the purposes of this section when it is pending under the Nationality, Immigration and Asylum Act 2002, s 104"

Purpose

Removes from the ambit of the definition of a disqualified person a person whose asylum claim has not yet been finally determined.

Briefing

The clause as drafted appears to exclude persons on temporary admission from its ambit. Those most likely to be on temporary admission for very lengthy periods are persons seeking asylum. Many will be very poor, but some, for example those whose claims have been pending for more than a year and who can find work in a shortage occupation may be allowed to work. Some persons seeking asylum may be able to get some money out of their country of origin when they flee or even subsequently. It is rare, but it does happen. Those persons should be able to have a bank account.

There are other ways of achieving this result, for example the Secretary of State could indicate that she will exercise her discretion under subclause 25(3)9c) in their favour. But they should not be forgotten.

Amendment 88* John McDonnell, Jeremy Corbyn

Purpose: Omits clause 38 and thus the power to alter the categories of financial institutions to which clauses 35 to 37 apply and the categories and definitions of accounts to which the provisions apply. To deny the Treasury to amend primary legislation by secondary legislation.

Briefing

Clause 38 contains Henry VIII powers and as such should be subject to special scrutiny. It is subject to the affirmative procedure but the affirmative procedure is not a get out of jail free card where such powers are concerned. It may provide a safeguard where such a power is considered by parliament to be essential but does not obviate the need to scrutinise whether the power is essential. Something has gone wrong with the Delegated Powers Memorandum on this point, for it says

> *...it is possible that in future the government may need to amend the definitions in order to alter the range of institutions falling bring other institutions within the scope of the restriction*

As drafted the clause could be used to deny persons without leave, including persons seeking asylum, anywhere where they could safely deposit their money. That is a Henry VIII power indeed and parliament should withhold it.

Work

New Clause 17 (Dr Julian Huppert, Sarah Teather) *Permission to work*

New Clause 20 (Dr John McDonnell, Jeremy Corbyn) Permission to work, No.2

Purpose

To give permission to work to persons seeking international protection who do not receive a decision on their asylum application within six months.

Briefing

ILPA supports New Clause 17 our preferred of the two amendments. The text of New Clause 17 currently forms a private members Bill that is before the House of Lords sponsored by Lord Roberts of Llandudno. Currently those seeking asylum are only allowed to work after 12 months without an initial decision and then only if they can qualify for a limited list of skilled jobs. The integration of those recognised as refugees is made more difficult by their inability to work during the, often all too-lengthy, asylum determination procedure, while those whose claims for asylum do not succeed return to their country without having maintained or improved skills that could benefit that country. The State bears the cost of supporting persons who would be happy to support themselves.

Driving licences

Starred amendment in the name of John McDonnell. Number not known

Clause 41 Grant of Driving licences: residence requirements

> "unless that person has made a claim for asylum which has not yet been determined by the Secretary of State or has been refused and an appeal against that refusal is pending
>
> > ( ) claim for asylum has the same meaning as in section 94 of the Immigration and Asylum Act 1999;
> >
> > ( ) an appeal is pending for the purposes of this section when it is pending under the Nationality, Immigration and Asylum Act 2002, s 104"

Purpose

To allow persons seeking asylum whose claim has yet to be determined to drive.

Briefing

While debating driving licences parliament should consider the position of persons seeking asylum, who may have a lengthy wait for a decision and in the meantime lose skills that will help them integrate as refugees, or help them on return.

As to an inspiring story of how driving can promote integration, see the 2013 winner of the Big Society award, UR4Driving at The Upper Room. UR4Driving is not a project for refugees or migrants but for ex-offenders, although in its more general work the charity works with British citizens and migrants together. See http://www.theupperroom.org.uk/ur4-driving/background/

Clause 41 and 42 are among the measures by which the Government seeks make the UK "*a more hostile place for illegal migrants.*"[79] Clause 41 amends section 97 of the Road Traffic Act 1988 so as to add to the circumstances, in which a British driving licence must be provided, the new requirements of new section 97A (to be added by clause 41). The new requirements essential require lawful residence on the part of the applicant, who must not be a person requiring but not have leave to enter or remain (new section 97(A)(2)). However, as the shadow Home Secretary alluded to at Second Reading, the current position is that, save for nationals of a European Economic Area country, six months' leave is required to obtain a British driving licence.[80] The clause makes provision for Northern Ireland.

Placing the scheme on a statutory footing risks adding to the workload of the already much overstretched former UK Border Agency.

Clause 42 Revocation of driving licences on the grounds of immigration status

Starred amendments in the name of John McDonnell. Number not known.

First amendment

Clause 42, page 33, line 22 after "it" insert unless that person has made a claim for asylum which has not yet been determined by the Secretary of State or has been refused and an appeal against that refusal is pending
( ) claim for asylum has the same meaning as in section 94 of the Immigration and Asylum Act 1999;
( ) an appeal is pending for the purposes of this section when it is pending under the Nationality, Immigration and Asylum Act 2002, s 104"

Second amendment

Clause 42, page 34, line 6 after "it" insert unless that person has made a claim for asylum which has not yet been determined by the Secretary of State or has been refused and an appeal against that refusal is pending
( ) claim for asylum has the same meaning as in section 94 of the

[79] Home Secretary, Second Reading, Hansard, 22 Oct 2013 : Column 163
[80] Hansard, 22 Oct 2013 : Column 171

Immigration and Asylum Act 1999;
( ) an appeal is pending for the purposes of this section when it is pending under the Nationality, Immigration and Asylum Act 2002, s 104"

Purpose
To ensure that the licences of persons seeking asylum whose claim has yet to be determined are not revoked. The first amendment addresses the Road Traffic Act 1988, the second the Road Traffic (Northern Ireland) Order 1981 (SI 1981/154).

Third amendment

Clause 42, page 33, line 24, leave out lines 31 to 40

Fourth amendment

Clause 42, page 34 line 10, leave out lines 10 to 19.

Purpose

Removes the prohibition on a judge of the County Court or sheriff, to whom a person can appeal the revocation of their licence, considering the merits or otherwise of the refusal of leave or the person's having been granted leave.

The first amendment addresses the Road Traffic Act 1988, the second the Road Traffic (Northern Ireland) Order 1981 (SI 1981/154).

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

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.

Starred new clause in the name of John McDonnell, number not known

A person (P) shall be entitled to a residence permit for one year for rest and reflection where:-
a) P is married, in a civil partnership, or in a durable relationship with someone who is lawfully in the UK; and
b) P is in the UK as a dependant of that other person; and
c) The relationship breaks down as a result of domestic violence
The residence permit shall be available to P and any dependants already in the UK with entitlement to work and access public funds.

Briefing
(From Rights of Women) Following the Call to End Violence Against Women and Girls Action Plan 2013 The Government introduced the Destitute Domestic Violence Concession – a three month

period of leave to allow spouses and civil partners of those settled or British citizens limited leave with access to public funds while making an application for Indefinite Leave to Remain.. In the ministerial foreword,the Home Secretary states:

> "*I am determined to see continued reductions in domestic and sexual violence. But I am also determined to see a society where abuse is no longer tolerated, where all businesses and organisations offer support to those who may be victims, where those affected by domestic or sexual violence feel confident in coming forward to report their experiences and are fully supported for doing so, where female genital mutilation and forced marriage are no longer practiced, and where the criminal justice system rightly punishes those who would abuse and blight the lives of others.*"

At the time, the then immigration minister, Damian Green MP, said

> "*No one should be forced to stay in an abusive relationship and this scheme helps victims in genuine need escape violence and harm and seek the support they deserve.*" (seehttps://www.gov.uk/government/news/support-for-victims-of-domestic-violence)

Whilst the domestic violence rule and destitute domestic violence concession enables a small group of people to be able to remain in the UK permanently in some circumstances, there is no avenue for protection for those who are unable to benefit for the rule or who seek only temporary support in the UK. The current piecemeal approach, means some may benefit from the domestic violence rule whilst others might secure limited leave to remain if there are ongoing criminal or civil proceedings. If a victim of domestic violence is required to leave the UK immediately, they may be leaving employment, being removed from their support networks and services and uprooting their children.

The aim of the amendment is to simplify the position of vulnerable victims by guaranteeing them a period of safety with access to services and benefits. It is intended to augment current provisions for victims of domestic violence. It does not alter the right to apply for Indefinite Leave to Remain (ILR) for spouses or civil partners of British citizens or those settled here, but should act in tandem to extend support available to victims of domestic violence and allow them a period in which to consider any applications they may make, or **allow them to leave the UK legally having made appropriate arrangements.**

The use of a residence permit is analogous with the language of the Council of Europe Convention of Action Against Trafficking in Human Beings (Article 13); and is intended to entitle victims of domestic violence to a period of rest and reflection.

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.* [81]

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, ..."* [82]

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

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.

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[81] *A Points-Based System: making migration work for Britain* Cm 6741, Home Office, March 2006, paragraph 20.

[82] Hansard HC Deb 6 Mar 2013 : Column 1500.

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.

Amendment 83* Jeremy Corbyn, John McDonnell

Purpose To require that before any of the provisions in the chapter on residential tenancies come into force, the Code of Practice on discrimination must have been issued.)

Briefing
See Briefing to Amendment 82

Starred amendment (number not known) John McDonnell

Clause 65, page 50, line 27, at end insert-

Sections 15 to 32 of this Act shall come into force on a day to be appointed, being no earlier than the day on which an order made by the Lord Chancellor under s 9(2)(a) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in respect of civil legal services in connection with applications under the Housing Act 1996, the Homelessness Act 2002 comes into effect.

Purpose: Provides that Part 3 Chapter 1 (Residential Tenancies) cannot come into force until an order has been made dealing with legal aid for services in connection with homelessness. The nature of the Order is not addressed in this amendment save that it will be in connection with the provisions of the specified Acts and that legal aid will be extended, not reduced.

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.

Government New Clause 18 Deprivation of citizenship: conduct seriously prejudicial to vital interests of the UK

See separate briefing.

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