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DETENTION, DEPORTATION AND REMOVAL
ILPA's PROPOSALS FOR REFORM

The Immigration Law Practitioners' Association is a professional association of lawyers, advisers, academics and others interested in the development of immigration law. It has over 760 members who practise in all areas of immigration, nationality and refugee law. Many members represent asylum-seekers who are detained and threatened with deportation or removal, and others who have breached the immigration laws but have strong compassionate grounds for remaining, or who are appealing against deportation or contesting their designation as illegal entrants. From this experience, ILPA believes that the immigration laws and practice in relation to forcing people to leave the country are deeply flawed and urgent action is needed to reform and improve them. This paper gives a summary of ILPA's concerns and recommendations. It is one of a series of papers on different aspects of the law.

MINIMUM STANDARDS IN RELATION TO DEPORTATION AND REMOVAL

1. All people threatened with expulsion from the UK must have the right to appeal, on all aspects of their case, before being forced to leave the country.
2. All those appealing against expulsion decisions must have the right to representation at their appeal. Legal aid must be available for this.
3. If a settled person is not re-admitted to the UK after travelling abroad, this should be treated as a form of deportation and there should be a right of appeal.
4. Persons lawfully residing in the UK for 10 years or more should only be expelled if it is proven that they have breached national security. They must have a right of appeal in a forum with power to consider all the merits of the case.
5. Persons with strong family ties or long residence from infancy should not be expelled. Parents of children who are British citizens (or entitled to register as British citizens) should not in general be expelled. In addition, parents with care and/or access should be treated in the same way.
6. The courts should no longer have the power to recommend deportation in criminal matters, as it amounts to double punishment. If this power is retained, when deportation is recommended after conviction for a criminal offence the *Bouchereau* test/principles (that deportation should only be contemplated if the person is likely to reoffend) should be applied.
7. The European Convention on Human Rights should be incorporated into UK law.
8. The European Social Charter 1961 should be incorporated into UK law.
9. Detention must be kept to an absolute minimum and only when removal is imminent, following an unsuccessful appeal. People must not be detained for more than 48 hours. If this is not accepted, there must be regular reviews of detention and the right to apply for bail.
10. All immigration and appellate authorities must adhere to the letter and the spirit of the UN Convention Relating to the Status of Refugees and its Protocol, all other international instruments the UK has signed and all aspects of Community legislation.

Some of these proposals are self-explanatory, such as the final statement of principle. The government is beginning the process to implement some others, such as the incorporation of the ECHR and the establishment of a Special Immigration Appeals Commission to hear appeals in cases where national security is raised. Others may need further explanation. ILPA is in communication with the Home Office and with Ministers who are currently reviewing many aspects of immigration and asylum law and practice and we hope our concerns will be met.

Elaboration of some points

All people threatened with expulsion from the UK must have the right to appeal, on all aspects of their case, before being forced to leave the country.

The current law

People who are not British citizens and who do not have the right of abode can be deported if they overstay their permission to remain or breach other conditions of stay, if the Home Secretary deems their deportation to be conducive to the public good, if they are convicted of a criminal offence and the court recommends deportation, or if they are the spouse or child under 18 of a person being deported. There is a right of appeal against the Home Secretary's decision to deport. This appeal can consider all the facts and merits of the case only if the person was last given leave to enter more than seven years before the date of the deportation decisions (although this does not apply where the decision is based on grounds that deportation is conducive to the public good). If the person was last given leave to enter less than seven years before the decision, the appeal is only on whether the Home Secretary had the power in law to make the decision and the facts of the case, unless it was an asylum application, cannot be argued.

People treated as illegal entrants have no right of appeal against removal while they are in this country, unless they have claimed asylum or allege that they are not the person against whom a current deportation order is signed. Illegal entry includes entering without being examined by an immigration officer, entering on false documents, or in breach of an extant deportation order, or deceiving or concealing information from an immigration officer.

Injustice of the current law

It is wrong and arguably, in some circumstances, contrary to the provisions of the European Convention on Human Rights, that people should not be able to contest decisions made against them on so important a matter as having to leave the country in which they are living. When the Home Office alleges a person has entered illegally there is no judicial forum in which this can be contested, regardless of how long the person has lived here or however strong family or compassionate reasons there may be.

ILPA's recommendations

- All people threatened with expulsion from the UK should have a right of appeal against this, at which all the facts of the case, and the Home Office's exercise of discretion, can be considered.
- In deciding a case, the appellate authorities must balance any public interest in favour of expulsion against the compassionate circumstances of the case.

All those appealing against expulsion decisions must have the right to representation at their appeal. Legal aid must be available for this.

The present position

Two organisations, the Immigration Advisory Service and the Refugee Legal Centre, are funded by the Home Office in order to represent, free of charge, at appeals. Other organisations, such as law centres and advice centres and community organisations may do so. There is no regulation of commercial advisers, who may have no legal qualifications or knowledge. They may advise and represent people, with no comeback for the damage they do. There is no limit to the fees they may charge. There is no legal aid or green form for representing at hearings, so solicitors and barristers charge for doing so.

The problems

The RLC and IAS are heavily overworked and may not be able to deal with all the people who want them to take their cases, or to work in the depth and thoroughness which is necessary. Many areas do not have law centres or other agencies which can represent them, forcing them to go to solicitors they cannot afford and who may not have experience or expertise in immigration or refugee law. Some consultants and agencies are incompetent, inefficient or corrupt and seriously prejudice their clients' cases.

ILPA's recommendations

- Legal aid, or extensions under the green form scheme, should be available for representation before adjudicators, special adjudicators and the Tribunal.
- There must be a system of licensing advisers and consultants to ensure a basic level of competence before they can act.
- ILPA is continuing to address the problem of incompetent solicitors. Continuing consultation with the Government in relation to unscrupulous advisors is essential.

If a settled person is not re-admitted to the UK after travelling abroad, this should be treated as a form of deportation and there should be a right of appeal.

The current situation

The immigration rules state that returning residents should be admitted if they:

- had indefinite leave to enter or remain in the UK when they last left, and
- they had not been away from the UK for more than two years; and
- they did not receive assistance from public funds towards the cost of leaving the UK; and
- they now seek admission for the purpose of settlement.

People may still be re-admitted after spending more than two years out of the UK if there are special circumstances. The rules only mention one instance: 'if, for example, he has lived here for most of his life' but other reasons may also be considered. Returning residents, even if visa nationals, do not need visas. But if they do not have them this means, in common with all others refused entry at the ports, there is no right of appeal until after they have been sent back.

People may be admitted not as returning residents but as visitors, if the immigration officers do not believe that they intend to settle. Although they may then apply to the Home Office to correct the mistake, the immigration rules make no provision for this. If the Home Office refuses, there may be a right of appeal but because the application cannot fit into the rules, the appeal cannot succeed. It is only if they are given leave to enter as a visitor and they intended all along to enter the UK as a resident that they can appeal against the initial refusal to renew their indefinite leave to remain.

The need for change

The situation is clearly unjust. There is a serious risk that immigration officers may use their discretion in an unjustified way, or make decisions on the basis of inadequate information. By the fact of having qualified for settlement in the past, the person must have substantial ties with the UK, for such reasons as length of previous residence, presence of close family here. It is wrong that they can be capriciously refused entry to the country where they have lived in the past, with no meaningful right of appeal.

ILPA's recommendations

- the law must be amended to give an in-country right of appeal, on all the merits of the case, for people refused entry as returning residents
- returning residents admitted as visitors instead of for settlement must have a full right of appeal, on all the merits of their case, if an in-time application for settlement is refused.

Persons lawfully residing in the UK for 10 years or more should only be expelled if it is proven that they have breached national security. They must have a right of appeal against expulsion which can consider all the merits of the case.

The current position

Length of residence in itself does not give people any claim under the rules to remain. Four years in a particular category, for example work permit holder, retired person of independent means, allows a person to settle, but others may never gain this right through residence alone. It is Home Office practice to grant settlement to people who have lived legally in the UK for ten years or more, but this is discretionary and there is little chance of winning an appeal against refusal.

The need for change

Length of residence means that a person will have made ties and put down roots in the UK. It is likely that families will have children born here, who may be entitled to register as British citizens after living here ten years. All these connections should be strong grounds against deportation.

ILPA's recommendations

- when people have lived in the UK for ten years or more, they should qualify under the immigration rules for settlement
- people who have lived here lawfully for ten years or more should only be deported if it can be proved that they are a threat to national security. They must have full rights of appeal against the decision.

Persons with strong family ties or long residence from infancy should not be expelled. Parents of children who are British citizens (or entitled to register as British citizens) should not in general be expelled. In addition, parents with care and/or access should be treated in the same way.

The current law

The current law gives no rights to remain for family reasons. Because allowing people to stay is always discretionary, immigration status outweighs family ties. Thus people who are married to British citizens or settled people can be refused leave to remain because the marriage took place after a previous decision to refuse leave to remain on another basis. Having children born in or living in the UK gives the parents no rights. By contrast European Union citizens exercising Treaty rights in the UK are entitled to have their spouses and children up to the age of 21 join them, even if the spouse has been refused leave to remain in the UK on another basis.

Children born in the United Kingdom after 1 January 1983, when neither parent is British or settled, are not born British citizens. They become eligible to register as British citizens after having resided for 10 years or if a parent is granted settled status (indefinite leave to remain). But before this, they have no specific rights in the UK. There is no provision for unmarried co-habitees unless they are legally unable to marry. They and partners in same-sex relationships will be considered only under a restrictive concession to the rules, after they have been together for at least four years.

Injustice of current law

The Home Office practice is that people who have lived here for 10 or 14 years should not be expelled. This long residence concession does not appear to have been drafted with children in mind, but rather adults. It is unfair to expect children who have spent, for example, up to five of their early developmental years in the United Kingdom to sever their ties and start life again in a foreign country.

Parents should not be denied the right to be with their British citizen children (or those entitled to register as British citizens). In addition, parents with care and/or access should not be denied this. British children should have the right to have their parents living with them in the United Kingdom.

Many marriage applicants are refused leave to remain because of the timing of their application (e.g. because it is made after the expiry of their permission to stay or after a decision to refuse leave to remain on another basis). This is despite Home Office acceptance in many cases that the marriage or relationship is genuine. It negates the right of British nationals and those with settled status to a family life of their choice in the UK.

ILPA's recommendations

The following people should not be expelled from the UK:

1. People with strong family ties in the UK.
2. Parents of children who are British citizens or entitled to register as British citizens.
3. Parents with care and/or access to their children in the UK.
4. People with long residency since childhood.
5. All people involved in genuine marriages/relationships, whether heterosexual or same-sex, no matter the timing of their marriage or the development of their relationship.

The courts should no longer have the power to recommend deportation in criminal matters, as it amounts to double punishment. If this power is retained, when deportation is recommended after conviction for a criminal offence the *Bouchereau* test/principles should be applied.

The current situation

At present, European Union (EU) and non-European Union (non-EU) nationals may have different principles applied by the courts to their case, when the court is considering deportation. EU nationals, who often only have temporary or limited rights to remain in the UK, are treated more favourably than non-EU nationals, even if the latter have indefinite leave to remain (permanent residency) in the UK. EU Directive 64/221 makes it clear that expulsion, in spite of the free movement rights of European Union citizens, would have to be "based explicitly on the personal conduct of the individual concerned", and that "previous criminal convictions shall not in themselves constitute grounds for the taking of such measures".

The European Court of Justice stated in the case of Bouchereau (1978) 1 QB 732 that: "A previous criminal conviction can only be taken into account insofar as the circumstances which gave rise to the conviction are evidence of personal conduct constituting a present threat to the requirement of public policy". There were held to be two ways in which this threat might exist. Firstly, if there was "a propensity to act in the same way in the future"; or secondly, if "past conduct alone may constitute such a threat".

UK immigration law

People over 17 who are not British citizens and do not have the right of abode can be recommended for deportation if they are convicted of an offence for which the sentence could include imprisonment. The Home Office then considers the recommendation, and balances that and the 'public interest' in deportation against any compassionate circumstances of a case. This is a much lower test for the Secretary of State to meet than the Bouchereau principles.

The injustice of the present law

The power to recommend deportation means that a person may receive a double punishment simply because he or she is not a British citizen. This is clearly discriminatory. People imprisoned after conviction are often denied parole or temporary release pending the Home Office's consideration of the recommendation, which may take several months. If there were no such recommendations, or if the Home Office considered them during rather than after sentence, this problem would be avoided.

Although EU nationals have greater freedom of movement rights, non-EU nationals with indefinite leave to remain should not be put in a worse position on challenging deportation. A non-EU national with indefinite leave to remain status may have more rights than a EU national, in certain respects, including the right to remain in the UK without time-limit and the right to claim public funds. The non-EU national's settled status recognises the length of residency and the attachment the holder of the status has with the UK. Therefore, that a lower test may be used on considering whether a decision to deport is correct is unfair

ILPA's recommendations

- Criminal courts should not have the power to make recommendations for deportation
- If the power is retained, the Bouchereau principles must apply to all recommendations and they must be considered before the end of any custodial sentence
- If detention is prolonged beyond the sentence, the person should be transferred to an immigration detention centre, not kept in prison.

Detention must be kept to an absolute minimum and only when removal is imminent, following an unsuccessful appeal. People must not be detained for more than 48 hours. If this is not accepted, there must be regular reviews of detention and the right to apply for bail.

Detention at present often lasts too long, is used inappropriately and causes great suffering both to the detainees and their families and friends. It is particularly distressing to asylum-seekers who have suffered in their country of origin when they are detained, often for prolonged periods, on entry to the UK while their asylum claim is considered. Detention should not be used at this time, but only, in rare cases, after all appeals have been unsuccessful and removal is imminent. The principles of the Bail Act must apply to them, and the practice of demanding unrealistic amounts of money from sureties must cease, so that bail is a practical possibility.