ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION LAW PRACTITIONERS' ASSOCIATION (ILPA) PARLIAMENTARY BRIEFING ON THE ASYLUM AND IMMIGRATION BILL 1995.

BACKGROUND

The Government's central justification for the introduction of the wide-ranging measures contained in the Bill is the alleged dramatic increase in the number of "bogus" asylum seekers. It is to be noted that since the introduction of the Asylum and Immigration Appeal Act 1993 the numbers of applicants granted asylum or exceptional leave to remain by the Home Office has fallen from 80% to 20%. The number of people granted refugee status as part of that 20% has fallen only slightly. No evidence has been presented by the Home Office to explain this dramatic change in circumstances, it cannot rationally believed that there was a fourfold increase of "bogus" claims after 1993, rather there was a change in government policy.

The use of the term "bogus" is in any event objected to as misleading and meaningless, designed to pander to pejorative headlines in tabloid newspapers and from the experience of those working in the immigration field does not correspond to the reality of the vast majority of asylum claims. In any event a bona fide claim which fails to meet the strict test required by the Convention is not "bogus" and such refusals are being relied upon in government statistics quoted to support their assertions.

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The increased numbers of asylum seekers is a world wide phenomenon reflecting the increased political instability and conflict throughout the world particularly in Africa and Eastern Europe, as well as the long term human rights crisis in countries such as Turkey and Sri-Lanka.

GENERAL OBSERVATIONS

1. Even on a cursory reading this bill is poorly drafted, ambiguous, uncertain in its ambit and draconian in scope. It is likely to result in extensive and costly litigation. A number of its provisions will be unworkable in practice and expensive to administer.

2. Individual measures and its overall impact mark a significant infringement of the UK's obligations under the Convention to protect those at risk of persecution.

3. There are implications for civil liberties of all those residing in the UK, including British Citizens , in particular those from Black and ethnic minority communities. Especially disturbing is the potential for the removal of entitlement to child benefit of those with settled status in the UK, (irrespective of years of contributions) and the possible relegation to a secondary and in terms of social rights, precarious status. It will undoubtedly have a detrimental and damaging effect on race relations.

4. The Bill discloses a pattern of criminalising aspects of migrants lives and the lives of those who deal with them; employers, advisers and relatives.

5. This provision compounds and extends the trend of devolving immigration responsibilities to other state and private agencies who are not equipped with the requisite expertise to determine immigration status upon which they are the required to make judgements and to impose sanctions. Immigration Officers, as a matter of constitutional principle and practicality alone should be charged with internal immigration control.

6. The details of these intrusive powers curtailing of civil liberties and social rights will be determined in many areas by orders without effective parliamentary scrutiny and control.

THE CLAUSES

Clause 1

1. This provides for the potential extension of a fast track procedure to the vast majority of all asylum claims, which will be subjected to limited investigation of the claim by the Home Office, tight time schedules for the preparation and determination of appeals and the loss of a further right of appeal, including on a point of law to the Immigration Appeal Tribunal. There is no provision in the Bill for the Adjudicator to direct that a case is remitted to the Secretary of State for reconsideration if he/she considers that the certificate was not validly made. This is an important safeguard which is contained in the Asylum and Immigration Appeals Act 1993 (' the 93 Act') (schedule 2 para 5(6)). It appears that once the case is subject to the fast track procedures it will remain so, irrespective of the merits of the initial decision.

2. a) The designation of countries on a so called "White list" (Clause 1(2)(3)) infringes a fundamental principle of the Convention that each claim to asylum should be considered on its individual merits. Under this clause what ever the merits of the individual case , if the country is designated, the claim will be subject to the curtailed procedures.

b) There is no indication in the Bill as to how the Home Office will determine this issue, the designation of a country will not be subject to effective parliamentary scrutiny but by way of delegated legislation. There will be no independent scrutiny of the designated list by Adjudicators who in substantive asylum appeals do often disagree with the Secretary of State's assessment of the conditions prevailing in countries of claimed persecution.

c) Foreign policy implications can not be excluded from the decision of whether or not to put a country on or off the list.

d) Any assessment as to the general circumstances in a country is transient and the Secretary of State is required to make predictions as to the future risk of persecution . The unpredictability and instability of countries can mean that circumstances could change significantly during the processing of any single asylum application.

3. The fast tracking of a case solely on the basis of the timing of the application is draconian. There is no allowance given for any reasonable explanation, including that the fear of persecution itself arose because of developments in the country of

nationality after the applicant had arrived in the UK. (The Convention, ofcourse, provides for refugees sur place) .

4. The existing provisions allow for the fast tracking of a case which is certified as "frivolous and vexatious" and the immigration rules which provide for adverse inferences to be drawn, in the absence of a reasonable explanation (interalia) where there has been delay in claiming asylum, are sufficient to address concerns regarding "unfounded" claims to asylum, once adequate resources are given to the appellate structure.

5. The clause, if passed, will lead to a substantial increase in judicial review applications.

CLAUSES 2 AND 3

1. These clauses relate to asylum applicants who have travelled through other (third) "safe" countries before arriving in the UK. A safe third country is one where the asylum seeker will not be subject to persecution for a Convention reason nor sent on to another country where he/she would be at risk.

i) Clause 2 removes the need for the Secretary of State to show that the applicant had an opportunity to claim asylum in the third country or that there is other clear evidence of his /her admissibility which is provided for under the current regime, a matter agreed to by the Minister in an EU Resolution of the 20 November and the 1 December 1992;

ii) Clause 3 abolishes the right to appeal before being removed to the allegedly "safe" third country, and greatly restrict, the ambit and the effectiveness of the appeal which is exercisable **only after removal**.

2. Under the 1993 Act it is estimated by UNHCR that 40% of appeals against the Secretary of State's certificate that a country is a safe third country have been successful (this does not include refusals subsequently overturned on judicial review) and the asylum seeker has had his/her claim substantively considered in the UK. In all these cases the Adjudicator was not satisfied that the proposed removal did not put the applicant at risk of being returned to a country where the life and liberty of the applicant would be threatened. The Secretary of State's response is to abolish the appeal right!

3. A non-suspensive right of appeal where the issue is whether the country to which the person is to be removed is unsafe is a ludicrous and a wholly inadequate remedy. The provision is clearly inconsistent with the obligations under the Convention and will result in applicants being put at substantial risk of being removed to unsafe countries of persecution. It is precisely those whose appeals which would be successful (40% currently) because they will have been returned to unsafe countries who will be unable to even exercise the out of country appeal right because they will not have been admitted to the third country and/or will have been subjected to or passed on to another country where they would be subjected to persecution.

4. The non-suspensive nature of the right of appeal is again contrary to the EU Resolution signed by the Minister in 1992.

5. It will obviously be practically impossible to exercise the right of appeal due to lack of access to legal representation, the inherent difficulties of keeping track of the applicant who will most likely need the services of an interpreter and be without resources. There are no strict time limits for determining the appeal (as there were for the in country appeal rights) despite the imperative need for any such appeal to be dealt with on an urgent basis. There is no provision in the Bill regarding the directions and the logistics of returning the applicant if the appeal is successful.

6. Under the 1993 Act the Adjudicator was required to consider for himself on the merits whether or not the certificate should be upheld if no issue was raised as to the UK's obligations under the Convention. The test set out in Clause 3 of the Bill is whether the SoS acted "**unreasonably**" in certifying the claim as raising no issue under the Convention. This makes any appeal in practice ineffective, the test is so high as to be almost impossible to meet. It is entirely contrary to judicial authority as to the correct approach that should be adopted in determining questions relating to asylum and it will be permissible for an Adjudicator to uphold the certificate even if on the merits he/she would not consider the country to be safe. To act unreasonably, in the legal sense the Secretary of State must be shown to have "taken leave of his senses" and to be acting perversely.

7. The clause, if passed, is likely to lead to a substantial increase in judicial review applications.

IMMIGRATION OFFENCES

CLAUSE 4

The extension of criminal offences to include entering by deception brings into line the Immigration Act 1971 with case law that extended the ambit of illegal entry. As a matter of law entry by deception can include deception by third parties of which the entrant is entirely innocent. Without further definition or a defence this offence will, therefore, be one of strict liability (without the requirement of a criminal intention, mens rea) and in this respect the ambit is too wide.

CLAUSE 5

1. The clause creates two new offence of assisting:

i) asylum seekers for gain and not on behalf of a bona fide organisation to seek entry into the UK (Clause 5(b)) ;

ii) persons seeking leave to remain in the UK with the knowledge or reasonable belief that the person is not entitled to such leave (Clause 5(c));

i) ASYLUM CLAIMANTS

2. There is no means of obtaining leave to enter as a refugee prior to arrival in the UK and a person must be outside of the country of feared persecution to qualify as a refugee. It has been government policy over a number of years to progressively

restrict legal means of entry into the UK , particularly in respect of refugee producing countries. The starkest recent example was the introduction of visa requirements for Nationals of the former Yugoslavia in 1992 to stem the flow of asylum applicants from that country. Further obstacles have been put in place for those seeking asylum through Carriers Liability legislation. In the absence of accessible legal means of exist asylum seekers are forced to turn to those who can secure, be it for profit or otherwise, their exit from the country of feared persecution and entry to the safe haven.

3. This clause by implication is criminalising the very act of seeking and/or claiming asylum. The Home Office assertion is that this provision closes a loop hole exposed by the case of **Naillie [1993] AC.** What the House of Lords underlined in that case is that asylum seekers who do not present false documents but claim asylum immediately upon arrival are not illegal entrants but, in accordance with Convention obligations, will be entitled to remain in the UK until the determination of their claim to asylum. By implication those who help them, commit no offence. This position should be maintained.

4. The criminalisation of this form of assisting entry of asylum seekers is likely to push refugees into more clandestine and dangerous methods of seeking entry in order to avoid detection of the facilitators.

5. Many agencies (including solicitors and barristers) do assist people in the way that the clause seeks to outlaw, as a matter of routine and as part of their professional duty to their clients. To outlaw these actions is absurd.

ii) **OTHER ENTRY**

5. This clause is so loosely and widely drawn as to also be absurd in its consequences.

a) "Entitled to leave to remain" is a meaningless concept in immigration law because there are no such "entitlements" to leave to remain and many people seek leave and are granted exceptional leave to remain outside of the immigration rules on a discretionary basis to which they had no entitlement precisely because the matter is one of discretion.

b) The scope of the provision would include bona fide legal representatives and advisors. The protection for people helping migrants (but not for gain) and for bona fide refugee organisations in Clause 5(b) does not apply here. Therefore, anybody (including advisers, friends, solicitors and M.P.s) helping an individual to make an application to stay outside of the rules - as many are, will be committing an offence. This will include even an application for exceptional leave to remain!

<u>CLAUSE 7</u>

1. This extends the power of arrest including forced entry into premises to effect the arrest, without a warrant, and the issuing of search warrants to police officers where there is a reasonable suspicion that an immigration offence has been committed.

2. The clause treats the immigration offences of illegal entry and overstaying in the same category as "serious arrestable offences" such as murder, manslaughter, rape etc. Equivalent draconian powers of arrest, entry and search are not appropriate in this context and are likely to result in the compounding of the climate of fear now associated with immigration control and which, in a number of documented cases, has had tragic consequences.

3. Reasonable grounds for believing that offences have been committed is a low threshold to be established by police officers and will involve the interpretation of complicated immigration law. Wide powers of arrest and entry in the past have been abused by the police particularly in respect of black and ethnic minority communities. This sensitive and complex area is more appropriately dealt with through administrative control by immigration officers.

CLAUSE 8

1. Clause 8 creates a new offence sanctioning employers with a fine of up to £5,000, if they employ those without "valid and subsisting leave or those who have a condition attached to their leave prohibiting employment". The employer has a defence if he/she is able to show that before the employment commenced the employee produced a

document which will be provided for in regulations and is likely to include a P45, an NI Number , passport etc.

2. The Home Office has proposed this clause without any research into the extent to which employers are employing so called "illegal" workers.

3. Employers in principle should not be required, nor do they have the requisite expertise to determine a persons immigration status.

4. The Clause is widely accepted as placing a substantial administrative burden on employers, with negative cost implications, particularly on small business.

5. Unless all employees are asked the same questions and required to provide the same documents this provision can not be implemented without infringing the Race Relations Act.

6. Its main impact will be deterring employers from employing workers who are from black and ethnic minorities. The social consequences of implementing this clause far outweigh the benefits of it.

7. It is widely thought that the National Insurance Number scheme is so badly compromised already, that even within the Government's terms the scheme will not be effective.

8. Furthermore asylum seekers will be caught by this provision and with the abolition of welfare benefits for asylum seekers this category of immigrants will be entirely without means of subsistence, although they will have a bona fide right to remain (although not valid or subsisting leave) until the claim has been finally determined.

9. The scheme criminialises employers for employing individuals some of whom them selves are not committing criminal offences by working.

CLAUSE 10

1. In the absence of regulation and on its face this Clause abolishes the right to child benefit for all children whose parents are categorised as "immigrants". This is everybody except British and EU Citizens. It will include a large number of people who have indefinite leave to remain in the UK and have been settled in this country for many years and who will certainly have been making tax and national insurance contributions. They will now be told that they are immigrants and their children are to be excluded from this previously universal benefit, irrespective of their particular need.

2. To introduce a status condition into a previously universal benefit will create a bureaucratic burden and expense for benefit agencies who again will be required, without the requisite expertise, to determine immigration status.

3. The clause is contrary to EC Law (Reg 1408/71) since refugees in the UK lawfully paying national insurance contributions are entitled to be treated in the same way as British nationals. They are "immigrants" under the terms of the bill.

4. The parents of British children who are not themselves British will not get benefit as the person making the claim has to qualify and not the child.

THE SCHEDULES

1. ILPA welcomes the much called for extension of the right to bail to illegal entrants, including those whose claim to asylum is pending consideration, provided for in paragraph 9 of schedule 1.

2. Paragraph 5 to schedule 1 gives an extension of the powers of immigration officers on examination on arrival in the UK to require a person to declare and to produce documents. It is extremely widely drawn and requires the person to give details of documents they have had in the past. A person may "carry" or "convey" a document without knowledge of it. The danger is an increased number of people being treated as illegal entrants for failure to produce such documents.

3. Further inroads are made in para.3 of Schedule 1 for removing the rights to an appeal against refusals to vary leave to remain.

4. Schedule 2 para.2 effectively denies an asylum claimant from exercising an appeal against the refusal to revoke a deportation order on the grounds that the removal in

consequence will be contrary to the UK's Convention obligations, even if he/she has not previously appealed against the refusal to grant him/her asylum.

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