ILPA proposed amendments for the Immigration Bill (Part 1)
House of Lords Report 1 April 2014 ff

The Immigration Law Practitioners' Association (ILPA) is a charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental 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 committees, including Home Office, and other consultative and advisory groups and has provided briefing on immigration Bills to parliamentarians of all parties and none since its inception.

ILPA's briefings to date on this bill can be read at http://www.ilpa.org.uk/pages/immigration-bill-2013.html . ILPA is happy to comment on or assist with ideas for other amendments and will provide further briefing on the final selection of amendments tabled. All references are to HL Bill 96.

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PART 1 REMOVAL AND OTHER POWERS

Clause 1 Removal directions

AMENDMENTS A and B

Clause 1 page 2 line 24 at end insert

() For the purposes of this section 10(2) of the Act, the following shall be regarded as family members provided they are not British citizens or entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972—

(a) a person who has leave to enter or remain as P's partner,

(b) a person who has leave to enter or remain as P's dependant,

(c) a child below the age of 18 for whom P has parental responsibility.

Clause 1 page 2 line 28, leave out line 28

Purpose

The first amendment defines family members. The text is taken from the Government's draft regulations defining them at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264750/Draft_Regulations_-_Removal_of_Family_Members.pdf

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The second amendment removes the power to define in regulations who is a family member.

Briefing

The amendments give effect to the recommendation of the Delegated Powers Committee:

> *3. We consider section 10(2) confers an important power enabling, as it does, the removal of persons from the UK and that it should, in the absence of very good reasons to the contrary, be clear on the face of the primary legislation who is subject to it. We are not convinced by the reasons given in the memorandum for placing the definition of family member in regulations. The memorandum refers to matters relating to family members being detailed and potentially requiring change in the light of operational experience. We find it difficult to understand why operational experience should have any effect on who is to be treated as a family member under section 10(2). Also, we note that the Government have helpfully produced draft regulations containing a definition of family member for the purposes of section 10. That provision is not unduly long or complicated and we can see no reason why it should not be set out on the face of the Bill.* ***Accordingly, we consider the delegation by section 10(6)(a) of the power to define a family member to be inappropriate. Accordingly, we consider the delegation by section 10(6)(a) of the power to define a family member to be inappropriate.*** **(see** **http://www.publications.parliament.uk/pa/ld201314/ldselect/lddelreg/136/13603.htm#a1**)

The Government indicated at Committee that it was considering this amendment and this is an opportunity to ask it to report back to the House (COL 1120 Per Lord Taylor of Holbeach)

AMENDMENTS C D, E

> Clause **1**, page **2**, line **31**, leave out 'whether' and insert 'where'.
>
> Clause **1**, page **2**, line **31**, leave out 'to be'.
>
> Clause **1**, page **2**, line 32, leave out 'and, if so'.

Purpose

To remove the suggestion that if regulations are made about the removal of family members, they can provide that a person being removed as a family member should not be given notice of their removal. The second and third amendments are consequential.

Briefing

Amendment proposed by the Joint Committee on Human Rights in its legislative scrutiny report on the Bill HL Paper 102, HC 935 and laid at committee by Baroness O'Loan, and Baroness Lister of Burtersett as amendments 5, 6 and 7. The Government indicated that it was looking at the Committee's report and possible amendments so this would provide an opportunity to return to the matter. The Bill provides a power, not a duty, to make regulations about the removal of family members including "whether" they should be given notice of removal. Technically, it would still be possible for regulations to make no

provision as to notice were the amendment to be accepted and for this reason ILPA would prefer to see provisions as to family members set out on the face of the legislation, but accepting the amendment would signal a clear intention to give family members notice of removal. The immigration Minister has already committed to such notice "always" being given in his letter of 12 November 2013 to the Joint Committee on Human Rights, ref BIILLs (13-14) 088. Should be combined with amendment F above.

AMENDMENT F

Clause 1 page 2 line 36 at end insert—

> "(7) Regulations under subsection (6)—
>
> (a) shall be made by statutory instrument, and
>
> (b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament."

Briefing

Tabled by Baroness Smith and Lord Rosser at Committee as amendment 8. Gives effect to a recommendation of the Delegated Powers Committee which, having advocated that the definition of family members be placed on the face of the Bill then said

> 4. We accept that it is appropriate for other matters relating to the removal of family members to be set out in regulations, particularly procedural matters relating to the exercise of the power of removal. However, we note that the power in section 10(6) is not limited to procedural matters, but is expressed in very wide and general terms. **Given the broad scope of the power conferred by section 10(6) we recommend that it should be subject to the affirmative procedure.**

The Government indicated at Committee stage that it was considering the Committee's report so this is an opportunity to ask it to report back on that consideration. Should be combined with amendments C D E above.

Clause 5 Restrictions on detention of unaccompanied children

AMENDMENT G

> Clause 5, page 5, paragraph 18B(6) line 22, after may insert "not"

Purpose

To prohibit an unaccompanied child's been held for more than one 24 hour period in a short-term holding facility

Briefing

The Minister's assurances on this point were contradictory. He said

> ***…****a removal attempt will be unsuccessful for reasons that may be beyond the Government's control. For example, a plane may develop a technical fault. When this happens, we accept that children should not continue to be held in a short-term holding facility for more than 24 hours. They should be released and given time to rest and recuperate. But the fact that a removal attempt is unsuccessful should not mean that such people are automatically entitled to stay in the UK. It should still be possible to enforce immigration decisions. It may therefore be necessary, after a suitable period, to attempt removal again and this may require a further, short, period of detention.*
>
> *I reiterate what I said earlier. While it is vital that we enforce immigration decisions in these circumstances, we will not hold children for multiple 24-hour periods in order to achieve this.* (col 1125-6 per Lord Wallace of Tankerness)

Then, later

> *…it is possible that a removal attempt will be unsuccessful for reasons that may be beyond the Government's control. For example, a plane may develop a technical fault. When this happens, we accept that children should not continue to be held in a short-term holding facility for more than 24 hours. They should be released and given time to rest and recuperate. But the fact that a removal attempt is unsuccessful should not mean that such people are automatically entitled to stay in the UK. It should still be possible to enforce immigration decisions. It may therefore be necessary, after a suitable period, to attempt removal again and this may require a further, short, period of detention.*
>
> *I reiterate what I said earlier. While it is vital that we enforce immigration decisions in these circumstances, we will not hold children for multiple 24-hour periods in order to achieve this.* (col 11324 per Lord Wallace of Tankerness)

Will unaccompanied children face multiple periods of 24 hour detention immediately before an attempt at removal, or not? The amendment provides an opportunity for the Minister to clarify his position. If his position is that they will, then we suggest the amendment becomes a necessity.

Before Clause 7

AMENDMENT H NEW CLAUSE *Presumption of liberty*

Insert the following new Clause—

> "Presumption of liberty
>
> (1) In the event of an application for bail from detention, an immigration office or the First-tier Tribunal must release the detained person on bail unless the First-tier Tribunal is satisfied that there are substantial grounds for belief that if released the person would—
>
> (a) fail to comply with one or more of the conditions of bail or of any recognisance or bond, or
>
> (b) while on bail commit an offence which is punishable by imprisonment.

(2) In subsection (1), "detention" has the same meaning as in Schedules 2 and 3 to the Immigration Act 1971."

Purpose
To place a presumption of liberty on the face of the statute

Briefing
Tabled as amendment 16 in the names of Baroness Hamwee and Lord Avebury at report. Taking from the wording of the provisions of Part III of the Immigration and Asylum Act 1999 which were repealed without ever having been brought into force. The Lord Taylor had nothing to say in reply save

> *There is no need to place the presumption of liberty on the statute book and bind judges in the way that the amendment would.* (col 1164)

The amendment does not bind judges. It does not even cut across them in the way that the consent provisions of this Clause do. It creates a presumption, no more.

Realising no doubt, that this was unconvincing, Lord Taylor tried another tack

> *The proposed new clause would set the threshold for displacing the presumption in favour of liberty far too high. It would mean that bail should be granted even when a judge had substantial reasons for believing that the person concerned would offend on release, provided the offence being contemplated would not lead to a custodial sentence. It would mean that a perfectly lawful detention might have to be terminated even if the judge believed that the person concerned would go on to commit further criminal offences. I hope that noble Lords will agree that this cannot be right.* (col 1165)

Small wonder that the response ends on vain hope when the level was that at which it was considered necessary to set the presumption to comply with obligations under Article 5 of the European Convention on Human Rights in 1999. The response shows how cheaply liberty is now held. Baroness Hamwee indicated an intention to return to this matter on report. She apologised for her "amateur amendment" but there was nothing amateur about it – it was drafted by parliamentary counsel in 1998/9 and accepted by both houses.

Clause 7 Immigration Bail: repeat applications and the effect of removal directions

AMENDMENT 1 ILPA supports the amendment to page 6 line 45 in the names of Baroness Williams of Crosby, Lord Lloyd of Berwick and Lord Ramsbotham

Purpose
To place a maximum time limit on detention. The limit specified is 60 days which is longer than we should like but shorter than the period for which too many persons are detained. The need for a maximum time limit on detention was debated at Committee (cols 1158-1165). This was a provision to which the Government had no answer. The Lord Taylor said

> *The immigration detention power is used proportionately and safeguards are in place* (col 1165 per Lord Taylor)

Unfortunately the safeguards do not work. The Minister said

> *Those suffering from serious mental illness which cannot be satisfactorily managed within detention are specially listed as case types that should be detained only n very exceptional circumstances* (per Lord Taylor of Holbeach, col 1167)

Then why has the Home Office has 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[1] with other cases have settled or are ongoing? In case after case, findings of unlawful detention have been made. Tens of thousands of pounds have been paid in compensation. Those who wish to understand just how badly the safeguards work should read ILPA's March 2014 response to the Home Office consultation on mental health in detention (available at http://www.ilpa.org.uk/resources.php/25708/ilpa-response-home-office-consultation-on-mental-health-in-detention-consultation-date-24-january-20) It is accurate, but it is very distressing.

PROPOSED AMENDMENT J

Clause 3, page 2, line 40, leave out from line 40 to page 3 line 30.

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. Thus removes subclause 3(2) and, as consequential changes, subclauses 3(3) to 3(5)

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 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.

The amendment also provides an opportunity to obtain answers to questions posted by Baroness Smith of Basildon, to which as far as we can see, no response was given:

[1] *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).

> *In trying to understand the clause, it would be helpful to clarify whether, when a bail applicant is told of a bail decision, they will be told whether the decision has been taken by an immigration judge or the Home Secretary. If they are not granted bail, will they know that in some circumstances that may have been a decision where the Home Secretary has overruled the immigration judge who has said that there are exceptional circumstances? Will the applicant know what the process is in that case? If, as Norman Baker has said, no new factors will be taken into account, the question will be whether the decision has been taken on the facts, or whether it has been taken on political grounds. Unless it is absolutely clear what criteria the Home Secretary has used, surely that could make it far more likely that those decisions will be legally challenged.*
>
> *I am genuinely trying to fully understand why the Government are bringing forward the change. What difference will it make, if there is no difference in the criteria looked at, and what are the cost implications of what could be an increase in the number of judicial reviews? I have read the debate in the other place and the material that the Minister and the Government have provided, and these questions remain outstanding. It would be helpful if the Minister could provide some clarity on these points and the reason for this clause.* (col 1157)

Lady Smith indicated that she was not getting an answer and asked again for information on

> *…the criteria the the criteria that the Home Secretary would use and …whether an individual who had had bail denied would be told whether the Secretary of State had overruled the tribunal judge.* (col 1165-6)

She got an answer at cross purposes about mental health and family bereavement, in the context of criteria that would lead the Secretary of State to release on temporary admission or Chief Immigration Officer bail without the need for a person to apply to the Tribunal for bail, which was not on point (col 1166 per Lord Taylor). She tried again

> ***Baroness Smith of Basildon:*** *I think the Minister has missed the point that I made. I was probing not what the exact examples would be but the criteria that the Secretary of State would use given that she will have the ability to overturn a decision by a tribunal judge. In the other place, Norman Baker said that there were no other grounds that she would look at, yet that begs the question about it being a political decision. What grounds will the Secretary of State use if she decides to overturn the decision of a tribunal judge?* (col 1166)

The Minister realised that something had gone wrong and indicated

> *If the noble Baroness wishes me to elaborate further, I shall do my best to explain it to her in writing so that she has something more positive than just a few scattered notes from which I am addressing her.*

A letter has the disadvantage that it appears nowhere on the parliamentary record. On the record answers to these questions are needed although we can imagine none that would be satisfactory.