ILPA proposed amendments for the Immigration Bill (Part 3) 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. We include briefings to all amendments printed at the time of writing. Inclusion does not imply that ILPA supports the amendment; this should be clear from the briefing.

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PART 3 ACCESS TO SERVICES

AMENDMENT 23 NEW CLAUSE Exemption to charges under Part 3
Lord Hannay of Chiswick, Lord Tugendhat, Baroness Williams of Crosby, Baroness Warwick of Undercliffe

Purpose

Purpose

Provide that any bars on access to tenancies, bank accounts driving licences or "other
services" (which would appear, without more, to encompass the health charge under Clause
33 and charges levied under the NHS charges regulations mentioned in clause 34) for health services but may or may not encompass the levy identified) shall not be imposed on those
holding a Tier 4 visa as students of universities or those holding a Tier 2 (skilled worker) visa
registered in full time postgraduate study at a university.

Briefing

ILPA supports this amendment for

the attention it will draw to the range of practical problems, suffering and hardship these proposals will cause, not just for persons under immigration control but for British citizens also, although we do not think that it will achieve its aim of exempting persons in the group specified from the residential tenancies provisions.

Chapter 1 Residential Tenancies

Key interpretation

Clause 19 Residential tenancy agreement

AMENDMENT 24 Baroness Hamwee, Lord Clement Jones

Purpose
Obliges the Secretary of State to consult whomsoever she considers appropriate before implementing a pilot and lay a report on the proposed criteria, including an equalities impact assessment, before parliament.

Briefing
An obligation to consult whomsoever you consider appropriate is not an obligation at all. Parliament might be heavilty critical of the report; the equalities impact assessment might evidence discrimination, this would not prevent the pilot going ahead. There is nothing in this amendment to mitigate the effects of the scheme and indeed the amendment does not create any obligation to have a pilot at all.

AMENDMENTS 11 in in the names of Baroness Smith of Basildon Lord Pannick, the Earl of Clancarty and the Lord Bishop of Leicester, and 29-40 42-47 Baroness Smith of Basildon, Lord Rosser, Lord Stevenson of Balmacara, The Lord Bishop of Leciseter

Purpose
To remove the chapter on residential tenancies from the Bill.

Briefing
ILPA supports these amendments that will remove Chapter 1 of Part 3 from the Bill. The more closely peers have scrutinised the residential tenancies provisions, the more it has fallen apart in their hands. We are left with the impression of a scheme whose "light touch" operation will mean that decisions to find and prosecute are wholly arbitrary and where there will be no check upon discrimination. Those desirous of renting to a particular person may call the telephone helpline as a protection, but they are likely to be almost the only callers as the prospect of a 48 hour delay means that a person under immigration control is unlikely to be a desirable tenant. Persons without documentation, both British and under immigration control, are at risk of homelessness and the amendments made in Committee to the Schedule of exclusions point up how difficult it is to get this scheme right. Indeed, anyone who carries with them the spectre of a £3000 fine is likely to find it very difficult to rent at all, and prejudices and stereotypes will dictate who those persons are. The notion that the former UK Border Agency is any shape to administer this

scheme is simply fanciful and it is hard to understand why the costs of administration are felt to be affordable.

GOVERNMENT AMENDMENT 25 Lord Taylor of Holbeach

Purpose
Makes provision for a pilot in one or more areas, although all detail is left to secondary legislation

Briefing
We do not support the proposal in amendment 25 for a pilot the terms of which, set out in secondary legislation, could be exactly the same as those on the face of the Bill. For those in the affected area the consequences of a pilot are likely to be those highlighted in debates as consequences of the scheme, save that affected persons may be able to move away from the affected area, making it likely that the pilot will not demonstrate all the problems that arise from the scheme. Debates to date have demonstrated that the scheme proposeds is undesirable and unworkable.

Schedule 3 Excluded Residential Tenancy Agreements

GOVERNMENT AMENDMENTS 26, 27, 28, 29 Lord Taylor of Holbeach

Purpose
Amendment 26 widens the exclusion for student accommodation from halls of residence to accommodation used wholly or mainly for students

Amendment 27 widens the exclusion for halls of residence so that all halls of residence are covered.

Amendment 28 is consequential on amendment 29 which provides an exclusion for accommodation arranged throught he university

Briefing
These amendments will mean that all students whose accommodation is arranged through the university is exempt from the scheme. It is only by exclusion of types of accommodation that there can be exemptions from the scheme, as everyone, including Britsh citizens, must prove their status if renting accommodation within the scheme. Therefore, although these amendments do not purport to go as far as amendment 9 in respect of residential tenancies, they provide a more realistic prospect of protection from the scheme from the some, although not all, students that they cover.

Cluase 31 General Matters

GOVERNMENT AMENDMENT 31 Lord Taylor of Holbeach

Purpose
Requires that any Code of Practice on the setting of a penalty be laid in draft before parliament, but does not require the affirmative procedure as recommended by the

Committee on Delegated Powers in the absence of any Government explanation as to why a distinction from the equivalent code in respect of employment should be made.

Clause 32 Discrimination

GOVERNMENT AMENDMENTS 43 AND 44

Purpose
Give effect to the recommendation of the Delegated Powers Committee that the Code should be laid in draft before parliament and come into force in accordance with the negative procedure.

Chapter 2 Other Services Etc.

Health

Clause 38 Related provision: charges for health services

AMENDMENT 51 Lord Ramsbotham, Baroness Finlay of Llanduff, Baroness Masham of Ilton

Purpose
Provides that a person cannot be charges for services provided while s/he is detained or for
services provided in continuation of treatment commenced while the person was detained. ILPA supports this amendment.

After Clause 48

AMENDMENT 52 Baroness Masham of Ilton, Lord Rogers of Riverside

Purpose
Provides for exemptions from charging both where it poses a risk to public health and where it is
not cost effective. Sets out a de minimus provision but also gives the provider discretion to waive
the charge where s/he considers that it is not economical to collect it or where it would pose a
risk to public health.
Briefing
Laid at Committee as Amendment 66A.

After Clause 43

Work Appeals Against Penalty Notices

To ensure that the Code of practice on
Clause 15 Right of Appeal to the Tribunal

PROPOSED AMENDMENTS J, K

Clause 15, page 12, line 29 delete "or"

Clause 15, page 12, line 31 at end insert

"or,

(d) the Secretary of State has decided to refuse P's application for leave to enter or remain

Purpose

To provide a right of appeal against a refusal of leave to enter or remain on the grounds set out on the face of the Bill.

Briefing

This right of appeal is not at large. The status quo is not maintained. A person can still appeal only on asylum or human rights grounds. But they do not have to have raised such grounds at first instance, as long as the refusal breaches their human rights. See briefing to clause stand part below.

PROPOSED AMENDMENTS L

Clause 15, page 13, line 26 at end insert

( )that the decision is not otherwise in accordance with the law;

Purpose

To add new grounds of appeal: that the decision is not in accordance with the law.

Briefing

The clause does not wholly obviate the problem with the provisions as a person still has no right of appeal unless the Secretary of State has refused a protection or human rights claim (or decided to revoke protection). still have to bring the appeal on human rights or protection grounds. But it does mean that once the appeal has been brought it is possible to go directly to the error of law. Of limited effect as there is no right of appeal unless the Secretary of State has refused an asylum or human rights claim and therefore may need to be supplemented by a separate amendment.

The wording is taken from the current section 84 which this section replaces. It has been suggested that "Administrative Review " will deal with "caseworking errors" but all that administrative review means, whatever process is packed around it, is the Home Office looking again at its own decision. It has every incentive to do that now, to avoid the time and expense of an appeal, but according to the appeal's impact assessment but is losing 50% of its appeals.

In any event, it is a question of doing things the easy way or a hard way. Every claim that proceeds to appeal will be refracted through the prism of human rights. It thus provides an opportunity to open up the debate on appeals.

Finally see Adrian Berry of ILPA's concluding remarks in his oral evidence to the Public Bill Committee. The people who lose out if the only appeals are on protection or human rights grounds are, for example, those lawfully here, making an in time application that they are permitted to make under the Immigration Rules, in circumstances where the Home Office, as is all too frequent, has made a mistake. There is no public interest in this.

AMENDMENT M page 13 line 39 in the name of Baroness Berridge and others

Purpose

To prevent the substitution of the Secretary of State's decision for that of the Tribunal judge as to whether a matter should be heard by the Tribunal or go back to the Secretary of State but to insert a test (to be applied by the Tribunal) as to when a matter should proceed.

Briefing

The Joint Committee on Human Rights said

> *In our view, the Tribunal itself, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new matter raised on an appeal. We would expect the Tribunal, in the exercise of its inherent power to prevent abuse of its own process, to permit a new matter to be raised only if there were good reasons for not raising the matter before the Secretary of State.*
>
> *47. In view of the admitted novelty of new s. 85(5) and (6) of the Nationality, Immigration and Asylum Act 2002, inserted by clause 11 of the Bill, we recommend that the Government amends the Bill to achieve its purpose in a way which does not appear to make the scope of the tribunal's jurisdiction depend on the consent of one of the parties to the appeal before it, but leaves to the Tribunal the question of whether or not it may consider a new matter.*

The Lords Committee on the Constitution said

> *…concern remains about whether clause 11(5) is compatible with the right of access to court and the rule of law.[4] Given that the Secretary of State would be a party to any relevant appeal, there is also a concern as regards equality of arms and common law principles of natural justice.*
>
> *7. The phrase "unless the Secretary of State has given … consent" in clause 11(5) suggests that in the absence of such consent it would be unlawful for the Tribunal to consider the matter in question. Yet the purpose of the clause is not to grant to the Secretary of State a veto over matters that may be considered by the Tribunal, but merely to ensure that the Tribunal does not consider grounds or reasons which have not first been considered by the Secretary of State. On this view, clause 11(5) as currently drafted appears to go further than is required in order to meet the Government's stated purpose.*

PROPOSED AMENDMENT N STAND PART

ILPA urges peers to oppose Clause 15 standing part of the Bill.

In summary:

- The Bill removes rights of appeal on any grounds other than asylum and human rights. It denies any independent review to anyone else who makes an immigration application. It hits hardest those lawfully in the UK making an in-time, wholly lawful, application to extend or vary their leave, who receive a decision that is wrong.
- Many of those arguing to be allowed to stay on the grounds of family life, rather than as persons in need of international protection, are likely, because of cuts to legal aid, to be tackling these cases unaided and the proposals are put forward against a backdrop of inequality of arms as the Joint Committee on Human Rights highlighted in its report (paragraph 38)
- Purchase of an internal "Administrative Review" adds nothing to current procedures, however it is dressed up. How much more incentive to reconsider a decision when you are about to have to defend it before an independent tribunal. It is indeed at this stage reviewed by a presenting Officer, in a separate part of the home office to the decision maker and of a higher rank. Still Table 8 in the Appeals Impact Assessment shows that 49% of "Managed Migration" (work and students) appeals are allowed, 50% of entry clearance appeals are allowed and 32% of appeals against deportation are allowed.
- If one can only appeal to the tribunal against a refusal of a protection or human rights claim or against revocation of protection status what of the student or worker who has made no protection or human rights claim at all. Have they no right of appeal at all, however erroneous the decision? This appears to be what was said by the Minister, Lord Wallace, in Committee (cols 1190 to 1191)
- What of the person who has applied under the immigration rules on family life and on human rights grounds and brings an appeal on human rights grounds the only grounds allowed apart from protection grounds). What happens if they win? Do they have all the rights and entitlement of a spouse and are on a five year route to settlement, or do they instead get discretionary leave and find themselves on a ten year route to settlement?
- The Secretary of State's proposal that she must consent to a new matter that is raised being heard by the Tribunal does not streamline any procedures or save time. It simply moves the power to decide whether the matter needs to go back to the Secretary of State or can be dealt with at the hearing from the Tribunal judge to the Secretary of State. It is open to abuse by the Secretary of State who could use it to manipulate which cases go ahead when. It is opposed by the Joint Committee on Human Rights (paragraph 46 of its report on the Bill)
- 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 clause cannot be reconciled with the rule of law or common law principles of fairness.

For the avoidance of doubt we place on record that we agree with Lord Wallace of Tankerness response on Schedule 9 that leave will continue on the same terms and conditions through the period for appeal and while any appeal, including onward appeals, is pending although not, as now, while any judicial review is pending. We had misread the clause and he has corrected us.

We recall the words of the Joint Committee on Human Rights

> *39.* ***We are concerned that the Bill's significant limitation of appeal rights against immigration and asylum decisions is not compatible with the common law right of access to a court or tribunal in relation to unlawful immigration decisions, and the right to an effective remedy, particularly in light of the following:***
>
> - ***the relatively high proportion of such appeals which currently succeed due to the well-documented shortcomings in the quality of decision-making by the UK Border Agency;***
> - ***the importance of appeals as a means of enforcing the children duty in s. 55 of the Borders, Citizenship and Immigration Act 2009;***
> - ***the lack of information about the proposed new system of administrative review; and***
> - ***the likely cumulative impact of proposed changes to legal aid and judicial review on the practical effectiveness of that remedy for those seeking to challenge the lawfulness of immigration decisions on grounds other than those covered by the surviving rights of appeal.***
>
> ***In our view, when viewed in this broader context, 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.***

After Clause 15

AMENDMENT O page 14 line 1 in the names of the Baroness Smith of Basildon, Lord Rosser and Lord Stevenson of Balmacara

Purpose

Require parliament's consent to the clause coming into force following provision of a report of the Chief Inspector of Borders and Immigration and the Secretary of State's confirmation of her view that decision-making is efficient, effective and fair.

Briefing

If this amendment were to stop Clause 11 coming into force we should incline to support. However, to move the decision on this clause from primary to secondary legislation is to reduce scrutiny.

Baroness Hamwee suggested in Committee (col 1351) that

> *I suppose we could really know if administrative review is working well only if it were possible to run it as a sort of shadow to the appeals process – but we cannot, to my mind, run two systems in parallel*

Lord Wallace of Tankerness replied

> *She quite properly said that there might be certain attractions in having two systems running in parallel although I suspect that would be a bureaucratic nightmare and would not properly serve the interests of anyone, least of all the applicants.* (col 1358)

We disagree, and we disagree because we are aware that the Home office has done this before, most recently in asylum and assured us that the applicants would have known nothing about it. It is possible because only one system has effect in the world. The other runs as a shadow system, and can thus be tested, before it affects any case in the real world. So any case would proceed to appeal in the normal way, but meanwhile a dummy file would proceed through an administrative review. The outcome of the two would then be compared, and one could observe whether administrative review were producing the same results as appeals. If the Government is resistant to this, peers should seek to ascertain whether this is evidence of a lack of confidence that administrative review would come up to the mark.

AMENDMENT NEW CLAUSE *Administrative Review: rules* Baroness Hamwee Lord Avebury

Purpose

To require rules on administrative review to be laid before parliament and to require the Chief Inspector to report on them after the first year of operation. The latter reflects an undertaking the Minister has already given (col 1358).

Briefing

As described in our briefing to clause stand part above, administrative review is no more than should be happening now. Bu it is not enough. The *Report of the Committee on Immigration Appeals*[1]*, which* recommended that there should be a right of appeal because of the 'basic principle' that:

> *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… there are now well established methods of resolving disputes between a private individual and the administration under a procedure requiring a clear statement of the administration's case, an opportunity for the person affected to put his case in opposition and support it with evidence, and a decision by an authority independent of the Department interested in the matter. The safeguards provided by such a procedure serve not only to check any possible abuse of executive power but also to private individual a sense of protection against oppression and injustice, and of confidence in his dealings with the administration which are in themselves of great value. We believe that immigrants and their relatives and friends need the same kind of reassurance against their fears of arbitrary action on the part of the Immigration Service.*

Then in *Asifa Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443 Lady Justice Hale said of the right of appeal to the Immigration Appeal Tribunal that:

> *There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare*

[1] **August 1967, Cmnd. 3387**

cases where this is needed, their decisions are enforced in the ordinary courts. In certain types of dispute between private persons, tribunals are established because of their perceived advantages in procedure and personnel. In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review. This was undoubtedly the motivation for grafting asylum cases onto the immigration appeals system in 1993. In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.

Clause 16 Place from which appeal may be brought or continued

PROPOSED AMENDMENT

Clause 16, page 15, line 13 eave out sub-clause (3)

Purpose
To leave out subsection (3), 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". To delete from clause 12 new section 94A that it is proposed by the clause to insert into the Nationality Immigration and Asylum Act 2002.

Briefing
Laid as amendment 31A by Lord Pannick and Baroness Lister in Committee.

The section would allow the Secretary of State to certify the claim of a person facing deportation so that although the person had an outstanding human rights claim s/he could be. A certificate could be issued on the grounds that the person would not "before the appeals process is exhausted" suffer serious irreversible harm.

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

51. We asked the Government whether judicial review will provide a practical and effective means of challenging the Secretary of State's certification that an appeal can be heard out of-country, bearing in mind the proposed changes to the availability of legal aid, such as the proposed residence test, and the proposed changes to judicial review which will also restrict its availability.

52. The Government replied that it believes that judicial review will provide a practical and effective means of challenging the Secretary of State's certificate. It says that the cases affected by the new certification power will primarily be human rights claims made on the basis of Article 8 ECHR. The proposed residence test will not affect the effectiveness of judicial review as a means of challenging certification, because "it is already the case that individuals seeking to appeal on the basis of Article 8 are already unable in practice to access civil legal aid." …

53. ***We are not satisfied with the Government's reliance on the continued availability of judicial review to challenge the Secretary of State's certification that a human rights appeal can be heard out of country, having regard to the unavailability of civil legal aid to bring such a claim and the proposed reforms of judicial review.***

The Minister, Lord Wallace of Tankerness could find little to say to defend the clause. It would affect "only a very small cohort of cases" "the vast majority of whom will be convicted criminals" (col 1366). The Minister did not add that following the amendment of the clause in Commons Committee, the conviction need no longer have resulted in a sentence of 12 months imprisonment; indeed it need not have resulted in any term of imprisonment at al. The statement that the amendment would have affected less than 2% of all appeals in the Tribunal last year (col 1366) is not meaningful: appeals include large numbers of family visit appeals, of appeals against refusal of a visa, of work or student appeals. That deportation appeals do not make up a significant part of the cohort should come as no surprise save to those who make inflammatory statements about foreign criminals.

The Minister spoke of "the rare cases where the Government seek to deport family members" (col 1366). We find this a surprising assertion. The figure of interest is the percentage of cases where a family member could be deported (i.e. a family member exists and is a person subject to immigration control) in which a family member is deported. We should be surprised if that were rare at all. It is not at issue in this clause, for the clause does not include a power to deport a family member while an appeal is ongoing (although many may be forced to leave with the principal) but it would be helpful to understand the assertion nonetheless. We are equally surprised by the Minister's assertion that there would be no liability to pay compensation if the appeal were successful (col 1367). That would depend upon the facts of the case. The Minister suggested that exceptional funding would result in legal aid being available to avoid a breach of a person's human rights (col 1369). In the period April to December 2013, according to Ministry of Justice statistics, 187 applications were made for exceptional funding in the immigration category and three were granted, a success rate of 1.6%, against which backdrop it is getting harder to find legal representatives to make the applications. See the Ministry of Justice statistical release at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289183/exceptional-case-funding-statistics-apr-13-dec_13.pdf - it has taken a year's very hard work and the intervention of Ministry of Justice statisticians (see https://www.gov.uk/government/publications/exceptional-case-funding-in-legal-aid-statistics) to get official figures.

The amendment could be used to ask the Minister to give more information both about overall numbers and about how many of those would have a criminal conviction and of which type.

Finally, Lord Wallace suggested that he could not comment on the effect of the Criminal Justice and Courts Bill, with its changes to the availability of judicial review, on the clause, because that Bill is currently before parliament and could be amended (col 1369). That is not acceptable as an excuse. The Government has put forward that Bill and has purported to set out its effects in impact assessments and explanatory notes. It should be able to explain its inter-relationship with this Bill.

Those who were not worried about this clause at Committee should become so having seen the manner in which it was defended.

Clause 18: Public interest considerations in Article 8 claims

PROPOSED AMENDMENT

Clause 18, page 17, line 4 at end insert

"( ) The promotion of the best interests of children is in the public interest"

Purpose

If parliament is to take upon the task of defining what is in the public interest parliament had better make a proper job of it. The UK has ratified the UN Convention on the Rights of the Child and its own Children Act 1989 makes the best interests of the child a primary consideration in decisions concerning children. The Home Office in carrying out its immigration functions is under a duty to safeguard and promote the welfare of children. All these are indications that the best interests of the child are a matter of public interest.

Baroness Lister said at Committee (col 1373)

> *As it stands, the clause fails to recognise that promoting and protecting the interests of children, which is rightly no longer seen as by public policy as a purely private matter, is in itself a public good—a point just made by the noble Baroness, Lady Hamwee—and therefore of public interest. In HH, the Supreme Court held that there is,*
>
> *"a strong public interest in ensuring that children are properly brought up".*
>
> *Does the Minister agree with that sentiment, and if so, would he also agree that the kind of amendment proposed would dispel any impression that children's interests are being treated as no more than personal and private interests?*

The Supreme Court in *HH* said

> *In his written submissions on behalf of the Coram Children's Legal Centre, Mr Manjit Gill QC argues that international human rights instruments, including the Universal Declaration of Human Rights and the UNCRC, have recognised the special and unique status of children. This involves not only a negative duty to avoid doing them harm but also positive obligations to promote their development into adulthood. In this they are different from adults, even vulnerable adults, because adults have passed the growing-up stage while children need special attention in order to grow up. It is not just a matter of balancing the private rights of children against the public interest in extradition, because there is also a wider public interest and benefit to society in promoting the best interests of its children. Children are (as Latey J put it in In re X (A Minor)(Wardship: Jurisdiction) [1975] Fam 47, at 52) "a country's most valuable asset for the future". More than that, promoting their proper development is in the public interest in order to prevent their becoming the criminals of the future. In addition to article 3.1 of UNCRC, he draws attention to article 3.2:*
>
> > *"States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."*

And

When we come to consider the other side of the equation, we will notice, at para 167 below, not just the importance that PH should be punished for his wrong-doing but the public importance of adhering to arrangements for extradition. So, at this earlier stage, we should notice not just the grave effects of his extradition upon these three children but the public importance that children should grow up well-adjusted. The principle which pervades the despatch of issues relating to children in the family courts is that, as a rule, they are more likely to grow up well-adjusted if they continue to live in the home of both or at least one of their parents: see, for example, In re KD (A Minor) (Ward: Termination of Access) [1988] 1 AC 806 at p 812 B-C (Lord Templeman). I agree with Lady Hale's comments on this point at para 25 above. To "A commentary on the UN Convention on the Rights of the Child", published by Nijhoff in 2007, Professor Freeman contributed Chapter 3, of which the title was "Article 3: The Best Interests of the Child". He wrote, at p 41:

> *"There are also utilitarian arguments in favour of prioritizing children's interests. Thus, it may be thought that giving greater weight to children's interests maximises the welfare of society as a whole. Barton and Douglas have even argued that children are important for the continuity of order in society. Putting children first is a way of building for the future. It is significant that countries reconstructing after nightmares of rightlessness have put children's interests in the foreground."*

AMENDMENTS to page 17 lines 5, 10 and 24 in the names of Lord Pannick and Lord Hope of Craighead

Purpose

Inserts the word normally into amendments setting out that little weight should be given to a private life established while a person's status was precarious or while the person was in the UK unlawfully and that the public interest requires the deportation of a person sentenced to over four years unless a specified exception applies.

Briefing

ILPA supports these amendments, which build on elegant amendments tabled by Lord Hope at Committee. **T**he Joint Committee on Human Rights said of the Clause

> *54. Clause 14 of the Bill requires a court or tribunal to have regard to certain enumerated public interest considerations when determining whether an immigration decision is compatible with a person's right to respect for private and family life in Article 8 ECHR, including a bespoke set of such public interest considerations in cases involving foreign criminals.[37]*
>
> *55. There is nothing inherently incompatible with the Convention in Parliament spelling out in primary or subordinate legislation its detailed understanding of the requirements of relevant Convention rights in particular contexts. Indeed, such an exercise could be considered to be Parliament's fulfilment of the important obligation imposed upon it by the principle of subsidiarity: to take primary responsibility for the protection of Convention rights in national law, by providing a detailed legal framework designed to give effect to Convention rights in particular contexts. Such legislation should not, however, purport to determine in advance claims that Convention rights have been violated in particular cases, because that would be a usurpation of the judicial function to determine individual cases. The guidance provided to courts or tribunals should also accurately reflect the relevant Convention case-law, and should not be incompatible with any other international obligations.*

The Joint Committee on Human Rights also said

> *59. …The Government has not… provided any examples of other legislation in which a court or tribunal is required to have regard to a consideration which purports to prescribe the weight that should be given to that consideration. …*
> *60. …* ***we are uneasy about a statutory provision which purports to tell courts and tribunals that "little weight" should be given to a particular consideration in such a judicial balancing exercise. That appears to us to be a significant legislative trespass into the judicial function. We note that the Government did not provide us with any other examples of such statutory provisions, which suggests that this approach may be unprecedented. We recommend that the Bill be amended in a way which retains as relevant public interest considerations whether a private life or relationship were established at a time when the person was in the UK unlawfully or when their immigration status was precarious, but omits the direction about the weight to be given to the person's private life or relationship.***

These amendments go just a little way to leaving the question of private right to the judges looking at the facts.

AMENDMENTS to page 18 line 7 in the names of Baroness Lister of Burtersett and Lord Pannick

Purpose
To change the definition of a qualifying child, a relationship to which may bring into play the exceptions in the clause, so that indefinite leave to remain or four years residence, rather than the current seven years are present.

Briefing
Four years is better than seven. But the approach still accepts the project of addressing questions of individuals' rights in statute absent the facts of facts of facts of the particular case.

The Minister illustrated perfectly in Committee how to fail to treat the best interests of a child as a primary consideration. He said

> *In EA (Nigeria) the court said that, in considering the best interests of a young child, the correct starting point is to assume that it is in the best interests of a child to live with and be brought up by his or her parents unless there are very good reasons why that is not the case. Therefore, where the child is being removed with their parents and as a family to that family's country of origin, that is not a breach of Article 8 and we believe that it is consistent with the children duty in Section 55.*(col 1384)

The words after "therefore" are a gloss on the judgment, unwarranted and incorrect. In other words, he looks first at what should happen to the parents and then says "if they are going, what should happen to the child?" That is not what the Upper Tribunal did in EA (Nigeria) (see **http://www.bailii.org/uk/cases/UKUT/IAC/2011/00315_ukut_iac_2011_ea_others_nigeria.html**) a case of a migrant family whose stay had always been expected to be temporary. The tribunal looked at the interests of the children first and then at whether the family as a whole should stay or go:

47. Having assessed the best interests of the second and third appellants as a first and primary consideration and found that they favour the course of remaining within the family unit, whether that be in the UK or in Nigeria where, on the evidence produced, each of the appellants would be able to thrive and continue attending school, work, church, and doing charitable works; we move to consider whether requiring the appellants to go to Nigeria is a necessary, proportionate and a fair balance between the right to respect for the private life of the appellants and the particular public interest in question.

48. We have no doubt that it is. The purpose for which the first appellant came to the UK has been fulfilled. It was always a temporary purpose and there was no expectation that he or any of his dependents who joined him here or were born here would be able to remain indefinitely in the UK ..

The tribunal also held in that case that the Supreme Court in *ZH (Tanzania)* [2011] UKSC 4 was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.

We do not consider that the "qualifying child approach" is easy to reconcile with that finding in *ZH (Tanzania)*. We are far from confident, whatever the Minister may say, and what he is saying at the moment is far from satisfactory, that the application of the provisions would respect the rights of children under whatever age is used in the definition. The weighing of the facts of the individual cases before them is properly the job of judges.

We agree with the Joint Committee on Human Rights that

63. ***…, the Government has not explained how in practice the provisions in the Bill are to be read alongside the s. 55 duty. Without such explanation there is a danger that front-line immigration officials administering the legal regime will be unclear about the relationship between the children duty in s. 55 and the new tests introduced by the Bill which use different and unfamiliar language. We recommend that new guidance be issued to ensure that the Government's stated intention about the unaffected status of the children duty is in fact achieved in practice. We also ask the Government to confirm that it intends that the s. 55 children duty also applies to children who are not within the Bill's definition of a "qualifying child", as we believe it should.***

After clause 18

AMENDMENT NEW CLAUSE *Residence Permit: domestic violence* Baroness Smith of Basildon, Lord Rosser, Lord Stevenson of Balmacara

Purpose

To provide survivors of domestic violence with a period of access to services and benefits. The amendment 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 extends support available to survivors of domestic violence for a period in which to consider any applications they may make, or allow them to leave the UK legally having made appropriate arrangements.

Briefing

ILPA supports the amendment which comes from Rights of Women. It was the first amendment debated on 19 November in the Public Bill Committee. Mr Hanson MP, introducing the amendment at col 372 (See http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131119/am/131119s01.htm), identified its being in response to the *Government's action plan, "A Call to End Violence against Women and Girls.*

Clause 72

AMENDMENT ILPA supports the amendment to page 56 line 41 in the name of the Lord Roberts of Llandudno

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).