# ILPA Briefing to amendments tabled to 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.

***For further information please get in touch with Alison Harvey, Legal Director, on 0207 251 8383, alison.harvey@ilpa.org.uk***

## PART 1 REMOVAL AND OTHER POWERS

### Clause 1 Removal directions

### GOVERNMENT AMENDMENT 1 Lord Taylor of Holbeach

**Purpose**

To place the definition of a family member who may be removed with or subsequent to the removal of the principal on the face of the statute. The family members are defined as the partner child, parent or adult dependent relative of the principal, and also a child living in the same household where the principal has care of that child but only where they have leave as dependants of the principal or they have no leave, no entitlement to leave in their own right, but would have been granted leave as dependants of the principal had the principal been granted leave. British citizens and those exercising right under European law are protected from removal.

**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 (Col 1120 Per Lord Taylor of Holbeach). The Government had previously produced draft regulations *inter alia* defining family members. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264750/Draft_Regulations_-_Removal_of_Family_Members.pdf

The draft regulations referred to "a child below the age of 18 for whom P has parental responsibility.

- **Why has the Government not followed its own draft regulations and opted instead for the imprecise formulation "A child living in the same household as P in circumstances where P has care of the child?**

The provision as drafted creates the risk of the removal of a child for whom someone else in the UK has parental responsibility.

- **Does it create a risk in the case of a child in local authority care?**

**We recommend that peers ask Minister to adopt the legally precise and safer formulation of parental responsibility.** See also amendments 4 and 6 in the name of Lord Judd.

- **Why has parent been included when parent nowhere figured in the draft regulations?**
- **In what way is a parent to be distinguished from another adult dependent on the principal?**
- **Why was the provision on parents considered necessary?**

The draft regulations were confined to those who had leave as dependants of the principal. The new formulation includes family members with no leave and posits a complex test involving a large measure of subjective judgement: a judgement that if the person applied for leave to enter or remain they would not get it and a judgment that the person would be granted leave as the family member of the principal were the principal to apply for it. This involves too many hypotheticals to be a sensible or safe way of going about removal decisions.

- **Why does the amendment make provision for dependants without leave, when the draft regulations do not?**
- **What would have happened if the draft regulations had been brought in as drafted that is avoided by the current formulation?**

**Will the family member with no leave who is given notice have**

- **No right of appeal; their own recourse will be judicial review or**
- **A right of appeal on human rights or asylum grounds?**

**GOVERNMENT AMENDMENT 2 Lord Taylor of Holbeach**

**Purpose**

To remove provisions that by use of the word "whether" suggested that a family member might not be given notice of removal. The provisions are replaced with a power to make regulations as to the time period for removal and the service of a notice.

**Briefing**

Responds to concerns expressed by the Joint Committee on Human Rights in its legislative scrutiny report on the Bill HL Paper 102, HC 935. The Government at Committee stage indicated that it was looking at the Joint 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. The amendment removes that "whether" although it still imposes no duty to give notice. The reference to a notice under subsection (2) is vague, as subsection (2) does not mention a notice.

The clause provides a power and not a duty to make regulations thus even with the redrafting the provisions do not impose an obligation to give notice.

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 and that may be repeated for the record. However, the exception set out in *Pepper v Hart* to the general rule that the parliamentary record may not be consulted to determine the meaning of a statute applies only when the statute is ambiguous. These provisions are not ambiguous – they provide a power but no duty to give notice. A Ministerial assurance given in good faith thus binds no one and is nothing more than an expression of current intention which, given that there will be little of this parliament left when the Bill becomes law, would provide reassurance for a very short period indeed.

The Delegated Powers Committee, 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. It has not accepted this recommendation, but, aside the definition of a family member, the powers are no less broad and general than they were when the Committee criticised them. It is all very well to rewrite subsection (6) but the words "in particular"

mean that the redrafting makes no difference to the scope of the regulations other than in respect of the definition of family members.

- **Why has the Government rejected the Committee's recommendation?**
- **Will it reconsider given that aside the definition of family member it has retained the full breadth of regulation-making powers.**

Parliament has seen very significant changes in the definition of family members from the draft regulations laid before it to the provisions on the face of the statute, which will not be able to be changed. These are detailed in the briefings above. It would be sensible in the circumstances to treat any statements as to what will be in the draft regulations as very provisional.

## GOVERNMENT AMENDMENT 3 Lord Taylor of Holbeach

### Purpose

Defines a child as under the age of 18 for the purpose of defining which members of a person's family may be removed with person.

### Briefing

See amendment 1 above – an adult dependant relative as well as a child may already be removed with a principal.

- **Why has the government not placed an obligation to give notice of removal on the face of the statute?**

## Clause 2 Restriction on removal of children and their parents and Clause 3 Independent Family Returns Panel

## AMENDMENTS 4 and 6 Lord Judd

### Purpose

The clauses as drafted apply the provisions for the removal of families to children who face removal alongside an adult who has care of the child. The effect of the amendment is that children facing removal with an adult not their parent would be treated as unaccompanied children and not subjected to the family returns process.

### Briefing

We fully expect the Minister to stand up in response to these amendments and say that they are a cruelty and would we wish the poor child to be stranded on the outside while the parent is detained in a nasty immigration removal centre? Would we wish a child to be given less than 28 days' notice of removal? To which the answers are:

- No of course not.
- It was necessary to take legal action to get the Home Office to end a practice of giving unaccompanied children no notice of removal whatsoever, for example in "third country" cases where they had claimed asylum in the UK having travelled through another European Country and were being sent back to that country to claim asylum. The policy was only changed following the cases of *R(MA, BT and DA) v SSHD* [2011] EWCA Civ 1446 in which a child had been sent back, all alone to

Italy with no notice where she faced real risk of harm.

The policy change following the *MA* case was only acknowledged during the litigation around *R(Medical Justice) v SSHD* [2010] EWHC 1925 (Admin). We should be delighted to see the Government put a requirement that unaccompanied children be given 28 days of removal on face of the statute but this is something very different.

- There is no obligation to detain a parent or carer.
- A child for whom no one in the UK has parental responsibility should have all the protection afforded to a child who is unaccompanied. The definitions that the amendment would change will leave unaccompanied children at risk of immigration detention and loss of all the protections afforded unaccompanied children.

See also the briefing to Government amendment 1 above. There the Government replaced reference to "parental responsibility" in the draft regulations at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264750/Draft_Regulations_-_Removal_of_Family_Members.pdf
with the unhappy formulation on the face of the statute in that clause and this.

- **Why has the Government opted for the imprecise formulation relating to care and living in the same household rather than parental responsibility?**

The provision as drafted creates the risk of the removal of a child for whom someone else in the UK has parental responsibility.

- **Does it create a risk in the case of a child in local authority care?**

**We recommend that peers ask the Minister to adopt the legally precise and safer formulation of parental responsibility.** If no one has parental responsibility for the child the child should be afforded all protection to be afforded to unaccompanied children.

## AMENDMENT 5 LORD JUDD

### Purpose

To provide that parent and child can be separated only for the purposes of child protection, in the specific context of the 28 day period between notice of removal and removal.

### Briefing

The clause as drafted envisages that one parent or carer could be removed from the UK within the 28 day period of notice of removal provided there remained on parent in the UK. This is in stark contrast to the attempts at Committee to paint immigration detention in Cedars as benevolent, with Lord Wallace of Tankerness saying that the measures "ensure[] that families with no right to be here are given every opportunity to leave without the need for enforcement action" (col 1124)./ Contrast that with the image of a mother, terrified because her partner has been removed, struggling to care for her children, possibly in immigration detention in Cedars and to reassure them. We are grateful to Lord Judd for calling a spade a spade with this amendment.

Lord Wallace of Tankerness was pressed on what he had said and got in a muddle. He started with

> *"..temporary separation may sometimes be necessary to ensure a family's safe return"* (col 1133)

- **In what circumstances might temporary separation help to ensure the safety of return of a family?**

Lord Wallace continued:

> `*"we would not separate a family solely for a compliance reason. It would always be when it` was considered in the best interests of the child to be temporarily separated from their parent or where the presence of one of the parents or carers was not conducive to the public good. We would never separate a child from both adults for immigration purposes "*

- **What is the meaning of "solely" in the first sentence?**
- **Do these comments not illustrate that the child would be separated from parent for immigration purposes?**
- **In circumstances where a parent is considered sufficiently harmful not to be able to wait 28 days to be removed and it is considered in the best interests of the child to separate them from the parent, what steps will be taken to ascertain whether it is appropriate to remove the child out of the jurisdiction into the care of that person?**
- **What circumstances have arisen where it has been held to be in the best interests of the child to be separated from the parent immediately prior to removal but has nonetheless been held that it is in the best interests of that child to be removed with that parent?**

**Clause 4 and Schedule 1 Enforcement Powers**

**AMENDMENT 7 Lord Ramsbotham**

**Purpose**
To remove from the bill the provision that would extend the former UK Border Agency's powers to use force.

**Briefing**
The amendment was laid at Committee where it attracted support from all parts of the House (cols 1141-1148). Only the Minister sought to resist it. Paragraph 5 of Schedule 1 amends section 146(1) of the Immigration and Asylum Act 1999. Currently, this) licenses the use of force by immigration officers in exercising powers under the 1999 Act or the Immigration Act 1971. Paragraph 5 would amend this to license the use of force by immigration officers exercising powers under "*the Immigration Acts*", comprising ten Acts – including the 1971 and 1999 Acts, the Bill and any future legislation that would be included

in the definition of the immigration acts[1]

The explanatory memorandum to the Bill states this is mere clarification.[2] This is incorrect. An extension of statutory license for the use of force cannot be mere clarification. To state that it is suggests the Home Office currently considers itself to have license to exercise force in circumstances to which the statutory power does not extend.

The Government's Immigration Bill Factsheet on 'Powers of Immigration Officers (clause 2)'[3] disarmingly asserts an intention to: "*Ensure immigration officers' powers to use reasonable force applies* (sic) *uniformly across immigration legislation.*" But it provides no justification for extending the license to use force in this way. A uniform result could equally well be achieved by removing the license to use force altogether. Given the facts, it is perhaps surprising that this has not been the preferred approach:

- Mr Jimmy Mubenga was killed in the course of his removal. Now, nearly four years after his death, three of the Home Office's private contractors, staff of G4S, have finally been charged with his manslaughter. As has been widely reported, the coroner, Karon Monaghan QC, found unnecessary and dangerous use of force in the attempted removal and death of Jimmy Mubenga in October 2010.[4] Karon Monaghan QC's report included the following finding: "*The evidence points not to a mere lack of robustness either in the procedures of G4S or the Home Office but to an agreement to dispense with the need for accreditation, apparently to address delays within the UK Border Agency in processing applications for accreditation.*"
- The 2012 recommendation of HM Chief Inspector of Prisons to cease the use of force against pregnant women was prompted by an appalling example at Cedars where an attempt had been made to force a pregnant woman into a wheelchair as staff held her by her feet, resulting in her suffering a dangerous fall risking significant injury to her unborn child.[5] Her Majesty's Inspectorate of Prisons found that *HE.18 Substantial force had been used in one case to take a pregnant woman resisting removal to departures. The woman was not moved using approved techniques. She was placed in a wheelchair to assist her to the departures area. When she resisted, it was tipped-up with staff holding her feet. At one point she slipped down from the chair and the risk of injury to the unborn child was significant. There is no safe way to use force against a pregnant woman, and to initiate it for the purpose of removal is to take an unacceptable risk.* In response, the Lord Taylor of Holbeach told the House: "*The recommendation in the report of HM Inspectorate of Prisons on Cedars pre-departure accommodation that force should never be used to effect the removal of pregnant women and children was rejected by the UK Border Agency.*"[6] Whereas a consultation on the matter was offered, it was only in the face of a legal challenge that the Home Office backed down.

[1] Clause 66(5) of the Bill includes "*the Immigration Act 2014*" (i.e. the current Bill) among the Immigration Acts as listed in section 61(2) of the UK Borders Act 2007

[2] Explanatory Notes to Immigration Bill as brought from the Commons, HL 84, paragraph 49

[3] see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249391/Factsheet_02_-_Powers_of_immigration_officers.pdf

[4] see e.g. http://www.theguardian.com/uk-news/2013/aug/04/jimmy-mubenga-coroner-report-deportations

[5] *Report of an unannounced inspection of Cedars Pre-Departure Accommodation*, paragraph HE.18 available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/cedars/cedars-2012.pdf

[6] *Hansard* HL, 10 Apr 2013 : Column WA313

- The Minister gave an assurance that: "*The schedule* [Schedule 1] *is distinct from the powers available to private contractors who are responsible for immigration detention – it is about the powers of immigration officers.*"[7] However, the willingness and ability of the Home Office effectively and adequately to constrain the use of powers of those private contractors delegated to carry out its detention and removal functions has repeatedly been shown to be inadequate even since the report of the Baroness Nuala O'Loan in March 2010 where she found: "*Over the period under investigation there was inadequate management of the use of force by the private sector companies.*"[8] This in turn casts doubt on the willingness or capacity of the Home Office to constrain its own use of force.
- Coverage in the Guardian and The Observer newspapers highlighted allegations of rape, abuse and ill-treatment at Yarls' Wood removal centre[9]. It was suggested in those cases that an attempt was made to remove the victims from the jurisdiction before they could bring a case. Such allegations are not new. We recall for example the comments of Mr Justice Munby in *R (Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin): *I am driven to conclude that the claimants' detention was deliberately planned with a view to what in my judgment was a collateral and improper purpose - the spiriting away of the claimants from the jurisdiction before there was likely to be time for them to obtain and act upon legal advice or apply to the court. That purpose was improper"*
- Several reports before and since have highlighted serious problems in this regard including *Harm on Removal*, published in 2004 by the Medical Foundation for the Care of Victims of Torture (now Freedom from Torture),[10] the final annual report of the UK Border Agency's Complaints Audit Committee published in December 2008, and *Out of Control – the case for a complete overhaul of enforced removals by private contractors* published by Amnesty International in July 2011.[11]
- Yet, abuses continue. In 2012, the High Court found the use of use of handcuffs and a chain by detention staff when escorting a detainee to hospital to have been unnecessary and to have breached the Article 3 prohibition of inhuman or degrading treatment or punishment.[12]
- ILPA has seen the letter from the then Immigration Minister to Members of the Commons' Public Bill Committee concerning the current use of force in-country.[13] The data provided does not include removals (such as the use of force in the attempted removal and death of Mr Jimmy Mubenga).[14] Nonetheless, over the 2012-13 financial year, 316 instances of the use of force during enforcement visits, 546

[7] Tuesday, 5 November 2013 : Column 156

[8] *Report to the United Kingdom Border Agency on "Outsourcing Abuse"*, executive summary, paragraph 14 available at http://www.medicaljustice.org.uk/images/stories/reports/reportonoutsourcingabuse.pdf

[9] Yarl's Wood affair is a symptom, not the disease, Nick Cohen, The Observer, 14 September 2013.

[10] available at http://www.freedomfromtorture.org/sites/default/files/documents/Harm%20on%20Removal%20-%20final2_0.pdf

[11] available at http://www.west-info.eu/files/Amnesty-report.pdf

[12] *FGP v Serco PLC & Anor* [2012] EWHC 1804 (Admin)

[13] Letter of 18 November 2013 from Mark Harper MP to the Co-Chairs of the Immigration Bill Public Bill Committee

[14] Figures provided to the Home Affairs Committee on the use of force in removals show recorded use of force in ranged between 533 and 659 instances per year over the years 2008-2010, and 245 instances in the first six months of 2011; see the Committee's Eighteenth Report of Session 2010-12, *Rules governing enforced removals from the UK*, January 2012, HC 563.

instances of the use of force by detention contractors and 414 instances of the use of force by escort contractors were recorded. The Home Office Professional Standards Unit (PSU) investigated five serious complaints related to the use of force by the Immigration and Compliance Enforcement (ICE) Team. None were upheld. Of 73 serious complaints about the exercise of detention and escort powers, 53 concerned the use of force. Two were thereby substantiated in whole or in part. These figures are not reassuring. They show force being used on average several times each day by those exercising immigration powers.

- The Government is proposing that there will be no protection from exclusion from the legal aid on the basis of a residence test for claims in tort or damages claims for breaches of the European Convention on Human Rights[15] or claims for damages resulting from abuse by a public authority of its position or powers[16] so victims of abuse and harm will lose this means of trying to get redress.
- Most recently, HM Chief Inspector of Prisons has reported on several cases of unnecessary use of handcuffs, including in the cases of wheelchair users, a dying man "*while sedated and undergoing an angioplasty procedure in hospital*", and an 84 years' old frail and dementia-suffering man who died while in handcuffs having been kept handcuffed for five hours.[17] ILPA is also aware of many substantial claims for damages involving enforced removal and/or false imprisonment where aggravated damages and damages for personal injury have been awarded including for the use of force, restraint and assaults.

The extension of the use of force is not an appropriate response to this list of failings and it is not an appropriate response to the longstanding dysfunction and cultural malaise as recognised by the Home Secretary in her statement to the House of Commons in March 2013[18] at the heart of the organisation to which it is now proposed to extend more powers. In the words of the Home Secretary

> *The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies …UKBA has been a troubled organisation for so many years. … it will take many years to clear the backlogs and fix the system, ..."*[19]

The use of force is or ought to be an exceptional measure, and Parliament's license for its use ought to be tailored to those powers of immigration officers shown to require its possible use and in respect of which the Government has satisfied Parliament that any use of force will in practice be proportionate and reasonable.

In the Public Bill Committee, the then Immigration Minister, and Mark Harper MP, said of the reports of the Chief Inspector of Borders and Immigration that "...some *of them do not always make happy reading.*"[20] He referred to the opportunity for aggrieved persons to

[15] Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 2, paragraph 22
[16] Ibid. paragraph 22
[17] *Report of unannounced inspection of Harmondsworth Immigration Removal Centre*, 2014, section 1, paragraph 1.3 available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf
[18] *Hansard* HC, 26 Mar 2013 : Columns 1500-1
[19] Hansard HC Deb 6 Mar 2013 : Column 1500.
[20] Tuesday, 5 November 2013 : Column 155

complain to a Member of Parliament or to the Home Office.[21] If a peer received such a complaint, would they feel that they could do anything to stop the abuse?

The amendment is modest in the extreme. Lord Taylor's response in Committee contained no acknowledgement of the former Agency's record, no apology for its manifest failings. He said "I would like to reassure the noble Lord, Lord Rosser, that effective regulatory oversight…is already in place".

We disagree. Independent inspection and complaints processes may provide for some remedial or compensatory action after the event, but are not in themselves effective preventive measures. This is particularly so because those who may suffer from inappropriate or excessive use of immigration officers' powers include many who speak little or no English, are unfamiliar with formal complaints procedures in the UK, may have no effective opportunity to bring or pursue any complaint having been removed from the UK and are especially susceptible to real or perceived pressure to not complain for fear this may compromise any hope they may have of being permitted to remain in the UK or lead to other treatment they may wish to avoid e.g. continued detention. Independent inspectorates, such as the chief inspector of borders and immigration, have limited resources and can only periodically inspect discrete units, teams or processes; and there is no obligation upon the Home Office to accept their findings or implement their recommendations. Faced with the catalogue of errors described above, there may be oversight in place, and it may work extremely hard, but it cannot be described as effective.

## Clause 5 Restrictions on detention of unaccompanied children

### AMENDMENT 8 Lord Judd

**Purpose**
To place on the face of primary legislation the injunction, already contained in guidance, that children should only be detained as a last resort and for the shortest possible time.

**Briefing**
The amendment is a necessary corrective to the renaming of immigration detention "pre-departure accommodation" and thus normalising the detention of children. It commits the Government to no more than that to which they commit themselves by the terms of their own guidance.

Chapter 55 of the Home Office enforcement Instructions and guidance states:

> *The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:*
> …
> *Unaccompanied children and young persons under the age of 18 (see 55.9.3 above)*[22]

It also provides

> *Staff must …ensure they have regard [section 55 of the Borders, Citizenship and Immigration Act 2009, the obligation to safeguard and promote the welfare of Children]*

[21] Tuesday, 5 November 2013 : Columns 157
[22] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270032/chapter55.pdf

*when taking decisions on detention involving Enforcement Instructions and Guidance or impacting on children under the age of 18 …Staff must also ensure detention is for the shortest possible period of time.*

Chapter 45 of that guidance says

*Unaccompanied children (i.e. persons under the age of 18) must only ever be detained in very exceptional circumstances, for the shortest possible time and with appropriate care…*[23]

The amendment should also be read with Lord Judd's amendments 4 and 6 which seek to protect the definition of an unaccompanied child for detention purposes from being blurred in the context of the detention of families with children.

We have yet to see a situation and cannot envisage one, where detaining a child as opposed to relying on powers of social services to safeguard them is the appropriate response to an unaccompanied child. But in any event, this modest amendment does not go so far as to eliminate the power to detain children. If the Government will not accept the amendment that is good reason to return to the provisions on the detention of children introduced at Committee with a much more jaundiced eye than was shown at that time.

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

**AMENDMENT 9 Baroness Williams of Crosby, Lord Lloyd of Berwick, Lord Ramsbotham, Lord Roberts of Llandudno**

**Purpose**

To place a maximum time limit of 60 days on detention under immigration act powers.

**Briefing**

The Bingham Centre for the Rule of Law's *Immigration Detention and the Rule of Law: Safeguarding Principles*[24] has as principle 17:

SP17. MAXIMUM. The duration of detention must be within a prescribed applicable maximum duration, only invoked where justified.

It quotes, *inter alia*

*UNHCR Detention Guidelines (2012), Guideline 6: "To guard against arbitrariness, maximum periods of detention should be set in national legislation. Without maximum periods, detention can become prolonged, and in some cases indefinite".*

*UNHCR/[Office of the High Commissioner for Human Rights] Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011),*
*§2: "Maximum time limits on … administrative [immigration detention] in national legislation are an important step to avoiding prolonged or indefinite detention".*

[23] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/275015/chapter45general.pdf

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

*§11: "Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons".*
*UN Working Group on Arbitrary Detention Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 7: "A maximum period should be set by law".*

Sixty days is a long time to be held by administrative fiat, without being charged with a crime and without being brought before a court if you do not instigate this.

The UK is not a party to Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals, which sets a six-month limit on detention with the possibility of further detention for limited periods to a maximum of 18 months *in toto* where, despite the State's reasonable efforts, lack of co-operation by the detainee or in obtaining documentation from third countries had caused time to be extended[25].

In *Mathloom v Greece*[26]I t was held that absent the time limits on detention, Greek legislation on detention under immigration act powers did not meet the "in accordance with the law" test laid down in Article 5 of the European Convention on Human Rights because it was not sufficiently precise or its consequences sufficiently foreseeable.

In May 2013, the UN Committee against Torture urged the UK to "(i)ntroduce a limit for immigration detention and take all necessary steps to prevent cases of de facto indefinite detention."[27]

When Lord Hylton moved amendments in 1999[28] on a maximum length of detention this was in the context of proposals that all detainees would be brought before a court or tribunal seven and 28 days after their detention started[29] and the number of persons detained beyond six months was 120[30].

At Committee stage when a 28 day limit was proposed, Lord Taylor of Holbeach appeared sanguine. He said "Detention must be used sparingly and for the shortest period necessary. I hope that reassures/..." (col 1164). He said "every case is carefully considered to see whether detention remains appropriate (col 1164). He cited cases. But the facts of those very cases and many others, show that these could intentions have scarce any reflection in reality.

In 2010 we saw the detention of 52 months in the case of an Iranian who failed to co-operate with his removal in *R(NAB) v Secretary of State for the Home Department* [2010] EWHC 3137

[25] See Case C-357/09, Kadzoev [2009] ECR I-11189, 30 November 2009.
[26] Application 48883/07, judgment 24 April 2012.
[27] Committee against Torture, Fifth periodic report of the United Kingdom, (6-31 May 2013)
[28] HL Deb 19 July 1999 vol 604 cc 693-724.
[29] Immigration and Asylum Act 1999 s 44.
[30] HL Deb 28 July 1999 vol 604 cc1611-66, letter of Lord Williams of Mostyn to Lord Avebury, to which reference is made by Lord Avebury.

(Admin). The European Court of Human Rights in *Mikolenko v Estonia*, Application no. 10664/05 (judgment became final January 2010), commented that detention for three years and eleven months was extraordinarily long and not justified by non-cooperation. One hundred and seventy –four persons had been detained for over a year at 30 June 2012, down from a peak of 255 at 31 December 2010.

According to Home Office statistics, of detainees leaving detention after more than a year in 2011, 62% were released and 38% removed. These proportions were exactly reversed, for those released after less than a year. Detention Action's September 2010 report "No Return No Release No Reason" monitored the cases of 167 long-term detainees, of whom only a third (34%) were deported. Detention Action writes

> *The courts have repeatedly found cases of long-term detention to have breached the Hardial Singh principles and become unlawful. For example, in the case of Sino, the High Court found that an Algerian asylum-seeker with a psychological disorder and a history of minor offending had been detained unlawfully for the entirety of his four years and eleven months in immigration detention.*[31] *… The court found that there was at no point any prospect of his deportation becoming possible within a reasonable period, so there was never a power to detain him. Efforts to obtain a travel document had been unsuccessful for three years prior to Mr Sino's detention, so it should have been clear at the outset that further efforts would prove unsuccessful.*

Of a total of 3,142 people in detention centres on 30 June 2013, 233 (7%) had been detained for over six months[32].However, these statistics do not reflect the true scale of detention under immigration act powers. Persons whom the Home Office elects to detain in prisons rather than Immigration Removal Centres are arbitrarily excluded from the statistics[33]. On 9 September 2013, 979 persons were detained under immigration act powers in prisons[34]. Their legal status is no different from that of persons detained in Immigration Removal Centres. Those detained in prisons are usually ex-offenders, and experience the longest periods of detention: for example, the HM Inspector of Prisons recently discovered a person detained for nine years in Lincoln prison[35].

The Minister, Lord Taylor of Holbeach, said "The system affords appropriate protections to individuals and flexibility to Government (col 1163). We do not consider the protection afforded to those described above can properly be called "appropriate".

The Minister said "...an individual can challenge the legality of their detention at any point" (col 1163). That ignores the restrictions to be placed on challenges by Clause 7. He said "...an individual can challenge the legality of their detention at any point by way of judicial review and legal aid will remain in place for this" (col 1163). That is only the half the story.

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[31] *Sino, R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 2249 (Admin) (25 August 2011)

[32] UK Border Agency *Detention Data Tables Immigration Statistics April – June 2013*, table dt.09.q, available at https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2013/immigration-statistics-april-to-june-2013#detention-2

[33] *ibid*, Vol 2, "Notes"

[34] Mark Harper MP, Minister for Immigration, HC Deb, 5 November 2013, c116W

[35] HM Chief Inspector of Prisons, Report on a full unannounced inspection of HMP Lincoln, 20-24 August 2012

Challenges to detention will still be funded but under the Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations, currently before parliament and subject to the negative procedure, work on the initial application for permission to bring a judicial review will be "at risk" – legal aid payments will only be made if permission for judicial review is given, or at the discretion of the Legal Aid Agency. The House of Lords Secondary Legislation Committee has said of this instrument in its 37th report[36]

> *In this very sensitive area MOJ has made a poor job of explaining how the revised payment system will function. We note with concern that there are aspects of the Regulations that are not clear to organisations that deal routinely with legal matters. It therefore seems likely that providers who are uncertain about whether they will get paid or not for their work will not put themselves forward to test the grey areas of the law.*

In practice, detainees will struggle for legal aid to challenge their detention.

And while legal aid will be available for challenges to the detention itself, it will not be available for In challenges to the underlying immigration case that may be the means of demonstrating that there is no prospect of removal and therefore that the detention does not confirm to *Hardial Singh* principles.

Other detention related cases will be subject to the residence test: claims in tort or damages claims for breaches of the European Convention on Human Rights; claims for damages resulting from abuse by a public authority of its position or powers.

The Minister, Lord Taylor said

> *We should try to get some of these figures in proportion. Admittedly some individuals have been detained for considerable periods but 62% per cent have been in detention for fewer than 29 days and the total number of people who have been in detention for more than a year is 199.*

We consider that anyone who does get these figures in proportion will support the amendment. Some 200 people, not charged with any crime, have spent over a year deprived of their liberty for the administrative reason of immigration control. What comfort is it to a man detained for years to know that in 29% of cases persons are detained for fewer than 29 days (the percentage is inflated by those held at ports or airports for a few hours). We need to see the figures in proportion with other European countries, which, as described in Committee, detain for much shorter periods (cols 1162-1163 per Baroness Williams of Crosby)

Lord Ramsbotham said at Committee

> *…on 11 September 2013, in addition to the 220 people…who had been there for six months or more , 27 had been there for 18 to 24 months, 11 for 24 to 36 months and one from 36 to 48 months. For heaven's sake, four years without anything happening is totally unacceptable anywhere, let alone in this country. We really should be ashamed of those figures.* (col 1161)

Now *that* gets the figures into proportion.

[36] **http://www.publications.parliament.uk/pa/ld201314/ldselect/ldsecleg/157/157.pdf**