Immigration Bill House of Commons' Consideration of Lords' Amendments 7 May 2014: Briefing from the Immigration Law Practitioners' Association

The Immigration Law Practitioners' Association (ILPA) is a registered 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, including Home Office, and other, consultative and advisory groups.

In this briefing we identify matters that have changed in the House of Lords and thus will return for Commons' Consideration. This briefing is written before Lords' Third Reading and before we have seen the final marshalled list for it. . Therefore some comments, and indeed Clause numbers, are provisional. Suggestions amendments are annexed to this briefing. We can provide drafts of amendments or further briefing to any clause on request. All ILPA's briefings on the Bill to date, as well briefings from the Open Society Institute and Professor Guy Goodwin Gill can be found at http://www.ilpa.org.uk/pages/immigration-bill-2013.html

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Introduction

The greatest challenge for the House of Commons is to hold on to the two new clauses resulting from the two Government defeats, both of which enjoyed support from all parts of the House through a combination of votes and abstentions. The first, Clause 65, creates an obligation to provide guardians for trafficked and potentially trafficked children. The second, Clause 67 (number assumed), replaces the clause inserted at Commons' Report to permit deprivation of citizenship resulting in statelessness with provision to refer the question of whether the Government should bring forth legislation permitting such deprivation to a committee of representatives of both Houses. ILPA supports both amendments. Baroness Butler Sloss indicated in moving her amendment on guardians for trafficked children that she would be equally happy to see it, intact, in the anticipated Modern Slavery Bill anticipated. We agree, as long as it survives intact.

Other changes were Government responses to amendments. Some of them are far from generous and could usefully be built upon in the House of Commons. Others go further to meet concerns.

Of greatest concern to ILPA is that, the despite the opposition forcing what is now Clause 15 to a vote and receiving considerable support from all parts of the House, manifesting in votes or abstentions, rights of appeal have not been saved.

Clause 1 Removal of Persons unlawfully in the United Kingdom

Purpose of Lords' amendments

- 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 as recommended by the Delegated

Powers Committee. 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.

- To remove provisions that by use of the word "whether" suggested that a family member might not be given notice of removal as recommended by the Joint Committee on Human Rights[1].
- To limit the scope of the regulation-making power in clause 1 to the time period (if as now, subsequent to the removal of the principal) during which a family member could be removed under the section and the service of a notice of removal under the section, the two matters on the face of the Bill and thus responds to the Delegated Power's Committee's second report on the Bill, its 24th report, which indicated that it was not satisfied with the Government's response to its first report in this regard..
- The amendment to Clause 1 concerning the detention of children is consequential.

Main outstanding concerns

- There is still no provision on the face of the Statute that a person must be given notice of their removal.
- Unlike the draft regulations laid before the House of Commons the amendments now assume that children can be removed with a principal facing removal who does not have parental responsibility for them.
- Unlike the draft regulations laid before the House of Commons there is provision for the parent of a minor child facing removal to be included in the list of those who can be removed.

Briefing

The definition of family member for the purposes of setting out who can be removed as a dependant of a principal has been placed on the face of the Bill and the regulation-making power restricted but there are difficulties with what the Bill says. In the Commons, the Government had produced draft regulations[2] defining family members. The draft regulations referred to "a child below the age of 18 for whom P has parental responsibility" but in the clause as amended prefers the imprecise formulation "A child living in the same household as P in circumstances where P has care of the child." The provision creates the risk of the removal of a child for whom someone else in the UK has parental responsibility and may create confusion in the case of a child in local authority care.

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.

[1] Joint Committee on Human Rights legislative scrutiny report HL Paper 102, HC 935.
[2] Draft Immigration (Removal of Family Members) Regulations 2014 are available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264750/Draft_Regulations_-_Removal_of_Family_Members.pdf

Detention of Children Lords' Amendment to Clause 1, Clauses 2 (*Restriction on removal of children and their parents etc.)*, 3 (*Independent Family Returns Panel)* 5 (*Restrictions on detention of unaccompanied children)*, and 6 (*Pre-Departure accommodation for families*)

Purpose

Amendment to Clause 1 Consequential on Clause 6: Pre-departure accommodation for children and their families

Clause 2 Provides that where a child is being removed as part of a family unit this cannot happen until 28 days have elapsed since the date when all rights of appeal are exhausted. New section 78A(4)(a) is inserted into the Nationality Immigration and Asylum Act 2002. This allows removal directions to be set, a deportation order made and "interim or preparatory action" to be taken during the 28 day period.

Clause 3 ***Independent Family returns panel*** Places the "independent family returns panel" on a statutory footing.

Clause 5 ***Restrictions on the detention of unaccompanied children*** Places a 24 hour limit of the detention of an unaccompanied child and confines the circumstances in which such a child should be detained

Clause 6 ***Pre-departure accommodation for families*** Gives a new and more palatable name to places where children are detained and provides for a seven day limit on their detention in these places.

Amendments to Schedule 9 ***Transitional and Consequential Provision*** **concerning the detention of children** These:

- Apply the 28-day period for which provision is made in Clause 6 to appeals before the Special Immigration Appeals Commission.
- Ensure that Her Majesty's Inspectorate of prisons will still be able to able to inspect "pre-departure accommodation".
    - Weave the new jargon of "pre-departure accommodation" through a range of legislation relating to detention under immigration act powers including that a person who assaults a detention custody officer or "wilfully obstructs" such an officer in "pre departure accommodation" commits a criminal offence ; that it is a criminal offence to escape from or to help someone to escape from "pre-departure accommodation" and that notices to this effect must be displayed prominently; the accommodation can be run by private contractors.

Main outstanding concerns

- Children are still detained under immigration act powers. The Bill does not prohibit this, nor does it contain a statement reflecting current Home Office policy that children should be detained under Immigration Act powers only in very exceptional circumstances, for the shortest possible time and with appropriate care.
- The language of "pre-departure accommodation" risks making the detention of children seem more palatable and all protections applicable to those deprived of their liberty apply to these children and to their parents.
- The safeguards in these clauses apply only when a child is living in the same household as the person as a part of whose family unit they are to be removed. Children living elsewhere should not be detained, but should be included in all procedures.

- Provision is made for families to be split during the removal process for reasons of immigration control, with one parent removed or required to leave where the other remains behind with the child. This is achieved by removing the "word relevant" so that the prohibition on removal applies to any parent or carer.
- There are powers to give removal directions, make a deportation order to take any other interim or preparatory action during the 28 day "reflection" period.
- The family returns panel is appointed by the Secretary of State and she regulates its conduct. This puts its independence at risk.

Briefing

These new clauses were introduced by the Government at Lords' Committee stage (HL Report: Vol 752, No 121 col 1124, giving effect to an undertaking given to Dr Julian Huppert MP by the then Immigration Minister in the Public Bill Committee to consider whether the restrictions the Government has placed on the detention of children could be placed on the face of the Bill.

The new clauses attempt to mimic the status quo and putting such protections as have been achieved on the face of primary legislation is an improvement on the current situation where those protections are is a matter of policy and could be changed without ceremony. But the provisions in the Bill, and indeed current procedures, could be improved.

Clause 15 Right of appeal to First-tier Tribunal

Purpose of Lords' amendments

An amendment is to be made at Lords' Third Reading to limit the situations in which the Secretary of State has power to consent to a matter's being considered by the Tribunal to matters within the Tribunal's jurisdiction.

Main outstanding concerns

All concerns are outstanding. Whether a matter is dealt with by the Tribunal or given to the Secretary of State to consider should be a matter for the Tribunal, not for a party to the proceedings before it.

Briefing

The Joint Committee on Human Rights said in its Eighth report[3]

> *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

[3] Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* (8th Report, Session 2013-14, HL Paper 102, HC 935), available at http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/102/10206.htm#a9

> *…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.* [4]

The Government amendment appears to be formal and wholly meaningless. Consent to the Tribunal's considering a matter not within its jurisdiction would be of no effect, for the Tribunal could not consider the matter. Despite the Minister's assertion in his letter of 29th April 2014 to Baroness Smith of Basildon that the Government acknowledges that the power to withhold consent is too widely drawn, the amendment in no way limits the circumstances in which the Secretary of State can prevent the Tribunal considering a matter.

The Government says in its letter of 29 April 2014 to Baroness Smith of Basildon that it will publish detailed guidance as to when the consent should be given. The House might want to ask **for the opportunity to debate that guidance**. This may increase transparency but there are no guarantees as to what the guidance will say and the Government's proposed residence test for legal aid will mean that many of those affected by the Secretary of State's withholding consent will not be eligible for legal aid to challenge her decision to do so as not in accordance with the guidance.

Powerful speeches were made in support of an amendment tabled in the names of Baroness Berridge and Lord Avebury (HL Report 1 April 2014, cols 883 -895) by Lord Woolf, Lord Pannick, Lord Hope of Craighead, Baroness Smith of Basildon and Lord Brown of Eaton-under-Heywood, a former judge of the Supreme Court. Baroness Smith said
Baroness Smith of Basildon

> *"the idea that the scope of the tribunal's jurisdiction should depend on the consent of one of the parties to the appeal is something that offends a great many noble Lords and their sense of justice and fairness* (col 891)

Lord Brown made the same point:

> *"…it seems intrinsically objectionable for the Government, one of the parties before the tribunal on the appeal, themselves to have the last word with regard to what the tribunal may or may not consider."*(col 886)

The Lord Wallace of Tankerness said in response **"**the principal reason why the Government have proposed this measure is that we do not believe it is right for the tribunal to be the primary decision-maker" (col 891). But no one has argued with that. They have simply asked that when a new matter is raised it should be for the Tribunal, rather than the Secretary of State, to determine that it is necessary for the matter to go back with the Secretary of State.

[4] Paragraphs 6 and 7, available at
http://www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/102/10206.htm#a9

The Secretary of State if free to address the tribunal on the matter and it seems unlikely that her reasonable request for an adjournment would be refused. She has not produced evidence to suggest that reasonable requests have been refused in the past.

Clause 16 Report by the Chief Inspector on Administrative Review

Purpose of new clause

Requires the Secretary of State to ask the independent Chief Inspector of Borders and Immigration on the first year of administrative review and to lay that report before parliament.

Main outstanding concerns

- The report comes after administrative review has come into force.
- Parliament does not vote on the report.
- A satisfactory report is not a condition of clause 15 coming into force.

Briefing

This new clause was introduced by a Government amendment at Lords' Report (HL Report 1 April 2014, Vol 753, No 139, cols 904 to 909. The irony of it does not escape us. Not for parliament a report by the Home Secretary. Oh no, the report must be independent. Yet a review from within the department is perfectly good enough for the person who faces a decision that will affect their future. Dress administrative review up as you will, it is a decision by the very same body you want someone to scrutinise and to keep up to the mark.

The new clause was unnecessary, it does no more than Lord Wallace of Tankerness promised at Committee stage – ask the Chief Inspector commissioned within 12 months (col 1196 and col 1358).

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.

Administrative review is no more than should be happening now. 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. If the Presenting Officer disagrees with the original decision maker they do not have to go back to that decision-maker, they can raise the matter with their own line manager and decide how to proceed on appeal. Nothing the Government has offered by way of Administrative Review offers any more than this. Indeed it offers considerably less, since the Presenting Officer knows that the decision will be scrutinised by the Tribunal. Still Table 8 in the Appeals Impact Assessment shows that 49% of "Managed Migration" (work students and family) appeals are allowed, 50% of entry clearance appeals are allowed and 32% of appeals against deportation are allowed. To think that administrative review could suffice is to ignore the fundamental principles of administrative justice.

Lord Wallace of Tankerness suggested in Committee that these rates should be viewed against a backdrop of the Home Office only refusing 10% of cases (col 1196). But why? What has that got to do with the Home Office being wrong in nearly one in two "managed migration" cases?

The *Report of the Committee on Immigration Appeals*[5] 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…*

For Lord Wallace of Tankerness the definition of independent, as far as administrative review is concerned, although not reports of the Chief Inspector, simply means not in the same management chain and in a geographically separate location (col 1357). It is a managerial, bureaucratic definition of independence that owes nothing to the rule of law. Had parliament any confidence in the process it would say "Oh no, Home Secretary, do not trouble the Chief Inspector who, after all, has rather a lot to do. You do the report, that will be fine by us." You are separate from these people and in a different management chain. You are at a higher grade as well. We want no more". But we do want more; as the Committee on Tribunals so correctly identified, one must get outside the department to have justice and the rule of law. .

Clause 20 Residential Tenancy Agreement): Schedule 3 Excluded Residential Tenancy Agreement

Effect of Lords' Amendments

First amendment: widens the exclusion for student accommodation from halls of residence to accommodation used wholly or mainly for students
Second amendment: widens the exclusion for halls of residence so that all such halls are covered.
Third amendment: consequential
Fourth amendment: provides an exclusion for accommodation arranged through the university

Main outstanding concerns

- The test of ""wholly or mainly" may not be easy to apply in practice.

[5] August 1967, Cmnd. 3387

- No assistance to persons other than students or to students who wish to occupy accommodation not arranged through the university.

Briefing
Amendments were made to Schedule 3 at Lords' Report (3 April 2014, Vol 753 No 141 cols 1056-1061; 1093) in response to intense expressions of concern about the effect of the Bill on students. The effect is that all students whose accommodation is arranged through the university are exempt from the scheme. It is only by exclusion of types of accommodation that there can be exemptions from the scheme, as everyone, including British citizens, must prove their status if renting accommodation that falls within the scheme. For those students renting in the excluded accommodation, the exemption may work. We say "may" because "wholly or mainly" is a test that may not always be easy to apply in practice as the composition of the tenantry of a building may change over time.

Clause 32 General Matters

Effect of Lords' amendment

Requires that any Code of Practice on the setting of the amount of a penalty be laid in draft before parliament.

Main outstanding concerns
- Not subject to 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.

Briefing
The clause was amended at Lords' Report (3 April 2014, Vol 753 No 141 cols 1083 to 1095 to give effect to recommendations of the Delegated Powers and Regulatory Reform Committee.

The Delegated Powers Committee said

> *Clause 27 requires the Secretary of State to issue a code of practice … Under subsection (2) the code is required to specify the matters which the Secretary of State must take into account when determining the amount of a penalty. The code may also contain guidance about other matters…*
> *6. Under clause 27(6) the Secretary of State must lay the code of practice before Parliament, but apart from that there is no provision for parliamentary scrutiny. The memorandum explains the lack of any further scrutiny on the basis that the parameters for the code will have been set out in the primary and other secondary legislation. However, we note the approach adopted here is inconsistent with that adopted for the employment provisions of the Immigration, Asylum and Nationality Act 2006. That Act contains a similar regime for the payment of penalties, in that case by employers who employ persons who do not have a valid leave to enter or remain in the UK. Section 19 of the 2006 Act requires the Secretary of State to publish a code which sets out the factors which the Secretary of State will consider in determining the amount of the penalty. However, in that case the code is required to be laid in draft before Parliament and to be brought into force by an order subject to the negative procedure.*
> *7. The Home Office does not explain in the memorandum why a lower level of parliamentary scrutiny applies to the code under clause 27. In both cases, the provisions of the code will affect the level of the penalty that the Secretary of State will impose in particular cases. In relation to*

*the code of practice under clause 27, its contents are also likely in practice to affect the circumstances in which a person is liable to pay a penalty; …**In the absence of any explanation from the Home Office for the difference in treatment, we recommend that the level of parliamentary scrutiny applied to the code of practice under clause 27 should be no less than that applied to the equivalent code under section 19 of the Immigration, Asylum and Nationality Act 2006**. Further, given that the role played by the code of practice under clause 27 is wider than that of the code under section 19 and is liable to affect the circumstances in which a person is held liable to a penalty, **we recommend that the order bringing into force the first code under clause 27 should be subject to the affirmative procedure.*** [6]

Clause 33 Discrimination

Effect of Lords' Amendments

Give effect to the recommendation of the Delegated Powers Committee that the Code of practice on discrimination, designed to ensure that landlords and landladies do not discriminate against their tenants should be laid in draft before parliament and come into force in accordance with the negative procedure.

Main outstanding concerns

The code offers no protection against discrimination.

Briefing

The clause was amended at Lords' Report (3 April 2014, Vol 753 No 141 cols 1083 to 1095 to give effect to recommendations of the Delegated Powers and Regulatory Reform Committee. It addresses the recommendation of the Committee.. What is does not do is to offer any protection against discrimination.

The Committee said

8. Clause 28 requires the Secretary of State to issue a code of practice setting out what a landlord or landlord's agent should or should not do to ensure that, while avoiding the liability to pay a penalty, they do not contravene equality legislation so far as it relates to race. The code must be laid before Parliament but otherwise there is no parliamentary scrutiny. Again, this contrasts with the position under the employment provisions in the Immigration, Asylum and Nationality Act 2006, where the equivalent code under section 23 of that Act must be laid in draft and the order bringing it into force is subject to the negative procedure.

*9. The Home Office explains in its memorandum that laying the code before Parliament is considered sufficient because of the stringent consultation requirements that apply. For our part, we do not accept that consultation is an alternative to parliamentary scrutiny. In any event we note that similar consultation requirements apply to the code under section 23 of the Immigration, Asylum and Nationality Act 2006. The fact that a breach of the code under clause 28 is a matter that a court or tribunal may take into account suggests that the code is liable to affect the circumstances in which a landlord or agent will be found to have infringed equality legislation. **This in our view makes the negative procedure more appropriate, and accordingly we recommend that the same procedure should apply to the code***

[6] 22nd Report: Six Bills considered, Delegated Powers and Regulatory Reform Committee.

under clause 28 as applies to the equivalent code under section 23 of the Immigration, Asylum and Nationality Act 2006.

On the face of the Bill there is absolutely no penalty for discrimination by a landlord, landlady or other person letting accommodation. Employees and would-be employees have routes of redress if they are treated badly, including if they are victims of discrimination. It is possible to challenge discrimination, victimisation and harassment by a private landlord or landlady under Part 4 of the Equality Act 2010. Under the Equality Act s.136, in the county court the burden of proof shifts from the claimant to the defendant once the claimant has established a *prima facie* case that discrimination has taken place. Giving the code publicity will assist tenants in establishing this prima facie case, although we still consider that they will struggle. The Government consultation paper stated:

> *34. Many landlords will meet a number of prospective tenants. There is no requirement to check the immigration status of all of them – only the people with whom the landlord actually proceeds. Checks should be performed on a non-discriminatory basis (i.e. without regard to race, religion or other protected characteristics as specified in the Equality Act 201020) on all adults who will be living at the property.*

This paragraph perfectly encapsulates the risk that racial profiling will take place before a tenancy is offered.

A fine of three thousand pounds for letting to a person with no right to rent is a considerable sum and will cover the cost of many properties standing empty for months. It will cover a considerable amount of repair. A landlord or landlady would have an incentive not to accept a person who otherwise appears to be a model tenant if there is any risk of having to pay the fine. Any stereotype or prejudice might weigh with a person with multiple offers on the property, not because they feared having a particular individual as a tenant, but because they feared a fine, making the assumption that that person was more likely to be a person under immigration control whose documents would be complicated to check. When will a landlord perceive a risk of a fine? When will a landlady start worrying that a person's passport is false or otherwise unsatisfactory?

All too often this is likely to depend on what people look like, what they sound like, what their names are and how those names are spelt, and what place of birth is identified in their passports. Ms Caroline Kenny of the UK Association of Letting Agents, giving oral evidence to Public Bill Committee [7] made clear that the major concerns of her association about the provisions were concerns about the effect on ethnic minorities. She said (col 54):

> ***"Caroline Kenny:*** *It is illegal and abhorrent, but we can envisage a stage where more landlords will ask their agents not to show their properties to people of ethnic minorities. That is what we are extremely worried about…"*

Richard Jones of the Residential Landlord Association said in his evidence:

> ***Richard Jones****: …Landlords will shy away from individuals who are here perfectly lawfully to start with, and they will effectively discriminate against them. If you are faced with two tenants, one of whom has full status and one of whom is of limited status, you will not let to the one who has the limited status. It may well be that they have limited leave to remain, and that leave may*

[7] http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131029/pm/131029s01.htm

well be extended without any difficulty, but the landlord will shy away from that potential tenant for that reason.

In all these circumstances we are under no illusion whatsoever that a Code of Practice will resolve the problem of discrimination to which this clause will give rise. For the lucky few who are able to bring a challenge, a clear, accurate Code of Practice targeted specifically at landlords and landladies and their obligations under the Immigration Act might encourage country court judges, who must sit with lay assessors who are knowledgeable about race discrimination, at least in some cases, to consider awarding aggravated damages as well as compensation for loss and injury to feelings.

Part 6 *Miscellaneous*

Clause 65 Child trafficking guardians for all potential child victims of trafficking in human beings

Effect of Lords' amendments

To place the government under an obligation to provide statutory guardians for trafficked and potentially trafficked children. The functions of the guardians are set out in detail.

Main outstanding concerns

- That the Government will try to remove this amendment from the Bill without undertaking to insert it, intact, in the Modern Slavery Bill.
- That Guardians are needed for all separated children under immigration control, not just trafficked children.

Briefing

The Government was defeated at Commons' report 282 votes to 184, with support in the form of votes and abstentions from all around the House of Lords on this amendment which was laid in the names of Baroness Butler Sloss, Lord McColl of Dulwich, Lord Carlile of Berriew and Baroness Royall of Blaisdon[8]. Moving the amendment, the Baroness Butler Sloss explained that little was known about the Government's proposal for personal advocates for trafficked children but it appeared they would have no statutory basis and would thus lack essential powers. The Government would make no promise that provision would be made for statutory guardians in the Modern Slavery Bill presented to parliament:.

> ***Lord Taylor of Holbeach:*** *The Bill that is presented to Parliament is hardly likely to contain details of this measure because, as I understand it, the intention is to introduce sections on the trafficking advocates during the passage of the Bill, when we will have the information available.*[9]

Baroness Butler Sloss's summary invited the House of Lords to deliver the coup de grace:

> "*…I am a member of the Joint Committee on the Draft Modern Slavery Bill, and three different government Ministers came to speak to us, together with endless government officials at different times, but nobody told us about this. The first I knew of it was the press release. … it looks as though the Government are scrabbling a bit to meet this amendment… I ask noble Lords to reflect on what is going on here…What is the real difference between what the Government are offering and what the amendment is saying? The difference is the statutory*

[8] 7 April 2014 col 1142ff see http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140407-0001.htm#14040716000863

[9] Col 1158.

power. …If the Government would accept in principle what we are asking for, there is no reason why the other place cannot improve it …I would prefer it in the modern slavery Bill but the Government are not offering it there. Let us, consequently, get it into some legislation. If the Government accept it, they can put it into the modern slavery Bill and we do not have to have it in the Immigration Bill...

'Personal advocates' without the requisite authority to make legal decisions on behalf of the child are not a solution to the problems legal representatives face because of the lack of an adult competent to give instructions in the case of a trafficked child. Where a separated child (i.e. a child without a guardian or parent in the UK) has an immigration case, as is very often the case, there frequently will be no one with the legal competence to make the difficult decisions involved in litigation on behalf of the child. Until the case reaches the higher courts, the official solicitor does not get involved, as the official solicitor confirmed in oral evidence to the Joint Committee on Human Rights[10]. Lawyers can only take instructions from the child client him/herself. This creates myriad problems, not least where the child's instructions may be in conflict with his or her best interests. This was discussed in ILPA's oral evidence to the Joint Committee on the Modern Slavery Bill[11].

A real example may assist in illustrating the point. The client, a child of eight. The UK Border Agency case, that the child is trafficked by X. The child's instructions, that X is uncle and carer. Who is to instruct the lawyers? The child, who is only eight years old and may be acting under duress? The uncle/trafficker?

There has been some confusion as to the legal aid available to trafficked persons. It goes like this (all eligibility is subject to means and applicable merits tests):

- There are no special rules on trafficking for children, nor any general provisions granting legal aid to children
- There is legal aid for a person who claims asylum, but not all trafficked persons do
- There is no legal aid, at all, for a person who does not claim asylum prior to the "reasonable grounds" decision by the "competent authority" under the National Referral mechanism
- Following a positive reasonable grounds decision and thence forth, unless the "conclusive" decision is negative a trafficked person is entitled to legal aid.
- At the moment, a person who gets a negative "reasonable grounds" decision is eligible for legal aid to challenge that refusal by way of judicial review.
- If the proposals to implement a residence test go ahead (a draft statutory instrument has been laid before parliament) then trafficked persons' ability to get legal aid will not be affected by the residence test, but with the important exception that the exemption for trafficked persons does not stretch as far as legal aid for any judicial review. So, no legal aid prior to a positive reasonable grounds decision, but no legal aid to challenge a negative reasonable grounds decision if a person is not lawfully resident at the time of making the application (very many trafficked persons are not) and has not been lawfully residence for a continuous period of 12 months in the past.

This is a simplified version, omitting questions of evidence etc. It means that it falls to local authorities to meet legal fees, interpreter costs, court fees and fees for expert evidence. The guardian will be an important figure in ensuring that local authorities understand their

[10] http://www.parliament.uk/documents/joint-committees/human-rights/Legal_Aid_Inquiry_Transcript_231013.pdf
[11] http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/7468

responsibilities toward the child and meet them in a timely fashion. It is however desirable that proper provision for legal aid be made so that legal costs do not fall on local authorities.

The UK's obligations to provide guardians extend to all separated children going through the asylum procedures.

The EU Reception Directive by which the UK is bound[12] provides

> "*Article 19*
> *Unaccompanied minors*
> *1. Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.*"

Would a separated child's being required to bring a case unaided in this manner be tolerated in any other jurisdiction? The proposal that underlies the clause, that separated children should have the protection and assistance of a guardian, is long overdue. This clause is a first step; a vital first step but only a first step.

Clause 66: illegitimacy

Purpose of Lords' Amendments

There are three amendments. These

- Provide for persons born before 1 July 2006 to fathers who are British citizens otherwise than by descent not married to their mothers to acquire British citizenship by registration subject to proof of paternity.
- Provide that whether a person registering is a British citizen "by descent or otherwise than by descent" (i.e. able to pass on their British nationality to their children born overseas or not) will depend on what they would have been had their fathers been married to their mothers;
- Provide for registration under the new sections 4E to 4I inserted into the British Nationality Act by the new clause to be subject to a good character test;
- Ensure that the provisions of the British Nationality (General) Regulations 2003 as to the means of signalling parental consent operate for the purposes of signalling such consent under these paragraphs
- Ensure that the amendment to the British Nationality (General) Regulations 2003 can be amended by the order-making powers that operate for use of the Act as a whole

Main outstanding concerns

That unlike their counterparts born within marriage, or to unmarried parents after 1 July 2006, those registering under this clause must be of good character.

Briefing

This clause is to be introduced at Third Reading and some of the points raised below may be addressed there. Children born outside the UK to British fathers who are not married to their non-British mothers were not able to inherit their father's British citizenship. Since 1983, this also applies to those born in the UK to such fathers and to a mother who was not British nor settled in the UK. Before 1983, a child born in the UK was automatically born a British citizen. The anomaly was addressed for the future by section 9 of the Nationality, Immigration and

[12] 2003/9/EC

Asylum Act 2002, inserting section 4C into the British Nationality Act 1981, which came into force on 1 July 2006. But that section applies only to children born on or after 1 July 2006.

The new clause would allow those born to British fathers not married to their mothers and for that reason alone, not British citizens, to register as British citizens. For those born in the UK, the new clause thus assists those born after 1983 and before 1 July 2006. For those born outside the UK to fathers who are British citizens otherwise than by descent (i.e. able to pass on their nationality to their children born outside the UK) it would assist all those born before 1 July 2006 still living.

The means of proving paternity are set out in The British Nationality (Proof of Paternity) Regulations 2006, SI 2006/1496.

These amendments are an important step towards eliminating the present day effects of historical discrimination in British nationality law on the grounds of legitimacy. They are not the final word.

We question the need for 4J (2) which provides a power to have a different definition of natural father for purposes of these sections from that used for other cases. It may have been drafted with benevolent purpose, with the notion that because cases under these sections may be much older cases than those normally dealt with under The British Nationality (Proof of Paternity) Regulations 2006 (SI 2006/1496), there may be particular evidential problems, but given the breadth of the proof of paternity regulations, which allow the Secretary of State to have regard to any evidence she may consider relevant, we question what more could possibly be required.

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It too some four years for section 4C of the British Nationality Act 2002 to come into force. To bring in section 4C involved deciding the way in which paternity should be proven and brining the British Nationality (Proof of Paternity) Regulations 2006 (SI 2006/1496) into force. There are no such complications this time and we should welcome an assurance that commencement will be rapid.

There is no fee to register under section 4C only the £80 citizenship ceremony fee is payable. The current Secretary of State got rid of the fee that was being charged[13], recognising arguments that fee was not appropriate in cases designed to address the effects of this discrimination on the grounds of legitimacy. We should welcome an assurance from the Minister that there will be no fee for registration under the new provisions, in line with the Home Secretary's approach.

The amendments do not address forms of nationality other than British citizenship, such as British overseas territories citizenship. We understand that this is because there would need to be discussions with the British overseas territories. We should welcome the Minister's assurance that he will bring the provisions to the attention of the administration of the overseas territories so that they can consider the question.

The amendments look only at persons entitled to register now. They thus do not address the present day effects of historical discrimination against earlier generations born illegitimate unless those persons are themselves in a position to register now. We look forward to coming back

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301380/Master_Fees_Leaflet_Apr_2014.pdf

in the future to work on this and can only hope that when we do a draftsperson equally able to grapple with the complexities of British nationality law is assigned to work on it.

We do not consider that registration should be subject to a good character test. The aim of the provision is to correct discrimination against men as to their ability to transmit nationality to their children. Those born to fathers married to their mothers need not be persons of good character.

Clause 67 Deprivation if conduct seriously prejudicial to vital interests of the UK

Effect of Lords' Amendment

To remove the powers inserted at Commons' report allowing the Secretary of State to deprive persons of their British citizenship even if this would leave them stateless and refer the question of whether the UK should take powers to deprive people of citizenship where this would make them stateless to a committee of parliamentarians and then require the Government to bring forth fresh legislation if it subsequently decided to proceed.

Main outstanding concern

That the Government will try to remove this amendment from the Bill and thus undo the effects of a particularly proud moment in parliament's history.

Briefing

ILPA and others, including Professor Guy Goodwin Gill, Professor of Refugee Law and fellow of All Souls at the University of Oxford, the Open Society Institute, Liberty and the Bureau of Investigative Journalism all provided briefings for the debates in the House of Lords. The Government was defeated at Lords' Report by 242 votes to 180 .You can read an account of the history of the amendment here http://www.statelessness.eu/blog/uk-house-lords-defeats-government-deprivation-citizenship-leading-statelessness

Subsequent to the defeat the Minister, Lord Taylor of Holbeach wrote[14] to Baroness Smith of Basildon. The letter is a disappointing document. Its opening

> *"the Government is currently considering how to protect the security of its citizens following the vote on the deprivation of citizenship provisions in the Immigration Bill, on Monday 7 April"*

is pompous and does scant justice to the concern for national security expressed by those who participated in the debate or to the carefully reasoned arguments they put forward for considering that the clause would not contribute to national security.

The majority did not accept that deprivation of citizenship resulting in statelessness would make the citizens of the UK, or indeed of other countries, safer. It conceived of security not as a national, but as a global, affair. A person who threatens security is the responsibility of all States, in the spirit of, as Lord Macdonald of River Glaven put it, "the comity of nations" and "solidarity between free countries in the face of terrorism." He said

> *"… statelessness deprives people of the "right to have rights". It brings about a bleak, hopeless status, or rather a complete lack of status, that the British Government should have no role in encouraging, first, because of the positively terminal impact that the imposition of statelessness*

[14] Available at http://data.parliament.uk/DepositedPapers/Files/DEP2014-0641/170414_-_Baroness_Smith_-_Deprivation_-_Letter_from_Lord_Taylor.pdf

is bound to have on the ability of the rightless to function in a way that is even remotely human in the modern world and, secondly, because it is clear that such an imposition as a policy measure can have no sensible part in a co-ordinated international effort to combat security threats. …" (17 March 2014, col 53)

The Lord Brown of Eaton-under-Heywood, having indicated that he was in any event unimpressed by the national security arguments, said firmly *"…it is very unlikely that any advantage to national security could begin to compensate for the indisputable reputational damage that such a measure would occasion"* ((17 March 2014, col 54).

Baroness Kennedy of the Shaws, who represented Madhi Hashi , asked**…** Where is the rule of law of which we are so proud? …Deprivation of citizenship is potentially inconsistent with obligations accepted by the United Kingdom under many different treaties dealing with terrorist acts, in particular, the obligations of investigation and prosecution in the fulfilment of which every other state party has a legal interest." (10 February 2014, col 484).

The letter in many respects appears lazy, rehashing arguments that were demonstrated to be fallacious at earlier stages. Thus, the letter advances argument that deprivation of citizenship allows the Government to stop people travelling although it has all the powers it could want or need to deprive citizens a passport on national security grounds as was pointed out by Lord Pannick in the debate on7 Apr 2014: Column 1169 with reference to the Ministerial statement of 25 March 2013.

Another example, the letter again makes reference to the possibility of the immigration rules (Part 14, paragraph 400ff[15]) being used to give a person remaining in the UK after having been deprived of their citizenship on the grounds that they had done something seriously prejudicial to the vital interests of the UK. Yet Baroness Hamwee had pointed out at Lords' Report (7 Apr 2014: Column 1177),, that there are exclusions from leave as a stateless person for a wide range of persons, including where there are concerns about conduct, character or associations or where the person represents a threat to national security. Why mention the stateless determination procedure at all, when it is irrelevant?

The letter is silent on the question posed by the Joint Committee on Human Rights and in the debates of how many of the 25 persons deprived of their British citizenship since 2006 had been outside the UK at the time. Yet in 2010 the Government responded to freedom of information requests on this very point. The Bureau of Investigative Journalism has identified 18 of the people, 15 of whom were deprived of their citizenship while outside the UK[16]. What could answering the question tell us that we do not know already?

In the face of silence, it was taken as read during the debates in the House of Lords that most persons would be outside the UK when deprived of their nationality. The letter says

"…we would expect any individual…to seek to resolve their nationality issues at the earliest opportunity"

Quite how a person such as Madhi Hashi, rendered to the United States and there imprisoned, is supposed to set about "resolving his nationality issues" is wholly unclear. The letter goes on to say

"In cases where this is not possible, the individual would be able to avail themselves of whatever protection that country provides"

[15] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279697/Immigration_Rules_-_Part_14.pdf

[16] See http://www.thebureauinvestigates.com/2013/02/27/graphic-detail-how-uk-government-has-used-its-powers-of-banishment/

The seemingly casual use of "whatever" says it all. Madhi Hashi sought to avail himself of "whatever" protection Djibouti could provide.

We have yet to see the promised full response to Professor Goodwin Gill's paper and to his exegesis of the international law obliging states to readmit their former nationals. We can only state that we have yet to find an international lawyer who does not find Professor Goodwin Gill's arguments on the point persuasive.

The Government proposal at Lords Report was for a review of the operation of the power to deprive after the first year of its operation and then every three years. It was unclear whether it envisaged all powers to deprive or just those that render a person stateless. The person who would carry out the review was unspecified Save that it would appear not to be the Secretary of State herself. The drafting did not preclude its being one of her officials although the Minister said that although the word "independent" was not used, the Government had in mind someone independent. The clause gave the Secretary of State power to supress such of the report as she sees fit if in the opinion that it would be "contrary to the public interest or prejudicial to national security for that part of the report to be made public. The clause gave the Secretary of State a blank cheque to pay for the report.

The Minister was going to move the amendment but on advice from the box, did not. The text of the amendment comes across as reflecting an intent that is contemptuous, almost insulting. "Oh give them a review; it does not matter what it looks like, just something to shut them up." A secret report by a person with no guaranteed independence can be contrasted with Section 36 of the Terrorism Act 2006 where the Secretary of State is obliged to lay a report annually before parliament.

By the amendment made to the Bill parliament asks for further and better argument before it takes a step, the gravity of which and the consequences of which for the persons concerned and the UK's international reputation, the House of Lords took extremely seriously:

The Lord Avebury invited the House to consider "**…** the appalling example we are setting…the rest of the world. Britain was in the forefront in promoting the 1961 UN Convention on the Reduction of Statelessness, and has since worked to reduce the pockets of statelessness that still exist all over the world, such as the Bidoon in the Gulf states, the Rohingya and the Palestinians. How can we now pretend to a share in the leadership of the UNHCR's continuing effort to eliminate statelessness when, at the same time, we are enacting domestic legislation to create more stateless people?" (19 March 2014, col 212). The Lord Roberts of Llandudno reminded the House "Let us not forget the judgment of Chief Justice Warren ruling in the United States Supreme Court case of *Trop v Dulles* in 1958. He said that, "use of denationalization as a punishment", means, "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture." (17 Mar 2014 : Column 53**)** The Lord Deben said "… the exemplars are not ones that are easily taken to the heart of the broad mass of the British people. That means that those people should be particularly able to call upon this House… We live in a world in which statelessness is one of the most terrible things that can befall anyone." (19 March 2014 col 213) The Lord Brown of Eaton-under-Heywood recalled that "…Lord Wilson, in giving the Al-Jedda judgment, referred in paragraph 12 to "The evil of statelessness" and spoke of the "terrible practical consequences" that flow from it" (17 March 2014, col 54).

Clause 72 Duty regarding the welfare of children

Purpose of Lords' amendment

The new clause provides that "for the avoidance of doubt" nothing in the Bill is intended to limit the duties under section 55 of the Borders Citizenship and Immigration Act 2009 (duty to have regard to the need to safeguard and promote the welfare of children. It is a response to concerns expressed that provisions of the Bill were not compatible with this duty.

Main concerns

- The new clause fails to state that the best interests of a child affected by an immigration decision will always be a primary concern.
- What are the implications for future Bills? Will they all need to carry the same clause, and if they do not will this give rise to doubt?

Briefing

This new clause was tabled by the Earl of Listowel at Lords' Report, with Government support. The debate on it can be found at Vol 753, No 139 at Cols 932 to 942. The Lord Wallace of Tankerness said in Lords' Committee "The best interests of a child in the United Kingdom will continue to be a primary consideration in all cases…"(col 1382).

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. …***

Clause 19, which is concerned with Article 8 of the European Convention on Human Rights, on its face only takes into account the interests of British citizen children and those who have been in the UK for seven years and then only takes their interests into account insofar as it imposes a duty to consider whether the effect of the amendment on them would be "unduly harsh". The new clause confirms that it is necessary to take into account the need to safeguard them and promote their welfare as well, and to take into account the need to safeguard and promote the welfare of children who are not British or have not been in the UK for so long. Thus it confirms that the confusion identified by the Joint Committee on Human Rights exists and provides that it must be resolved in favour of the section 55 duty. It does not say how. The Earl of Listowel, moving the amendment which stood in his name and that of the Minister, said

> *"I could have wished that the amendment went further to include reference to the best interests of the child…However, having discussed this with officials, I understand that that there are procedural difficulties that prevent the Government agreeing such a reference in the legislation at this stage of the Bill."*

We are at a loss as to what such difficulties could be and, in any event, if they applied only at Lords' Report perhaps they will not apply at Commons' Consideration? An express statement the best interests of the child are to be a primary consideration in any decisions concerning children, as the UN Convention on the Rights of Child says that they are and as the UK courts have said in *ZH (Tanzania) v SSHD* [2011] UKSC 4 that they are, might go some way toward elucidating the clause.

Clause 75

Purpose of Lords' amendments

- To make subject to the affirmative procedure regulations as to marriage that concern
- The conduct of any investigation by the Secretary of State
- When a person shall be taken to have complied with the Secretary of State's investigation
- Information be prescribed to be included in any notification the Secretary of State makes about the investigation
- An order specifying additional immigration purposes for which information disclosed to the Secretary of State by a registrar may be disclosed. These do not appear to have to have anything to do with the investigation of the marriage.
- An order specifying purposes as "immigration purposes"

Main concerns

Affirmative procedure or not, the marriage regime will permit an enormous amount of sharing of information for reasons which have nothing to do with the marriage or relationship itself.

Briefing

The amendments give effect to the recommendations of the House of Lords' Committee on Delegated Powers and Regulatory Reform.

LORDS' AMENDMENT: Title

Purpose

The government proposes at Lords' third reading to amend the long title of the Bill to include reference to illegitimacy and deprivation of children, but not to guardians for trafficked children

Briefing

Amendments to the long title of a Bill are permissible as set out in Chapter 8[17] of the Companion to the Standing Orders at 8.54:

8.54 The House observes the following general rules regarding the admissibility of amendments:
- *amendments must be relevant to the subject matter of the bill…*
- *amendments proposed at committee or any other stage must not be inconsistent with a previous decision taken at that stage…*
- *amendments to the long title are not in order unless they are to rectify a mistake in the original title, to restate the title more clearly, or to reflect amendments to the bill which are relevant to the bill but not covered by the former long title;*
- *clause headings, and headings placed above parts of the bill or above groups of clauses, are technically not part of the bill and so are not open to amendment. Punctuation is also technically not part of the bill.*

[17] http://www.publications.parliament.uk/pa/ld/ldcomp/compso2013/10.htm

The Companion also provides that amendments to the long title be taken last in a marshalled list[18]. What we are less clear is what precedents there are for a title to be amended at such a late stage and at a stage of the Bill several stages subsequent to that at which a Government amendment was first introduced.

We also question why the amendment makes reference to deprivation of citizenship in terms that have more to do with the clause that was voted out of the bill than the one that replaced it and why it makes no reference to guardians for trafficked children despite that being a new addition to the Bill. Will the Minister confirm that he considers the amendment on guardians for trafficked children to be within the existing long title?

When nationality amendments were raised at Public Bill Committee stage they were treated as being outwith the scope of the Bill. The then Minister said (col 178)

> ***Mr Harper: …****My hon. Friend the Member for Cambridge has raised with me before the issue that his amendment deals with, as he says, and he has thought of a very creative way of raising it in the Bill, given that to solve the problem substantively, as both he and the hon. Member for Hackney South and Shoreditch suggest, would actually be outside the scope of the Bill. …*

ILPA raised this point in our briefing on the deprivation amendment when it was tabled for Commons Report.

ANNEX PROPOSED AMENDMENTS

Clause 1 Removal of Persons unlawfully in the United Kingdom

First proposed amendment

> At the end of subsection 10(1) after "it" insert "and the Secretary of State has given the person written notice of his liability to removal"

Purpose
To ensure that a person must be given notice of their removal.

Second proposed amendment

> In subsection 10(3)(b) leave out "has care of" and replace with "has parental responsibility for"

Purpose
To restore the language used in the draft regulations laid before the House of Commons as to which children can be removed with a principal facing removal to those children for whom the principal has parental responsibility.

Third proposed amendment

> Leave out subsection 10(3)(c)

Purpose

[18] 8.58

To restore the provision made in the draft regulations laid before the House of Commons as to which family members can be moved with a principal facing removal to remove provision for the parent of a minor child facing removal to be included.

Detention of Children Lords' Amendment to Clause 1, Clauses 2 (*Restriction on removal of children and their parents etc.)*, 3 (*Independent Family Returns Panel)* 5 (*Restrictions on detention of unaccompanied children)*, and 6 (*Pre-Departure accommodation for families*)

First: new Clause before Clause 2

Replace Clauses 2,3 5 and 6 and all related amendments with a clause providing that no child under the age of 18 years can be detained under immigration act powers

Purpose
To prohibit the detention of children, unaccompanied or accompanied, under immigration act powers.

Second: Alternative New Clause before Clause 2

Children should be detained under Immigration Act powers only in very exceptional circumstances, for the shortest possible time and with appropriate care.

Purpose
To place the limitations on detention currently found in Home Office guidance (Enforcement Guidance and Instructions Chapter 55) on the face of primary legislation.

Third

In all places where it occurs, the words "pre-departure" accommodation should be replaced with "detention centres for families"

Purpose
To call a spade a spade and make clear that pre-departure accommodation is detention, both to avoid making the detention of children seem more palatable and to ensure that is it not forgotten that all protections applicable to those deprived of their liberty apply to these children and to their parents.

Fourth – to Clause 2 *Restriction on the removal of children and their parents*

Leave out "care of the" in 78A(1)(b)(i) and replace with "parental responsibility for" in section 78A(2)(b)

Purpose
To probe the circumstances in which a child would be removed with someone who does not have parental responsibility for him/her. If a child faces removal as part of a family unit, then it is desirable that the procedures in this clause apply to them, hence this is a probing amendment, but it should not be the case that a child faces removal with someone who does not have parental responsibility for him/her.

Fifth – to Clause 2 *Restriction on the removal of children and their parents*

Leave out section 78A(1)(b)(ii)

Purpose

To ensure that the safeguards in these clauses apply when a child is to be removed as part of a family unit, regardless of whether the child is living in the same household as the parent. This would not require the detention of a child who was living at liberty elsewhere, but would require that child to be included in all procedures..

Sixth – to Clause 2 *Restriction on the removal of children and their parents*

Leave out the word "relevant" in section 78A(2)(b)

Purpose

To ensure that the family cannot be split during the removal process for reasons of immigration control, with one parent removed or required to leave where the other remains behind with the child. This is achieved by removing the "word relevant" so that the prohibition on removal applies to any parent or carer.

Seventh – to Clause 2 *Restriction on the removal of children and their parents*

Leave out subsection 78A(4)

Purpose

To remove powers to give removal directions, make a deportation order to take any other interim or preparatory action during the 28 day "reflection" period.

Eighth – to Clause 3 *Independent family returns panel* and consequential amendments)

Remove word "independent" where it occurs.

Purpose

The panel is appointed by the Secretary of State and she regulates its conduct. This puts its independence at risk.. The amendment would be with a view to ensuring that a false impression is not given. It would also pave the way for the Bill to be amended to make provision for an independent panel.

Ninth – to Clause 5 Restrictions on the detention of unaccompanied children

Leave out Clause 5, save for the definition of an "unaccompanied child" at the end and replace with "An unaccompanied child shall not be detained under Immigration Act powers.

Purpose

To prohibit the detention of unaccompanied children under immigration act powers.

Clause 15 Right of appeal to First-tier Tribunal

Proposed Commons' Amendment

Replace the words "to "and" in line 13" in the Lords' amendment with

"and the Tribunal has determined that it is in the interests of justice that it invite the Secretary of State to consider the matter before it is considered by the Tribunal."

Purpose

Hands control over whether a matter is dealt with by the Tribunal or given to the Secretary of State to consider back to the Tribunal and thus gives effect to the recommendations of the Joint Committee on Human Rights and the Lords' Committee on the Constitution.

Clause 16 Report by the Chief Inspector on Administrative Review

Proposed amendments to Lords' amendment

To change the timing of a requirement to report on administrative review from 12 months after commencement of section 15 to before commencement of section15.

To require Parliament on receipt of the report to vote on it.

To require that vote to determine whether section 15 shall come into force or not.

Purpose
To give parliament a chance to consider the report on the system of administrative review system (on a shadow system run in parallel with the current system) and decide in the light of it whether rights of appeal should be abolished.

Clause 32 General Matters

Proposed amendment (to Clause 75)

To make the Code of Practice on the setting of the amount of a penalty subject to the affirmative procedure

Purpose
To give effect to the recommendation of 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 66: illegitimacy

Proposed amendments to Lords' amendments

In the amendment to Schedule 9, inserting PART 8A PROVISION RELATING TO PERSONS UNABLE TO ACQUIRE NATIONALITY BECAUSE NATURAL FATHER NOT MARRIED TO MOTHER, leave out paragraph 1(3) which provides "(3) In section 41A (registration: requirement to be of good character), in subsection (1), after "5," insert "4F, 4G, 4H, 4I".

Purpose
To remove the requirement that those registering under this section must be of good character and thus equate their position in this regard with that of those born legitimate.

Clause 72 Duty regarding the welfare of children

Proposed amendment to Lords' Amendment

To add to the clause a statement that "The best interests of a child in the United Kingdom will continue to be a primary consideration in all cases involving children".

Purpose

To provide an unambiguous statement as to the best interests of a child in the United Kingdom (the section 55 duty is limited to children in the United Kingdom) using language that derives from the UN Convention on the Rights of the Child and from the judgment of the UK Supreme Court in *ZH (Tanzania)*.

The new clause provides that "for the avoidance of doubt" nothing in the Bill is intended to limit the duties under section 55 of the Borders Citizenship and Immigration Act 2009 (duty to have regard to the need to safeguard and promote the welfare of children. It is a response to concerns expressed that provisions of the Bill were not compatible with this duty.