ILPA Briefing for the Counter-Terrorism and Security Bill House of Lords Committee First Day 20 January 2014 part 2 Temporary Exclusion Orders

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 committees, including Home Office, and other consultative and advisory groups.

We refer you to our second reading briefing for general evidence and analysis; this briefing addresses key points about the Government amendments pertaining to judicial supervision of temporary exclusion orders. ***For further information please get in touch with Alison Harvey, Legal Director, on 0207 251 8383, Alison.Harvey@ilpa.org.uk***

PART 2 TEMPORARY EXCLUSION ORDERS

ILPA is unpersuaded that temporary exclusion orders are necessary or desirable. We share the view of the Joint Committee on Human Rights that **"We are opposed in principle to any exclusion of UK nationals from the UK, even on a temporary basis"**[1] Authority to carry schemes, discussed further in ILPA's briefing for Committee stage[2], already provide the Government with information on who is travelling and there has been no suggestion that the security forces would have problems in mobilizing rapidly in the event of a person's being deported to the UK, as the clause envisages and permits. [3]

The Joint Committee on Human Rights recommended that if, contrary to its recommendation, the Government pursues Temporary Exclusion Orders: **"…that the Bill be amended to provide expressly for a judicial role prior to the making of a notification of return order…"** [4]

A review on judicial review principles

The Government amendments make provision for a review on judicial review principles (amendment 52 subclause (5); amendment 44 paragraph 5(1)). This is of limited use. In the House of Commons the Home Secretary sought to resist calls for judicial oversight by

[1] HL Paper 86, HC 859, op. cit. para 3.9

[2] Available at http://www.ilpa.org.uk/resources.php/30446/ilpa-briefing-for-counter-terrorism-and-security-bill-part-4-aviation-shipping-and-rail-part-1-passe

[3] This suggests that the Government has heeded debates in the House of Lords during the passage of the Bill that became the Immigration Act 2014 as to obligations toward other States who have admitted an individual on the strength of his her British passport. See e.g. HC 7 Apr 2014: Column 1169 with particular reference to the opinion of Professor Guy Goodwin Gill, Professor of Refugee Law at the University of Oxford and Fellow of All Souls. His briefings are available on the ILPA website at http://www.ilpa.org.uk/pages/immigration-bill-2013.html

[4] HL Paper 86, HC 859, op. cit. para 3.15.

suggesting that judicial review was the means by which the courts would be involved. Mr Jeremy Corbyn MP reminded that House that a judicial review is not an appeal. The Home Secretary did not dispute his correction.[5] A judicial review, as he explained, is judicial oversight of how the original decision-maker reached his or her decision. It looks for bias, for a decision-maker who is acting outwith his/her powers, for irrationality. It is not an appeal on the substantive merits of the case. It does not provide a sufficient check on the extreme powers parliament is being asked to give to Government to exclude citizens from their own land.

The standard of review

The court will determine these cases, and whether a matter is urgent, on the basis that the decision of the Secretary of State is "obviously flawed" (amendment 52, subclause 5, amendment 44 paragraph 5(1) and, on urgency, paragraph 4(3)). This test does not allow for adequate supervision. "[O]bviously flawed" is a high test, particularly in cases where a party and his/her legal representative, if any, can be excluded from the proceedings and where the use of closed material procedures limits the extent to which material can be tested. In addition, urgent cases will be proceeding at speed.

The standard of review for the question of urgency is all the more surprising given that on the matter of urgency the Court can give only declaratory relief (amendment 44, paragraph 4(4)).

Legal aid

While Government amendment 1 makes provision for legal aid when an application to retain a passport beyond 14 days comes before a court, no similar provision has been made for legal aid in respect of these hearings. Without legal aid many will struggle even to pay the court fees for a judicial review, let alone secure legal representation. And in any event, , the Government proposes a residence test for legal aid so that only those within the UK and with 12 months prior residence will qualify for legal aid. The proposal is currently on hold because of a successful legal challenge,[6] but the Government has appealed. The Government is restricting access to judicial review through the Criminal Justice and Courts Bill currently in ping pong.

In cases before the Special Immigration Appeals Commission, while a means test for legal aid need be satisfied, there is no merits test. It is accepted that an individual requires legal representation faced with closed material procedures, gisting, special advocates and the rest.

Cases in which the permission of the Court is not required

Government amendment 44 makes provision for cases where the Secretary of the State "reasonably" considers that the urgency of the case requires the order to be imposed without obtaining the permission of the court.

Given the gravity of the matters at stake, proposals to exclude the scrutiny of the court should be subject to intense scrutiny. The Government will have to move extremely rapidly

[5] 15 December 2014, col 1233.
[6] *R (PLP) v Secretary of State for the Home Department* [2014] EWHC 2365 (Admin).

if the person is deported to the UK which the clauses envisage and for which they make provision. We have experience of the Government mobilising extremely rapidly in immigration cases where challenges to removal are made at a late stage or in cases where a matter of, for example, immigration detention, is of extreme urgency. Judges work out of hours: they make themselves available and provide an incredibly high standard of service. We question whether there is any evidence that a court would not be able rapidly to scrutinise an order.

Onward appeals

Amendment 52 provides that only the Secretary of State may appeal against the decision of the court. If an error of law has been made, to the detriment of either party, it should be possible to challenge it. It is proposed that the individual, quite possibly outside the jurisdiction in a perilous situation with poor communication, will have as their only redress judicial review of a decision on judicial review principles, to a standard that the decision is not "obviously flawed". In other words, you have the theoretical possibility of challenging the decision with the slight drawback that you are bound to lose.

In summary, these amendments provide for judicial supervision but they do not provide for justice. They serve to highlight the extreme nature of the temporary exclusion order regime by which a British citizen can be excluded from their country of nationality for under an order that can last two years[7]. Orders may be placed end to end,[8] with no maximum duration, so that nothing on the face of the Bill prevents orders from being indefinite and/or lifelong. While there is an obligation to issue a permit to return,[9] unless the individual is required to attend an interview with an immigration officer and fails so to do,[10] a permit to return can be revoked, where the Secretary of State considers that it was obtained by misrepresentation[11] or where a subsequent permit is issued.[12] The permit may be subject to conditions[13] and nothing on the face of the Bill prevents the Secretary of State revoking and reissuing permits indefinitely. Meanwhile if there is a challenge, it will be under closed material procedures and we recall the comments of Sir Richard Shepherd MP during the passage of the Immigration Act 2014:

> *…my concern is not the difficulty for Governments; my concern is for the British common law system. This is not about the European Court of Justice—its rulings or anything else. The issue of concern to me is: what is our process?*
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> *I believe, and this was fundamental to our legal system, that a person should know the reasons they are to be aggrieved… they can make no case that can be held to be valid, because they do not know what they are challenging—or they will claim they do not know what they are being challenged with. We do not know and the public do not know, so this violates one of the first principles of our legal system—our common law system. I want the House always to remember that our common law system in England has been absolutely essential to our liberties, freedoms, standing and our sense of who we are.*

[7] Clause 3(2).
[8] Clause 3(8).
[9] Clause 5(1).
[10] Clause 5(2).
[11] Clause 7(e).
[12] Clause 7(d).
[13] Clause 4(2).

I understand the difficulties that Governments face, as there are a lot of wicked, evil people out there, but the answer has always been to prosecute. We are told, "Oh we can't prosecute because in a prosecution we may have to reveal our sources." This is the nightmare situation that the world in which we now live is facing: we are not to know, we cannot know and we cannot challenge. The Special Immigration Appeals Commission is one of the most monstrous extrusions on the national scene, as not even the solicitor representing the accused or the person who loses their citizenship knows the reasons their client is there. Gisting? Well, all those rules that have been put in place essentially deny open justice using the argument of national security.

I have been a Member of Parliament for 36 years, and I look back over the decline of our sense of who we are, what our system is, and our freedoms and liberties, which are concentrated in the concept of the common law. I did not invent it—we did not invent it—it came from the movement of the people of this country over hundreds of years and the development of our legal system. Year after year, in a way that one could never assume would happen, Governments have gone out searching for new measures to conceal the openness of what justice should be. We, as citizens of this country, have a right to know why people are charged. That is why we have an open court system, so that we can judge whether the measures are competent, reasonable or truthful to the purpose of our nation. That is why I cannot support the very notion that so much power should be concentrated in one individual—a Home Secretary—whether good or bad, that they may make decisions of this nature without our being able to challenge whether they are valid, true or right. I want the House to stand up for who we are and what our system of justice is—and it is not secret justice.[14]

[14] HC deb 7 May 2014 : Columns 205-206.