ILPA briefing for House of Commons Second Reading of the Immigration Bill 2015, 13 October 2015

The Immigration Law Practitioners' Association (ILPA) is 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 in 1984, 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 many Government and other consultative and advisory groups.

This briefing provides an overview of some of the changes the Bill seeks to implement and of some of the changes ILPA would wish to see. We deal first with appeals then take the provisions of the Bill in order. We are happy to provide further information on request. ***Please get in touch with Alison Harvey, Legal Director Alison.Harvey@ilpa.org.uk or Zoe Harper, Legal Officer, Zoe.Harper@ilpa.org.uk , phone 0207 2518383.***

OVERVIEW

On 28 March 2013, the Home Secretary abolished the UK Border Agency. Her reasons for doing should be read in full but an extract gives a flavour:

> *… the performance of what remains of UKBA is still not good enough. The agency struggles with the volume of its casework ... has been a troubled organisation since it was formed in 2008… UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry ...and they often involve paper files … The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies … it will take many years to clear the backlogs and fix the system, ..."* [1]

We agree. Ms Sarah Rapson, Director General of UK Visas and Immigration, told the Home Affairs Select Committee in June 2013 "Is it [the organisation] ever going to be fixed?... I think I answered that question from you earlier. I don't think so."[2]

This complex Bill is the latest stage in the "vicious cycle of complex legislation" described by the Home Secretary. The Bill makes demands that the Home Office is not equipped or able to meet and gives it powers that it cannot be relied upon to exercise properly. It is predicated upon the false assumption that the Home Office gets it right, not most of the time, but all of the time. The Bill will mean that where it exceeds or abuses its powers, or simply fails to do the job, British citizens are denied their entitlements as citizens; persons whose presence in the UK is authorized, and indeed welcomed, are not able to live and work in accordance with the conditions of their authorization, and the rights of all: citizens, persons under immigration control and those with no leave, are put at risk.

[1] HC Report 6 Mar 2013: Col 1500.
[2] Oral evidence given on 11 June 2013, published as HC 232-I, response to question 6, see http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc232-i/uc23201.htm

The State is shielded from challenge: there will in very many cases be no remedy and no redress. The Bill cannot be read in isolation from the cuts in legal aid.[3] Restrictions on judicial review[4] further against challenges. It is a reasonable assumption that if parliament does not put a safeguard into place it will be considerable time before that safeguard can be put into place through litigation.

UK Visas and Immigration has better things to do than administer the complex bureaucracy engendered by this Bill. Parliament has better things to do than pass this Bill.

If the Bill is to proceed through both Houses of Parliament, then alongside what it already contains we propose amendments to:

- Make provision for a time limit on detention and for regular automatic judicial oversight of immigration detention;
- Restore rights of appeal cut away in 2014 and restore accountability of UK Visas and Immigration;
- Amend section 94 of the Nationality, Immigration and Asylum Act 2002 so that the Secretary of State cannot deem a country to be safe for a person seeking international protection, regardless of the evidence to the contrary;
- Provide for asylum support to be uprated in line with benefits uprating;
- Repeal Schedule 3 to the Nationality, Immigration and Asylum Act 2002 which restricts the support local authorities can provide to persons under immigration control;
- Provide protection from abuse for overseas domestic workers;
- Progress reform of citizenship laws to eliminate the present day effects of historical discrimination.

PART 4 APPEALS

The Immigration Act 2014 contained a power to certify the appeals of "foreign criminals", as defined, before these appeals began or while they were in train so that, other than in cases based on fear of persecution or ill-treatment abroad, the "foreign criminal" could be removed before the appeal was determined if to do so would not breach human rights and rights under EU law and in particular would not cause "serious irreversible harm." Now it is proposed to extend these powers beyond "foreign criminals" those whose presence in the UK is deemed "not conducive to the public good" to anyone appealing an immigration decision. Since rights of appeal are now restricted to protection and human rights grounds, this means for the most part those relying on Article 8 of the European Convention on Human Rights in their appeal, the right to private and family life. Rights under Article 8 normally arise when a person has lived in the UK since childhood or where leaving the UK would mean leaving British or settled family members who cannot follow them to their destination.

The power of one party to a case to send the other party from the jurisdiction so that they cannot appear before the court or tribunal and may struggle to present their case at all is inimical to the notion of equality of arms. If the proposed residence test for legal aid, currently under challenge in the courts, is brought into effect it will mean that being outside the jurisdiction automatically disqualifies a person from legal aid. Those paying privately, and the Legal Aid Agency while legal aid is still available, will be forced to expend considerable sums

[3] See the Legal Aid, Sentencing and Punishment of Offenders Act 2012
[4] Criminal Justice and Courts 205 Act Part 4.

instructing lawyers and marshalling evidence from overseas. Appeals will not be pursed or will be pursued inadequately.

The Home Office does not get these decisions right all of the time. Success rates are set out below[5]:

		All	Asylum	Managed Migration	Entry Clearance	Family Visits	Deport &Others
2012/13	**Determined at hearing / papers**	**68,187**	**10,106**	**21,669**	**12,815**	**22,525**	**1,072**
	Allowed/Granted %	44%	30%	49%	50%	43%	32%
	Dismissed/Refused %	56%	70%	51%	50%	57%	68%
2013/14	**Determined at hearing / papers**	**67,471**	**9,897**	**28,720**	**14,291**	**12,766**	**1,797**
	Allowed/Granted %	44%	29%	49%	48%	43%	37%
	Dismissed/Refused %	56%	71%	51%	52%	57%	63%
2014/15[r]	**Determined at hearing / papers**	**66,262**	**9,137**	**38,084**	**11,631**	**5,314**	**2,096**
	Allowed/Granted %	40%	31%	42%	42%	37%	33%
	Dismissed/Refused %	60%	69%	58%	58%	63%	67%

The separation of a family until the appeal is finally determined, is for a lengthy, and unknown, period. We are currently seeing cases before the Immigration and Asylum Chamber of the First-tier Tribunal listed for June 2016, in some instances July. This is before onward appeals are considered. The President of the First-tier Tribunal issued a message about the challenge of listing and ILPA understands that delays are likely to increase in the foreseeable future. It is ILPA's understanding that volumes of appeals, and of judicial reviews, have exceeded those predicted at the time of the passage of the Immigration Act 2014. Parliamentarians should ask what steps are being taken to ensure that the Tribunal deal with the volume of work before it and whether payments are being made from the Home Office to Her Majesty's Courts and Tribunals Service to mitigate the effect of Home Office legislation on courts and Tribunals.

The Bill would also make amendments to provisions that allow a person's leave to continue on the same terms and conditions pending an appeal or administrative review of a decision to revoke or cancel leave. The Explanatory Notes to the Bill contend that the provisions revoked "have no continuing purpose". This currently true, but the reasons why it is true should be challenged. During the passage of the Immigration Act 2014 examples were given of where those losing rights of appeal would instead be given an administrative review. These included

[5]For full table see Table 2.5a in the zip file at https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015 In immigration judicial reviews, Professor Robert Thomas, of the University of Manchester School of Law, who has conducted detailed research into the immigration and asylum chambers of the tribunals over many years, has taken account of reviews won by claimants and those conceded by the Home Office and has concluded "*It is estimated here that the true success rate of immigration challenges is nearer to 30 per cent than the less than one per cent figure that arises from the Government's preferred and misleading metric.*" Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis [2015] P.L. October, Thomson Reuters (Professional).

where leave is revoked cancelled. [6] This example disappeared when the Explanatory Notes to the Bill became the Explanatory Notes to the Act. The subsequent Immigration Rules on administrative review[7] do not provide for administrative review where a person's leave is curtailed or revoked. Such a person has no right of appeal and no administrative review. Such persons are thus unable to continue to work, rent property etc from the moment of the Home Office decision, however erroneous that decision may be. They, their families and their employers suffer as a result.

PART 1 LABOUR MARKET AND ILLEGAL WORKING

Director of Labour Market Enforcement

In 2007, the Trades Union Congress' Commission on Vulnerable Employment produced a report *Hard work; hidden lives*[8] which proposed a "Fair Employment Commission" with "an advisory role at the highest level of government" which would have "*permanent responsibility for promoting cross-government awareness of the problem of vulnerable employment, and taking strategic action to ensure a coordinated and comprehensive response.*"

The Bill proposes not a commission but a Director of Labour Market Enforcement, producing a strategy and reports to parliament, acting as an information hub but not making recommendations in relation to individual cases. The Director's remit, an uncomfortable mixture of protection and enforcement, does not have a protective function as wide as that envisaged by the Trades Union Congress' commission. While it takes in the Gangmasters' Licensing Authority, the Employment Agency Standards Inspectorate and the National Minimum Wage Commission it does not cover the Health and Safety Executive or local authorities with their statutory responsibilities for the enforcement of health and safety legislation (mainly in the distribution, retail, office, leisure and catering sectors) and for the rights of children at work.

ILPA recommends that a Director of Labour Market Enforcement have specific responsibilities to review the way in which immigration rules and legislation undermine attempts to protect migrant domestic workers. The amendments made by Statement of Changes in Immigration Rules HC 474 with effect from 15 October 2015 are the most restrictive possible implementation of the hard-won section 53 of the Modern Slavery Act 2015. Migrant domestic workers who have been recognized as victims of trafficking or slavery may have leave extended for up to six months (section 53 says "not less than six months"), but leave may be given in increments of less than six months. The worker has no recourse to public funds during this period and is permitted to work only as a domestic worker. The provisions provide little incentive to domestic workers to leave situations of abuse and risk their destitution when they fail to find gainful employment for such a short period. James Ewins, appointed by the Home Secretary to review provision for domestic workers, is expected to report in November and it is desirable that the Bill be used to give effect to recommendations for enhanced protection for domestic workers.

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[6] Explanatory Notes to Bill 206-EN 2013-2014 at para. 73 "...an administrative review may be sought when a person's leave is curtailed or is revoked" see http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0110/en/14110en.htm and see HL Bill 84-EN 2013-14, para. 77 http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0084/en/14084en.htm

[7] Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449633/20150803_Immigration_Rules_-_Appendix_AR.pdf (rights to administrative review set out at 3.2, 4.2 and.2).

[8] Available at http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf (accessed 20 September 2015)

Offences

The Bill would create a new criminal offence of working without leave. Earnings can be seized. This is not, as has been suggested[9] a new departure. Criminal offences were created for Romanian, Bulgarian and Croatian workers working without authorization.[10] ILPA has asked the Home Office for statistics on the numbers of prosecutions for those offences, and also whether, when the employee was prosecuted, the employers were prosecuted or made subject to a civil penalty. This information has not been provided. It would assist in understanding whether offences have resulted in a displacement of enforcement activity, away from employers to workers.

The Bill widens the existing offence of employing a person without leave so that as well as catching those who knowingly employ such a person it captures employers who have reasonable cause to believe that the worker had no right to work. This is stated to be to capture those who deliberately do not check worker's documents so that they can at most be liable for a civil penalty, but of course it puts a much wider swathe of employers at risk of prosecution. Work is broadly defined and covers, for example, a contract for services. While the threshold for commission of the offence is lowered, the maximum penalty is raised, from two to five years.

Illegal working in licensed premises: clause 10 and Schedule 1Licensing Act 2003: amendments in relation to illegal working.

This clause and schedule apply only to England and Wales but portmanteau provisions would allow the Secretary of State to extend them to Scotland and Northern Ireland by regulation and the Explanatory Note records the view that a legislative consent motion would not be required for this. The most striking thing about this Schedule is the new power where an immigration officer "has reasonable grounds to believe that any premises are being used for a licensable activity" to enter the premises "with a view to seeing whether an offence under any of the Immigration Acts is being committed in connection with the carrying on of the activity." This is a very wide power to search any licensed premises, with no need for a suspicion. It is extremely striking, when one consults the Home Office lists of illegal working penalties given out, how many pertain to small businesses that appear likely, given that they serve ethnic cuisines, to be run by ethnic minority owners. [11] Is this because these are the gravest offenders, or because they are searched most frequently, and will the same be true of licensed premises?

The Secretary of State is added to the list of persons who must be notified when an application for a licence is made. She can object to the grant of the licence and this is to be taken into account by the licensing authority. She can appeal against a grant of a licence/refusal to cancel a licence despite her objection. All running licensed premises are affected by the additional bureaucracy.

Illegal working notices and orders*: clause 11 and Schedule 2 *Illegal working closure notices and illegal working compliance orders

The Bill would give immigration officers powers to close an employer's premises where "satisfied on reasonable grounds" that the employer is employing an "illegal worker" as defined,

[9] Prime Minister's speech of 21 May 2015 available at https://www.gov.uk/government/speeches/pm-speech-on-immigration (accessed 20 September 2015)

[10] Accession (Immigration and Worker Authorisation) Regulations 2006 SI 2006/3317 regulation 13 http://www.legislation.gov.uk/uksi/2006/3317/pdfs/uksi_20063317_en.pdf and the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013SI 2014/1460 (accessed 20 September 2015)

[11] See https://www.gov.uk/government/collections/employers-illegal-working-penalties (accessed 1 October 2015). The latest penalty lists date from 29 September 2015.

where the employer has been required to pay a civil penalty in the last three years, or has an outstanding civil penalty or has been convicted of the offence of knowingly employing an "illegal worker" or (under the amendments to be effected by this Bill) employing a person whom they have reasonable cause to believe is not entitled to work. The initial closure could be for up to 48 hours. The immigration officer can then apply to the court for an illegal working compliance order which can prohibit or restrict access to the premises for up to two years.

PART 2 ACCESS TO SERVICES

We recall the Home Secretary's introduction of the Identity Documents Bill at second reading:

> *The national identity card scheme represents the worst of government. It is intrusive and bullying, ineffective and expensive. It is an assault on individual liberty which does not promise a greater good...We are a freedom-loving people, and we recognise that intrusive government does not enhance our well-being or safety. In 2004 the Mayor of London promised to eat his ID card in front of "whatever emanation of the state has demanded that I produce it."*
> *I will not endorse civil disobedience, but Boris Johnson was expressing in his own inimitable way a discomfort even stronger than the discomfort to be had from eating an ID card. It is a discomfort born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government* [12]

and the words of Anuerin Bevan about the National Health Service in 1952

> *Are British citizens to carry means of identification everywhere to prove that they are not visitors? For if the sheep are to be separated from the goats both must be classified…"*[13]

A wrongful refusal by the Home Office could jeopardise a person's accommodation, bank accounts and driving licence.

Residential tenancies

The right to rent scheme introduced under the Immigration Act 2014, requiring landlords and landladies to check immigration status documents and not rent to people disqualified from renting by their immigration status, is to be extended across the UK from the West Midlands where it was first used, without the need for primary legislation. Those who cannot prove that they have lawful leave to be in the UK (some of whom will be British citizens, without passports or whose passports are regarded by landlords and landladies as possible fakes) will not be able to rent property at all. Those who rent to them face fines, against which they can protect themselves by carrying out document checks. However informal an arrangement to let a room for a peppercorn rent, it will entail private citizens checking on each other.

The Government response to its consultation on private rented accommodation and the documents accompanying the Bill that became the Immigration Act 2014 made assertions that the new regime would not be onerous, and that landlords and landladies would operate it successfully. MPs should ask businesses in their constituencies whether they find checking immigration status for employment purposes straightforward and how long they spend on this. If this system were enforced with all due checks it would make onerous demands on private landlords. If the system is not enforced, which seems more likely given the complexity of the

[12] HC report 9 Jun 2010: Column 345-350
[13] *In Place of Fear*, Bevan, A., (1952), Chapter 5

proposals and the reference in the papers accompanying the bill that became the 2014 Act to "light touch" regulation, discrimination and unfairness will flourish unchecked. The Home Office carried out an evaluation of the right to rent scheme from 1 December 2014 to 1 May 2015, but has yet to make public its findings. Parliamentarians need the results of the evaluation to inform debates on this Bill. The Joint Council for the Welfare of Immigrants conducted an evaluation and has published its findings. It found that landlords/landladies found the checks and the *Code of Practice for Landlords* and the *Code of Practice on Avoiding Discrimination* confusing and difficult to understand and undertook checks incorrectly. JCWI found evidence that landlords and landladies are prepared to discriminate against those with complicated immigration status who cannot immediately provide documents. What is proposed is unworkable, resource intensive and beyond the capacity of the UK Visas and Immigration to deliver.

In the 2014 Act the provisions were backed by a "civil penalty scheme" whereby landlords and landladies and their agents could face fines of up to £3000 per tenant. This Bill moves the scheme onto a new footing: one backed by criminal sanctions. It would create four new criminal offences, two that can be committed by landlords and landladies, and two that can be committed by their agents, when the landlord, landlady or agent knows or has reasonable cause to believe that the person does not have a right to rent. The offences carry a maximum five year prison sentence. This is harsh for persons who did not ask to be immigration officers in the first place.

The offences are likely further to deter landlords/landladies from renting to persons, whether British citizens or not, who cannot produce a British passport and thus prove their immigration status without complicated checks.

The Bill would give landlords and landladies new powers to evict persons whose immigration status means that they have 'no right to rent.' It would be an implied term of a residential tenancy agreement that a landlord or landlady could terminate a tenancy if an adult occupying the premises did not have a right to rent. Powers of eviction could be used is where all occupiers do not have a right to rent. One question in need of clarification is whether this means that the powers could not be used against a household with a child in it. Children do not require a right to rent.

Under the 2014 Act it sufficed for a landlord or landlady to conduct periodic checks on a tenant's immigration status. They were then protected from a civil penalty until the next check was due, even if the tenant's status changed. Now it is proposed that if the Secretary of State gives notice in writing to the landlord or landlady that the person has no right to rent the landlord or landlady will face the criminal penalty if they continue to rent to the tenant even though the next check is not yet due. It is proposed that these measures be applied to existing tenancies. Landlords/landladies are thus ill-placed to protect themselves from receiving a notice.

Provision is made where one or more tenants has/have no right to rent but other tenants have for the tenants who do not to be severed from the tenancy agreement which would then be transferred to the remaining (lawful) tenants. This could leave the other tenants liable for the rent of those who did not have the right to rent.

The Bill is an opportunity to amend the Immigration Act 2014 to make provision for persons seeking asylum who have sufficient funds to rent privately and do not need of Home Office asylum support accommodation. Because they are on temporary admission (if this Bill is enacted "immigration bail") they have no right to rent. Certain forms of accommodation are excluded

from the scheme, among them asylum support accommodation. But exclusions are by types of accommodation, not types of tenant. The current Home Office approach is that the landlord/ landlady should ring the helpline, at which point they will be told that they can rent to the person seeking asylum. This is unsatisfactory: why should the landlord or landlady pick up the 'phone when Home Office guidance makes clear that with no leave means no right to rent?

Driving

A new strict liability criminal offence of driving whilst not lawfully resident in the UK is proposed, Immigration officers and constables will have powers to impound vehicles which are owned by the person suspected of not having leave or vehicles which that person has driven. Vehicles can be disposed of.

Powers that would enable police, immigration officers and other persons (unspecified) authorised by the Secretary of State to enter premises to search for and seize driving licenses and to search persons for these would sit as well in the enforcement section of the Bill.. The test is one of reasonable grounds for believing, rather than knowledge that a person is in possession of a driving licence and that the person is not lawfully resident in the UK. Premises owned or occupied by the person could be searched, but so could the premises in which they were encountered, either without prior authorisation from a senior officer. The authorised person could seize and retain driving licences. There is an obligation to return them only where it is decided not to revoke the licence or the person wins their appeal against revocation of the licence. Normal powers to have access to and copy seized material do not apply. The Explanatory Note states that this is so that a person cannot make use of a photocopy to secure goods and services, but there are also questions about whether there can be a fair appeal when a person cannot examine the evidence held against them.

Bank accounts: Clause 18 and schedule 3

Banks and building societies would be required periodically to check the immigration status of current account holders and to notify the Home Office if a person does not have the correct legal status. Bank accounts can be frozen. There is a right of appeal against this. Banks would be required to facilitate the closure of bank accounts held by those without legal status.

Banks would be required to notify the Secretary of State when a check identifies that an account holder is a person disqualified from holding a bank account under the 2014 Act. Yet the banks would perform the check against information notified by the Home Office to an anti-fraud organisation (currently CIFAS). If the Home Office were making proper use of its own information it would not be necessary to outsource this work, with the attendant expense and regulatory burden, to banks. Shortcomings in Home Office information, with the out of date databases and problems of manual data entry described by the Home Secretary and quoted at the beginning of this briefing, would be passed onto the banks. According to the impact assessment, in which it is acknowledged that numbers are very rough estimates indeed, numbers are anticipated to be small, c 900 matches per year after the first year are anticipated, out of some 76 million current accounts. The regulatory burden appears disproportionate.

Part 3 ENFORCEMENT and Schedule 4 Amendments to search warrant provisions

Powers of Immigration officers etc.

In October 2014, in *R v Ntege et ors,*[14] a prosecution of persons accused of arranging sham marriages, His Honour Judge Madge stayed the prosecution because of both bad faith and serious misconduct on the part of the prosecution. He held "I am satisfied that officers at the heart of this prosecution have deliberately concealed important evidence and lied on oath." It is against this background that the proposals extensions to enforcement powers in Part 3 should be evaluated.

Immigration officers are not part of the regular police force yet they, and in many cases persons acting under their supervision, have powers as extensive as those of the police. These powers have been built up over successive pieces of immigration legislation. Seeming limitations on powers are illusory. Immigration officers lawfully on premises, which, given their extensive powers of search without warrant means pretty much any premises, will have power to search for, seize and retain documents relating to civil penalties or which may assist in removing a person. Civil penalties can be imposed on lawyers and employers. The limitation to circumstances where the officer "reasonably believes" that the conditions precedent to the exercise of the power are met offer little protection given the breadth of those conditions. Powers to seize and retain evidence relating to (non-immigration) crimes are extended from those immigration officers trained as criminal investigators to all immigration officers, who will no longer be required to defer to the police.

Instead of enhanced protection for those detained under Immigration Act powers, new powers are proposed for detainee custody officers, prison officers and prison custody officers to search detained persons for evidence of their nationality and the offences of obstructing those persons are extended. This is in circumstances where the Home Office has repeatedly been found to have violated Article 3 of the European Convention on Human Rights[15] for its treatment of mentally ill detainees, with many other cases pending or in settled. The All Party Parliamentary Groups on Refugees and on Migrants have produced a damning report on immigration detention[16] which has led to the former prisons and probation ombuds, Stephen Shaw, being asked to investigate the treatment of "vulnerable persons" in detention but prohibited from examining the decision to detain them in the first place.

The new powers this bill would give immigration officers and others arguably violate the rights of persons under immigration control, lawfully present in the UK with leave, such as workers, spouses and partners and students, to respect for their home, private life and correspondence. The case for the powers has not been made out. Parliament should scrutinise how existing powers are being used and the case be made to it for each additional power sought.

Immigration Bail – clause 29 and Schedule 5

The Bill gives the Home Office new powers to manage those without leave, be they refused or persons waiting (as in an asylum case) for an initial decision. Henceforth there will be no concept of "temporary admission" to the UK while a decision is made on the case. Instead, anyone without leave who is waiting for a decision will be on "immigration bail", the conditions

[14] See www.ilpa.org.uk/resources.php/30347/r-v-ntege-and-others-on-abuse-of-process-by-immigration-officers-21-october-2014

[15] R*(S) v Secretary of State for the Home Department* [2011] EWHC 2120; *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748; *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501; *R (HA (Nigeria)) v Secretary of State for the Home Department* [2012] EWHC 979; *R (S) v Secretary of State for the Home Department* [2014] EWHC 50

[16] The *Report of the Inquiry into the Use of Immigration Detention in the United Kingdom* 3 March 2015 available at http://detentioninquiry.com/report/

of which will be managed by the Home Office not the Tribunal. Temporary admission is most often used for those seeking asylum. The terminology of "immigration bail" suggests that detention is the norm and liberty an aberration and also suggest that persons seeking asylum are a form of criminal. In international law, Article 31 of the 1951 Refugee Convention expressly protects those who claim asylum from being treated as criminals and UNHCR and other international guidance recognises that detention of persons seeking asylum must always be the exception.

The tribunal is mocked by provisions that allow the Home Office to impose bail conditions it has not seen fit to impose or change conditions it has imposed. Electronic tagging is a deprivation of liberty and should not be imposed where it is not required to make a person comply with conditions of admission and release.

With the repeal of powers to support persons who have never claimed asylum (see Part 5 below), this section makes new provision for the Secretary of State to provide support to a person bailed to an address of her choosing. It is provided, however, that the power would only be used in exceptional circumstances and the wording "where a person is on immigration bail" creates doubt about whether an impecunious detainee could apply for an address to facilitate making a bail application. Without such an address they are unlikely to be granted bail and their rights to liberty under Article 5 of the European Convention on Human rights risk being infringed.

Nothing in the Bill addresses the scandal that is detention under Immigration Act powers. This part of the Bill should be treated as an opportunity to end detention by administrative fiat, without limit of time and without a person's ever being brought before a court or tribunal unless they instigate this and apply for bail or for judicial review, or in England, Wales and Northern Ireland, a writ of habeas corpus.

Power to cancel leave

At present, if a person makes an application for further leave before their leave expires, but the Home Office does not decide it until after that leave expires, leave continues on the same terms and conditions until the Home Office decision is made and any appeal against or administrative review of that decision is finally determined. The Bill would give the Home Office power to cancel that leave so that the person would be left with no leave until such time as the Home Office made its decision, a matter over which the person does not have control. Erroneous decisions would leave a person unable to work, study, rent property, drive or hold a bank account until such time as the decision was challenged successfully.

PART 5 AND SCHEDULE 6: SUPPORT FOR CERTAIN CATEGORIES OF MIGRANT

Part 5 makes changes to the system of asylum support. It restricts support to persons seeking asylum or, in limited circumstances, those whose claims for asylum have failed. There is no power in this part of the Bill to support persons who have never claimed asylum, even if they cannot be returned. Where their destitution imperils their human rights, which is likely to be the case as they cannot work, they will be the responsibility of local authorities if their support needs are not met under the new provisions in clause 29 and schedule 5 (see above).

It is proposed that the Secretary of State can certify that families with children whose claims for asylum have failed and who do not have "a genuine obstacle to removal" as defined are not

taking steps to leave the UK voluntarily. At this point they will no longer be entitled to Home Office support. The provision is similar to section 9 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, which was the subject of an unsuccessful pilot in 2005, [17] of which the Joint Committee on Human Rights said

> *97. The section 9 pilot has caused considerable hardship and does not appear to have encouraged more refused asylum seeking families to leave the UK. ... We believe that using both the threats and the actuality of destitution and family separation is incompatible with the principles of common humanity and with international human rights law and that it has no place in a humane society. We recommend that section 9 be repealed at the earliest opportunity.*[18]

Families in these circumstances are likely to turn to local authorities. At the time when section 9 was proposed, Mr James Clappison, for the Conservative party, stated

> *"We were concerned—and so were many others—that children could slip through the safety net that the Government were seeking to put in place and that, as a result, children and families could suffer hardship, especially children who were taken into care and separated from their families—which is undesirable and should be avoided if possible—or even worse. …*
>
> *The Home Secretary has asserted that it was not the intention of the framers of the Children Act to cater for situations such as the one that he has outlined. That may be so, but he is wrong in one respect. The framers of the Act, which received all-party support, intended to provide comprehensive protection for children, covering all contingencies; …*
>
> *We still support the principle of the 1989 Act—that all children on British soil should be given the same protection—and are now seeking an assurance from the Government that that principle shall continue in legislation. We want there to be a safety net for all children, because no child should go without protection…. We are concerned about the welfare of children, who should not suffer under any circumstances, whoever their parents are and whatever their basis for being in the country. The intention of the original Children Act 1989 was that any child on British soil should benefit from its comprehensive protection which puts their interests first.*[19]

What has changed?

A new s 95A replaces s 4 of the Immigration Act 1999. It will provide a power, not a duty, to support those whose claim for asylum is refused but who have a "genuine obstacle to removal" and those with pending further submissions or judicial review challenges to these. Support can still be provided in the form of vouchers but does not have to be. Only those with protection claims will be able to obtain this support, not those with claims based on private and family life. Unlike s 4 support, support need not be full board. Section 95A appears to be a result of responses to the Home Office consultation on asylum support which identified that the Home

[17] Border and Immigration Agency, Family Asylum Policy: The section 9 implementation project (undated) http://webarchive.nationalarchives.gov.uk/20140110181512/http:/www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/section9implementationproj.pdf (accessed 5 September 2015). See further Refugee Council and Refugee Action's 2006 report *Inhumane and Ineffective - Section 9 in Practice*, 2006 Immigration, Asylum and Nationality Bill in Standing Committee E, 6th session, afternoon 25 October 2005, Tony McNulty MP, at Col.237.

[18] Joint Committee on Human Rights, *The Treatment of Asylum Seekers* 10th Report of session 2006-2007 HL Paper 81, HC 60 http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf

[19] HC Report, 16 June 1999, 417-421.

Office proposals would impose a massive burden on local authorities.[20] There is thus no detail on what s 95A support will look like.

The asylum support part of UK Visas and Immigration will be further protected from scrutiny because, there will be no right of appeal against a decision to refuse or to discontinue support for those whose claims for asylum have failed. There will be no right of appeal against a decision to discontinue support when any further submissions are rejected. These appeal rights also will be lost by those who continue under the old support regime under transitional protection. The only remedy will be that of judicial review, a remedy to which, if the legal challenge to the government's plans to restrict legal aid to those lawfully resident in the UK succeeds, will be a remedy beyond the means of destitute applicants. The government is consulting on raising the fees for judicial review from the current £60 to lodge an application, £215 for an oral renewal (where permission is refused on the papers), and £215 for a hearing to £135 for an application and £680 for a hearing or an oral renewal.[21] Examples of decisions, taken from ILPA's response to the Asylum Support Consultation, illustrate why this area of operations should not be immune from scrutiny:

Case of A
A's claim for asylum had failed. He had physical and mental health problems. His eye sight was very poor as a result of having been tortured. He was destitute and living on the streets. A Law Centre advised him to submit further representations by post as he was unable to travel by person to the Further Submissions Unit in Liverpool. They also helped him apply for support. The Home Office refused him support on the grounds that he had not attended the Liverpool Further Submissions Unit in person, as required by its policy. It made no mention of his postal submissions nor did it address his request to submit them by post for medical reasons.

Case of B
B was in receipt of section 4 support but was given one weeks' notice by the accommodation manager that this support would terminate on the basis that it should have ended two years previously as it was alleged that B had breached the conditions of his support at that time. This was not something that had previously been put to B and he denied the allegation of a breach in any event. A voluntary sector organisation assisted B to make a new application for s 4 support, and asked that this be treated as urgent due to his imminent homelessness and because he has a disability; his leg has been amputated and he wears a prosthetic limb. However, the Home Office refused to give B's application any priority or provide him with accommodation before his current accommodation was due to end. The voluntary sector organisation referred B to lawyers as they considered that B would be street homeless unless legal action was taken. The lawyers sent the Home Office a letter before claim threatening judicial review and he was provided with accommodation the following day.

Case of K
K's support was terminated and because of this he did not receive notice of the appeal hearing. The appeal was heard in his absence and, in the absence of evidence from him, dismissed. He did not know that this had happened. He applied for and was granted 'section 4' support on the grounds that there was no route of return to his country of origin. When Secretary of State indicated an intention to cease support, on the grounds that there was now a viable route of return, K's legal representatives, a law centre, prepared submissions to demonstrate that K

[20] ILPA's response to the consultation can be read at http://www.ilpa.org.uk/resources.php/31352/ilpa-response-to-home-office-consultation-on-asylum-support-8-september-2015
[21] See the Ministry of Justice consultation 2015 consultation *Court fees proposals for reform* at https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/courtfeesconsultation.pdf

continued to be entitled to support on other grounds, citing the applicable case law. The Secretary of State indicated that support would be terminated before the date on which K could lodge further submission in Liverpool. This would have left K street homeless. The representatives applied for an emergency judicial review to require the Secretary of State to accommodate K until he was able to make his application. Within just a few days, the Secretary of State indicated that K would be granted indefinite leave to remain in the UK.

Case of D

D, with the help of a voluntary sector organisation, had applied for section 4 support as he, his wife and his children (aged three, four, and seven) had been told to leave their relative's accommodation and they had nowhere else to go. The Home Office refused this application as D was not treated as having made a fresh claim for asylum as he had not submitted this in person at the Liverpool. D had not done so because he could not afford to travel to Liverpool. A duty barrister from the Asylum Support Appeals Project, acting pro bono, represented D at his appeal to the First-tier Tribunal (Asylum Support), but the appeal was refused, although it was accepted that D was destitute. D was referred to legal aid lawyers for advice about challenging those decisions. D's immigration background was unusual and complicated, and it was advised that rather than challenge the section 4 decisions, under which support is provided to persons whose claims for asylum have failed, he should instead apply for section 95 support, which is paid to persons who have an outstanding, unresolved claim for asylum. D was provided with emergency accommodation (available in these circumstances but not in cases of section 4 support) within two days and subsequently went on to receive section 95 support.

This part of the Bill provides an opportunity to debate the current levels of asylum support: £35.39 week for each individual, adult or child and to require that they be raised now and thence in line with benefit payments so that persons seeking international protection can live in dignity.

PART 6 BORDER SECURITY, Schedule 7 Penalties relating to airport control area and Schedule 8, Maritime Enforcement

This part creates yet another civil penalty regime, this time targeting airlines and port officers who allow passengers to disembark without being presented to immigration control where a control zone has been designated. Zones are designated in statutory instruments laid before parliament and subject to the negative procedure.[22]. Unlike the case of landlords and landladies, who will be subject to criminal offences because civil penalties are considered insufficient, this conduct is already a criminal offence. If the criminal offence did not deter the conduct, why should a civil penalty? The Explanatory Notes offer no explanation of why a civil penalty is needed other than that this will make the legislation "simpler to enforce." The criminal offence, set out in s 27 of the Immigration Act 1971, requires that the person act "knowingly" or fail without reasonable excuse to comply with a direction given. The civil penalty uses a test of the person having taken "reasonable steps". The criminal offence carries a penalty of a fine of not more than level 5 on the standard scale or with imprisonment for not more than six months, or both. It is unclear therefore what is simpler about the new regime, which brings with it all the bureaucracy of a civil penalty regime.

The Bill extends the powers of immigration officers onto the sea. This is of concern for all the reasons given in comments on Part 3, Enforcement, above. But it is of very particular concern in the context of understanding what would happen to persons seeking asylum. The powers will allow immigration officers and their "assistants" to stop, board, divert and detain ships. They

[22] Immigration Act 1971, Schedule 2, paragraph 26(3A).

have powers of search, arrest without warrant and seizure. They can prevent persons from landing. Officers and "assistants" are absolved of civil and criminal liability for any of their actions provided they acted in good faith with reasonable grounds. It is an offence to obstruct them. What if persons, whether in territorial waters or on the high seas, approach an immigration officer who has boarded a ship and claim asylum? If a distinction is made between high seas and territorial waters (broken down into English and Welsh, Scots and Northern Ireland waters, will Ministers confirm that hot pursuit cannot start if the ship is on the high seas as opposed to in territorial waters.

In *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09), a case concerning "pushbacks" of refugees in the Mediterranean to Libya, the European Court of Human Rights found Italy to owe all obligations under the European Convention on Human Rights to those in need of international protection that it had taken onto on a ship flying its flag and under control of its personnel. But in these cases immigration officers will be boarding ships that fly other flags. They have powers to control the ship; although there is a defence to the offence of obstructing an officer of having reasonable excuse not to do so which may give a Master back some control. The reports of the Children's Commissioner for England and Wales *Landing in Kent* and *Landing in Dover* brought to light the 20 April 1995 "gentleman's agreement"[23] between England, Belgium and France allowing for the summary return of those refused entry within 24 hours. Although it was said not to apply to asylum cases after 1 September 1997, it was found to have been applied after that date to unaccompanied children and there was concern that they might not have had an opportunity to articulate a claim for asylum. The same concern applies here, in cases of those with a claim for asylum or victims of forced labour or trafficking.

PART 7 LANGUAGE REQUIREMENTS FOR PUBLIC SECTOR WORKERS

This part does not extend to Northern Ireland (clause 55). One would expect that in its recruitment a public authority would determine that a worker had the necessary skills for the job, including speaking fluent English and that normal complaints procedures would deal with this along with any other complaint about competence. But here it is proposed to impose a specific duty upon public authorities in this regard, to issue Codes of practice and monitor compliance with them. It is hard to see this as anything other than unnecessary bureaucracy imposed for show. If the public sector cannot find sufficient fluent English speakers, and the language is spoken widely throughout the globe, this would appear more likely to be because of skills shortages than sloppy recruitment practices.

PART 8 FEES AND CHARGES and Sc

Immigration

An immigration skills charge comes into effect two months after the Bill becomes an Act. It will require an employer sponsoring a skilled worker from outside the European Economic Area to pay an additional charge, which could then be used to fund apprenticeships.

Workers recruited from outside the European Economic Area are required to be highly skilled. These are not apprenticeship level posts. The companies paying in are unlikely to benefit from the fruits of the charge. The charge is simply an additional levy that will hit small and medium sized enterprises, struggling to find the workers they need and already bearing the costs of an

[23] Available at https://www.gov.uk/government/publications/gentleman-s-agreement

overseas recruitment and relocation expenses.

Passports and civil registration

This part of the Bill is not concerned with immigration control at all but with fees for British passports and charges that can be levied for additional services provided by registrars of births, marriages and deaths. They primarily affect British citizens. Henceforth the cost of a passport can exceed the cost of providing it. Fees will be set out in regulations. There are powers to charge for confirming the validity of a UK passport. Services provided in connection with the registration of births, marriages and deaths are moved to regulations. It will be possible to charge for services previously provided for free.

Summary

The Immigration Act 2014 created a legal framework under which to work, rent property, access health care, drive or maintain a current bank account, you must first prove that you are not a person without lawful leave to be in the UK or, in some cases, without certain types of leave. It gave the government powers to remove those appealing the decision on their immigration application, before the appeal had been heard. This Bill extends those provisions and backs them with new criminal offences, targeting not only persons under immigration control also landladies and landlords, employers and airline and airport staff, those to whom much immigration control is now "outsourced". It also backs them with new powers of search, seizure and retention for immigration officers and those working under their supervision.

Those affected by the UK Visas and Immigration and the Border Force's lack of resources, lack of competence or abuse of power or are not only immigrants and refugees. Do you want to prove your immigration status, your British citizenship, at every turn? Do you want to be on the receiving end of others' doubts as to whether you are British based on the colour of your skin, your accent and their prejudices? The Bill weaves as spaghetti of red tape that will entangle us all, including when it is inadequately and wrongfully administered. The hostile environment that it strives to create is hostile to us all.