ILPA proposed amendments for House of Lords Committee Stage of the Immigration Bill on 18 January 2016: Part One

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. ***For further information please get in touch with Alison Harvey, Legal Director or Zoe Harper, Legal Officer, on 0207 251 8383, Alison.Harvey@ilpa.org.uk; Zoe.Harper@ilpa.org.uk***

This briefing proposes amendments. We shall produce a briefing to amendments tabled

PROPOSED AMENDMENTS

Clause 10 Licensing Act 2003: amendments relating to illegal working

PROPOSED AMENDMENT/STAND PART DEBATE

Page 7 line 25 leave out Illegal working in licensed premises Clause 10 and Schedule 1

Purpose
To omit the new licensing/illegal working scheme for the Bill and maintain the status quo.

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."

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.

Government statements describe a high incidence of illegal working in licensed premises and this amendment is a chance to ask government for evidence of this. It is the case that restaurants and bars, especially those serving different ethnic cuisines feature heavily on the list of those given civil penalties for employing illegal workers (see https://www.gov.uk/government/collections/employers-illegal-working-penalties#penalties) but

is this because they employ illegal workers more frequently than other employers or because they are targeted more frequently for enforcement activity? If the latter, why?

Illegal working notices and orders

Clause 12 *illegal working closure notices and illegal working compliance orders* and Schedule 2

PROPOSED AMENDMENT/STAND PART

Page 8 line 24, leave out from line 24 to line 27 and Schedule 3

Purpose
To remove from the Bill provisions as to illegal working closure notices and illegal working orders

Briefing
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, 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.

Why are these measures required when criminal sanctions are available and what will ensure that they are not used in an oppressive manner?

Any power to close premises should rest with the courts, with the role of the Home Office to make applications (whether inter partes or ex parte depending on the circumstances) to the court. This should be the case for an initial closure, which is rife with reputational risk, as much as for extensions. If this is left to immigration officers, there are risks of mistakes or inappropriate decisions and injustice as a consequence. Closures may have adverse consequences for others working on the premises, including separate businesses.

What records will be kept of the decision-making process by immigration officers that led to an initial closure? Will these be made available to the person whose premises are closed?

PROPOSED NEW CLAUSE AFTER CLAUSE 12 *Overseas Domestic Workers*

Insert the following new Clause

Overseas domestic workers

(1) Rules made by the Secretary of State under section 3 of the Immigration Act 1971, shall make provision for overseas domestic workers in the United Kingdom, domestic workers employed in diplomatic households, to

(a) Change their employer;

(b) Be required to attend a group information session within one month of the commencement of the visa;

(c) Be able to renew their visa as long as they remain in employment and are able to support themselves without recourse to public funds;

(d) Be able to apply for settlement ;

(e) Be able to apply to be joined in the United Kingdom by their dependants

(f) Be entitled to a three month temporary visa permitting them to live in the United Kingdom for the purposes of seeking alternative employment as an overseas domestic worker where there is evidence that the worker has been a victim of exploitation.

Purpose: To provide for overseas domestic workers to be able to extend their visas and to change employers; to give them a route to settlement and to implement James Ewins proposals for mandatory group information sessions. To provide for a temporary visa, modelled on the provisions for the destitute who have fled domestic violence, to give a domestic worker who has been subjected to exploitation the chance to find new employment.

Briefing

The Government has published James Ewins' Independent Review of the Overseas Domestic Worker Visa. This is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report__6_11_15_.pdf

Mr Ewins takes as his fundamental question

> *"…whether the current arrangements for the overseas domestic workers visa are sufficient to protect overseas domestic workers from abuse of their fundamental rights while they are working in the UK, which includes protecting them from abuse that amounts to modern slavery and human trafficking."*

Thus his focus is on the minimum required to achieve this. He concludes that that minimum is

> *10. On the balance of the evidence currently available, this review finds that the existence of a tie to a specific employer and the absence of a universal right to change employer and apply for extensions of the visa are incompatible with the reasonable protection of overseas domestic workers while in the UK (see paragraphs 65 - 87).*
>
> *In particular:*
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> *10.1. The review recommends that all overseas domestic workers be granted the right to change employer (paragraph 90) and apply for annual extensions, provided they are in work as domestic workers in a private home (paragraph 93).*

10.2. The review finds that such extensions do not need to be indefinite, and that overseas domestic workers should not have a right to apply for settlement in the UK in order to be adequately protected.

10.3. The review recommends that after extensions totalling up to 2 ½ years, overseas domestic workers are required to leave the UK (paragraphs 99 - 106)…..11… this extension is the minimum required to give effective protection to those overseas domestic workers who are being abused while in the UK

He emphasizes

12. Since this review finds that, in granting that right, it is both impractical and invidious to discriminate between seriously abused, mildly abused and non-abused workers, the consequence is that it must be granted to all overseas domestic workers.

Mr Ewins goes on to say

13. … such essential changes to the terms of the visa referred to above can only be of practical help to overseas domestic workers if those workers are empowered and enabled to avail themselves of these and other rights. Therefore, overseas domestic workers must be given a real opportunity to receive information, advice and support concerning their rights while at work in the UK. …

To this end:

13.1. This review recommends the introduction of mandatory group information meetings for all overseas domestic workers who remain in the UK for more than 42 days (paragraphs 122 - 132).

13.2. These meetings should be funded by an increase in the visa fee (paragraphs 133 - 134 and Appendix 5)

He acknowledges a concern raised by ILPA and others

134. The review has heard concern that a £50 fee increase may well be visited indirectly upon the overseas domestic workers themselves. However, if the improved provision of information, advice and assistance are effective, then such a consequence is but one of the abuses that the overseas domestic worker will be empowered to prevent. Furthermore, it is considered that the relative benefit of the meeting outweighs this risk and sum involved. ILPA is concerned that fee increases might be passed on to workers and should welcome

Finally he holds

15. … with the introduction of entry/exit data from UKVI, it should be possible to collate such data with information drawn from overseas domestic workers visa applications, as well as applications to change employer and renew the visa as well as data from overseas domestic workers who enter the NRM. This review strongly urges the Government to collate and analyse such data to provide a clearer quantitative understanding of how the visa operates. 16. Further, implementation of this review's recommendations will provide data, information and intelligence which will enable the police, Immigration Enforcement or the proposed Director of Labour Market Enforcement, to take intelligence-led steps to investigate and pursue those who abuse overseas domestic workers with criminal, civil or immigration sanctions. Tasking such entities to take active steps to initiate enquiries into such abuse will require other measures beyond the scope of this report. However, it is the clear finding of this review that none of the basic protections of overseas domestic workers' fundamental

rights should be conditional upon the worker initiating any such enquiry themselves, especially where the Home Office will have sufficient data to do so

ILPA considers that Mr Ewins' recommendations, which he identifies as the minimum necessary to protect overseas domestic workers, should be implemented without delay as an essential first step toward comprehensive protection. We advocate going further and providing a route to settlement as best practice rather than implementing essential protection only. This the proposed new clause does, while also making provision for Mr Ewins proposals for mandatory group information sessions. It builds on proposed new clause *** in the names of Lords Rosser, Kennedy of Southwark and Alton of Liverpool, but goes further.

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.

The new leave is in addition to, not instead of, the existing leave. An overseas domestic worker is unlikely to opt for the new leave rather than the existing discretionary leave which the Government indicated in its letter to peers during the passage of the Modern Slavery Bill would be used in any event for those needing to stay more than six months.

An overseas domestic worker who is not persuaded to leave his/her employer by the protection previously in place is unlikely to be persuaded to do so by the provisions of the new rules. The chances of getting work if you can only stay in the UK for a maximum of six months are slim indeed? And without work, how will you live without falling back into exploitation and abuse, when you have no recourse to public funds?

During the passage of the Modern Slavery Act, the Government's only argument against the proposed amendment was that if workers could change employer without reporting to the authorities, then the abuse would not be identified. But if a worker is obliged to report that they have changed employer to the Secretary of State, who can then chose to investigate further, either by interviewing worker or employer, if she chooses to do so then that argument is removed.

Perpetrators are free to perpetuate abuse, because workers are not persuaded to come forward with the offer only of six months limited protection. Only when they feel safe are workers likely to have the confidence to tell the authorities about what they have suffered. It places heavy demands upon a person in a situation of exploitation, enslavement and extreme poverty to reach sources of help, let alone where they do not speak English and are isolated and alone; let alone when they are undocumented, fear removal and are reluctant to jeopardise such income as they do receive and such status as they have.

Baroness Garden of Frognal heralded these changes at Committee stage of the Modern Slavery Bill in the Lords. She also described existing "safeguards" and process changes [1]

- *All individuals applying to come to the UK on an overseas domestic worker visa must also provide evidence with their application that they have agreed in writing the core terms and conditions of their employment in the UK…*
- *….the Home Office has started a trial, through the Border Force, of handing personally to workers as they come in the form that tells them what their entitlements are. These forms are not just in English… ".*[2]

Baroness Garden of Frognal was unconvinced by her own arguments

- *…. of course, I hear from around the Committee the concerns that these documents will not be adequately and legally kept to…*[3]
- *I agree that it is possible that they* [forms handed out at port] *are snatched away by the employers and put in a passport...*I[4]
- *… The power of the employer and the fact that people support family links back home make it extraordinarily difficult for people to complain about their employment….*[5]

The Home Office Entry Clearance Guidance and Instructions already makes provision for interviews:

> ***WRK2.1.8 Interviews***
> *Where an interview is appropriate, applicants should be interviewed on their own, at least on their first application, to establish that they understand the terms and conditions of the employment and are willing to go to the UK.*[6]

The guidance also makes provision about the minimum wage

> ***WRK2.1.9 The National Minimum Wage***
> *Domestic workers must be paid at least the NMW unless they are subject to an exemption.*[7]

Signed statements, albeit in a different format, are already required. It is easy for an employer to present a contract of employment that promises the earth for the purposes of immigration control, then pay the domestic work nothing, force him or her to sleep on the floor and work long hours and subject him/her to beatings.

Evidential requirements do not remove the risks of exploitation. It is possible to produce evidence that money has been paid to a domestic worker but demand that money back with menaces.

The specialist charity Kalayaan, whose figures Ministers accept,[8] reports that 65% of the 120 domestic workers on the new visa that they saw between 6 April 2012 and 6 April 2014 did not

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[1] Baroness Garden of Frognal, 10 December 2014, col 1866-1867.
[2] Baroness Garden of Frognal, 10 December 2014, col 1866-1867.
[3] HL Report 10 December 2014 col1866.
[4] *Ibid.* Col 1869.
[5] *Ibid.*
[6] https://www.gov.uk/government/publications/overseas-domestic-workers-in-private-households-wrk21/overseas-domestic-workers-in-private-households-wrk21--2#wrk218-interviews
[7] *Ibid.*
[8] See HC Report 4 Nov 2014 : Column 764.

have their own rooms but shared children's rooms or slept on the floor of communal areas, while 53% worked more than 16 hours a day. Sixty per cent were paid less than £50 a week.[9]

Those who attended the meeting convened by Baroness Cox in parliament at Lords' Committee stage of the Modern Slavery Bill heard overseas domestic workers describe how they did not get documents supposed to tell them their rights or how, when they did and told the employer that the employer had promised to pay them or to give them a day off, they were laughed at by employers who pointed out that there was nothing the worker could do about it.

[9] *Ibid.*