ILPA briefing to amendments tabled for House of Lords Committee Stage of the Immigration Bill: Part Three: Enforcement

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.

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Part Three of the Immigration Bill deals with:

- Powers of immigration officers etc;
- Immigration bail (including detention matters); and
- Power to cancel leave.

This briefing addresses the amendments tabled in each of these areas. We have repeated information provided in our briefings to proposed amendments where those amendments, or variations on them, have now been tabled.

POWERS OF IMMIGRATION OFFICERS ETC

This section of the Bill significantly extends the enforcement powers of immigration officers.

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. For example, Schedule 2, paragraph 2 of the 1971 Act (ostensibly a power dealing with individuals on arrival in the UK for the purposes of determining whether they have, or should be given leave to enter or remain) has been used by the Home Office as justification for conducting speculative, in-country spot-checks involving 'consensual interviews'[1]. At Commons Report the Minister suggested that the power was needed to question those emerging from vehicles, who have entered the UK in a clandestine manner, but there are powers of arrest in such cases. He then suggested that the power was necessary to "avoid unnecessary arrests[2]" but there is no power to arrest someone merely to conduct a speculative interview.

[1] HC Deb 1 December 2015, col 232, debate on amendment 39 at Commons' Report.
[2] *Ibid*.

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In October 2014, in *R v Ntege et ors*[3], 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 proposed extensions to enforcement powers in Part 3 should be evaluated.

Clauses 20-24 Search of premises

Under **Clauses 20 to 24**, immigration officers lawfully on premises will have new powers to search for, seize and retain documents relating not only to crimes but to civil penalties (for example those imposed on employers, landlords and landladies) or which may assist in removing a person.

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.

The new powers this Bill would give immigration officers and others arguably violate the rights of persons under immigration control, those lawfully present in the UK with leave, such as workers, spouses and partners and students, as well as of citizens who are employers, landlords or landladies, 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.

ILPA supports **Baroness Hamwee and Lord Paddick's opposition to Clause 21 standing part of the Bill.**

This clause creates a power for an immigration officer lawfully on any premises, be these a private home, a shop or a place of business, to search that premises without a warrant if the immigration officer has reasonable grounds for believing that there are documents which might be of assistance in determining whether an employer or landlord/landlady is liable to the imposition of a civil penalty on those premises. Such documents could include an employer's personnel and other records or a landlord/landlady's rent book or diary.

Under existing provisions, augmented by this Bill, an employer, employee or landlord/landlady can be guilty of a criminal offence. The Bill proposes to make it a criminal offence to work without permission. Remaining in the UK without leave is already a criminal offence. Paragraph 25A of Schedule 2 to the Immigration Act 1971 provides powers of entry and search of premises for the purposes of finding and retaining documents which may establish the person's identity, nationality or citizenship, or the place from which he or she has travelled to the UK or intends to travel from the UK. The powers it confers on immigration offers were extended as

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

recently as last year, by Schedule 1 to the Immigration Act 2014. *Inter alia*, paragraph 3(3) of that Schedule extended the premises which may be entered and searched from the premises on which a person was found, or which he or she controls or occupies to other premises, but only under the authority of a warrant issued by a justice of the peace if certain conditions are met. These conditions essentially described circumstances where it is not practicable to seek and obtain the permission of whoever owns, or is entitled to enter, these premises.

A document may be retained only be retained under these amendments for such time as an immigration officer has reasonable grounds for believing that the arrested person may be liable for removal and the document may facilitate the person's removal.

The Schedule also amended Section 146 (1) of the Immigration and Asylum Act 1999 to permit immigration officers to use reasonable force in exercising powers under any of the Immigration Acts past, present and future, including any Act resulting from this Bill.

The powers of an immigration officer are set out in Chapter 16 to the Home Office Enforcement Instructions and Guidance.[4] Immigration Officers already have extensive powers to search without warrant in connection with a criminal offence. Thus what is envisaged here is to give them powers to search premises without a warrant in circumstances where they do not have any reasonable suspicion that a criminal offence has been committed. There is no restriction in the clause authorising an immigration officer to act only where it is not practicable to obtain a warrant etc.

Powers of search of private homes and places of business of citizens and others in connection with a civil infraction are disproportionate.

Immigration Officers cannot be relied upon to exercise these powers responsibly. In October 2014, in *R v Ntege et ors*,[5] 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."*

In *Abdillaahi Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453 the Court of Appeal concluded that the conduct of what was then the Immigration and Nationality Directorate and HM Prison Service in the unlawful imprisonment of Mr Muuse "*was not merely unconstitutional but an arbitrary exercise of executive power which was outrageous*". Indeed, it is clear that each of the Lord Justices considered that the Secretary of State was fortunate to avoid a finding of reckless indifference to legality, which would have established misfeasance in public office by officials of his department.

At paragraphs 73 and 74 of the judgment, Thomas LJ lists the key actions or omissions on the part of the officials and of the department which the Court found to exhibit the outrageous nature of the conduct of the officials and the department in this case. In the paragraphs that follow, Thomas LJ sets out what has been done to address the inevitable concerns arising from

[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330367/Chapter16_v6.pdf

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

the findings of fact in this case. The Court's conclusion, justifying the grant of exemplary damages in the case, was that:

> "*Given the absence of Parliamentary accountability for the arbitrary and unlawful detention of Mr Muuse, the lack of any enquiry and the paucity of the measures taken by the Home Office to prevent a recurrence, it is difficult to see how such arbitrary conduct can be deterred in the future and the Home Office made to improve the way in which the power to imprison is exercised other than by the court making an award of exemplary damages.*"

The Guardian and The Observer newspapers covered allegations of rape, abuse and ill-treatment at Yarls Wood removal centre[6]. It was suggested in those cases that an attempt was made to remove the victims from the jurisdiction before they could bring a case. Such allegations are not new. We recall for example the comments of Mr Justice Munby in *R (Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin):

> *I am driven to conclude that the claimants' detention was deliberately planned with a view to what in my judgment was a collateral and improper purpose - the spiriting away of the claimants from the jurisdiction before there was likely to be time for them to obtain and act upon legal advice or apply to the court. That purpose was improper. It was unlawful. And in my judgment it renders the detention itself unlawful.*
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> *What the present case and others like it reveal, in my judgment, is at best an unacceptable disregard by the Home Office of the rule of law, at worst an unacceptable disdain by the Home Office for the rule law, which is as depressing as it ought to be concerning.*

For these reasons, ILPA also supports **Baroness Hamwee and Lord Paddick's opposition to Clause 21 standing part of the Bill.** This clause extends powers to seize and retain evidence relating to (non-immigration) crimes from those immigration officers trained as criminal investigators to all immigration officers, who will no longer be required to defer to the police.

Clauses 25 Search for nationality documents by detainee custody officers etc

New powers are proposed under **clause 25** for detainee custody officers, prison officers and prison custody officers to strip search detained persons for "nationality documents" and the offences of obstructing those persons are extended. Although the Secretary of State changed the name of the search from "strip" to "full" at Commons' Report[7], the extent of the powers was unchanged and the power is still to conduct strip searches. "Nationality documents" are so broadly defined that this amounts to a power to carry out speculative searches. This is in circumstances where the Home Office has repeatedly been found to have violated Article 3 of the European Convention on Human Rights[8] for its treatment of mentally ill detainees, with many other cases pending or settled.

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

[7] Government amendments 3 and 4 at House of Commons' Report. Amendment 36 would have removed the power to strip search from the Bill.

[8] 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*

Give the very grave concerns about the treatment of immigration detainees, including about sexual abuse, it is not acceptable to give detainee custody officers further powers of strip search. The potential for abuse is enormous and those being searched might previously have been stripped as a prelude to torture or other treatment. The powers can be exercised in a young offenders' institution and it was confirmed in the debates on the amendment in Commons committee that they could lead to a child being strip searched[9].

The specific mention of reasonable force (not in connection with this power) in paragraph ((10) provides no reassurance as in the Immigration Act 2014 immigration officers were given powers to use reasonable force in carrying out any of their functions. Commenting on that power, Lord Ramsbotham, former HM Chief Inspector of Prisons and former chair of an independent commission on enforced removals said at second reading of the Bill that became the Immigration Act 2014:

> *"I do not believe that paragraph 5 of Schedule 1 which allows untrained and unlicensed immigration officers to use unspecified but allegedly 'reasonable force' when there is such an authentic catalogue of unreasonable force being used by those on Home Office contracts, including a charge of unlawful killing, should be allowed to stand. I go further by suggesting that it would be wholly irresponsible of this House not to try and ensure that current practice is wound up in favour of something more akin to our claim to be a civilised nation"*[10]

The All Party Parliamentary Groups on Refugees and on Migrants have produced a damning report on immigration detention[11] which has led to the former prisons and probation ombuds, Stephen Shaw, being asked to investigate the treatment of "vulnerable persons" in detention and producing an equally damning report.[12]

Whilst amendments tabled for the House of Lords Committee have not focused on the proposed extension of powers of search and strip search for the purpose of identifying nationality documents under this clause as they were during the passage of the Bill during the House of Commons, the release by the Home Office last week on Thursday 14 January 2016 of the review into the welfare of vulnerable persons in detention conducted by Stephen Shaw which criticises the conduct of searches in immigration detention gives cause for further scrutiny of these provisions.

His report sets out Home Office policy on searches in detention:

> 6.180 Strictly speaking, Home Office policy actually amounts to the following: all searches involving the removal of clothes must only be undertaken by officers of the same sex as the detainee and there must not be members of the opposite sex present or anyone not directly involved in the search. In the case of rub down searches of women not involving

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(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.

[9] Public Bill Committee 3 November 2015, col 339.

[10] Hansard, 10 February 2014: Column 515.

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

[12] *Review into the Welfare in Detention of Vulnerable Persons A report to the Home Office by Stephen Shaw*, January 2016 at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

> the removal of clothes (other than shoes), the search must be carried out by a woman officer and, *where possible*, only female members of staff should be present. When the room of a detainee is searched, the detention centre is required to *aim* to ensure that the staff members conducting the search are female and that, *where possible*, all other staff members present are female.

While Stephen Shaw could not corroborate the serious complaints of strip searches being undertaken by male staff of women in Yarls' Wood detention centre, he observed that male detention staff undertake rub down searches of women (not involving the removal of clothes) and searches of women's rooms in Yarl's Wood in circumstances that do not comply with the spirit of the policy which limits this wherever possible:

> However, so far as the second issue is concerned, it appears that at times staff at Yarl's Wood have been operating outside the *spirit* of the policy. It is of the greatest importance that the proportion of female staff at Yarl's Wood is increased (see paragraph 3.136 above). In the meantime, Serco should only conduct searches of women and of women's rooms in the presence of men in the most extreme and pressing circumstances, and there should be monitoring and reporting (to Home Office Detention Operations) of these cases.
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> *Recommendation 35: I recommend that the service provider at Yarl's Wood should only conduct searches of women and of women's rooms in the presence of men in the most extreme and pressing circumstances, and that there should be monitoring and reporting of these cases.*

During the review, Stephen Shaw identified evidence that the Home Office policy of not searching detainees (especially women) in the view of other people is not always followed:

> 6.183 As far as the practices at Heathrow, Lunar House and Eaton House are concerned, the evidence of this review is that the Home Office's policy that detainees (especially women) should not be searched in view of other people is not always followed. All detention settings need to comply with this policy, and Home Office Detention Operations should carry out an audit of reception and holding environments to ensure that they do.
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> *Recommendation 36: I recommend that Home Office Detention Operations carry out an audit of reception and holding environments to ensure that the policy on searching out of sight of other people is properly followed*[13].

Stephen Shaw observed the following matters of concern in separate detention centres during his visits to the detention estate for the purpose of the review:

> 3.175 A female detainee was searched in front of several people. [Heathrow Terminal 3]
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> 3.186 The facility consisted of offices fronted by a reception desk. The detainee would move from the desk to a seating area, and then to a separate area for searching. Staff claimed that a modesty curtain was used for searching, but the screen was tied back with a long cord, and it looked as if this had been in place for some time. [Cayley House]

[13] Ibid, p.142, para 6.183

> 3.227 Detainees were searched in an area where they could be seen by others in the main holding room. Staff resisted the suggestion of a screen on the basis that they could be assaulted, but could not remember the last time there was a physical assault on the premises. I believe a screen should be installed to ensure privacy during searching. [Lunar House]
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> 3.240 A female detainee was searched in the holding room by the Tascor escort who had arrived to take her to Colnbrook. This was in front of a male detainee and a male member of staff. The permanent staff said that there had previously been a curtain for searches in the ante-□room but this had made way for a cupboard containing foods and other equipment. Although space is tight, there is no reason why a quarter-□circle curtain could not be installed in one of the corners without impinging on operations (I acknowledge that staff were concerned that this would mean it would allow detainees to make accusations about maltreatment if the searching occurred unobserved). [Eaton House]

Given the vulnerable position of detainees - particularly of women who are held as immigration detainees - and the lack of compliance by detention custody staff with existing policies on searching detainees, it would be highly inappropriate to extend those powers of search to include searches for the purpose of identifying nationality documents, particularly where these are so broadly defined (see below).

Amendment 185 in the names of Baroness Hamwee and Lord Paddick

This amendment seeks to prevent searches for nationality documents in detention of individuals where the Secretary of State intends to make a deportation order and limit this provision to individuals where a deportation order is made.

ILPA considers that the proposed new powers to conduct searches, including strip searches for nationality documents in detention must be reviewed for all persons held in detention and not solely for those where the Secretary of State intends to make a deportation order.

The Secretary of State may have sought to reflect the procedural requirement of giving formal notice of her intention to make a deportation order when using the wording 'intends'. Should this be the case, the text of the legislation should be clarified to better reflect the formal procedural step of giving notice of intention to deport, if it is not deleted.

ILPA supports the intention of **Amendments 186-188 in the names of Baroness Hamwee and Lord Paddick** discussed together below with comments on where the text could further be improved.

Amendment 186 in the names of Baroness Hamwee and Lord Paddick places a duty on the Secretary of State instead of a discretion to return nationality documents in the manner set out in the legislation where these are not required to facilitate the removal of a person liable for removal.

Amendment 187 in the names of Baroness Hamwee and Lord Paddick prevents the Secretary of State from disposing of a document that is not required to facilitate the removal of a person in any manner she decides. The effect of the amendment is that the Secretary of State is required instead to return to the person who was previously in possession of that document

or, under amendment 188 below, if found at a location, to the person who appears entitled to it.

Amendment 188 in the names of Baroness Hamwee and Lord Paddick requires that where a document is found at a location rather than in the possession of a person, that the document is returned to the individual who appears entitled to it rather than to the location where it was found.

The Secretary of State should not be permitted to dispose of documents in any manner. Under the law of many countries, property in a passport vests in the issuing authority. It is not the property of the Secretary of State to direct be disposed of as she directs. A wider range of documents are envisaged by this clause than passports issued by States, but they are among the documents captured by the very wide definition of a "nationality document" at Clause 24(15).

The amendments are necessary as there would otherwise be no safeguards preventing the Secretary of State from retaining or disposing of nationality documents belonging to a person who is subsequently found not to be liable for removal. There is also no indication that a person will be notified of the disposal of their passport or their document.

It is appropriate that, where a document is retained following a search of a location rather than from a person, this document is returned to the individual entitled to that document rather than simply returned to the location as proposed under the Bill. This is simply the proper exercise of a duty of care in relation to that document.

The proposed wording under **Amendment 188** may need to be considered carefully to ensure that it expressly relates to private individuals and can address concerns raised by ILPA that return of a document to an issuing authority might in some circumstances, for example, where an asylum claim has been made, present a danger to an individual. Any provisions that facilitated return of a document to an issuing authority would need to include measures to ensure that an assessment is conducted by the Secretary of State to ensure that such action would not present a danger to a person.

Amendment 189 in the names of Baroness Hamwee and Lord Paddick seeks to limit the definition of a 'nationality document' in section 25(15) by changing this to a document which *'might establish a person's identity, nationality or citizenship'* and removing the inclusion of documents which *"might indicate the place from which a person has travelled to the United Kingdom or to which a person is proposing to go".*

ILPA supports this amendment but considers that the inclusion of documents which '*might'* establish identity, nationality or citizenship mean that this provision remains too broadly expressed and does not reflect the definition of 'nationality documents' elsewhere in immigration legislation.

During the debates in House of Commons committee, the Solicitor General stated:

The definition given in clause 24 is frequently used elsewhere in immigration legislation where immigration and police officers have various powers to search for, seize and retain documents that will facilitate a person's removal from the UK[14].

A detailed search of UK legislation identifies one instance where a nationality document is referenced and defined. The relevant provision, section 44(5) of the UK Borders Act 2007, gives the following definition:

In relation to an individual "nationality document" means a document showing –

a) The individual's identity, nationality or citizenship
b) The place from which the individual travelled to the United Kingdom, or
c) A place to which the individual is proposing to go to the United Kingdom.

It is clear that section 44(5) of the UK Borders Act 2007 does not replicate the uncertainty of the use of the wording '*might establish*' in the proposed definition of nationality documents in section 25 of the Immigration Bill.

The proposed definition of a nationality document under the Bill is much broader. What is a document which "might" establish a person's nationality, identity or citizenship? Is it what we should understand as an identity document, with the "might" indicating that the document may not be genuine? Or are a broader range of personal documents envisaged: a signed letter purporting to be from a parent or sibling etc.?

A document which "might" indicate the place from which a person has travelled to the UK or to which they intend to go could include an air ticket, but it could also include a diary, a tourist brochure or a lonely planet guide.

These provisions must be read alongside the other provisions of clause 25 which give powers to detainee custody officers, prison officers and prison custody officers to search for nationality documents, including through strip searches. Given the breadth of the definition, clause 24 (4) appears to provide no restriction or safeguard at all. If what the Secretary of State wants is the power to rifle through the possessions of detainees at will, then that is what she should ask parliament for and that is what should be discussed. ILPA considers that, given the findings of the review into the welfare of vulnerable persons in detention, that Parliament should be extremely cautious of extending the powers that can be exercised by detainee custody officers and others over vulnerable persons held in detention.

Clause 26 Seizure of nationality documents by detainee custody officers etc

This clause provides for the seizure of nationality documents where these are identified by detainee custody officers during searches conducted under powers other than those under clause 25 specific to searches for nationality documents.

The provisions for the retention and disposal of nationality documents identified reflect those in clause 25 above and **Amendments 190, 192 and 193 in the names of Baroness**

[14] *House of Common Committee debates, 03 November 2016*, p.341 at: http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151103/pm/151103s01.pdf

Hamwee and Lord Paddick deal with similar concerns to those discussed above in relation to clause 25 that proposed amendments 186-188 seek to address.

Amendment 191 in the names of Baroness Hamwee and Lord Paddick would also require that reasonable suspicion, rather than simply a suspicion, that a person is liable for removal and that the document may facilitate removal is needed before the Secretary of State may retain a nationality document. ILPA supports this amendment.

Schedule 5 Amendments to search warrant provisions

The Bill amends the Immigration Act 1971 and other immigration legislation to widen the circumstances in which a warrant may be issued authorising entry and search by immigration officers.

Under the proposed legislation, 'all premises warrants' may be issued permitting entry and search of premises occupied or controlled by an individual named in the warrant without the requirement of specifying the premises that may be searched. New provisions are also made for warrants to be issued that authorise multiple entries to a premises, such that a Chief Immigration Officer may authorise entry and search of the same property an unlimited number of times within a three month period without these being reviewed each time by a judge.

These provisions are added to the general powers of entry and search under the Immigration Act 1971 (paragraph 2); powers of search for personnel records with a warrant under the same Act (paragraph 3); powers of search for nationality documents under the Immigration Act 1971 (paragraph 6); and the search of premises for nationality documents under the UK Borders Act 2007 (paragraph 7).

Amendment 194 in the name of Baroness Hamwee and Lord Paddick would remove the provisions the provisions creating an 'all premises warrant' for entry and search by immigration officers under the Immigration Act 1971 (paragraph 2) and ensure that premises subject to entry and search are specified in the warrant issued by the court.

Amendment 201 in the name of Baroness Hamwee and Lord Paddick is also supported by ILPA. This would remove provisions creating 'all premises warrants' from searches under warrant authorised for the search of personnel records and would prevent warrants for multiple entries of premises from being permissible.

ILPA supports both these amendments but considers that provisions permitting the authorisation of 'all premises warrants' and multiple entries warrants should be removed from all the search powers amended by Schedule 5 and listed above.

Government amendments 195-200 and 202-209 remove the provisions permitting 'all premises warrants' and multiple entries warrants from all the powers of search listed above from being authorised by a justice of the peace in Scotland. Whilst these amendments demonstrate the haste with which the Bill has been drafted and the absence of adequate consultation with the devolved administration, it is also clear that a more robust approach to the judicial scrutiny of powers of search by immigration officers will be applied in Scotland and should be applied in England.

In his March 2014 report, *An inspection of the use of the power to enter business premises without a search warrant*, the Chief Inspector of Borders & Immigration, March 2014 examined powers of entry without a warrant. In 59% of the cases in his sample entry without warrant had been effected when the required justification for entry without warrant was not made out and in a further 12% the evidence on file did not allow him to determine whether it was made out or not. Recording was inadequate.

Failure to comply with guidance was widespread. In only 5% of cases was there evidence that whether to apply for a warrant had been considered. Speculative grounds were replied on and training was inadequate, with managers as well as staff under them not displaying knowledge of the correct procedures.

In the circumstances, anything that reduces the scrutiny the courts can bring to immigration officers powers of entry and search is undesirable.

Clause 29 Supply of information to Secretary of State

This section amends section 20 of the Immigration and Asylum Act 1999 to require public bodies to supply any nationality document lawfully in their possession that the Secretary of State may request to facilitate the removal of a person liable for removal.

Amendments 210 and 211 in the names of Baroness Hamwee and Lord Paddick require that the Secretary of State has reasonable suspicion, not simply a suspicion, that a person is liable for removal and the document may facilitate that removal for a document to be supplied or retained.

Amendment 212 in the names of Baroness Hamwee and Lord Paddick requires that the document is returned to the person who supplied it rather than disposed of in any manner chosen by the Secretary of State should the document not be required.

Amendment 213 in the names of Baroness Hamwee and Lord Paddick seeks to limit breadth of the definition of nationality documents.

ILPA supports these amendments which address similar matters to the amendments proposed for clauses 25 and 26 of the Immigration Bill and discussed in more detail above.

After Clause 30

ILPA supports **Amendment 215 in the names of Baroness Hamwee and Lord Paddick** inserting a new clause: oversight of complaints. This would establish a commission that would set standards for actions of immigration officers, handle complaints against them and investigate serious concerns in relation to conduct.

Whilst it is mandatory under section 145 of the Immigration and Asylum Act 1999 that immigration officers should have regard to codes of practice under the Police and Criminal Evidence Act 1984, there is no mechanism under which complaints can be made and where the conduct of immigration officers may be monitored on a systemic and consistent basis.

We refer again to the serious misconduct of immigration officers criticised by the Crown Court in *R v Ntege et ors (2014),* by the Court of Appeal in *Abdillaahi Muuse v Secretary of State for the*

Home Department [2010] EWCA Civ 453, and by the High Court in R *(Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin), discussed in detail above in relation to clauses 20-24 of the Bill.

This Bill increases the powers of immigration officers with limited safeguards over the exercise of their coercive power over those who are vulnerable to abuse of that power on account of their immigration status or their situation of detention in the UK and this amendment would provide a minimum of oversight.

IMMIGRATION BAIL (including detention matters)

Clause 32 and Schedule 7 Immigration Bail

The Bill creates a single status to replace bail, temporary admission and temporary release. Temporary admission is used for persons at liberty on the territory of the UK who have applied for leave but do not have it. While it can be used generally for persons in cases where an immigration officer is deliberating whether to admit them to the UK and does not detain them while these deliberations are taking place, it is used most often for persons seeking asylum. Turning someone back at port of entry is likely to take hours or at most days whereas the determination of an asylum claim takes months so many of those who remain on temporary admission for any significant period are persons seeking asylum.

The terminology of "immigration bail" risks creating an impression that detention is the norm and liberty an aberration. It also risks suggesting that persons with this status, in particular those 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.

Persons seeking asylum have greeted with consternation the notion that they might be termed "on bail." These are persons who have presented themselves to the authorities and asked to regularize their status: they have applied for leave as a person seeking asylum. They include refugees, children, survivors of torture and trafficked persons. One unified term could be given to all those awaiting a decision without its being "immigration bail with its connotations of criminality.

We therefore support **Amendments 215A and 216A** in the names of Baroness Hamwee and Lord Paddick which would change the terminology of 'immigration bail' to 'temporary admission' where this is granted by the Secretary of State rather than amounting to bail granted by a Court as it is more normally understood. Further amendments would be required in order to fully achieve the proposed change.

We detail below particular concerns about Schedule 7.

One that is not picked up in any amendment is the introduction of a restriction on studies as a condition either of temporary admission or bail for those subject to immigration control is new. No reason for the restriction is given in the Explanatory Notes to the Bill.

Breach of a condition of immigration bail is a criminal offence and therefore has serious consequences. Those lawfully present and in touch with the authorities should not be restricted from undertaking studies.

As all those subject to immigration control will be on immigration bail, not just persons released from detention, the condition could potentially be applied to children and young people, from accessing further education and even preventing them from attending their school.

Those previously on temporary admission will henceforth be on "immigration bail." This will include persons seeking asylum. The condition could be applied to them, preventing them from learning English or undertaking other studies whilst their asylum claim is pending. This would put those recognized as refugees at a disadvantage as they start to rebuild their lives in the UK. Those refused asylum are more likely to have an incentive to return if they know that return with skills or qualifications and such skills and qualifications may also help to rebuild countries recovering from war.

Persons seeking asylum currently face considerable delay in the determination of their asylum claim, during which time they are not permitted to work. The Home Office now has a target of six months for the initial decision on an asylum claim if the case is straightforward and a target of 12 months for deciding a case that it considers not to be straightforward[15]. Only if a person waits for more than 12 months for a decision will they be permitted to work and then only in an occupation on the shortage occupation list. A person who does not wait more than 12 months for their initial decision will not be permitted to work while waiting for a decision on their appeal, however long the appeal may take.

Should a person appeal against a wrongful refusal they will wait a long time for an appeal. At the moment the First-tier Tribunal is listing appeals for June and July 2016. That is the initial appeal; some cases will proceed to the Upper Tribunal and higher courts

By the time an individual is recognized as a refugee, they have large gaps in their employment history which make it more difficult to get a job and to begin to rebuild their lives in the UK. Placing an additional restriction on persons seeking asylum that would prevent them from learning English or other skills they may need to integrate into the UK will limit their prospects of integration on recognition as a refugee.

We are also concerned at the power to impose such other conditions on immigration bail as the person granting bail thinks fit.

The Bill makes explicit that conditions requiring a person to appear before the Secretary of State or tribunal at a specified time or place can be imposed on immigration bail. It makes explicit that conditions restricting work, occupation, studies or as to residence, reporting and electronic monitoring may also be imposed. But this detailed list is otiose, for the power to impose bail conditions is at large.

- What conditions are envisaged?
- Why can these not be specified on the face of the Bill?

We regret that the power to use immigration detention on the basis that it is in the person's best interests to be detained under immigration Act powers has not yet been dropped. This is discussed further in our commentary on the amendments to Schedule 7 below.

[15] UKVI, *Non-straightforward cases: exclusions from the asylum processing aspiration*, 10 June 2015

After Clause 32

Amendment 36 proposed new clause ***Review of Immigration Detention*** in the names of **Lord Rosser, Lord Kennedy of Southwark and Baroness Lister of Burtersett** proposes a review of immigration detention by an independent panel appointed by the Secretary of State. Its report must be presented to the Secretary of State, who must publish it within three months. The report must consider the process for, and detail of, introducing a statutory maximum limit on the length of time an individual can be detained ; how to reduce the number of people detained ;how to minimise the length of time an individual is detained under the relevant provision; the effectiveness of detention in meeting the Secretary of State's objectives; and the effectiveness of procedures to review decisions to detain and to continue to detain.

Comments on the substantive issues of a time limit and an automatic review of detention are detailed below. ILPA contends that another review is not needed. Now is the time for action. If a report holds the Secretary of State to account for her response to the review by Stephen Shaw all when and good, but a review should not be seen as a substitute for action or as a reason to delay action.

After Schedule 7

Amendment 217 in the names of Lord Rosser and Lord Kennedy of Southwark proposes automatic reviews of detention.

The amendment is modelled on Part III of the Immigration and Asylum Act 1999, never brought into force and repealed in 2002. A version of it was tabled at House of Lords Committee stage of the Bill that became the Immigration Act 2014. It is in simplified form but what appears suffices to debate the principle of automatic bail hearings.

Detention under Immigration Act powers is by administrative fiat, without limit of time and a detained person is not brought before a tribunal judge or a court unless s/he instigates this. The lack of any time limit adds greatly to the stress of the detention. It may render the detention arbitrary.

The Bingham Centre for the Rule of Law's publication, written by Michael Fordham QC, *Immigration Detention and the Rule of Law: Safeguarding Principles* provides as principle 21

> *SP21. AUTOMATIC COURT-CONTROL.*
> *Every detainee must promptly be brought before a court to impose conditions or order release.*

As set out in that publication, this is in accordance with international standards.

Article 5(4) of the European Convention on Human Rights provides:

> *'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.*

The UN Commission on Human Rights Resolution 2004/39: *Arbitrary Detention* of 19 April 2004, E/CN.4/RES/2004/39 provides:

"3. Encourages the Governments concerned: (c) To respect and promote the right of anyone who is deprived of his/her liberty by arrest or detention to be entitled to bring proceedings before a court, in order that the court may decide without delay on the lawfulness of his/her detention and order his/her release if the detention is not lawful, in accordance with their international obligations".

Organization of American States, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008), Principle VI: *"Competent, independent, and impartial judges and tribunals shall be in charge of the periodic control of legality of acts of the public administration that affect, or could affect the rights, guarantees, or benefits to which persons deprived of liberty are entitled, as well as the periodic control of conditions of deprivation of liberty"*

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UNHCR Detention Guidelines (2012), Guideline 7 §47: *"asylum-seekers are entitled to the following minimum procedural guarantees: … (iii) to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. The review should ideally be automatic, and take place in the first instance within 24–48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release".*

In 1999 the then Government introduced provision for routine bail hearings. At second reading Lord Williams of Mostyn for the then Government said

> *Part III introduces important new safeguards for immigration detainees.* [see below for full passage, quoted by Baroness Anelay] .[16]

He later explained:

> *Perhaps I may set out our intention in setting time-limits for routine bail hearings and their determination. One element that is lacking in the present system—I do not disagree with what has been said in part—is any degree of certainty or structure with regard to bail hearings. We intend that the first routine bail hearing—to use the word "routine" is not to play down its importance, but to underline the fact that it must be regular—should take place about seven days after the original detention. In practice, the reference will normally be made much earlier.*[17]

What has changed since 1999 so that a sense the gravity of the shortcomings of the system of immigration detention, and the urgency of addressing them, has gone so entirely? In 2002 the then Government, decided to repeal that part of the Immigration and Asylum Act 1999 that would have introduced a new bail regime. Baroness Anelay of St Johns, with support from all around the house, tried to stop them. She said:

> *In another place the then Home Secretary, Mr Straw, said in a debate on 22nd February 1999 at col. 39 of the Official Report: Part III fulfils the commitment in the White Paper to introduce a more extensive judicial element in the detention process. That will be achieved by introducing routine bail hearings for those detained under immigration legislation." In this House the noble and learned Lord, Lord Williams of Mostyn, when moving the Second Reading of the same Bill on 29th June 1999, at col. 178, said,*

[16] *HL Deb 29 June 1999 vol 603 cc176-257.*
[17] HL Deb 19 Jul 1999 : Column 707.

Part III introduces important new safeguards for immigration detainees. It introduces a more extensive judicial element into the detention process by means of a system of routine bail hearings, but the Government have decided that we should go further. The Government intend to bring forward amendments during the proceedings in this House to provide for a statutory presumption of bail, with exceptions to ensure effective immigration control and enforcement. Part VIII of the Bill provides a proper statutory framework for all aspects of the management and administration of detention centres and for the escort of detainees. Taken together, the provisions regarding bail and detention centres will provide significant additional safeguards for immigration detainees".

I am sure Members of the Committee will recall that the noble and learned Lord moved the amendment of which he spoke at Second Reading on 19th July in Committee when he said,

> *I hope that the amendment will meet with the universal acclamation of the Committee".—*[Official Report, 19/7/99; col. 725.]

That amendment is now Section 46 of the 1999 Act and it is those very provisions in Part III of the Act, so eloquently spoken to by the noble and learned Lord, Lord Williams, three years ago, which today the Government propose to repeal under Clause 57(6) of this Bill. We acclaimed it; the Government now dispose of it.

There was an extensive debate on this matter in Standing Committee in another place. But the justification given at that time by Miss Angela Eagle was unconvincing. Members of the Committee will note that the provisions have never been brought into force. The Minister said that they were not brought into force because

> *"we have been trying since the 1999 Act to work out the frequency and logistical implications of automatic bail hearings for each detainee. We concluded that it would be a logistical nightmare that would divert scarce resources from processing asylum applications … Implementing the Part III bail provisions would significantly increase the burden on the Immigration Appellate Authority".—[Official Report, Commons, Standing Committee E, 14/5/02; co1.256.]*

I cannot believe that the provisions in the 1999 Act which were described as important and significant by the noble and learned Lord, now the Leader of the House, and the implications of which were doubtless considered in detail by the Home Office when the White Paper was drawn up, when the 1999 Bill was drafted and when the amendments were proposed, are now to be dismissed as a logistical nightmare. I cannot believe that the noble and learned Lord, Lord Williams, would have put his name to such a measure and spoken in favour of it if he were not entirely certain that it was eminently workable and its implications had been fully thought through by the time the Act was passed by this House.

One final but important point on Amendment No. 173 is this. In another place my honourable friend Mr Malins moved an amendment which would have brought the provisions of Part III of the 1999 Act into effect. The Minister argued in response that to do so would be administratively unworkable and would cause chaos and catastrophe in the system. Amendment No. 173 meets the Government's point. It would not bring the provisions into effect but it would stop their repeal. The effect of that would be to allow the Government to bring them into force at a time when the administrative concerns which the Minister cited in another place had been allayed.

> *If the Minister were to resist the amendment, surely he would have to cast aside the mask of administrative unworkability that was taken up in another place and reveal the real policy reasons behind the Government's change of position. I invite him today to give us better justification on this matter than in another place. I beg to move*[18].

In 1999 Lord Hylton[19] put forward an amendment that would have meant regular reviews throughout the period of detention. All speakers, with the exception of the Minister, supported him.[20] Contrast this with the current Home Office guidance on review, not by a court or tribunal, but by the officials detaining the person[21]:

> *There is a statutory requirement above, detention should also be reviewed during the initial stages, that is, the first 28 days. This does not apply in criminal casework cases where detainees come from prison, or remain there on completion of custodial sentence, and their personal circumstances have already been taken into account by the Home Office when the original decision to detain was made. However, criminal casework cases involving the detention of children must be reviewed at days 7, 10, 14 and every seven days thereafter…in practice, this will apply only to those exceptional cases where an FNO under 18 is being detained pending deportation or removal.*

When the matter was debated in the Public Bill Committee the Minister said

> **"…***we do not consider that there is a need for mandatory judicial oversight of detention … There is already well-established judicial oversight available. Individuals detained under immigration powers have unrestricted opportunity to apply to the tribunal for bail at any time. They can also apply for a judicial review of their detention, or for a writ of habeas corpus to the High Court, again at any time.*
> *… All detainees are made aware of the ability to apply for bail, but there is obviously a need to strike a balance.* [22]

This is far too sanguine. Unless an immigration detainee applies for bail, s/he will never be brought before a court or tribunal to consider either release on bail or the lawfulness of detention. For those held in the prisons, there are no legal surgeries and the difficulties of obtaining any legal representation at all are increased. People with a mental illness are among the least likely to be able to take the necessary steps to instigate a bail hearing.

The lack of procedural protection and effect access to a court or tribunal in the UK renders detention under immigration act powers in particular cases arbitrary within the definitions used by the UN Human Rights Committee in resolution 1997/50 and by the UN Working Group on Arbitrary Detention: where it is clearly impossible to invoke any legal basis justifying the deprivation of liberty of a particular individual[23] and where an asylum seeker, immigrants or refugees are subjected to prolonged administrative custody without any possibility in practice of administrative or judicial review or remedy.[24]

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[18] *HL Deb 17 July 2002 vol 637 cc1257-305*
[19] *HL Deb 19 July 1999 vol 604 cc693-724*
[20] Ibid. col 704
[21] Enforcement Instructions and Guidance 55.8.
[22] Public Bill Committee 3 November 2015 col 363
[23] Category One of the UN Working Group's criteria
[24] *Ibid*., Category Four.

Schedule 7

Amendment 218 in the names of **Lord Ramsbotham, Baroness Hamwee and Lord Roberts of Llandudno** would place a time limit of 28 days on immigration detention.

ILPA supports a time limit on immigration detention.

When Lord Hylton moved amendments in 1999[25] to set a maximum time limit on detention this was in the context of proposals that all detainees would be brought before a court or tribunal seven and 28 days after their detention started[26] and the number of persons detained beyond six months was 120[27]. In May 2013, the UN Committee against Torture urged the UK to "(i)ntroduce a limit for immigration detention and take all necessary steps to prevent cases of de facto indefinite detention."[28]

Practice in the UK is that increasing numbers of persons are detained, some for years on end, [29] including in circumstances where eventual release is to liberty calling into question the necessity for detention at all. Home Office migration statistics[30] show that immigration detainees who are held for any periods above one year are more likely at the end of their detention to be released from detention into the community than to be removed from the UK. Home Office statistics further show that a greater proportion of detainees who are released after such long periods in detention are released on bail than are released on Temporary Admission by the Home Office.

For the full year 2014, 57% of people leaving detention who were held for 12 months or more were released into the community and 43% were removed from the UK. Of those released into the community, 58% were bailed. For that same year, 47% of those people held for any period from one day to 12 months were released into the community, but only 15% of them achieved this through bail. The vast majority (81%) were granted Temporary admission or release by the Home Office.

Trends in earlier years are similar. According to UK Border Agency statistics, of detainees leaving detention after more than a year in 2011, 62% were released and 38% removed or deported. These proportions were exactly reversed, for detainees released after less than a year. Detention Action's September 2010 report "*No Return No Release No Reason*" monitored the cases of 167 long-term detainees, of whom only a third (34%) were removed or deported. Sixty-two per cent of those held for over a year were released in 2013.[31] Between 2007 and

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[25] HL Deb 19 July 1999 vol 604 cc 693-724.
[26] Immigration and Asylum Act 1999 s 44.
[27] HL Deb 28 July 1999 vol 604 cc1611-66, letter of Lord Williams of Mostyn to Lord Avebury, to which reference is made by Lord Avebury.

[28] Committee against Torture, Fifth periodic report of the United Kingdom, (6-31 May 2013)
[29] See, for example, *R (Sino) v SSHD* [2011] EWHC 2249 (Admin) (four years and 11 months) and *R (Mhlanga) v SSHD* [2012] EWHC 1587 (Admin) (five years two months). See *The effectiveness and impact of immigration detention casework: A joint thematic review,* Her Majesty's Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration, December 2012, available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/thematic-reports-and-research-publications/immigration-detention-casework-2012.pdf (accessed 7 October 2014).
[30] Source: Home Office, *Immigration statistics, January to March 2015'. Table dt_06: People leaving detention by reason, sex and length of detention*. Available at http://bit.ly/1NuAxG3
[31] Home Office, *Immigration Statistics January to March 2014,* table at 06. See also *Immigration Statistics: summary points: April to June 2014*.

2010, overall numbers of enforced removals and notified voluntary returns declined by 6%. Yet in the same period the number of persons detained at any one time increased by 38%.

The UK does not conform to international standards including:

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

- UNHCR/Office of the High Commissioner for Human Rights Summary Conclusions from Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons (2011):

> 2*: "Maximum time limits on … administrative [immigration detention] in national legislation are an important step to avoiding prolonged or indefinite detention".*
> …
> *11: "Lack of knowledge about the end date of detention is seen as one of the most stressful aspects of immigration detention, in particular for stateless persons and migrants who cannot be removed for legal or practical reasons".*

UN Working Group on Arbitrary Detention Annual Report 1999, E/CN.4/2000/4/Annex 2, 28 December 1999 (Deliberation No. 5), Principle 7: "A maximum period should be set by law".

The UK is not a party to Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third country nationals, which sets a six-month limit on detention with the possibility of further detention for limited periods to a maximum of 18 months *in toto* where, despite the State's reasonable efforts, lack of co-operation by the detainee or in obtaining documentation from third countries had caused time to be extended[32]. In *Mathloom v Greece*[33] it was held that absent the time limits on detention, Greek legislation on detention under immigration act powers did not meet the "in accordance with the law" test laid down in Article 5 of the European Convention on Human Rights because it was not sufficiently precise or its consequences sufficiently foreseeable.

In the debates in on the bail provisions of the Immigration and Asylum Act 1999, Baroness Williams of Crosby said

> *One characteristic of a tyrannical or dictatorial regime is that it detains innocent people without any indication as to how long they will be detained. A few months ago, I had the obligation of visiting the last standing prison under the gulag archipelago system, Perm 65 in the Soviet Union as it then was, now Russia. I discovered that the most dreadful agony faced by people who had been at that detention centre was not knowing if or when they would ever get out. There was no clear procedure. An obligation rests upon those of us who are more privileged in a democratic society to limit that sense of being almost totally lost within the system—not knowing when, if ever, the procedures will be concluded. The main purpose of the new clause is to limit that period to a maximum of six months.* [34]

[32] See Case C-357/09, *Kadzoev* [2009] ECR I-11189, 30 November 2009.
[33] Application 48883/07, judgment 24 April 2012.
[34] *HL Deb 19 July 1999 vol 604 cc693-724* Baroness Williams said

Lord Williams of Mostyn rebuked her gently

> *719 . The noble Baroness spoke of the Gulag. There is no automatic application after seven days paid for at public expense, nor after the further period paid for at public expense. No reasons are given in writing. There is no presumption of bail. I take the point, but we have produced a series of circumstances which are infinitely better than that. They are very significant advances. We seek to attack a machine which is not subject to judicial overview or written reasons without a presumption of bail. Without the automatic first and second routine bail applications, applications for bail can be made, or applications for judicial review*[35].

What would he say now? When detention is without limit of time, by administrative fiat, and the detainee will never ever be brought before a court or tribunal if s/he does not instigate this? Litigation exposed that the Home Office had been operating an undisclosed, unlawful practice of detaining foreign national former prisoners on a blanket basis, without permitting officials to consider release in any circumstance[36]. Persons are detained in the UK for longer periods than in other EU countries.[37] On 11 September 2013, in response to a parliamentary question, the Minister for Immigration stated that as of 30 June 2013, 27 people had been detained for between 18 months and 24 months, 11 for between 24 months and 36 months and one for between 36 months and 48 months[38]. According to Home Office statistics, 220 people had been detained for over six months at 31 December 2013. In the context of a stated intention to reduce to an absolute minimum[39] the detention of children in families, the shortest possible time is envisaged as seven to 28 days.[40]

A significant number are unable to return to their country of origin. The majority of Bail for Immigration Detainees' clients for whom it provides legal advice and information on Section 4(1)(c) applications have one or more legal or practical barriers to their removal[41]. These individuals may move repeatedly in a cycle of extended detention, release on bail with residence in s 4(1)(c) accommodation, and then re-detention.

Lack of travel documentation is frequently a reason why a person cannot be removed. This may be for a number of reasons, including the inability of an individual to provide adequate information to support the issue of a travel document if they first came at a young age, statelessness or practical

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[35] *Ibid*. Col 719.
[36] *R (Lumba) v SSHD* [2012] 1 AC 245.
[37] See the joint Her Majesty's Inspectorate of Prisons/Chief Inspector of Borders and Immigration report, *The effectiveness and impact of immigration detention casework*, December 2012 at 2.7. In France there is a limit of one and a half months on immigration detention, which is subject to automatic oversight by the courts. The Netherlands too has a maximum time limit of one and a half months and Spain a limit of two months.
[38] HC Deb, 11 September 2013, c 723W.
[39] HL Committee, Immigration Bill, 3 March 2014, col 1125 per the Lord Wallace of Tankerness.
[40] Immigration Act 2014, s 2.
[41] The Independent Chief Inspector of Borders and Immigration (ICIBI) carried out an inspection of the Home Office travel document processes and noted in 2014: "*despite recommendations I have made previously, I was concerned to find that the Home Office was still keeping foreign criminals, who had completed their prison sentences, in immigration detention for months or even years in the hope that they would eventually comply with the re- documentation process. Given the legal requirement only to detain individuals where there is a realistic prospect of removal, this is potentially a breach of their human rights*" (ICIBI, 2014: 2). (Source: Independent Chief Inspector of Borders & Immigration, (2014), '*An Inspection of the Emergency Travel Document Process May-September 2013*.' Available at http://icinspector.independent.gov.uk/wpcontent/uploads/2014/03/An-Inspection-of-the-Emergency-Travel-Document-Process-Final-Web-Version.pdf)

problems in proving nationality or delays with in the issuing of travel documents (e.g. for returns to Algeria). There are currently no enforced removals to a small number of countries such as Somalia and Zimbabwe and some detainees are from these countries.

Other reasons why removal is not imminent, and indeed may never happen, include outstanding family court matters; pending judicial review hearings including challenges to unlawful detention and pending appeals, including Home Office appeals.

Case of Mr F

Mr F had been detained for nearly three years at the date of hearing. He was without travel documents and therefore could not be removed until this was resolved. He had a significant history of self-harm and suicide attempts in detention. He was refused bail at a hearing in 2012 because the First Tier judge did not know that Home Office initial accommodation ['Section 4 bail accommodation'] at Barry House in southeast London had the facility to monitor electronic tags where they were fitted as a condition of bail. The Home Office Presenting Officer did not enlighten the Tribunal. Counsel for the applicant had stated that monitoring was possible (Barry House was after all the release address for most detainees bailed in the south east), and was able to telephone Barry House and ask the manager to fax through confirmation of this to the hearing centre within minutes. Despite this bail was refused.

Counsel's attendance note stated: *"It was submitted by the HOPO in answer to a question by the IJ that Barry House did not allow electronic monitoring. I contacted Barry House while still at the hearing centre to confirm the tagging point but was told by the manager that they do permit electronic tagging and in fact they had residents with tags on there currently. I asked him to send a fax to the Tribunal* immediately confirming this since bail had been *refused on the false basis that tagging was unavailable at Barry House. He agreed to this and did indeed send the fax. I immediately told the usher of the Court to inform the IJ who was dealing with another application that this confirmation was coming through and that I wished her to reconsider the application in light of this. IJ received the fax but refused to reconsider the application stating that she would add the fax to the file for the next application. "When I told the HOPO about my telephone conversation and that I was awaiting confirmation she went and took instructions and maintained her position that Barry House does not permit electronic tagging. This is either dishonest or a very severe case of the left hand not knowing what the right hand is doing. Either way it is unacceptable…In my opinion the IJ should have reconsidered the application in light of the correct information about tagging at Barry House being provided within minutes of her refusal. She had commented that tagging provides certainty and she refused bail because she considered the applicant was a substantial risk of absconding"*

.

Stephen Shaw, commissioned by the Government to review immigration detention argues[42] that further consideration should be given to strengthening the safeguards against excessive detention. He writes

> *1.62 The unknown length of detention and obliqueness of the process contributed to the potential vulnerability of an individual detainee. This was in contrast to a prison regime where the length of detention was known.*

[42] See his review at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf.

He was told that uncertainty about length of detention was a significant worry, causing deterioration of welfare and mental health

Stephen Shaw asked Professor Bosworth, Reader in Criminology and Fellow of St Cross College, Oxford, and Professor of Criminology at Monash University, Melbourne, if she would assess the literature on the mental health effects of detention for him. She agreed. Her study is appended to the report as Appendix Five. Her conclusions are summarised in his report as including the following

- There is a consistent finding from all the studies carried out across the globe and from different academic viewpoints that immigration detention has a negative impact upon detainees' mental health. …
- The impact on mental health increases the longer detention continues.
- …
- The impact of the negative effect of detention endures long after a person is released.

Amendment 219 in the names of Lord Rosser and Lord Kennedy of Southwark removes a provision whereby a grant of immigration bail does not prevent a person's subsequent detention. Paragraph 1(6) of Schedule 5 provides that a grant of bail does not prevent a person's subsequent detention rather than this only being permitted when conditions of bail have been breached. It is another In *R(M) v SSHD* [2006] EWHC 228 (Admin) the Administrative court doubted that the Secretary of State can simply rely on reassertion of the underlying power under which a person had been detained to re-detain a person released by the Tribunal on bail where the effect of the decision is to undermine the basis on which the Tribunal reached its decision. The provision suggests that an immigration officer will be able to overrule the Tribunal.

When this matter was raised in the Public Bill Committee the Minister was asked why it was needed.

> .
> ***Keir Starmer:*** *… we are talking about a situation in which the tribunal is charged with faithfully going through a test of the individual circumstances of the case. In that situation, in what way and for what purpose does the Minister see the Secretary of State overriding the tribunal? Normally, if one side in a tribunal loses an argument on detentional conditions, there is an appeal route, but this appears to be something different in that the side that loses simply gets on with what it wanted in the first place.*
>
> ***James Brokenshire…*** *Sometimes, very close to a removal, when it is felt that the safest and most appropriate action would be to use detention, that mechanism may be adopted. Re-detention could be appropriate. It is also worth remembering that people granted bail might never have been detained. There will be people who are allowed into the UK on conditions while their claim is being considered. The amendment would mean that the Secretary of State could not detain such individuals if there were a change in their circumstances—for example, if their claim had been refused—without a suspicion that they were about to breach or had breached conditions.*
>
> *The power as drafted could not be used on an individual who had been granted bail by the tribunal where the facts in their case had not changed. Any attempt to re-detain would be*

unlawful. The power is not about marginalising the tribunal's ability to grant bail by allowing the Secretary of State to re-detain almost immediately after release. The power is about ensuring that detention is still available as an option when an individual is on bail and there is a change of circumstances in their case. The individual may never have been detained. The power is most likely to be used when removal becomes imminent, such as where someone was admitted at the border and their claim has subsequently been refused.

Keir Starmer: *I am grateful to the Minister for outlining the position on changes of circumstances. He has given a degree of reassurance, because what he said chimes with other not dissimilar regimes, but the matter is not clear in the Bill. Nothing in the Bill refers to changes of circumstances, so what level of assurance can he give that the provision is not intended to be used, nor will it be used, in a case where there is no change of circumstances?*

James Brokenshire: *If we are talking about detention, we are in many respects back to some of the basic principles as to why detention would be used, such as the immediacy of removal. Alternatively, we are talking about some other public policy objection on the basis of established legal principles around the matter. Those principles are what guide the potential use of the power, in addition to the obvious example of a change in circumstance.*

In short, the Minister has given no reason why the power should not be limited to cases in which there is a change of circumstances.

Amendment 221C and 221D in the names of Baroness Hamwee and Lord Paddick address the arrangements for persons subject to an electronic monitoring condition. **Amendment 221C** would require *reasonable* requirements of an individual subject to the condition to communicate with the body monitoring the condition. This would be a means of preventing an excessive or oppressive level of reporting being required of those subject to an electronic monitoring condition. **Amendment 221D** would stipulate that persons involved in exercising functions over persons subject to a monitoring requirement act on behalf of the Secretary of State or the First Tier Tribunal. This would make private companies involved in managing the electronic monitoring of individuals fully accountable to the public authority engaging them and accountable for their treatment of individuals subject to their powers.

Amendment 200 in the names of **Lord Rosser and Lord Kennedy of Southwark** and **Amendment 221** in the name of **Lord Mackay of Clashfern** remove the power of the Secretary of State to change an electronic monitoring or a residence condition of bail imposed by the first-tier tribunal. The difference between the two is not substantive; **amendment 200** takes in a prefatory paragraph and thus starts a few lines earlier.

Amendments 222 and 223 in the names of **Lord Rosser and Lord Kennedy of Southwark** are to similar effect but deal with the power to vary bail conditions. Paragraph 6 provides that power to vary conditions of bail can be exercised by the person who granted that immigration bail. This is as now: where the Tribunal grants bail, it has the power to vary conditions. Where the Secretary of State grants temporary admission or Chief Immigration Officer bail, it is the Home Office that can vary conditions. Paragraph 6 proposes a power whereby the Secretary of State could be empowered to vary conditions if the Tribunal so directed. It also includes provision for the Secretary of State to be able to vary the conditions as to electronic monitoring or residence without any need for such a direction. **Amendment 222** would strike this out**. Amendment 223** would remove the Secretary of State's powers

to override the Tribunal where the tribunal removes a residence or electronic monitoring condition or amends such a condition.

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. As barrister Colin Yeo explained when giving oral evidence on 22 October 2014, it renders the hearing before the tribunal a charade. The tribunal hears argument and determines not to impose a particular condition. The very next day the Secretary of State imposes it.

This is underlined by the debate on these amendments in the Public Bill Committee

> ***Keir Starmer:*** *How is it proposed that this will work in practice? There is a hearing before the tribunal. The tribunal goes through the individual facts of the case and there is an argument before the tribunal on whether a condition of electronic tagging, for example, is appropriate. The tribunal looks through all the relevant material and says that in this case, it is not necessary according to the test. As I understand the Minister, the Secretary of State then comes along and says, "That's all very well, tribunal, we disagree and we are now imposing a condition that you have just decided it is not necessary to impose." If the individual does not like it, they go to the High Court on judicial review. Is that the regime?*
>
> ***James Brokenshire:*** *I think the hon. and learned Gentleman has set out what I have just indicated to the Committee. It is that sense of requiring. We have looked at, for example, foreign national offender-type cases. Our judgment is that foreign national offenders who are in this country unlawfully should be subject to ongoing monitoring through electronic tagging. It is that clear policy intent that we judge, but, as I have indicated, there would be a right of challenge by way of judicial review.*
>
> *There is a precedent for such a power. The House passed a similar provision in the Immigration Act 2014; the Secretary of State is required to consent to the release of an individual on bail by the tribunal when removal is 14 days or fewer away. The Secretary of State already has that mechanism—in, I accept, a slightly different situation—and that sets a precedent on how the Secretary of State has a direct interest.* [43]

The way the provisions of the 2014 Act work in practice is as bizarre as it sounds. The immigration judge makes a decision on bail and then the Secretary of State's representative gives the view of the Secretary of State as to whether that decision can be implemented or not.

ILPA considers that the case against the Tribunal being overruled can be made all the more forcefully in the case of the Special Immigration Appeals Commission. The Special Immigration Appeals Commission is presided over by a High Court judge and has specialised expertise in matters of national security. It should not be constrained in its powers to impose conditions.

Amendments 221A and 221B in the names of Baroness Hamwee and Lord Paddick would remove the power added to use immigration detention on the basis that it is in the person's best interests to be detained under Immigration Act powers. The risks of using immigration detention rather than act to make appropriate provision have been illustrated by cases in the annex to this briefing, including the repeated cases in which the Home Office has been found to be in breach of Article 3 of the European Convention on Human Rights (the

[43] Public Bill Committee 3 November 2015 col 367.

prohibition on torture and ill-treatment) for its treatment of the mentally ill held under immigration act powers and the case in which only when a judicial review was brought did it desist from using force on children despite not having any policies in place governing its use.

Amendment 224 in the names **of Lord Rosser and Lord Kennedy of Southwark** would modify the power of the Secretary of State to provide support to persons on immigration bail.

In part five of this Act the Home Office is making changes to the arrangements for it to provide to support to persons under immigration control. One set of circumstances in which it provides such support is to persons released on bail who would otherwise be destitute. This support is provided under section 4(1)(c) of the Immigration and Asylum Act 1999 which is worded in identical terms to the words it is proposed to substitute in this amendment.

The mischief the amendment addresses in that the wording in subparagraph 7(1) "when a person is on immigration bail" may not be wide enough to encompass the circumstances in which a person applies to the Home Office for an address so that they can make an application for bail in the first place. The new powers are also stated to be used only in "exceptional circumstances," a restriction which the amendment would remove.

When the Home Office consulted on restrictions to asylum support in preparation for this Bill, it proposed to leave out s 4(1)(c) and did not propose any replacement. ILPA argued that a replacement was required. Paragraph 7 appears to be response to those arguments but it is insufficient.

Section 4(1)(c) is used in cases where the Home Office needs urgently to release a person detained under Immigration Act powers because their detention is unlawful so that there is accommodation to which the person can be released. It also acts as an essential precursor for a proportion of detainees to being able to lodge and have heard an application for release on bail. Bail hearings are a means by which immigration detention is scrutinized. A failure to release a person for want of an address may lead to additional periods of unlawful detention in violation of Article 5 of the European Convention on Human Rights and the common law.

Immigration detainees seeking release on bail from the First-tier Tribunal (Immigration & Asylum Chamber) must propose a bail address. This may be private accommodation offered by family or friends, but where this is not available a detainee can apply to the Home Office for Section 4 (1)(c) bail support, and once this is granted the detainee can lodge their application for release on bail to the specified address.

Any grant of immigration bail by the First-tier Tribunal (Immigration and Asylum Chamber) is a grant to a stated address. Bail cannot, therefore, be granted pending the provision of a bail address. While "bail in principle" could be granted, just as the commencement of a grant of immigration bail may be specified to be conditional under paragraph 3(8) of Schedule 5 to this Bill, In the experience of ILPA member Bail for Immigration Detainees, which provides representation in a substantial number of bail hearings, it is normal practice for Her Majesty's Courts and Tribunals Service to refuse to list applications for hearing without a bail address, save in special circumstances and a grant of bail in principle, where the absent (but shortly to be supplied) missing element of the process is the bail address, is not a possibility in Bail for Immigration Detainee's experience, given that consideration of the bail address is a primary and

essential part of any bail decision. **The Minister should be pressed on whether the matter has been raised with the Tribunal judiciary and provide their reply, as ILPA suggested be done in its response to the Home Office consultation on asylum support.**

If it were possible for detainees to seek release on bail first, and subsequently seek financial support and accommodation via s 95 support, then detainees would already be doing so. They would not need to wait in detention, for periods of up to 24 months in extreme cases, for a bail address to be granted by the Home Office, as Bail for Immigration Detainees' research and Home Office data indicates that they are doing.

On November 4 2014, there were 198 outstanding applications for Home Office Section 4(1)(c) bail support where the applicant was deemed unsuitable for Initial Accommodation. 28% of these detainees had been waiting six months or more, to date, of these 5% for over one year, and one detainee had already waited for two years.[44]

Data obtained by Bail for Immigration Detainees from the Home Office via Freedom of Information requests indicates that between three and four thousand applications are made to the Home Office each year for Section 4(1)(c) bail accommodation. In 2014 the Home Office made 2860 grants of Section 4(1)(c) bail accommodation for the purpose of lodging a bail application, although not all of these grants will have resulted in a bail application being lodged, and, if lodged, far from all will have resulted in release.

Home Office Section 4 (1)(c) bail accommodation: applications, grants by accommodation type, and refusals of support since January 2010

	Number of APPLICATIONS RECEIVED for s4 (1) (c) bail accomm[45]	Number of grants for **Initial Accomm**	Number of grants for **Standard Dispersal Accomm**	Number of grants for **Complex Bail Accomm**	Total number of grants for the year
2010[46]	3,367	1,916	66	19	2001
2011	3,138	1,568	218	55	1841

[44] Home Office response to BID FOI request dated December 2 2014.

[45] Some individuals made more than one application during this period.

[46] Note: June 2009: introduction of new practice of granting all Section 4(1)((c) applicants shared initial accommodation (IA). January 2010: publication of new HO policy on Section 4(1)(c) support arranging bail accommodation for applicants convicted of serious offences, including new process that sought to determine whether IA or dispersal accommodation was suitable, the latter almost immediately being found to be in short supply under existing contractual arrangements.

2012	3,465	1,961	382	35	2378
2013	3,841	2,081	529	14	2624
2014	3635	2233	613	14	2860

(Source: Data obtained from the Home Office by Bail for Immigration Detainees through a series of freedom of information requests since 2011)

Bail for Immigration Detainees' research in 2014 found that the average (mean) time to grant a Standard Dispersal bail address with no National Offender Management Service involvement in the case was 59.28 days (8.46 weeks), with a range from five to 175 days (one – 25 weeks).[47] See: Bail for Immigration Detainees, (2014),' *No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation'*. [48]

A core part of bail decision-making by First-tier tribunal judges is the consideration of the suitability of the proposed bail address. In the words of current *Bail Guidance* to tribunal judges, the Home Office, as a party to the bail application, is also asked "to take a view as to whether they can maintain reasonable control of the person at that address." The guidance to tribunal judges states at 38i, that:

> *"The proposed place of residence must be set out clearly in the application for bail so that the immigration authorities can consider its suitability and make representations if they believe it is not suitable."*[49]

Bail decision-making takes into account the nature of the accommodation, other residents at that accommodation, and the distance between the accommodation and any sureties. Immigration detainees who are on a National Offender Management Service release licence as a result of criminal convictions must seek the approval of their probation officer for any proposed immigration bail address. Tribunal judges of the First-tier Tribunal (Immigration and Asylum Chamber) must satisfy themselves that probation approval for a proposed bail address has been given. Without a bail address, under the current system, an immigration detainee, whether an asylum seeker or not, will not reach the point of release from detention on bail.

Detainees with severe and enduring mental illness may become estranged from family or friends who could otherwise stand surety at bail or offer bail accommodation on release; their illness or

[47] See: Bail for Immigration Detainees, (2014),' *No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation'*. Available at http://bit.ly/1DqTEQL (accessed 4 September 2015)

[48] On November 4 2014, there were 198 outstanding applications for Home Office Section 4(1)(c) bail support where the applicant was deemed unsuitable for Initial Accommodation. 28% of these detainees had been waiting 6 months or more, to date, of these 5% for over one year, and one detainee had already waited for 2 years. Source: Home Office response to BID FOI request dated December 2 2014. BID research in 2014 found that the average (mean) time to grant a Standard Dispersal bail address with no NOMS involvement in the case was 59.28 days (8.46 weeks), range from 5 to 175 days (1 – 25 weeks). See: Bail for Immigration Detainees, (2014),' *No place to go: delays in Home Office provision of Section 4(1)(c) bail accommodation'*. Available at http://bit.ly/1DqTEQL

[49] Tribunals Judiciary, (2012), 'Bail guidance for judges presiding over immigration and asylum hearings'

behaviour arising from their illness may have alienated those who were closest to them. Detainees in this position will often be reliant on Home Office bail accommodation.

One reason that longer term detainees are disproportionately reliant on Section 4(1)(c) is that their ties with family and friends who could offer accommodation and support are weakened by years spent in detention.

An unknown but presumed to be small number of former detainees, granted release on bail by the First-tier Tribunal Immigration and Asylum Chamber, are on a National Offender Management Service licence at the time of their release and are required by the terms of their licence to reside in premises approved by the National Offender Management Service. National Probation Service Approved Premises local managers nowadays may refuse to provide these individuals with an Approved Premises bed unless 'move-on' accommodation is in place.[50] For a proportion of immigration detainees their only option for 'move-on' accommodation is Home Office accommodation. They may have a home in the UK but precluded by some form of restriction order (e.g. non-molestation order, non-contact order] from occupying those premises on release.]) Immigration detainees required to reside in Approved Premises on release are entitled to apply for release on immigration bail but will be unable to do so in a number of cases if Home Office bail accommodation is not available.

Among Bail for Immigration Detainees' caseload, which consists mainly of long term detainees and those with additional needs, clients were reliant on a Home Office bail address in 53% of the bail applications prepared by Bail for Immigration Detainees in 2013, and in 36% of cases during 2014.

There is currently no limitation to "exceptional circumstances" in the Home Office guidance on bail accommodation under s 4(1)(c) of the Immigration Act 1999.[51]

There is such a limitation in guidance on the provision of support to persons who have never made a claim for asylum under sections 4(1)(a) and (b) of that Act, as follows:

> ***1.1.3 Applications from other immigration categories***
> *Support under Section 4(1) (a) and (b) of the 1999 Act will only be provided to other immigration categories in truly exceptional circumstances. In considering whether such circumstances exist, Caseworkers should take account of the following:*
> *Support should only be provided to other persons on temporary admission if:*
> - *They are destitute; and*
> - *They have no avenue to any other form of support; and*
> - *The provision of support is necessary in order to avoid a breach of their human rights.*
>
> *The consideration of whether support is necessary to avoid a breach of the person's human rights will usually require an assessment of whether they are likely to suffer inhuman or degrading treatment if they are not provided with accommodation and the means to meet their*

[50] This requirement is intended by NOMS to ensure that approved premises beds are not blocked by individuals (UK citizens and foreign nationals) without access to housing and a known address to transfer to at the end of their supervision in Approved Premises.

[51] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438472/asylum_support_section_4_policy_and_process_public_v5.pdf

essential living needs whilst in the UK. However, Caseworkers should only provide support for these reasons if it is clear that the person cannot reasonably be expected to leave the United Kingdom.

In considering all support cases on their individual merits caseworkers must take particular account of the following:

- *Support should not be provided in cases where there are children in the household because an alternative avenue of support is available through the duties local authorities have to safeguard and promote the welfare of children under Section 17 of the Children Act 1989;*

- *Support should not be provided to persons who claim that the reason they cannot leave the United Kingdom is because they are at risk of persecution or serious harm in their own country. Individuals in this position should submit a protection claim. Support may be available for such individuals under the asylum support arrangements. :(Sections 95 and 98 of the Act, and Section 4(2) for certain failed asylum seekers);*

Support should not be provided solely because the person has an outstanding non-protection based application for leave to remain in the United Kingdom (for example based on Article 8 of the European Convention on Human Rights or on long residence). A person in these circumstances can reasonably be expected to leave the United Kingdom to avoid the consequences of destitution.

The word "exceptional" is apt to be read as implying that a grant should only be made in exceptional cases. We recall the words of Lord Justice Dyson, giving the judgment of the Court of Appeal in the Legal Aid exceptional funding cases of *Gudanaviciene* et ors v Director of Legal Aid Casework and the Lord Chancellor [2014] EWCA 1622

> *"… that section 10 is headed "exceptional cases" and that it provides for an "exceptional case determination" says nothing about whether there are likely to be few or many such determinations. Exceptionality is not a test. … there is nothing in the language of section 10(3) to suggest that exceptional case determinations will only rarely be made "*

In that case the guidance was found to be unlawful in that it was leading to refusals of legal aid in meritorious cases.

ILPA considers that there should be a right of appeal to the First-tier Tribunal (Asylum Support) where the Secretary of State decides not to provide support or to discontinue support under this Part to enable a person to meet bail conditions. Without a right of appeal, there will be no scrutiny of Home Office decision-making in an area where decisions are frequently not sustainable.

ILPA's response to the consultation on asylum support, from which this is adapted, can be read at http://www.ilpa.org.uk/resource/31352/ilpa-response-to-home-office-consultation-on-asylum-support-8-september-2015

Amendments 224A, 225B, 224C and 224D in the names of Baroness Hamwee and Lord Paddick would make the provision of support under paragraph 7(1) a duty rather than a power but this would not address the mischief outlined above with which ILPA is concerned.

POWER TO CANCEL LEAVE

Clause 33 Power to cancel leave extend under section 3C of the Immigration Act 1971

Amendment 225 in the names of **Baroness Hamwee and Lord Paddick** requires that power to cancel leave extended under s 3C arises only if the condition with which the person fails to comply is a material condition. We are not sure how much difference this would make in practice as we find it difficult to envisage circumstances in which a condition imposed on leave would not be regarded as material.

Amendment 226 in the names of **Baroness Hamwee and Lord Paddick** requires that the power to cancel leave arises only when any deception used in an application was used deliberately. We trust that the Minister will respond that the amendment is unnecessary. The Court of Appeal in *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWCA Civ 773 distinguished deliberate falsehood and that which is merely incorrect. See also cases such as *Mumu (paragraph 320; Article 8; scope) Bangladesh* [2012] UKUT 143 (IAC) and *Singh (paragraph 320 (7A) – IS151A forms – proof)* [2012] UKUT 00162 (IAC). While there had been instances of first-tier tribunal judges getting this wrong (see, for example FW *(Paragraph 322: untruthful answer)* Kenya [2010] UKUT 165 (IAC)), the settled law of the higher courts is, we consider, clear.

After clause 33

Amendments 226A and 226B inserting new clauses (on return of asylum seekers: countries deemed safe and on exemption from deportation for unaccompanied minors upon reaching the age of 18) are addressed in ILPA's forthcoming briefing on Part 4 of the Immigration Bill.

Annex: Ill-treatment of persons deprived of their liberty under Immigration Act powers

During the evidence session on 22 October 2015 the following exchange took place between Mr Whittaker MP, the Government Whip and Jerome Phelps of Detention Action:

Craig Whittaker: *Do any of you have any evidence that there is any abuse in the detention centre?*
Jerome Phelps: *The most apposite evidence would be the series of finding by the UK courts of breaches of article 3 in relation to highly vulnerable mentally ill migrants in detention, who should not be detained anywhere except for under exceptional circumstances. Article 3, on inhuman and degrading treatment, is a very high threshold. Until recently there had never been a case of this, but in the past four years there have been six cases of desperately vulnerable people who have had complete psychiatric collapse in detention, to the article 3 breach level.*

Q 229 Craig Whittaker: *I do not want to undermine or belittle the six cases by any stretch of the imagination, but from the thousands who have been through the system in the past four years, which is what you mentioned, it is an incredibly small part. It would therefore be very difficult to say that the system is broken. Is that right?*

Jerome Phelps: *I do not think any of us have suggested that everyone in detention is abused. It is a small part but we have functioning safeguards, such as the bail system. What is concerning about the Bill is that it is removing some of those safeguards.* [52]

The exchange concerns breaches of Article 3 of the European Convention on Human Rights: the prohibition on torture, inhuman or degrading treatment or punishment. It is a right non-derogable at any time, including times of war or public emergency threatening the life of the nation. That torture inhuman or degrading treatment of mentally ill individuals can happen once does indeed suggest to us that the system is broken. That such a serious violation can happen more than once provides further evidence of this. We are aware of many more cases which have settled or are pending. Cases that are settled are now settled subject to confidentiality agreements so that further details cannot be given.

Cases in which the UK has detainees' rights under Article 3 of the European Convention on Human Rights, the prohibition on torture, inhuman and degrading treatment and punishment[53] can be read at the links below. We draw particular attention to:

R (S) v Secretary of State of State for the Home Department [2011] EWHC 2120 (Admin) (5 August 2011)

The Court held that the circumstances in which S was detained at Harmondsworth constituted inhuman and degrading treatment in breach of article 3. Those circumstances included:

- Detaining him despite a clear (and documented) history of severe mental illness, and contrary to the clear expert advice of a number of mental health professionals;

[52] http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151022/am/151022s01.htm
[53] For example *R (BA) v Secretary of State for Home Department* [2011] EWHC 2748 (Admin) ;*R (S) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (5 August 2011, *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012), *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012); R(MD) V SSHD [2014] EWHC 2249 (Admin).

- Serious deterioration in his mental state, with numerous acts of self-harm, psychotic symptoms, feelings of acute anguish and distress, and allowing him to reach such a deteriorated state that he lacked capacity to make decisions in his own best interests;
- The failure to respond assessments by the in-reach psychiatrist that he was unfit for detention and required urgent compulsory treatment in hospital under the Mental Health Act; and
- One incident in which officers encountered S, naked and bleeding, being pulled along a corridor by another detainee in view of a crowd of detainees after he had attempted suicide.

***R (BA) v Secretary of State of State for the Home Department* [2011] EWHC 2748 (Admin) (26 October 2011)**

The Court held that the circumstances of his detention, at Harmondsworth, constituted inhuman and degrading treatment in violation of article 3 and the prohibition on torture, inhuman or degrading treatment. Those circumstances included:

- Detaining him despite a clear and documented history of severe mental illness and contrary to expert advice that detention would be likely to cause deterioration. There was *"a deplorable failure, from the outset, by those responsible for BA's detention to recognise the nature and extent of BA's illness"*[54];
- The serious deterioration in his physical and mental health, including allowing him to reach a state where he was assessed as unfit for detention and, at one stage, on the verge of death;
- The failure, expeditiously, to make arrangements for his transfer to hospital once he had been assessed by medical staff as requiring urgent transfer; and
- The failure within the Home Office to ensure that clinical information about his deteriorating condition was accurately communicated to senior officials responsible for deciding whether he should be released. The judge referred to *"a combination of bureaucratic inertia, and lack of communication and co-ordination between those who were responsible for his welfare"* and described the Assistant Director's concern to manage press interest in the event of his death as *"callous indifference to BA's plight"*[55].

The judge carefully enumerates the shortcomings in the reviews "In common with the other detention reviews, no detention review checklist appears to have been completed" "The reasoning in this decision does not refer to BA's mental illness at all. It …does not comply with…the policy." He says "A crescendo of professional voices expressed the view in the course of July that he was unfit to be detained."

The case shows how much deterioration can happen in a short time:

> *57… It is of concern that when BA had been seen on 31 March, his condition had been seen to be getting worse, but that a little more than a week later, he was obviously unwell to a layman, and was saying both that his medication had run out three days earlier, and that he had not been able to see the healthcare staff. This suggests that no-one was keeping an eye on his welfare, despite the warning signs seen on 31 March 2011. This is all the more worrying when it is recalled that incarceration, stress, and lack of medication were factors which had led to BA's*

[54] Judgment, paragraph 236.
[55] Judgment, paragraph 237.

becoming ill in the past. The GCID note for 8 April 2011 says "subject came to the centre from hospital and his psychiatric illness is acknowledged on IS91RA". On 11 April 2011, the healthcare unit at Harmondsworth IRC were asked for an assessment of BA's mental health. There was then to-ing and fro-ing about consent forms.

58. BA was reviewed by the Harmondsworth IRC GP on 15 April 2011. …

59. On 27 April 2011, Mr Agbeni … asked for an assessment of BA's current mental health, his medication, and "the regularity of his appointments with the psychiatric doctor by return." Manuscript medical notes for 10 May 2011 record that an appointment to see the doctor was booked for BA for 12 May 2011 "as requested by UKBA". He was reviewed by a GP on 12 May 2011. He reported that BA was "disoriented, lying on the floor, keeps repeating 'I see demons'. H/O schizophrenia/on Olanzapine...Already on the waiting list to see psychiatrist (20.5.11)."

BA finally saw a psychiatrist on 20 May. But it was not until 6 August that he was transferred to a mental health ward. The judge records

75. On 6 July 2011, Dr Agulnik provided a preliminary psychiatric assessment. He formed the view that BA's food refusal was related to his delusional ideas. His physical condition was "not my area of expertise....gives rise to grave concern, and without more intensive and sustained treatment, could result in a lethal outcome." His physical and mental state made him unfit for continued detention, a "view supported by the Healthcare Manager". The stress and uncertainty about his status had a role in his current "decompensation into a psychotic state". Dr Agulnik considered it highly unlikely that BA could be successfully treated in an immigration detention centre, and "indeed that continuing to do so courts a real risk that he could die." He needed urgent psychiatric care which must be outside detention….

85. A file note on the same date indicates that UKBA knew that BA was considered unfit for detention, …

Even when the hospital told the Home Office that a bed was available for BA, no transfer took place for a further three days, despite the hospital's chasing.

***R (HA) v Secretary of State of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012)**

The circumstances which led the Court to find that HA had been subjected to degrading treatment included:

- Acts which *"violated his own dignity"* (prolonged periods of time in isolation; sleeping on the floor, often naked, in a toilet area; drinking and washing from a toilet; self-neglecting, including not eating properly and not washing or changing clothes for prolonged periods; and suffering from insomnia);
- Not receiving appropriate medical treatment for a prolonged period of more than 5 months;
- The use of force on him on several occasions; and
- In the second period, detaining him when the Home Office had been explicitly warned by a psychiatrist that Harmondsworth did not have the medical facilities to treat him should he suffer a relapse and that an aspect of his mental illness was paranoia about detention centre staff.

The judge observes:

> *"…under the heading 'Changes in Circumstances' the same words that had been used in the previous two reviews were repeated without in fact any record being given of any changes since the last review…" "The Defendant had no real answer to these submissions. In substance her response was to accept that the Claimant was in need of a transfer at about that time for assessment and, if necessary, treatment in a psychiatric setting but to deny that it was her responsibility that this did not happen as quickly as it might have done, that responsibility lying with others such as the Primary Care Trust."*

R (D) v Secretary of State for the Home Department [2012] EWHC 2501 (Admin) (20 August 2012).
Another case involving a schizophrenic in which a violation of Article 3 was found. Each review contains the formula "and as there are no medical or compassionate issues highlighted to date" despite the increasing evidence of mental illness. The judge describes the Home Office approach as "irrational" and "laisser-faire". The Secretary of State maintained throughout that there had been no error and no breach of Article 3 or even of Article 8 even though the Official Solicitor was acting as D's litigation friend by the time of the hearing because D's mental state was such that he could not instruct his solicitors.

Women in detention have been subjected to abuse by the staff of centres.[56] It was suggested in those cases that an attempt was made to remove the victims from the jurisdiction before they could bring a case. Such allegations are not new. We recall for example the comments of Mr Justice Munby in *R (Karas and Miladinovic) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin):

> *I am driven to conclude that the claimants' detention was deliberately planned with a view to what in my judgment was a collateral and improper purpose – the spiriting away of the claimants from the jurisdiction before there was likely to be time for them to obtain and act upon legal advice or apply to the court. That purpose was improper. It was unlawful.*

HM Chief Inspector of Prisons has reported on an 84 years' old frail Canadian man suffering from dementia who died in detention in handcuffs having been kept handcuffed for five hours.[57] Deaths, including suicides, and incidents of what is called "self-harm" but includes suicide attempts, are recorded. Home Office figures for the period July to September 2013 show 624 people on "self-harm watch" (what would elsewhere be called suicide watch) in immigration detention and 94 incidents of "self-harm" (which includes attempted suicide). In 2012 there were 208 incidents of what statistics call "self-harm" requiring medical attention and 1804 detainees formally recognised as being at risk of such harm[58] . There no figures for self-harm not requiring medical attention. Persons are detained for administrative convenience, although not for correct and sustainable decisions on applications for international protection, in the detained

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[56] Yarls' Wood affair is a symptom, not the disease, Nick Cohen, The Observer, 14 September 2013.
[57] *Report of unannounced inspection of Harmondsworth Immigration Removal Centre*, 2014, section 1, paragraph 1.3 available at http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf
[58] Response to Freedom of Information of information requests, see http://www.ctbi.org.uk/96 . See also the evidence of the Association of Visitors to Immigration Detainees to the Home Affairs Select Committee for its report on Asylum, Seventh report of session 2012-2013, HC 71, 8 October 2013 http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71vw32008_HC71_01_VIRT_HomeAffairs_ASY-73.htm . See also HL Deb, 27 June 2012, c71W.

fast-track. In the last two years, the courts have made unprecedented findings that mentally ill men have been subjected to inhuman and degrading treatment in contravention of Article 3 of the European Convention on Human Rights[59].
A case has revealed that the Home Office and its contractors had been operating an unlawful policy on the use of force on pregnant women and children in immigration detention.[60] The 2012 report of the Chief Inspector of Prisons on the Cedars centre in which families are detained found:

> *HE.18 Substantial force had been used in one case to take a pregnant woman resisting removal to departures. The woman was not moved using approved techniques. She was placed in a wheelchair to assist her to the departures area.*
>
> *When she resisted, it was tipped-up with staff holding her feet. At one point she slipped down from the chair and the risk of injury to the unborn child was significant. There is no safe way to use force against a pregnant woman, and to initiate it for the purpose of removal is to take an unacceptable risk.*

The Inspectorate called for force not to be used. Instead the Agency offered a consultation. It was only in the face of a legal challenge that it backed down. The case of *R (on the application of Yiyu Chen and Others) v Secretary of State for the Home Department* (CO/1119/2013) was an urgent judicial review claim challenging the Secretary of State's failure to have a policy in place in respect of the use of force against children and pregnant women. The claim was issued on 31 January 2013 following the Secretary of State's rejection of the Her Majesty's Inspectorate of Prisons' recommendation that she use force against these two groups only in situations where there is a risk of harm to self or another.

The Claimants sought urgent interim relief in the form of an injunction, prohibiting the Secretary of State from using force against these two groups until the issues were determined. On 12 February 2013 Mr Justice Collins granted an injunction prohibiting the Secretary of State's from using force against the four claimants (a pregnant woman and three children, all at risk of an enforced removal).

On 22 February 2013 the Secretary of State reinstated the former policy from Chapter 45 of the Enforcement Instructions and Guidance, which states that the UK Border Agency cannot use force against pregnant women, save to prevent harm. On 10th April 2013, Lord Taylor of Holbeach told the House of Lords that:

> *The recommendation in the report by HM Inspectorate of Prisons on Cedars pre-departure accommodation that force should never be used to effect the removal of pregnant women and children was rejected by the UK Border Agency.* [61]

The Government response to the Home Affairs Select Committee Eighth Report of session 2012-2013: The work of the UK Border Agency (April - June 2012) states:

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[59] *R (S) v Secretary of State for the Home Department* [2011] EWHC 2120 (Admin) (5 August 2011), *R (BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (26 October 2011), *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin) (17 April 2012), *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) (20 August 2012).
[60] *Chen and Others v SSHD* CO/1119/2013.
[61] HL Deb, 10 April 2013, c313W.

> *The UK Border Agency would prefer that pregnant women, vulnerable adults and under 18s who form part of family groups in Cedars left the UK voluntarily and compliantly. It would not be practical to consider a blanket ban on the use of physical intervention on pregnant women and under 18s as this might encourage non-compliance and render the Agency unable to maintain effective immigration controls.*

Bhatt Murphy solicitors, who acted for the claimants in Chen, wrote to the Home Affairs Select Committee on 28 March 2013, saying

> *We are concerned that the policy position set out in that response* [the government's response to the Committee*] directly contradicts the assurances which have been given to the Court and the parties in this action, which is now reflected in policy guidance published on the UK Border Agency's website, and upon which the Claimants have been invited by the Home Secretary to withdraw their claim for judicial review.*

Another case exposed "disturbing" evidence of systemic failures concerning the detention of survivors of torture.[62]

[62] *R (EO, RA, CE, OE and RAN) v Secretary of State for the Home Department* [2013] EWHC 1236 (Admin).