ILPA Briefing for the peers' meeting on the Bill, 22 February 2016: Part One, Clause 32: Offence of Illegal Working

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. ***For further information please get in touch with Alison Harvey, Legal Director or Zoe Harper, Legal Officer, on 0207 251 8383, Alison.Harvey@ilpa.org.uk; Zoe.Harper@ilpa.org.uk***

Clause 32: Offence of Illegal Working

Clause 32 of the Immigration Bill would create a new criminal offence of working in the UK without leave, which would apply to the worker rather than their employer. The offence could be imposed on the worker whether they know they are working unlawfully or not and their earnings can be seized.

The provision has been opposed, inter alia, by Tony Smith OBE, Former Director General of the UK Border Force[1]. ILPA considers that this clause should not stand part of the Bill.

Impact on trafficked or enslaved persons

As was raised by a number of speakers at second reading and during committee stage, the fear is that making it a specific crime to work without leave will drive the exploited and enslaved further underground. It strengthens the hand of the slave master against the slave. For example the employer of a domestic worker who had failed to renew their visa could tell them that they were a criminal and likely to be prosecuted if they presented themselves to the authorities.

Trafficked or enslaved persons could be liable for the criminal offence of working without leave to do so or in breach of conditions, contained in Clause 32. The Minister in the House of Lords has undertaken to reflect carefully on concerns raised by Members in relation to victims of modern slavery[2].

The Minister in the House of Commons stated that trafficked persons would have a defence under s 45 of the Modern Slavery Act 2015:

[1] http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/memo/ib05.htm
[2] House of Lords, Immigration Bill Committee debates, 18 January 2016 at: http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0003.htm, column 625

> ***James Brokenshire:*** *... There is always a balance to be struck, as was the case when framing the defence under section 45, and that balance applies to the defences that will operate under the Bill. …the statutory defence acts as an additional protection on top of guidance from the Director of Public Prosecutions on whether prosecution is in the public interest. It is also in a court's powers to stop an inappropriate prosecution for abuse of process. Although we need to think about the relevant section of the Modern Slavery Act, it is also important to bear in mind the DPP's guidance. The normal decisions that the Crown Prosecution Service takes are equally relevant to these issues.* [3]

However, the limitations of the s 45 defence were discussed at length during the passage of the Modern Slavery Act. In any event, the defence only comes into play once a person is prosecuted, and we do not want that to happen to trafficked persons. It may be that prosecutors will exercise discretion not to prosecute. But that has not always been the case, for example for young people exploited in cannabis factories. And in any event, the trafficked or enslaved person is not an expert on the exercise of prosecutorial discretion and cannot feel confident that discretion will be exercised in their favour.

In its summary for the Bingham Centre for the Rule of Law event on the Bill on 20 October 2015, Focus on Labour Exploitation (FLEX) said that the clause would mean that:

> *"a) that many victims of modern slavery in the UK would not risk referral in to the UK national referral mechanism if a negative conclusive grounds decision could mean imprisonment;*
>
> *b) that traffickers would use this new offence as a threat through which to coerce victims in to exploitation; and*
>
> *c) that trafficked persons could be criminalised for initially abusive undocumented working that then deteriorated into a trafficking situation."*

FLEX argued that the deterrent effect of the could lead to breaches of Article 4 of the European Convention of Human Rights due to a failure to prevent, identify and protect victims and potential victims of slavery.

The Anti-Trafficking Legal Unit provided the following case in evidence to the Public Bill Committee:

> ***"Case A***
>
> *An African woman kept in domestic servitude and subjected to violence by her employer. Her employer knowingly misled her* [she was present under the old visa, not the new, tied visa] *that she was not permitted to obtain alternative employment; she was told that if she challenged the employer or sought to leave her employment she would be imprisoned. Her employer told her that the employer controlled the UK police.*
>
> *Following a beating, the victim was advised by a neighbour that in fact she could lawfully change her employer and that leaving the abusive situation would not render her unlawful. She then ran away from the abuser.*

[3] Public Bill Committee 6th session, col 216.

She was still too scared to sustain a police complaint.

However, after the intervention of a support organisation and ATLEU lawyers, she was reassured of her lawful residency. She was then able to reapply to the police to investigate her former abuser.

The police refused to investigate the matter."

Had Clause 32 been law, then even when assured of her lawful residence, this woman might still have been fearful of being prosecuted because she had worked unlawfully.

The Office of the Children's Commissioner said in evidence to the Public Bill committee[4] that the provision could affect parents and also former unaccompanied children who are waiting for an appeal against refusal of a protection claim.

The Migration Advisory Committee's July 2014 report *Migrants in low-skilled work Migration Advisory Committee Summary Report July 2014 The growth of EU and non-EU labour in low-skilled jobs and its impact on the* UK[5] is relevant to this clause. The Committee stated:

The combination of non-compliance and insufficient enforcement can lead to instances of severe exploitation, particularly of vulnerable groups such as migrants.

The report sets out:

We were struck on our visits around the country by the amount of concern that was expressed by virtually everyone we spoke to about the exploitation of migrants in low-skilled jobs… migrant workers are more likely to be exploited than resident workers as they are not aware of their rights and are afraid they may be sacked/evicted/deported if they complain was raised on a number of occasions.

The Labour MP on the Public Bill Committee, Sir Keir Starmer MP, himself a former Director of Public Prosecutions, cautioned against leaving the decision as to whether or not to prosecute to the discretion of the prosecutor:

I am not concerned about the defence under the Modern Slavery Act—we had that exchange earlier and I understand the position—but the wider point of when that defence is unavailable. …. Does the Minister accept that in such circumstances it is not right to leave it to the DPP's discretion? In other words, should not the DPP's discretion be exercised according to the known offence and known defences? …That is not to suggest that discretion does not operate in many cases, but if there is a proper case for having a defence, it ought to be for Parliament to write that into the Bill and then for the DPP to exercise discretion as to how it operates in individual cases. The alternative is the DPP effectively introducing a back-door defence, which has not been thought to be an appropriate use of guidelines. [6]

Illegal working and seizures under the Proceeds of Crime Act 2002

[4] http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/memo/ib07.htm
[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/333084/MAC-_Migrants_in_low-skilled_work_Summary_2014.pdf
[6] Public Bill Committee Cols 203 and 218

The Minister in the House of Lords has stated that the introduction of the new offence would align the position of those found to be working whilst living in the UK illegally with those found to be working in breach of the conditions of their lawful stay. He has explained that the Government can confiscate relevant sums from those who work in breach of the terms of their existing stay under the Proceeds of Crime Act 2002 but cannot do so for those working in the UK illegally. The Government is therefore seeking to close this gap[7].

However, new clause 32 increases the penalty of the existing offence of working in breach of conditions. Further, statistics provided by the Government indicate that the Proceeds of Crime Act 2002 is not typically used in practice to confiscate earnings from those found to be working in breach of conditions of their lawful stay. It is also unlikely to be proportionate for prosecutors to seek a confiscation order under the Proceeds of Crime Act 2002 for working illegally in the UK.

Increased penalties

It is already a criminal offence, under section 24 of the Immigration Act 1971, to enter the UK without leave when leave is required, to overstay or to breach a condition of leave (such as working when work is prohibited). Thus not a single person could be prosecuted under this clause who could not already be prosecuted under existing offences.

Offences under section 24 of the Immigration Act 1971 are summary only offences. This means that for convictions of entering or remaining in the UK unlawfully or for working in the UK in breach of a condition of leave, the sentencing powers are limited to 6 months and would be dealt with by the Magistrates Court.

The proposed new section 24B would introduce a new offence criminalising illegal working for both those found working whilst living unlawfully in the UK and those found working in breach of the conditions of their leave in the UK. This new offence would remain a summary only offence but would carry increased sentencing powers of 51 weeks in England and Wales, which is greater than the maximum penalty normally imposed by Magistrates Courts.

Confiscation orders under the Proceeds of Crime Act 2002

The rationale for introducing a new criminal offence of illegal working is based on the potential opportunity to seize earnings through confiscation orders made under the Proceeds of Crime Act 2002. In a letter to Lord Rosser, to which the Minister made reference during the debate on the clause at Committee[8], the Minister stated:

> *[T]he new offence will provide us with a firmer basis for using Proceeds of Crime Act seizure powers – which apply only in cases where the cash involved exceeds £1,000. To be clear, the Government already uses Proceeds of Crime Act powers in relation to those committing immigration offences under existing provisions in the UK Borders Act 2007. In 2014-15, the courts approved the forfeiture of cash totalling £542,668 seized by immigration officers. Following criminal convictions for immigration-related offences courts ordered the confiscation of*

[7] House of Lords, Immigration Bill Committee debates, 18 January 2016 at: http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0003.htm, column 626

[8] House of Lords, Immigration Bill Committee debates, 18 January 2016 at: http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0003.htm, column 626

assets totalling £966,024. We expect that in-country seizure could double with the use of the extended powers enabled by the new illegal working offence".

However the Government has since published figures that would indicate that the Proceeds of Crime Act 2002 is not typically used for offences of working in breach of conditions, though it is deployed in cases involving other more serious immigration offences. In an answer to a parliamentary question, Lord Bates reported the following data for the offences for which confiscation orders totalling £966,024 were made:

There were 16 confiscation orders amounting to £966,024, these are broken down to the following offences.

Offence	*Amount*
Forgery and Counterfeiting	*£162,997.55*
Facilitation investigation	*£10,665.95*
Sham Marriage - assisting unlawful immigration	*£85,519.29*
Fraud and Money Laundering	*£2.00*
Conspiracy to Facilitate a Breach of Immigration Law	*£25,466.62*
Conspiracy to assist unlawful immigration	*£330,352.72*
Fraud by false representation	*£1,020.32*
Assisting Unlawful Immigration into the UK	*£350,000.00*

In the case of Money Laundering, the small total is because of nominal confiscation orders. A nominal confiscation order for a small amount (such as £1), may be imposed where the court finds that the defendant has benefitted from his criminal conduct, but has no realisable assets. If circumstances change then the order can be revisited[9].

From the above figures, there were only 16 confiscation orders made under the Proceeds of Crime Act 2002 in 2014/15 and none of these followed criminal convictions for working in breach of conditions. ILPA members practising in criminal law have indicated that this finding reflects their practice experience that Proceeds of Crime Act proceedings are lengthy, costly and not readily used in contexts of pure offences of illegal working. In reality and in practice, the confiscation order would be attached to other more serious matters charged in the indictment.

There would be few cases in which it would be cost effective or in the public interest to pursue confiscation proceedings to seize wages earned as a result of illegal working as proceeds of crime. In making a confiscation order, the Court will need to consider the benefit obtained as a result of the criminal conduct and the actual recoverable amount. If there are no assets, only a nominal order of £1 may be made. The Crown Prosecution Service Guidance on Proceeds of Crime[10] says that it should prioritise the recovery of assets from serious organised crime and serious economic crime. Pursuing undocumented workers with few assets will therefore not be a priority. Undocumented workers who are working for little money and living 'hand-to-mouth' will have very limited realisable assets. The Guidance says that: *"If a financial investigation has*

[9] Lord Bates, Written Answer HL5290, Home Office Immigration: Proceeds of Crime, 02 February 2016 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-01-20/HL5290/

[10] http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/

revealed that a suspect has few or no realisable assets, then it may not be a proportionate use of resources to pursue confiscation".

Proceeds of Crime Act proceedings are lengthy. They normally take place after a sentencing exercise by a criminal court and require the setting down of a timetable, with often delays well past 6 months after sentencing date. Section 14 of the Proceeds of Crime Act 2002 allows the postponement period to two years from the date of conviction (with further provisions for exceptional circumstances). This has particular relevance in relation to the summary nature of the offence. The Proceeds of Crime Act proceedings may not be resolved fully by the end of the sentence served by an individual prosecuted for illegal working and it is unclear as to what would happen in the case of an individual with no immigration status during the remaining period of time that the Proceeds of Crime proceedings take. Is it envisaged that individuals should be kept in immigration detention post completion of a summary only criminal sentence? Or would Proceeds of Crime Act proceedings take place in their absence? These are practical considerations that would also weigh in the balance in considering the public interest as well as the significant cost implications for both the Courts, the Crown Prosecution Service and the Legal Aid Agency.

A confiscation order must also be proportionate to the aim of the legislation, which is to recover the financial benefit that the defendant has obtained from the criminal conduct (*R v Waya [2012] UKSC 51)*. The purpose of the legislation is not to further punish the offender by fining them, or to act as a deterrent. If the confiscation order is not proportionate then it will be a violation of the right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the European Convention on Human Rights[11]. This was established by the European Court of Human Rights in the case of Paulet v UK.

Cases such as Nuro v the Home Office [2014] EWHC 462 (Admin), cited by the Home Office[12] as a case where it was held not to be possible to obtain a confiscation order to seize earnings in the absence of a criminal offence of a self-employed handyman living illegally in the UK, and which pre-dates the judgment and discussion of proportionality in Paulet v UK, are therefore unlikely to be common. It also remains the case that confiscation orders under the Proceeds of Crime Act 2002 can be brought in specific cases where fraud or deception has been used in relation to illegal working (for example where an individual has deceived their employer as to their entitlement to work in the UK)[13].

There is therefore no strong justification for the introduction of a new criminal offence and its harmful impact on the ability of victims of exploitation to seek assistance and protection would outweigh any argued advantage.

The example of criminalising illegal working for Accession state nationals

[11] See the discussion in *Paulet v The United Kingdom*; *Mouhid v. R. (Court of Appeal) (2014)*

[12] Lord Bates, Written Answer HL 5291, 28 January 2016 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-01-20/HL5291

[13] See *R v Carter, Kulish and Lyashkov* [2006] EWCA Crim 416; *R v Paulet* [2009] EWCA Crim 1573

The criminalisation of illegal working is not, as has been suggested[14] a new departure. The Accession of Croatian (Immigration and Worker Authorisation) Regulations 2013[15] and the Accession (Immigration and Worker Authorisation) Regulations 2006[16] both created criminal offences for Croatian, Romanian and Bulgarian working without authorisation in the UK and for those employing them in breach of the regulations.

In an answer to a parliamentary question, James Brokenshire MP provided data on prosecutions under the Accession (Immigration and Worker Authorisation) Regulations 2006 which showed that since they came into force on 01 January 2007, there had been three prosecutions under Regulation 12 (the employer offence) and no prosecutions under Regulation 13 (the employee offence). During the same period, 491 fixed penalty notices were issued to employees who breached the regulations[17].

In the same written answer, James Brokenshire MP stated that the Home Office has no record of any Fixed Penalty Notices issued to Croatian nationals working in breach of the Croatian (Immigration and Worker Authorisation) Regulations 2013 and that the Home Office had not issued any civil penalties to employers in respect of breaches of those regulations[18].

The data therefore indicates that employees were not prosecuted under the offences of illegal working under either the Accession (Immigration and Worker Authorisation) Regulations 2006 or the Croatian (Immigration and Worker Authorisation) Regulations 2013. This suggests that it is unlikely to be in the public interest to bring prosecutions in cases of individuals found to be working illegally in the UK.

The data provides also suggests that the introduction of a new offence of illegal working may lead to the displacement of enforcement activity from employers to employees. Whilst there were only three prosecutions of employers, 491 employees were given a fixed penalty notice for illegal working. A fixed penalty notice offers the individual an alternative to criminal prosecution through the payment of a fixed penalty. The disparity between the enforcement action taken against employees compared with those employing them gives cause for concern.

[14] Prime Minister's speech of 21 May 2015 available at https://www.gov.uk/government/speeches/pm-speech-on-immigration (accessed 20 September 2015)
[15] Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013, SI 2014/1460, regulations 11-18 at: http://www.legislation.gov.uk/ukdsi/2013/9780111539156/contents (accessed 19 February 2016)
[16] Accession (Immigration and Worker Authorisation) Regulations 2006 SI 2006/3317 regulations 12 and 13 http://www.legislation.gov.uk/uksi/2006/3317/pdfs/uksi_20063317_en.pdf (accessed 19 February 2016)
[17] James Brokenshire MP, Written Answer 12752, Worker Registration Scheme, 21 October 2015 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-21/12752
[18] *Ibid*