ILPA PROPOSED AMENDMENTS FOR IMMIGRATION BILL: LORDS' REPORT PARTS 1- 3 (EXCLUDING DETENTION) FOR DEBATE WEDNESDAY 9TH MARCH

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.

This briefing is concerned solely with amendments not already tabled as of 3 March 2016 to those parts of the Bill to be debated on Wednesday 9 March 2015. It covers:

- **Purpose of the Director of Labour Market Enforcement**
- **Eviction**
- **Driving**

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ILPA supports the amendments set out below. There are many other changes we should like to see to the Bill, including changes encompassed by amendments tabled. We are conscious that time is likely to be very short at report and have therefore endeavoured to prioritize those where there are votes to be won or important assurances to be gained.

Part 1

Director of Labour Market Enforcement

Clause 1 Director of Labour Market Enforcement

Clause 1, page 1, line 10 at end insert

> "The primary function of the Director shall be the protection of workers from exploitation. "

Purpose

To place on the face of the Bill that the Director is concerned with the protection of workers rather than immigration enforcement.

Briefing

This amendment was tabled at Committee in the name of Baroness Hamwee and Lord Paddick. Of all the attempts to make this point that we have seen so far, we consider this is so far the most successful. It allows the Director of Immigration Enforcement to have regard to immigration matters insofar as these are relevant to the exploitation of workers, which not all amendments on the point have left room for, but still asserts protection from exploitation as the primary function.

The Minister, the Rt Hon James Brokenshire MP, said in the Public Bill Committee appeared to support the approach the amendment takes to the primary purpose of the Director.

> *We intend the director's remit to cover labour market breaches, not immigration offences. The director and the enforcement bodies will work closely with Home Office immigration enforcement wherever labour market breaches are linked to illegal immigrants or people working in breach of their visa conditions, but that is an adjunct and not the purpose of the director*[1].

Pressed on why he declined to accept the amendment given that he did not appear to disagree with it the Minister said "I simply do not think it is necessary[2]." ILPA disagrees. The Director has a large and a wide-ranging role and no promise of adequate resources. It will be necessary for him/her to be ruthless in setting priorities and a primary purpose may assist in so doing.

The Minister gave cause for concern when he went on to say

> "*The provision is not intended to stray into the separate issues of immigration enforcement, but if cases of people who are here illegally are highlighted, the director would be duty-bound to report that and to pass on intelligence through the hub that is being created*.[3]"

A primary purpose would assist in ensuring that where protective and enforcement functions conflict, the Director prioritises a protective approach.

The Minister undertook at Commons' Report to continue to reflect on whether the provision for the Director is appropriately framed[4] .

ILPA's response to the consultation on the role of the Director can be read at http://www.ilpa.org.uk/resources.php/31617/ilpa-response-to-department-for-business-innovation-and-skills-consultation-tackling-exploitation-in

Part 2 ACCESS TO SERVICES

Residential tenancies

Clause 39 Order for Possession of a dwelling house

> Clause 39, page 28, line 11, leave out "Part 1" and insert "Part 2"

[1] 27 October 2015, am, col 163
[2] Ibid., col 166.
[3] Ibid.
[4] HC Deb 1 December 2015 col 208

Clause 39, page 13, line 11, leave out "must" and insert "may"

Purpose

To move the provisions in this Bill on Order for possession of a dwelling house from that part of Schedule 2 to the Housing Act 1988 dealing with the grounds on which a court 'must' order possession (Part 1) to the grounds on which a court 'may' order possession (Part 2). The second amendment is consequential. The effect of the amendments is to give a court considering the circumstances of the individual case power to determine whether or not it should order possession of a dwelling house.

Briefing

These amendments were tabled as amendments 154 and 155 by Lord Rosser, Lord Kennedy of Southwark and Baroness Hamwee at Committee stage. They were devised by the Housing Law Practitioners' Association and first proposed by Liberty.

The eviction measures were described by Scottish National Party MP Stuart Macdonald MP described at Commons Report as "Dickensian eviction processes"[5] should not stand part of the Bill. Sir Keir Starmer MP said at Commons Report

> *Some 30 or 40 years ago, the House set its face against summary evictions for a very good reason: there were too many examples of locks being changed and families literally being put out on to the street to sleep on the pavements. Everybody agreed that there should be due process before individuals and families, particularly families with children, were evicted. The Bill cuts through that protection for no good reason. In this country in the 21st century no group of individuals should—for whatever reason, and whether renting lawfully or not—be subject to summary eviction proceedings that, as I said, we turned our back on a long time ago.*[6]

ILPA concurs. The Minister, the Rt Hon James Brokenshire MP, confirmed:

> *In some circumstances, as with eviction for other reasons under housing legislation, that will mean that children are evicted along with adults in family groups*[7].

The parallel with housing legislation is apt to mislead, as the provisions as to summary eviction that are contained in this Bill are novel, or at least require one to look back some 40 years, as described above.

The eviction of children and families under these provisions is also likely to have a significant impact on children's social services, housing and homelessness departments. Local authorities will bear the responsibility of supporting and housing families where they are evicted by landlords who are not required to follow the normal eviction processes with the safeguards that these include. The point was raised by Mrs Emma Lewell Buck in the Public Bill Committee

> ***Mrs Emma Lewell-Buck*** *(South Shields) (Lab): I wonder whether the Minister can clear up something that I am a bit curious about. My hon. and learned Friend touched on a local*

[5] HC Report 1 December 2015, col 180.
[6] *Ibid*., col 186.
[7] *Ibid*., Col 278.

> *authority's duties under the Children Act 1989. If a family are evicted, will they be entitled to local authority help under homelessness legislation as well?* [8]

The Bill creates two new routes by which a landlord can recover possession. The first is new s.33D, being inserted into the Immigration Act 2014. The Secretary of State will serve notice on the landlord/landlady, informing him/her that a person without a "right to rent" lives in the property (new s.33D(2)). The landlord/landlady is then given power to terminate the tenancy by giving at least 28 days written notice to the tenants. The notice will be enforceable "as if it were an order of the High Court". There will be no need to obtain an order for possession. By inserting a new section 33E(4) into the Immigration Act 2014, the Clause excludes the residential tenancy agreement from the safeguards of the Protection from Eviction Act 1977.

Section 33D *Termination of an agreement where all owners disqualified* which is to be inserted into the Immigration Act 2014, would allow a tenancy to be terminated on receipt of a notice from the Secretary of State that the tenants had no right to rent and for the landlord/landlady's notice so terminating the tenancy to be enforced as though it were an order of the High Court.

It is unprecedented in housing law that a landlord or landlady's notice to quit can be enforced as though it were an order of the High Court as the Housing Law Practitioners' Association, has described[9]. In many civil penalty schemes, including the right to rent scheme, provision is made for a fine to be enforced as if it were a debt due under a court order. But there is an enormous difference between having a fine enforced as though it were a debt due under a court order (which is already innovative), which means the sum cannot be disputed at this stage, and having a notice to quit so enforced; between having a payment due under a statutory scheme and a notice given by a private individual so enforced.

Under the Bill a landlord/landlady can use "self-help" to recover possession, i.e. personally turn up and throw occupiers onto the street or call on (and pay) a High Court Enforcement Officer (previously called a High Court Sheriff) to do so. There are clear risks in self-help The Minister was pressed on these matters and identified the safeguards that exist at Commons Report:

> *…safeguards already exist. The Secretary of State will serve notices only where she is satisfied that the migrant is here unlawfully and only after taking the migrant's circumstances into consideration. Should there be recognised barriers to illegal migrants leaving the UK that are not of their own making, these will be taken into account.*[10]

Once again, the reliance on the Home Office getting it right every time.

In the Evaluation of the Right to Rent scheme prepared in response to the pilot scheme in the West Midlands, 109 'illegal migrants' were identified. Of this number, four had an outstanding judicial review, one had made further representations that were being considered, fifteen were being progressed as family cases, twenty eight had outstanding cases, including asylum claims and nine were subsequently granted leave to remain in the UK. This represents 57 of the 109 'illegal migrants' which is 52% of the total. This is a significant figure. These people are not subject to

[8] Cols 262-263.
[9] Available on ILPA's website at http://www.ilpa.org.uk/resources.php/31491/immigration-bill-house-of-commons-committee-stage-briefing-from-the-housing-law-practitioners-associ
[10] HC Deb, 1 December 2015, col 208.

removal during this period and many may, and indeed some did, obtain the right to remain. Yet they could face summary eviction under these provisions.

Under the administrative review provisions introduced by the 2014 Act, a person's leave extended under section 3C of the Immigration Act 1971 automatically ends where an administrative review is rejected. Those who had sought a review find themselves immediately without leave to enter or remain and could face summary eviction under these provisions.

The Government amended the Bill in Lords' Committee[11] to require the landlord/ landlady's notice to the tenant to be in a prescribed form. Where, however, is whether the notice is in the prescribed form to be tested if the notice is enforceable as it were an order of the High Court? If a landlord/landlady turns up to evict the tenants, relying on the notice, what scope is there for the tenants to begin to dispute the notice?

The Bill introduces a new mandatory ground for possession in both the Housing Act 1988 and the Rent Act 1977, again, triggered by a notice to the landlord/landlady from the Secretary of State. It would be an implied term of a residential tenancy agreement that a landlord or landlady could terminate a tenancy if adult occupying the premises do not have a right to rent. Courts will be obliged to issue an Order for Possession and will have no discretion in the matter.

The Minister, the Rt Hon James Brokenshire MP gave as the rationale for the provisions

> "*The mandatory ground for possession recognises that the Home Office notice is a clear statement of immigration status; it is not necessary or helpful for a court to enter into its own additional assessment of the reasonableness of making a possession order, which would be the effect of making this a discretionary ground*. [12]

This is only half the story. The court may be satisfied of the immigration status of the person facing eviction but conclude that because of the person's circumstances, for example a baby or children in the family, pregnancy, old age, disability or infirmity, that eviction is not appropriate. The Minister suggested[13] that the safeguard would be the Home Office's not serving a notice in cases where eviction would not be appropriate, but once given the powers to set in motion the eviction process, what will guarantees that these will not be used?

Driving

Clause 42 Offence of driving when unlawfully in the United Kingdom

At Lords Committee Baroness Lawrence of Clarendon, Lord Paddick and Baroness Sheehan opposed this Clause standing part of the Bill. ILPA supports that opposition being renewed at Lord's report. No satisfactory answers were given to their searching questions in the debate and nor have they been given in Lord Bates' letter of 1 March 2016. The Minister promises a consultation on guidance to the police as well as a pilot, but, as with the right to rent provisions, not the sort of pilot that could result in the measure being scrapped, rather a trial run in one area. We have seen with the right to rent pilot how few of the problems it threw up were

[11] Government amendment 153.
[12] Public Bill Committee, 29 October 2015, Col 263.
[13] Public Bill Committee col 278, 29 October 2016.

addressed either in the legislation that brought it into force in more areas from 1 February 2016, or in preparing the provisions on residential tenancies in the current bill.

Lord Bates' comments provide little or no reassurance. Immigration Officers will "generally" use the power to search for a driving licence in the course of normal enforcement activities. Immigration officers might use the power to detain a vehicle "for example, where during a visit to a place of work, they witness an illegal worker driving onto the employer's car park" But how will they know that the person is an illegal worker rather than a visitor going about their lawful business?

Lord Bates suggests in his letter of 1 March 2016 that the powers contain adequate safeguards against the use of a power to search a person's home. But the examples he gives fail to reassure. Lord Paddick emphasised at Commons' Committee that a routine check of the Home Office immigration database is not a normal part of a stop check and that Her Majesty's Inspectorate of Constabulary research shows that drivers are being targeted on that basis. He pointed out that police stops of vehicles under the Road Traffic Acts are not routinely recorded[14]. In short he described a receipe for the gains made in the operation of stop and search powers to be reversed.

Lord Bates said in his letter of 1 March that the officer must have reasonable grounds for believing that person is in possession of a driving licence and is not lawfully resident, which will require a check on the police national computer and a possible check with the Driving and Vehicular Licensing Authority, and could only enter premises (a definition which includes vehicles), where there are reasonable grounds for believing that the driving license can be found there.

If a person does not have a licence on them, is it not likely to be reasonable to assume that it is at home or work? In the circumstances the reasonable suspicion test does not appear to be a difficult one to meet.

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

> *… the performance of what remains of UKBA is still not good enough. The agency struggles with the volume of its casework ... has been a troubled organisation since it was formed in 2008… UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry ...and they often involve paper files … The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies … it will take many years to clear the backlogs and fix the system, ..."*[15]

We agree. Ms Sarah Rapson, Director General of UK Visas and Immigration, told the Home Affairs Select Committee in June 2013 "Is it [the organisation] ever going to be fixed?... I think I answered that question from you earlier. I don't think so."[16]

This complex Bill is the latest stage in the "vicious cycle of complex legislation" described by the

[14] HL Report 1 Feb 2016, col 1600.
[15] HC Report 6 Mar 2013: Col 1500.
[16] Oral evidence given on 11 June 2013, published as HC 232-I, response to question 6, see http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc232-i/uc23201.htm

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

The State is shielded from challenge: there will in very many cases be no remedy and no redress. The Bill cannot be read in isolation from the cuts in legal aid.[17] Restrictions on judicial review[18] further against challenges. It is a reasonable assumption that if parliament does not put a safeguard into place it will be considerable time before that safeguard can be put into place through litigation.

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

> *The national identity card scheme represents the worst of government. It is intrusive and bullying, ineffective and expensive. It is an assault on individual liberty which does not promise a greater good...We are a freedom-loving people, and we recognise that intrusive government does not enhance our well-being or safety. In 2004 the Mayor of London promised to eat his ID card in front of "whatever emanation of the state has demanded that I produce it."*
> *I will not endorse civil disobedience, but Boris Johnson was expressing in his own inimitable way a discomfort even stronger than the discomfort to be had from eating an ID card. It is a discomfort born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government* [19]

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

> *Are British citizens to carry means of identification everywhere to prove that they are not visitors? For if the sheep are to be separated from the goats both must be classified…*"[20]

A wrongful refusal by the Home Office could jeopardise a person's accommodation, bank accounts and driving licence. Lord Bates set the driving licence provisions firmly within this context at Lords' Committee

> ***Lord Bates:*** *… Sometimes there is an overfocus on this particular element, without recognising the wider context of the Bill. This is not being targeted simply through stop-and-search powers but is consistent with the wider aim to reduce the ability of people who are here illegally to live a normal life while in the UK—such as by having bank accounts, being able to rent properties, being able to work and gain employment, or being able to gain a driving licence. In the wider context, it fits, but there are some specific concerns here.*

[17] See the Legal Aid, Sentencing and Punishment of Offenders Act 2012
[18] Criminal Justice and Courts 205 Act Part 4.
[19] HC report 9 Jun 2010: Column 345-350
[20] *In Place of Fear*, Bevan, A., (1952), Chapter 5

Indeed, "In the wider context, it fits." It is a reminder that the effects of the hostile environment are likely to be felt not only by those present unlawfully but by all persons under immigration control and by British citizens from ethnic minorities.

Lord Bates said at Lords' Committee:

> *…the Government are clear that this provision will not undermine reform of police stop-and-search powers and will not undermine community cohesion. The police will first have to have cause to stop a vehicle. …Reasonable suspicion may occur where a vehicle has been stopped for a suspected driving offence, the police have checked the circumstances of the driver, as appropriate, and those checks have revealed a match against a Home Office record. The search is therefore intelligence-led, not a random search of a member of the public. I draw noble Lords' attention to the policy equality statement which accompanies this Bill and sets out very clearly in section 3 what the power to search for UK driving licences means in practice. The cause cannot be based on a person's race or ethnicity. The stop must be for an objective reason. Once a vehicle has been stopped, the police check the circumstances of the driver. The provision will not therefore lead to stop and searches of vehicles in order to check the immigration status of the driver.*
>
> *… This is what* [the Home Secretary] *said at the National Black Police Association's conference in October 2015:*
>
> > *"We made sure officers are clear what 'reasonable grounds' of suspicion are, so that its use is both legal and reasonable—because Her Majesty's Inspectorate of Constabulary said that over a quarter of stop and searches were unlawful. We brought in much greater transparency and required police forces to record the outcome of each and every stop and search—because only one in ten stop and searches led to an arrest. And we gave communities the ability to hold their police force to account through a 'community trigger', which means that the police must explain how stop and search powers are being used should concerns be raised. And I am delighted that the 43 police forces in England and Wales, plus British Transport Police, have all voluntarily signed up to our Best Use of Stop and Search Scheme".*
>
> *Moreover, the use of stop and search fell sharply in 2014-5. It was down by 40%, compared with 2013-14, to 540,870. This continues the recent downward trend. This is the largest year-on-year fall and sees the lowest number of stop and searches in a year since the current series began in 2001-02. The number of Section 60 stops, for which reasonable suspicion is not required, fell by 73%, compared to 2013-14, to 1,082 stops. Moreover, the Government announced a number of measures in 2014. Among them were: commissioning the College of Policing to review national stop-and-search training; including stop and search in the new HMIC PEEL inspections; commissioning HMIC to conduct a thematic inspection into other stop-and-search powers; introducing a strictly voluntary Best Use of Stop and Search Scheme to create more transparent and accountable use of stop and search; revising the PACE code of practice to make clear what constitutes reasonable grounds for suspicion—the legal basis for stop and search; mapping stop and search on Police.uk; exploring quick and efficient stop and search; and recording on the emergency services network.*[21]

Will the new powers reverse this trend or, indeed, are they a substitute for powers no longer used so extensively? Lord Bates continued

[21] HL Report 1 Feb 2016 cols 1598-1599.

> *A number of noble Lords referred to the comments by Chief Superintendent David Snelling in another place. In his evidence to the Public Bill Committee last year, he indicated that the police would use this power in the context of intelligence-led policing. If police have cause to stop a vehicle, they may then check the circumstances of the driver. If the driver is found to be an illegal migrant, their vehicle may be detained under these powers. In applying these new powers, the police will first have to have cause to stop a vehicle; for example, for a suspected motoring offence. They may then check the circumstances of the driver. There are, therefore, a series of objective steps that will be followed. This clause will not result in the police randomly stopping cars in order to check the immigration status of the driver.* [22]

Lord Alton asked what would be done to monitor the use of the power and whether annual statistics would be published[23]. It would be useful to pursue these points.

[22] Hl Report 1 Feb 2016 col 1599.
[23] *Ibid*.