ILPA BRIEFING FOR IMMIGRATION BILL PING PONG COMMONS CONSIDERATION 9 MAY 2016, LORDS THEREAFTER

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on many Government and other consultative and advisory groups.

ILPA briefings on the Bill can be read at http://www.ilpa.org.uk/pages/immigration-bill-2015.html We are happy to provide further information on request. ***Please get in touch with Alison Harvey, Legal Director Alison.Harvey@ilpa.org.uk or Zoe Harper, Legal Officer, Zoe.Harper@ilpa.org.uk , phone 0207 2518383.***

We deal with the amendments in the order in which they appear on the marshalled list and insert our proposals for amendments in lieu. In summary,

The Lords

- **Rejected the Commons' amendment 84A new clause *Duty to arrange consideration of bail* and insisted on *its* Amendment 84 new clause *Immigration Detention time limit and judicial oversight* (Lords's Reason 84B)**
- **Rejected the Government' amendment 85B *Limitation on the detention of pregnant women* and substituted Amendment 85C of the same name.**
- **Substituted Amendment 87 New Clause after Clause 37 *Unaccompanied refugee children: relocation and support*** for the Commons rejection

The following have been proposed for the Bill's return to the Commons

- **Government amendment (a) *Duty to arrange consideration of bail* in lieu of Amendment 84 *Judicial oversight of detention***
- **Government amendments (a)-(f) *Limitation on the detention of pregnant women* as modifications to Amendment 85C *Limitation on the detention of pregnant women***
- **To agree Amendment 87 New Clause after Clause 37 *Unaccompanied refugee children: relocation and support***

In what follows, ILPA **proposes amendments in lieu of amendment (a)-(f) to Amendment 85C.** We are happy to provide further information on request.

JUDICIAL OVERSIGHT OF IMMIGRATION DETENTION

Amendment 84B *Duty to arrange consideration of bail* in lieu of Amendment 84 *Judicial oversight of detention*

Purpose

Lords' Amendment 84 Judicial oversight of detention

Requires that the Secretary of State make an application to the Tribunal where she wishes to detain a person, other than a person who has been sentenced to a term of imprisonment for 12 months or longer or whom she has determined shall be deported, for more than 28 days – at a stretch or in aggregate.

On such an application the Secretary of State must persuade the Tribunal that the "exceptional circumstances" of the case require detention beyond 28 days. The Tribunal can then extend detention for a further period, not limited to 28 days and can do so more than once, with no maximum. It can review that extended detention of its own motion.

Rules as to the procedure are to be made by the Lord Chancellor.

Proposed Amendment 84B in lieu differs from Amendment 84A inserted by the Commons on consideration of Lords Amendments in that it replaces six months in that amendment with four months. Provides for the Secretary of State to arrange a bail hearing before the Tribunal when a person has been detained for four months from their first entry into detention or since their last bail hearing arranged under this section (i.e. there will be an automatic bail hearing every four months) or that they have instigated (save where the latter is a bail hearing with 14 days of a proposed removal as in such cases the Secretary of State would have to consent to bail for it to be granted). Does not apply to those detained pending deportation. Does not apply to cases before the Special Immigration Appeals Commission, a specialist court of record presided over by a High Court judge which is set up to hear national security cases. Does not apply where a person waives, in writing, their right to the hearing.

Briefing

ILPA supports the Lords' Amendment 84 on which the Lords have insisted. The difference between it and Government Amendment 84B in lieu is that:

- The Government amendment 84B envisages a bail hearing like any other: the person applies for release whereas Lords' Amendment 84 puts the onus on the Secretary of State to justify detention after 28 days
- Lords Amendment 84 provides for bail hearing after 28 days and then at such intervals as the Tribunal may determine. It does not prevent a person's applying for bail in the meantime. By contrast, Government Amendment 84 results in the person coming before the Tribunal after four months then, if they do not bring make any applications for bail in the interim, some four months thereafter (a hearing is arranged after four months).

Contrary to some suggestions during the debate in the Commons, Amendment 84 does not impose a maximum time limit on detention. It requires the Secretary of State to justify detention. That the Government are resisting it suggests that in practice, even for cases not involving deportation, as these are excluded by both amendment 84 and amendment 84B, the Government is not prepared to accept that a presumption of liberty applies. This is contrary to stated government policy (see the Enforcement Instructions and Guidance at 55.1.1. The

Government proposal would mean that even those whom Stephen Shaw recommended should not be detained save in very exceptional circumstances will only have an independent review of their detention once every six months.

> "…there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used"

If that is the policy, why is the Government not prepared to justify detention before the tribunal?

For ILPA's briefing to Amendment 84 see http://www.ilpa.org.uk/resources.php/31938/ilpa-briefing-for-lords-report-first-day-5-march-2016

ILPA is against the exclusion of deportation cases from judicial oversight in both amendment 84 and amendment 84B. Immigration detention is by administrative fiat, without limit of time. In these circumstances it is only right that a person should be brought before a court and the Government required to justify their detention, whether or not the person faces deportation. ILPA considers that all rules for the Immigration and Asylum Chambers of the Tribunal should, as now, be made by the Tribunal Procedure Committee.

DETENTION OF PREGNANT WOMEN

Amendment 85C *Limitation on the detention of pregnant women*

Purpose

Amendment 85C

In the Lords, the government proposed a time limit on the detention of pregnant women; that they can be held for a maximum of one week at any given time (72 hours if there is no Ministerial authorization of a longer period of up to one week) starting from the time at which the Secretary of State is satisfied that the woman is pregnant. A pregnant woman released can be redetained. The Lords did not accept the Government amendment as presented but accepted amendment 85C which built on it.

Amendment 85C incorporates the 72 hour/one week time limit proposed by the Government. Its other provisions are modelled on the ban on the detention of children in families set out in sections 2, 3 and 6 of the Immigration Act 2014. The amendments introduce an overriding principle that no pregnant woman shall be detained save in the most exceptional circumstances. They provide that a pregnant woman may be held only in a short-term holding facility or "pre-departure accommodation" (Cedars, used for families) where her needs can be met and provision can be made for her medical care save where she is being transferred, but the transfer journey must not exceed one hour.

The amendment requires that those pregnant women already in the country must have 28 days notice of detention. The text is modelled on section 2 of the Immigration Act 2014. It is designed to ensure that pregnant women are not subjected to dawn raids and long journeys in vans to reach detention. It does not apply in port cases, where the woman arrives in the UK airside (or equivalent) and remains airside until she leaves. Such women are likely to be in the country for very short periods.

Provision is made (new section 54B of the Borders, Citizenship and Immigration Act 2009) for the independent family returns panel, appropriately constituted with persons with the relevant expertise, to oversee the detention of pregnant women.

Government amendments (a) to (f)

These modify amendment 85C.

Amendment (a) removes the limitation on the detention of pregnant women to the "most exceptional" circumstances

Amendment (b) limits to the detention of pregnant women to "exceptional circumstances" and does not even require exceptional circumstances where the woman is "shortly" to be removed

Amendment (c) has the effect that the woman can be detained for 72 hours/one week from the point of detention or the point at which the Secretary of State is satisfied that the woman is pregnant, whichever is the later, rather than from the earlier of these dates as in amendment 85C.

Amendment (d) removes the restrictions on the places in which a pregnant woman can be detained (short term holding facilities and Cedars pre departure accommodation for families where arrangements can be made for their needs to be met and for their medical care and the limitation on transfers of pregnant women to one hour and in circumstances where there needs can be met and provision made for their medical care

Amendment (e) rejects 28 days notice of the removal of pregnant women

Amendment (f) rejects the involvement of the family returns panel

Briefing and ILPA proposed amendments

We wish to achieve that pregnant women are not detained without notice. If Stephen Shaw's recommendation of an absolute ban on the detention of pregnant women has been rejected, then it must be ensured that they are detained only in the most exceptional circumstances and for the shortest possible time.

While we prefer the text of amendment 85C without the modifications in amendments (a) to (f) our primary objections are to amendments (a) (b) (e) and (f) as set out below.

The current Home Office Enforcement Guidance and Instructions provide at 55.10 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470593/2015-10-23_Ch55_v19.pdf)

> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
>
> - Pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this

The reference is to "very exceptional". What is more, Stephen Shaw found that it had not been adequate to protect pregnant women.

Amendment (b) states

> "In determining whether to authorize the detention under a relevant detention power of `a woman to whom this section applies a person who, apart from this section, has power

to authorize the detention must have regard to the woman's welfare"

We do not understand thee reference "apart from this section".

ILPA therefore proposes that if the Lords' amendment be changed in this regard, **Amendments (a) and (b) be substituted** with

(1) This section applies subject to the over-riding principle that no pregnant woman shall be detained under a relevant detention power save in very exceptional circumstances.

We do not consider that the "must have regard to the women's welfare" is adequate. We are mindful of the treatment pregnant women have endured. We therefore suggest that if the limitation to short term holding facilities and Cedars, and to transfers of under an hour are rejected, as provided for by **amendment (d)** the very least that **should be substituted for paragraph 6 which amendment (d) removes is**

(6) A pregnant woman may only be held under a relevant detention power where her needs can be met and provision made for her medical care, except where the woman is being transferred in a manner which makes provision for her needs to be met and for her medical care.

The Enforcement Guidance and Instructions already make reference to

"and medical advice suggests no question of confinement prior to this"

But if medical advice is to be taken into account before deciding whether or not to detain a pregnant woman, then it must be obtained before the decision is taken to detain her.

Since the Immigration Act 2014 it has been the case that a person gets notice of liability to removal and to detention when refused. If not removed within that three months, they get another such notice. And so on. A notice is a warning that you could be plucked into detention at any time. Pregnant women do get notice that they are to be removed, but only once they are detained. They get no notice whatsoever of detention. We get the impression that Ministers have not always been clear on this.

A lot can happen in those first 72 hours of detention. There may be a dawn raid, which may include the use of force. The woman may undertake a lengthy journey in the back of a van. Women have described vomiting over themselves in these vans because they were nauseous as a result of their pregnancy. During the first 72 hours in detention adjustments will not have been made, or have finished being made, to accommodate the pregnant woman. She may not be able to eat the food, or sleep comfortably in the bed. She may need to urinate frequently but be far from a lavatory. The stress and fear, including fear of the effect of her treatment on her baby, may be very acutely felt during this period. Women must have notice of detention.

The worrying thing about Ministerial arguments against this in the House of Lords, where the Government was defeated, is that they were clearly based on a model that removal always requires detention, rather than a model that recognizes that detention of pregnant women is exceptional and a last resort.

The Minister suggested that 28 days' notice could not possibly be given, because the woman

would be expected to be removed within 28 days. But the whole point of 28 days' notice in the family returns process is that it is an attempt to negotiate departure without the need to resort to detention. That is the point of the process. The 28 day clock starts ticking while a person is at liberty. They are warned that they may face detention, but every effort is supposed to be made during the 28 days to ensure that that does not happen.

That is what we want for pregnant women if we cannot have an absolute ban on their detention. So that their ante natal care is in no way compromised. So that arrangements can be made to try to ensure their care and that their medical needs are met. We do not consider that that can be achieved if women are detained, but there is no question but that some treatment is more dangerous than others. Provision of anti-malarials contra-indicated in pregnancy for example. Failure to maintain medication, checks and scans. Lack of attempts to manage feelings of nausea and sickness or a need to urinate frequently and to keep a woman who is feeling or being sick or otherwise unwell clean and comfortable. A chance for the woman to exercise some degree of autonomy and control so that she can feel that she is protecting herself and her baby. That is why we want 28 days' notice of detention.

Amendment 85C provides an exception for cases where the woman is "airside" – i.e. where a pregnant woman arrives without leave, is not permitted to enter the UK and leaves at once. It is not the case that it prevents such removals. We consider that such an exception, tightly drawn, can be used to make clear that women rapidly turned around at port are not made subject to a 28 day process, only 72 hours of which (one week in exceptional circumstances) they could spend in detention in any event.

We do not, however, consider that such an exception is necessary. There is no such provision on the face of the 2014 Act in respect of family removals, but we are not aware that it has ever been suggested that a family arriving at port without the correct visas must be held in the UK for 28 days before they can be removed. If the Home Office thinks that is the case, we should like to know as this has implications for immigration lawyers' representation of such families.

For the 28 days notice to be effective, there must be expert review. This is why we suggest that subclause (14) should remain although it could make reference to detention rather than to removal, for example.

(14) After section 54A of the Borders, Citizenship and Immigration Act 2009 insert—

"54B **Cases of pregnant women**

(1) The Secretary of State must consult the Independent Family Returns Panel in each case where

(a) a woman who is pregnant is to be detained; and

(b) section 78B of Nationality, Immigration and Asylum Act 2002 applies to her detention

(2) The Secretary of State may by regulations make provision about the constitution of the Independent Family Returns Panel in cases involving pregnant women, and such regulations must provide for the panel considering such cases to include persons with expertise in the care of pregnant women and in maternity care.

(3) Regulations under this section must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

The reference to s 78B is to the 28 days' notice of removal as inserted by the Lords' amendment.

The Minister should be urged to provide a date by which he will provide detailed statistics on pregnant women in detention covering the numbers detained, the length of detention, whether or not they were released and whether or not they were removed.

We append hereto what a possible full text of an amended Amendment 85C might look like.

See ILPA's briefing at http://www.ilpa.org.uk/resource/32095/ilpa-briefing-for-ping-pong-immigration-bill-23-april-2016

REFUGEE CHILDREN IN EUROPE

Secretary of State Theresa May to provide that the Commons accept AMENDMENT 87B *Unaccompanied refugee children: relocation and support*

Purpose
Provides for the Government to resettle to the UK a number of children to be determined in consultation with local authorities.

Briefing
This amendment now enjoys the support of the Government. The Ministerial statement can be read at https://www.gov.uk/government/news/unaccompanied-asylum-seeking-children-to-be-resettled-from-europe

See the Prime Minister's comments at:

https://hansard.parliament.uk/Commons/2016-05-04/debates/Hocdebdt20160504scrlgtghs_8Questionod13tiengagements/Engagements

We draw attention to the following:

- The Minister proposes that only children registered before 20 March 2016 should be eligible for resettlement from within Europe. Given the very well-documented difficulties with official registration and the 10,000 children who have gone missing in Europe who may yet reappear, it is vital that children known to have been in Europe before 20 March, including those whose plight has been highlighted on television, who have met with MPs and peers and with officials, are not excluded on a technicality. **The Minister should be asked to confirm that a purposive approach will be applied to the application of this criterion so that it is not used to deny protection to children who need it.**
- Similarly, we suggest that any cut off should be a guideline and not a hard and fast rule so that the Government is not prevented from acting should a child stand in need of help. It is not in legislation so there is no reason why it should be a hard and fast rule. **The Minister should be asked to confirm that no child will be denied protection on a technicality.**
- **The Minister should be asked to confirm that no child who was unable to**

register because they were under control of traffickers or enslaved before 20 March 2016 will be excluded from the possibility of resettlement.

- The amendment makes no provision as to the numbers of children to be resettled. **The Minister should be asked** for assurances that the Government will work with willing local authorities to remove the financial barriers they identify to being able to accept these children.
- Given the urgency of the need to protect these children, **the Minister should be asked** to return to parliament a month after the Bill becomes law to report on progress, and to provide statements monthly thereafter.

See ILPA's briefing at http://www.ilpa.org.uk/resource/32095/ilpa-briefing-for-ping-pong-immigration-bill-23-april-2016

Appendix: Text of a proposed amendment to replace amendment 85C

Limitation on detention of pregnant women

(1) This section applies subject to the over-riding principle that no pregnant woman shall be detained under a relevant detention power save in very exceptional circumstances.

(2) This section applies to a woman if the Secretary of State is satisfied that the woman is pregnant.

(3) A woman to whom this section applies may not be detained under a relevant detention power for a period of—

(a) more than 72 hours from the relevant time, or

(b) more than seven days from the relevant time, in a case where the longer period of detention is authorised personally by a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975).

(4) In subsection (3) "the relevant time" means the later of—

(a) the time at which the Secretary of State is first satisfied that the woman is pregnant, and

(b) the time at which the detention begins.

(5) A pregnant woman may only be held under a relevant detention power where her needs can be met and provision made for her medical care, except where the woman is being transferred in a manner which makes provision for her needs to be met and for her medical care.

(6) This section does not apply to the detention under paragraph 16(2) of Schedule 2 to the Immigration Act 1971 of an unaccompanied child to whom paragraph 18B of that Schedule applies.

(7) In this section— "relevant detention power" means a power to detain under—

(a) paragraph 16(2) of Schedule 2 to the Immigration Act 1971 (detention of persons liable to examination or removal),

(b) paragraph 2(1), (2) or (3) of Schedule 3 to that Act (detention pending deportation),

(c) section 62 of the Nationality, Immigration and Asylum Act 2002 (detention of persons liable to examination or removal), or

(d) section 36(1) of the UK Borders Act 2007 (detention pending deportation); "woman" means a female of any age.

(8) The Immigration Act 1971 is amended in accordance with subsections (9) and (10).

(9) In paragraph 16 of Schedule 2 (detention of persons liable to examination or removal) after sub-paragraph (2A) insert—

"(2B) The detention under sub-paragraph (2) of a person to whom section (Limitation on detention of pregnant women) (limitation on detention of pregnant women) of the Immigration Act 2016 applies is subject to that section."

(11) In paragraph 2 of Schedule 3 (detention or control pending deportation) after sub-paragraph (4) insert—

"(4ZA) The detention under sub-paragraph (1), (2) or (3) of a person to whom section (Limitation on detention of pregnant women) (limitation on detention of pregnant women) of the Immigration Act 2016 applies is subject to that section."

(10) In section 62 of the Nationality, Immigration and Asylum Act 2002 (detention by Secretary of State) after subsection (7) insert—

> "(7A) The detention under this section of a person to whom section (Limitation on detention of pregnant women) (limitation on detention of pregnant women) of the Immigration Act 2016 applies is subject to that section."

(11) After section 78A of the Nationality, Immigration and Asylum Act 2002 insert—

> "78B Restriction on detention of pregnant women etc
>
> (1)This section applies in a case where a woman who is pregnant is to be detained other than in cases where a woman has arrived in the United Kingdom by ship or aircraft but has not yet disembarked or on disembarkation at a port as she remains in such area (if any) at the port as may be approved for the purposes of section 11(1) of the Immigration Act 1971 by an immigration officer.
> (2)During the period of 28 days beginning with the day on which the relevant appeal rights are exhausted the pregnant woman may not be detained.
> (3)The relevant appeal rights are exhausted at the time when the pregnant woman could not bring an appeal under section 82 (ignoring any possibility of an appeal out of time with permission),
> (4)In this section—
> "woman" means a female of any age.

(12) After section 54A of the Borders, Citizenship and Immigration Act 2009 insert—

"54B **Cases of pregnant women**

(1) The Secretary of State must consult the Independent Family Returns Panel in each case where—

> (a) a woman who is pregnant is to be detained; and
>
> (b) section 78B of Nationality, Immigration and Asylum Act 2002 applies to her detention

on how best to safeguard and promote the welfare of the pregnant woman

(2) The Secretary of State may by regulations make provision about the constitution of the Independent Family Returns Panel in cases involving pregnant women, and such regulations must provide for the panel considering such cases to include persons with expertise in the care of pregnant women and in maternity care.

(3) Regulations under this section must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Purpose

Changes to amendment 85C

- "most exceptional" changed to "very exceptional" the language of the current Home Office Enforcement Guidance and Instructions
- Place of detention no longer restricted to short term holding facilities and Cedars
- Journey time is no longer restricted to one hour
- Focus is on no notice detention rather than no notice removal

- Reference to section 11(1) of the Immigration Act 1971 has been tightened up accurately to describe port cases.
- Requirement to consult the family returns panel does not arise where the pregnant woman remains at port/airside.

Differences from Amendment 85C as it would be amended by Government amendments (a) –(f)

- Detention only in very exceptional circumstances
- No detention without notice
- Involvement of the family returns panel before a pregnant woman can be detained.
- Detention and transport only where provision can be made for care and welfare needs.