ILPA BRIEFING FOR IMMIGRATION BILL PING PONG LORDS 10 MAY 2016

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 Commons

- **Rejected the Lords' amendment 84 inserting new clause *Immigration Detention time limit and judicial oversight* and replaced it with its own (Government) amendment 84C *to arrange consideration of bail***
- **Amended the Lords' amendment 85C *Limitation on the detention of pregnant women* by (Government) amendments 85D to 85I.**
- **Accepted amendment 87 New Clause after Clause 37 *Unaccompanied refugee children: relocation and support***

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

- **Motion A in the name of Earl Howe: that the Lords accept Amendment 84C *Duty to arrange consideration of bail***
- **Motion B in the name of Earl Howe: that the Lords accept amendments 85D to 85I [on the detention of pregnant women]**

MOTION A: JUDICIAL OVERSIGHT OF IMMIGRATION DETENTION

Purpose

Amendment 84C in lieu

The Commons has insisted on the form of its previous amendment but has substituted four months for six months.

Thus the amendment 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.

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.

Briefing

ILPA urges the Lords to insist on Amendment 84. The difference between it and Commons amendment 84C in lieu is that:

- The Commons amendment 84C 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, Commons amendment 84C 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).

Amendment 84 does not impose a maximum time limit on detention. It requires the Secretary of State to justify detention. That the Government is resisting it suggests that in practice, even for cases not involving deportation, as these are excluded by both amendment 84 and amendment 84C, 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 four 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 84C. 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.

In the Commons the Minister said only that the change to four months reflected that the "vast majority" of persons are detained for less time than this. He put up no defence of the burden's being on the applicant or of four months as opposed to 28 days.

DETENTION OF PREGNANT WOMEN

Amendment 85C *Limitation on the detention of pregnant women* and amendments 85D to 85I to it

Purpose

Amendment 85C

In the Lords, the government proposed. The Lords did not accept the Government amendment as presented but accepted amendment 85C which built on it.

Amendment 85C builds on the time limit on the detention of pregnant women, a maximum of one week at any given time (72 hours if there is no Ministerial authorization starting from the time at which the Secretary of State is satisfied that the woman is pregnant. A pregnant woman released can be redetained. 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.

Amendments 85D to 85I

These modify amendment 85C.
Amendment 85D removes the limitation on the detention of pregnant women to the "most exceptional" circumstances

Amendment 85D permits the detention of pregnant women in "exceptional circumstances" or (not and) where the woman is "shortly" to be removed
Amendment 85E 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 85F 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 85G rejects 28 days notice of the removal of pregnant women
Amendment 85H rejects the involvement of the family returns panel

Briefing
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 very exceptional circumstances and for the shortest possible time. In summary, our concerns about the Commons amendments are that they fail to ensure

- 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.

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.

Top priorities – amendments 85D and 85E

ILPA proposes a**mendments 85D and 85E** be rejected.

Failing this:

- In the Commons David Burrowes MP objected to the notion that either there are "exceptional") circumstances or there is a "clear prospect of early removal", indicating that the word "and" would be preferable to "or". We agree.

- In the light of the Enforcement Guidance and Instructions the wording should be "very

exceptional."

Other priorities

We object to the subjective test "the Secretary of State is satisfied" in **amendment 85E**. Either removal directions are set or they are not.

The phrase "shortly" is not a clear and helpful term to have in primary legislation. Given that a woman can ordinarily only be detained for 72 hours by operation of this clause why is that not specified as a maximum period within which removal must take place.

The Enforcement Guidance and Instructions make reference in their discussion of removal to

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

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.

Amendment 85E also 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 the reference "apart from this section". This was not explored in the Commons. It should be probed. Either removal directions are set or they are not.

The amendment appears to say that a person who has power to authorise detention must have regard to the woman's welfare but to make an exception: "apart from this section". Is that a reference to the generality of constraints on detention imposed by this section, or is it a suggestion that a person with power given by this section to authorize detention need not have regard to a woman's welfare? We trust the former but there is ambiguity. If the latter meaning, then the section specifically refers to detention by the Secretary of State (the extension to one week). Given the ambiguity it would be helpful to have an assurance that the Secretary of State, in authorizing an extension of detention to one week, must indeed have regard to a woman's welfare.

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.

If **amendments 85D and 85E** are to remain, then as well as the addition of "very" before "exceptional" substitution of "and" for "or" so that both exceptional circumstances and the prospect of removal are required, we recommend that the word shortly be replaced with a requirement that removal directions be set for within 72 hours (the maximum period for which a pregnant woman can ordinarily be detained under the clause) and where medical advice, obtained prior to detention is that there is no expectation that the woman will give birth prior to such removal.

To make the safeguard of medical advice meaningful, it is important that such medical advice be obtained before the woman is detained. In any event, if the woman is to be removed by 'plane, it is extremely unlikely that a woman so close to her confinement date would be permitted to fly.

Amendment 85G should be rejected. Ministerial arguments when the Bill was last before the Lords 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 of detention 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. 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 **amendment 85H** should be rejected. It could be changed to make reference to detention rather than to removal if desired.

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, a matter raised in the Commons by Stuart McDonald MP.

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