Immigration Bill 2013

Briefing for House of Commons Report Stage

January 2014

Angela Patrick, Director of Human Rights Policy
Tel: (020) 7329 5100 Email: apatrick@justice.org.uk

JUSTICE, 59 Carter Lane, London EC4V 5AQ
Tel: 020 7329 5100 Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

JUSTICE is concerned that the Immigration Bill would create a more legally obscure system of immigration control, which places greater power in the hands of administrative authorities without effective means of independent oversight.

We regret that the proposal to remove access to an independent determination on appeal from most applicants will – in practice – leave many, if not, most decisions on immigration as a matter of effective administrative discretion, except where applicants are able to shape their case in a "human rights" mould. Neither administrative review nor the opportunity for judicial review in other cases will provide an effective alternative in practice. Administrative review is neither independent nor effective. Government proposals on judicial review – limiting access to review and to legal aid – are likely to render judicial review a remedy open only to those with independent means.

In light of these proposed changes to judicial review, we urge Parliamentarians to subject the proposals to expand the Secretary of State's certification power to remove an individual before his or her appeal is considered to close scrutiny. These certification powers may mean that the only determination of a case considered before an individual is removed is administrative. JUSTICE considers that the historically poor quality of administrative decision making – with up to 50% of some kinds of decisions being overturned on appeal – should form the starting point for Parliament's scrutiny of these proposals.

JUSTICE particularly regrets the politically charged debate that has been associated with the proposals in Clause 14, which relate to the individual right to private and family life protected by Article 8 ECHR and the Human Rights Act 1998. We reiterate our concern that any attempt to ask Parliament to entirely predetermine the proportionality of fact-sensitive immigration decisions will either be unworkable or could lead to the violation of the UK's international human rights obligations in practice. Parliament should resist invitations to amend the Bill to expressly limit the capacity of the Secretary of State and our domestic courts to consider the full application of the European Convention on Human Rights. This approach appears designed to create a statutory framework which will ultimately place the UK in violation of its international obligations. This will have a longer term detrimental impact on the ability of domestic courts to influence the application of Convention rights in immigration cases, on the reputation of the UK as a rights-respecting nation and on the public purse.

Introduction

1. JUSTICE is an independent all-party law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is the UK section of the International Commission of Jurists. JUSTICE has for many years produced briefings and consultation responses on proposed asylum and immigration laws and policies and their interaction with domestic and international human rights law. Most recently, we have briefed Parliament on the Bills that became the Borders, Immigration and Citizenship Act 2009 and the Criminal Justice and Immigration Act 2008. JUSTICE responded to the UK Borders Agency (UKBA) consultation on Family Migration[1] and urged caution in relation to the Home Secretary's House of Commons motion on the controversial statement of changes to the immigration rules which purported to limit the scope of domestic courts consideration of the facts of individual claims in some human rights cases.[2]

Background and overview

2. The Immigration Bill was introduced to the House of Commons on 10 October 2013, and it was scheduled to have its second reading on 22 October 2013, just six sitting days later. The Committee stage for the Bill commenced swiftly and was complete on 19 November 2013, just under a calendar month following second reading.

3. This is a relatively lengthy and complex Bill. JUSTICE has consistently criticised the complexity of our multi-layered domestic legislative framework for immigration and asylum. This complexity alone calls for adequate time to be allocated for Parliamentary consideration and debate. However, this Bill proposes to make wide-ranging changes to the operation of immigration and asylum decision-making within the United Kingdom. Its contents are divisive and controversial. Not least, Part 2 would give effect to a policy commitment of one of the parties in Government to significantly restrict access to the courts for individuals seeking to exercise immigration rights within the United Kingdom. This determination has been made with little consultation or consideration of the implications for individuals or the wider community of the decision to bring immigration largely within administrative control.

---

[1] http://www.justice.org.uk/data/files/resources/302/JUSTICE-response-to-UKBA-Family-Migration-consultation.pdf

[2] http://www.justice.org.uk/resources.php/326/justice-urges-commons-caution-on-immigration-and-human-rights

The Bill is heavy with commitment and light on detail, with many measures left to secondary legislation and no draft regulations, as yet, prepared for consideration.

4. In this briefing, JUSTICE focuses principally on the proposals in Part 2 of the Bill, which would restrict access to an independent determination of most immigration rights protected in domestic law. We also comment on the proposals to change the approach of domestic courts to claims grounded in human rights. However, we express two specific concerns about the proposals in Part 1. Changes to the rules on bail will, in effect, expand the administrative detention of individuals, and will remove important independent safeguards against serious abuse and maltreatment (Part 1, Clause 3). Similarly, the introduction of a general power for immigration authorities to use reasonable force in the conduct of their statutory duties creates legal uncertainty and the need for such a broad based power has not been illustrated (Part 1, Clause 2). Without clear justification for the expansion of this kind of compulsory power, and accompanying safeguards for the protection of individuals in practice, Parliament should be slow to accede to the expansion of the role of immigration officers.

5. Where we do not comment, silence should not be read as approval. We share concerns expressed by others about the implications of the proposed changes in the Bill for equality in the provision of services, access to housing and healthcare across the community, and regret that many of the changes in the Bill will have a wider-reaching impact on our communities far beyond immigration (Part 3).[3]

6. The introduction of each of these major changes at a time when domestic immigration authorities have a record which is routinely and fairly described as "failing" should be a serious cause for concern for Parliament.[4] Regrettably, we highlight below the stark statistics on successful appeals from decisions of the former UK Border Agency: up to 50% in some instances. This approach begs the question whether greater powers and fewer mechanisms for oversight are appropriate in these circumstances; and whether Home Office and Parliamentary time might be better spent improving current practice. We are concerned that many of these changes will create a more legally obscure system of immigration, which places greater power in the hands of

[3] See for example, Eighth Report of Session 2013-14, *Legislative Scrutiny: Immigration Bill,* HL Paper 102/HC 935, Chapter 4 ("JCHR Report")

[4] See for example, the latest inquiry by the Home Affairs Select Committee, including Press Release, dated 13 July 2013 and the Fourth Report of Session 2012-13: http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/130713-ukba-rpt-published/

administrative authorities without effective and accessible means of effective oversight. We regret that these changes are proposed without clear justification and against the background of significant political tension.

Immigration Bill: Part 1

Extending the authorised use of force by officials (Clause 2)

7. Clause 2 brings into operation Schedule 1 on the enforcement powers of immigration officials. Sub-paragraph 3(5) of Schedule 1 would amend Section 146(1) of the Immigration and Asylum Act 1999 to provide a general power for immigration officers to use reasonable force when exercising any powers under the "Immigration Acts". This removes the limitation on that power that reasonable force attaches only to the 1999 Act and the earlier Immigration Act 1971. The Explanatory Notes and the ECHR memorandum accompanying the Bill provide very little commentary on the impact of this change, but in effect, Parliament is being asked to authorise individual officers to exercise any duty – including duties in this Act and subsequent amendment – without any clear understanding of the circumstances when force might be used. The current definition of "Immigration Acts" is found in Section 61 of the Borders Act 2007, which lists 9 separate pieces of legislation and which can subsequently be amended. JUSTICE considers that this formulation of a statutory authorisation for the use of compulsory powers is inappropriate. The use of force engages the individual's right to be free from unwarranted interference without justification and the right to physical integrity, as protected by Article 8 ECHR. As such, any use of force must be necessary and proportionate in order to be justifiable. Since this provision provides for any use of force to be reasonable, it would leave that assessment of proportionality to the judgment of individual officers in each case, with no guidance provided on the circumstances when force might be appropriate nor any express provision being made for specific safeguards against abuse. The ECHR Memorandum explains the Government's view that this limitation will safeguard against inappropriate use of force, including by reference to individual officers' duties under Section 6 of the Human Rights Act 1998.

8. In JUSTICE's view, to adopt this broadbased precedent for the statutory authorisation of the use of coercive force would be an abrogation of the responsibility of Parliamentarians to question and consider whether the use of any proposed

compulsory power by the State is necessary and accompanied by appropriate safeguards. As the Joint Committee on Human Rights has repeatedly explained:

> *We consider that the authorisation of the use of force against persons by statute is a particularly serious matter which requires clear conditions and close Parliamentary scrutiny.*[5]

9. **JUSTICE proposes that the Bill be amended to delete sub-paragraph 3(5) of Schedule 1 (See Amendment 60).**

The right to bail

10. Clause 3 proposes significant new restrictions on access to bail for people in immigration detention. In short, where a person is subject to an order for removal within 14 days, they will be unable to challenge their detention. Where an individual has had an unsuccessful bail application within the past 28 days, there will be no further opportunity for bail except where there are has been a "material change in circumstances". During the Committee Stage debates, the Minister explained the Government view that it would be open to the Tribunal to determine that any procedural or other failing in an earlier bail application would amount to a "material change of circumstance". However, this power remains with the Tribunal and is highly uncertain. We are concerned that the explanation for the proposed restrictions appears little supported by evidence, but instead is accompanied by broad statements on the perceived abuse of the system. We regret that throughout the progress of this section of the Bill the fact of detention appears to have been trivialised. Detention for the purposes of deportation, while lawful in certain circumstances, has a significant impact on the rights of an individual. The persons subject to detention may be vulnerable, including people who may have been subject to torture and ill-treatment in their home countries. The authorisation of Parliament to detain must be subject to effective oversight. That this measure might envisage a month in detention without opportunity for regular review downplays the significance of a month's detention; and the impact which being held for that period of time might have on an individual. That impact may vary according to the circumstances of any case.

---

[5] See for example, Fifth Report of Session 2006-07, *Tribunals Courts and Enforcement Bill,* para 2.22

11. JUSTICE has long expressed concerns that immigration detention is overused in the UK. Detention involves the deprivation of an individual's liberty and is only appropriate in strictly defined circumstances. It is well-established that the right to liberty under Article 5 ECHR includes under Article 5(4) the right to review of one's detention by an independent and impartial tribunal 'by which the lawfulness of his detention shall be decided speedily … and his release ordered if the detention is not lawful'. JUSTICE is concerned that a tribunal whose power to grant immigration bail is variously time-limited and subject to the consent of a Government minister may not be capable of meeting the requirements of Article 5(4) in such a case.

12. **JUSTICE would support the deletion of Clause 3 from the Bill.**

Immigration Bill: Part 2 and Appeals

Reducing opportunities for appeal

13. Clauses 11 and 12 and Schedule 8 deal with rights of appeal. They would replace the current provisions for appeal within Section 82 and 83 of the Nationality, Immigration and Asylum Act – with a limited right to appeal to the Tribunal in only three circumstances a) where there has been a "refusal of protection" (i.e. the refusal of asylum or humanitarian claim); b) any human rights claim or c) the revocation of refugee or humanitarian status. In all other cases – even where the immigration authorities have departed from their statutory powers; misinterpreted or misapplied those powers or the Immigration Rules; or where they have failed to consider relevant factual information – the only remedy open to an individual who has a claim to have been treated unlawfully will be judicial review or an as-yet-unspecified provision for an internal administrative review of the original decision.

14. JUSTICE is concerned about the proposed restriction of the right to appeal to the Tribunal for a number of reasons:

    a. The provisions in the Bill and the Explanatory Notes would appear to seek to return administrative control of immigration to a pre-1971 Immigration Act state, where discretion of the immigration authorities was largely unfettered. The only concessions made are linked to the bare bones of the requirements imposed by international law. JUSTICE is concerned that this ignores

decades in the evolution of domestic decision making and the broader requirements of the right to a hearing protected by the Common law.[6]

b. The language used in the material in the Bill necessarily focuses on rights of appeal. We regret that Ministers – and specifically – the Home Secretary has referred to these provisions in the context of individuals allegedly "abusing the system" with appeal after failed appeal.[7] However, the statistical evidence on the poor quality of immigration decision making in this country appears to undermine this premise. The figures for 2012/13 alone show that in managed migration cases, 49% of all appeals were successful; in entry clearance appeals, 50%; and in deportation and other claims, 32% succeeded.[8] These figures are not anomalous and Home Office research estimates that up to 60% of successful cases result from case work errors. So, immigration decision making is poor. In effect, in between 30-50% of cases, without access to an independent consideration by the Tribunal an individual would have been deprived unlawfully of a status – and with it, employment, family or other connections – they would be entitled to under domestic law. Rather than improve these statistics, the Government proposes that this means of subjecting immigration authorities' application of the law to scrutiny should be removed.

c. The Government argues that these cases can – in the most part – be dealt with by administrative review. That is, a further consideration by a part of the Home Office or immigration authority that has not been involved in the initial determination. Importantly, the Government has provided little or no information on the process of administrative review, which is still in "development". JUSTICE notes that the provision for an internal review is not a provision for independent judicial oversight and cannot provide an effective substitute for the operation of appeal rights. We note the evidence of others, including immigration practitioners, that the existing provision for administrative review by immigration authorities in existing cases is not effective.[9] In light of the historically poor performance of Government in

---

[6] See for example, the case of *Saleem v Secretary of State for the Home Department* [2001] WHR 443, applying the common law principles established n *Leech and Witham* on the right to access a court.

[7] In her party conference speech, announcing these measures, the Home Secretary, for example, compared the appeals system to an endless game of snakes and ladders: http://www.dailymail.co.uk/news/article-2438130/Theresa-May-Ill-kick-illegal-migrants-BEFORE-chance-appeal.html

[8] See Impact Assessment, page 12, Table 8.

[9] See ILPA Second Reading Briefing, 21 October 2013.

immigration decision making the Government should be put to a high burden in removing any provision for independent review.

d. Many years have been spent on developing the Tribunal system as a more effective and less costly means of redress than traditional litigation and judicial review. Yet, what is clear is, that if a right to appeal to the Tribunal is removed, the only option open to an individual will be judicial review, a route which is likely to be more costly both for individuals and the Tribunal (as judicial reviews in immigration cases are moved to the Upper Tribunal) and may take longer. Importantly, the power to award costs, including against the immigration authorities will lie in judicial review cases. Yet, the Impact Assessment explains the Government view that while some cases might be pursued under grounds remaining within scope or as judicial reviews, these costs have not been quantified, as no estimate has been made of the likely increase in numbers of judicial reviews proceeding. This light-touch approach to the consideration of judicial review is likely a result of the Government's intention to restrict access to judicial review across the board.

e. In the alternative, rather than resort to judicial review, individuals may seek to recast their case in "human rights" clothing to secure a statutory appeal. Importantly, the first argument in any case where Convention rights are engaged may be whether the proposed determination of the individual rights at stake are "in accordance with the law" or "as prescribed by law". These tests are tests of legal certainty which almost certainly will not be satisfied where authorities have failed to comply with underlying provisions of immigration law and practice. Thus, a case which is actually about a failure to comply with the immigration rules may need to be recast as a human rights claim, only to succeed without any substantive argument about the scope of an alleged interference beyond a failure to comply with existing law and policy.

f. Not only will oversight by way of statutory appeal be circumscribed by the proposals in this Bill, in practice, it will be likely very difficult to challenge immigration decisions by way of judicial review or to secure legal assistance for those cases which remain within scope. The proposed residence test for eligibility for legal aid is likely to affect many immigration applications. Similarly, the proposal to limit access to legal aid for judicial review by shifting

the burden of risk in most cases to individual solicitors is likely to reduce the availability of advice and representation significantly. [10]

g. Taken cumulatively, it is likely that in most cases individuals will be unable in practice to challenge decisions of the Home Office and the immigration authorities. This seems contrary to good practice, and removes the incentive for good first tier decision making by immigration officers.

15. Several amendments – some technical and some substantive – were considered briefly during the House of Commons Committee Stage. However, JUSTICE is concerned that no clear justification for these measures has yet been provided to Parliament. We are concerned that these measures will either be unworkable and costly – diverting genuine claims into arguments about human rights or the more complex judicial review jurisdiction – or these proposals will lead to immigration determinations being principally an issue of unchallenged administrative discretion, particularly for those without independent means.

16. We reiterate the concern expressed by the Joint Committee on Human Rights that:

> *[t]he Bill's significant limitation of appeal rights against immigration and asylum decision is not compatible with the common law right of access to a court or tribunal….*
>
> *[W]hen viewed in this broader context, limiting the right to appeal to the extent that they are restricted in the Bill constitutes a serious threat to the practical ability to access the legal system to challenge unlawful immigration and asylum decisions.*[11]

17. **JUSTICE would support the deletion of Clause 11 from the Bill.**

---

[10] JUSTICE's briefing on the Proposed Further Judicial Review reforms will be available shortly. Our position is outlined in our recent evidence to the JCHR: http://www.justice.org.uk/data/files/resources/349/JUSTICE-JCHR-Submission-FINAL-27-September-2013.pdf

[11] JCHR Report, para 39.

The power to consider new issues on appeal (Clause 11)

18. Clause 11 would insert new sections 85(5) – (6) into the Nationality Immigration and Asylum Act 2002. These new provisions would prevent the First Tier Tribunal from considering new matters "unless the Secretary of State has given the Tribunal consent to do so". We are concerned that this appears to present a litigation advantage to the Government, to the detriment of the Tribunal's power to control its own jurisdiction. We share the view, expressed by the Joint Committee on Human Rights, that:

> *[T] he Tribunal itself, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new matter raised on appeal. We expect that the Tribunal, in the exercise of its inherent power to prevent abuse of its own process, to permit a new matter to be raised only if there were good reasons for not raising the matter before the Secretary of State.*[12]

19. **We recommend that Clause 11 be amended to make clear that the power to consider new matters rests principally with the Tribunal, not the Secretary of State.**

Remove first, check later: Out of country human rights appeals (Clause 12)

20. In those limited circumstances when an appeal will be open to the Tribunal – principally in human rights, asylum and humanitarian cases – the Government proposes to further restrict the potential for in-country – also known as "suspensive" – appeals. This will mean that, even in those cases where the claimant believes that a fundamental right to remain in the UK has been unlawfully determined, he or she will be removed from the UK before an independent body has an opportunity to consider his or her claim. At present – subject to judicial review – the Secretary of State may certify certain human rights or asylum cases unfounded or open to safe return to a third country. In these cases, an individual is returned before his appeal can be considered. In other cases the Secretary of State can certify that the grounds in an appeal have already been raised or considered.[13]

---

[12] JCHR Report, para 46.

[13] Section 94 and 96 of the Nationality, Immigration and Asylum Act 2002. See also Crime and Courts Act 2013, Sections 53-54.

21. Originally, Clause 12 proposed to amend these powers to provide that the Secretary of State will also be able to certify that a person should be removed without his appeal being heard, in any cases where the claimant is a "foreign criminal" and she considers that the removal would not cause "serious irreversible harm". [14] Pursuant to Government amendments proposed and accepted at Committee Stage, the right to a suspensive appeal is to be restricted for all persons subject to deportation pursuant to the public good. The Minister explained:

> *The clause as originally drafted would apply only to foreign criminals, and so would be focused on those convicted of a serious offence. On reflection, we realised that that definition would leave out a cohort of harmful individuals who should not have a substantive right of appeal…. That group would include individuals who were being deported from the UK on the ground that their presence would not be conducive to the public good (HC PBC 5 Nov 2013, Col 205).*

22. The extension of certification – and the associated restriction of suspensive appeal – is important as the Impact Assessment confirms that very few applicants pursue appeals out of country.[15] In light of the quality of decision making in connection with first instance decisions on appeal, reflected in the statistics on appeals, removal without access to an opportunity for an independent hearing must be treated as a serious impediment to effective consideration of the legal basis for the determination to remove the individual concerned.

23. JUSTICE has previously expressed concerns about the Secretary of State's power of certification in these cases. The Government's decision to extend these proposals and to provide limited explanation for the extension while on the floor of the House does little to assuage our concern. Importantly, the determination that a person should be deported as their presence in the UK is not conducive to the public good is largely an exercise of Executive discretion, albeit one exercised according to

---

[14] Although this language echoes the Crime and Courts Act 2013, and is also objectionable in that context, notably those provisions are also subject to the determination that the Secretary of State considers a case clearly unfounded. Both those provisions and these create cause for more significant concern without a realistic recourse to judicial review of the Secretary of State's determination.

[15] Impact Assessement, page 7.

domestic principles of public law. Yet, there is no determination of the impact of these new measures provided to accompany the Government amendment.

24. The impact of certification is likely to be exacerbated by the Government's proposals to restrict access to legal aid and to judicial review for the purposes of challenging the lawfulness of the determination of the Secretary of State. As explained above, it is proposed that access to judicial review and legal aid for judicial review is to be significantly restricted.[16] Notably, a combination of the removal from scope of many immigration cases in the Legal Aid, Sentencing and Punishment of Offenders Act 2013 and the proposed new residence test, will mean that most of these persons, once subject to certification and removal, will have very little opportunity to access legal advice. In practice, JUSTICE is concerned that only individuals with independent means are likely to be able to challenge certification by way of judicial review. We note that the Joint Committee on Human Rights shares our concern about the adequacy of judicial review as a remedy, reporting:

> *We are not satisfied with the Government's reliance on the continued availability of judicial review to challenge the Secretary of State's certification that a human rights appeal can be heard out of country, having regard to the unavailability of civil legal aid to bring such a claim and the proposed reforms of judicial review.*[17]

25. However, we have a number of other concerns about this measure, including that the reference to "serious irreversible harm" and its likely interpretation by the Secretary of State is far from clear. Even after Committee Stage, it is unclear what legal tests will be applied in practice by the Secretary of State to her consideration or what evidence will be considered relevant. We consider that – in light of the likely limited provisions for subsequent judicial review to set appropriate legal boundaries – this broad power of certification to deprive individuals of effective in-country appeals must be subject to close scrutiny by Parliamentarians. JUSTICE is concerned that it is likely to further circumscribe the ability of individuals to secure a remedy in cases of poor immigration decision making, by further restricting the oversight of domestic immigration authorities.

---

[16] Importantly, Clause 13 would shift some existing challenges to certification, in national security cases, to SIAC, where closed material procedures would be available without the limited safeguards applicable in Section 6 Justice and Security Act 2013.

[17] JCHR Report, para 53.

The Secretary of State has proposed some limited amendments to this Clause (Amendments 6 and 7). **However, JUSTICE considers that the proposed extension of certification has not been justified and recommends that Clause 12 should be removed from the Bill.**

The right to private and family life: the function of the judiciary

26. Clause 14 makes provision for the consideration of human rights claims involving the right to private and family life protected by Article 8 ECHR and the Human Rights Act 1998. This provision is politically contentious and follows public statements about the determination of the Government to ensure that the Home Secretary has "the last word" in this particular type of claim.[18] JUSTICE regrets the level of political tension that has been created around the determination of Article 8 ECHR claims.

27. Clause 14 purports to set in primary legislation the factors that domestic courts must have regard to when striking the balance between the rights of individuals to respect for private and family life and the rights of others protected by the State in protecting its borders. This balance is already at the heart of Article 8 claims in immigration. Article 8 expressly includes the potential for lawful qualifications of the rights to private and family life provided that they serve one of the broad range of legitimate aims listed in Article 8(2) – including the economic well-being of the UK, national security and the prevention of disorder or crime – and are proportionate to that aim. The case-law in this area has emphasised that '[t]he search for a hard-edged or bright-line rule to be applied in the generality of case is incompatible with the difficult evaluative exercise which article 8 requires'.[19]

28. For example, in the recent ECtHR decision of *AA v UK* the Court summarised the Strasbourg case-law on Article 8 ECHR claims in cases involving the deportation of offenders, thus:[20]

---

[18] Mail on Sunday, *Its MY job to deport foreigners who commit serious crime – and I'll fight any judge who stands inmy way,* 17 February 2013. See also http://www.dailymail.co.uk/news/article-2438130/Theresa-May-Ill-kick-illegal-migrants-BEFORE-chance-appeal.html

[19] *EB (Kosovo)* [2008] UKHL 41, para 12.

[20] App No, 8000/08, 20 September 2011, Fourth Chamber, paras 56-58.

The assessment of whether the impugned measure was necessary in a democratic society is to be made with regard to the fundamental principles established in the Court's case-law and in particular the factors summarised in Üner, cited above, §§ 57-85, namely:

- *the nature and seriousness of the offence committed by the applicant;*
- *the length of the applicant's stay in the country from which he or she is to be expelled;*
- *the time which has elapsed since the offence was committed and the applicant's conduct during that period;*
- *the nationalities of the various persons concerned;*
- *the applicant's family situation, such as the length of any marriage and other factors expressing the effectiveness of a couple's family life;*
- *whether the spouse knew about the offence at the time when he or she entered into a family relationship;*
- *whether there are children of the marriage, and if so, their age;*
- *the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;*
- *the best interests and well-being of any children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and*
- *the solidity of social, cultural and family ties with the host country and with the country of destination.*

…the weight to be attached to the respective criteria <u>will inevitably vary according to the specific circumstances of each case. Further, not all the criteria will be relevant in a particular case….</u>

It should also be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues the legitimate aim of "prevention of disorder or crime", the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities…" (Emphasis added).

29. Many of the considerations which are outlined in Clause 14 are considerations already examined at great length by judges when they consider claims made under Article 8 ECHR. However, JUSTICE is concerned that decisions in most cases must by their nature be fact sensitive and will depend on the proportionality of a decision to remove or deport, or refuse entry to an individual in their specific circumstances. We are concerned that – while it appears that judges will retain the discretion to determine Article 8 ECHR cases on their facts – the prescription in Clause 14 appears to be an attempt to ask Parliament to indicate to judges that they should ignore certain facts in favour of statutory pre-emption based on general policy objectives that determine the public interest.[21]

30. For example, the direction in new Section 117B(4) and (5) that little weight be given to private life considerations or any relationship with a partner formed while a person is in the country unlawfully or any private life considerations when immigration status is precarious appears to be a conscious statutory attempt to pre-empt the judicial balancing exercise necessary in the consideration of Article 8 ECHR claims. The quality and nature of the relationship concerned, including the circumstances of its establishment, must be considered in the round, taking into consideration its seriousness and importance for the individuals concerned in considering the weight to be given to the individual's Article 8 ECHR claim. If the Government intends that this statutory instruction should bind the hands of the court – no matter the factual circumstances – to give little weight to these kinds of relationships, JUSTICE is concerned that this will require the court to operate in a fiction, ignoring facts pertinent to the assessment of proportionality. It is likely that, should judges take this approach, adopting determinations which automatically rule out relevant considerations or which give undue weight to the public interest in deportation, individuals affected will have a valid claim for a violation against the UK of its obligations under the ECHR, with the UK bound to give a remedy under Article 46 ECHR.

31. The JCHR shares our concern:

---

[21] The Government has accepted that the Immigration Rules which precede these changes must be read according with the Courts obligations under the HRA 1998, and compatibly with Article 8 ECHR. See *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192, at para 39. See JCHR Report, para 57.

We are uneasy about a statutory provision which purports to tell courts and tribunals that "little weight" should be given to a particular consideration in such a judicial balancing exercise. That appears to us to be a significant legislative trespass into the judicial function.[22]

32. Another example of this kind of tension between the principles in Clause 14 and our international obligations is in the determination of the public interest in deportation cases as outlined in new Section 117C. As is made clear in the jurisprudence set out above, while the seriousness of offending and the degree of integration is relevant to the balance drawn in Article 8 ECHR cases, the setting of automatic presumptions based on duration of sentence or other factors cannot be permitted to tie the hands of individual judges in all cases. This would create an inevitable tension which could lead to a violation of individual rights in practice.

33. We are concerned that Clause 14 should not be presented as an opportunity to impose a series of rigid tests which would seek to predetermine that deportation would be proportionate in set categories of case.[23] This would suggest that the courts replace a series of nuanced, fact-sensitive decisions with the generally blanket application of a set of "tick-box" rules deemed proportionate by legislation. In our view, these were precisely the type of blanket rules which Convention rights were designed to avoid. It appears to us that this Clause will add significant complexity to the determination of these cases. We note that, despite the Government's concern, the scope of the application of the earlier changes to the immigration rules to deal with the public interest in these cases continues to be litigated in our higher courts.[24] We welcome the recognition of the Government that these measures will remain subject to the duties of the Court under Sections 3 and 6, Human Rights Act 1998, and that the ultimate discretion on the application of Article 8 ECHR remains with our judges. However, we consider that the addition of this extra layer of direction to the Courts will add greater potential for complexity and conflict between domestic law and practice and our international obligations, with the associated likelihood of satellite litigation on the scope of each of the clauses which deign to predetermine the public

---

[22] JCHR Report, para 60.

[23] We welcome the statement in the ECHR Memorandum prepared by the Government that nothing in Clause 14 will detract from the requirement of the Court or Tribunal to act compatibly with Convention rights (para 67).

[24] See for example, *MF (Nigeria) –v- SSHD* [2013] EWCA Civ 1192; *R (Onkarsingh Nagre) –v- SSHD* [2013] EWHC 720.

interest at issue. **JUSTICE would recommend that Clause 14 does not stand part of the Bill.**

34. JUSTICE is concerned that there is an inherent contradiction in the Government's approach to Clauses 11-12 and Clause 14 supported by an odd juxtaposition of different arguments on the relevance of our international obligations in the ECHR and the approach of our international and domestic courts to those obligations. In connection with Clauses 11 – 12, the Government uses its Explanatory Memorandum to argue that Parliamentarians should adopt the minimum standards identified in the ECHR jurisprudence, paring back existing protection for individuals to the "ceiling" required by international human rights law. Yet, on the other hand, to tackle cases where that jurisprudence conflicts with the policy objectives of the Executive, the Government is arguing that Parliament must restrict judicial discretion to apply those minimum standards in a way best suited to the facts of an individual case. All the while, through the proposed changes in Clause 11, these measures will force significantly more claims to be framed in human rights terms.

35. The political nature of this debate has thus far focused on a handful of decisions which the Government consider illustrate ill-deserved human rights claims, and anecdotal evidence of public attitudes to litigation on human rights in immigration cases. However, **JUSTICE is concerned that these measures seem designed to create clear tension between the underlying case law of the ECtHR and the statutory guidance being provided to Parliament on the public interest in deportation. While we welcome Government assurances that the balance to be determined will remain with our judges on a case by case basis; any more restrictive approach could lead to an effective Parliamentary direction to our courts to act incompatibly with the Convention obligations of the United Kingdom, possibly leaving any further remedy to be provided by the European Court of Human Rights pursuant to Articles 34, 46, with the possibility of the application of Rule 39. This would in our view be inconsistent with the Government's stated intention both to respect our international human rights obligations and to ensure that decisions are primarily determined by domestic courts, in keeping with the principle of subsidiarity. It would further raise serious questions about our commitment both to the ECHR and to the international rule of law.**

Further restricting the role of the Court: Convention Rights (New Clause 15, Amendment 62, Mr Dominic Raab MP)

36. New Clause 15 and Amendment 2 would expressly prevent the Secretary of State considering any human rights considerations in connection with automatic deportation, except the right to life and the right to be free from torture, inhuman and degrading treatment or punishment, in most cases.

37. Automatic deportations with respect to non-citizens who have been convicted of an offence in the UK and who have been sentenced to a period of imprisonment of 12 months or longer could be removed, even where removal would breach their rights, or the rights of their families, under the ECHR. The amendment would limit the scope of this exception so that the Home Secretary is only entitled to take into account breaches of Articles 2 (right to life) and 3 (freedom from torture or inhuman or degrading treatment or punishment) of the ECHR.

38. An exception is made for cases where the Home Secretary thinks:

> *taking into account all the circumstances of the case including the seriousness of the offence, that removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would cause such manifest and overwhelming harm to his children that it overrides the public interest in removal.*

39. This test fails to reflect the careful balancing exercise which is required by, for example, Article 8 of the ECHR, which would require the Secretary of State and any subsequent reviewing Court to consider whether removal was proportionate and justified in the public interest in all the circumstances of the case.[25] This approach would require the Secretary of State to ignore the facts of any case and the international obligations of the UK, in many cases. This approach is inconsistent with the UK's international obligations under the Convention of the Rights of the Child, which places the best interests of the child at the heart of all decisions that may affect the rights of children.

[25] ZH (Tanzania) v Secretary of State [2011] UKSC 4.

40. The amendment purports to limit review of removal in these cases to the Secretary of State's consideration of the "manifest and overwhelming harm" to children exemption where an appeal with be available, subject to judicial review principles (Amendment 62).

41. The HRA 1998 will continue to apply. However, the language in this amendment appears designed to create tension with the duty imposed on the Court by Parliament to act compatibly with Convention rights (Section 6 HRA 1998), which is limited in the instance of inconsistent primary legislation. The interpretative obligation under Section 3 HRA 1998 may yet be applicable, but there is a significant risk that the only option open to the Courts will be a declaration of incompatibility in a case where this measure applies and a person is subject to automatic deportation without consideration of the impact on his or her Convention rights.[26]

42. This unduly restrictive approach may, in practice, prevent domestic Courts' consideration of most Convention rights in these cases.[27] This, in turn, is likely to lead to an increased number of applications to the European Court of Human Rights by those seeking a remedy with respect to an interference with their rights. In these cases, it will be open to individuals to raise the inaccessibility of an effective remedy (Article 13 ECHR), in addition to any additional substantive human rights claim they seek to rely upon. It will be open to the applicant to ask the European Court to request that any deportation is suspended pending the consideration of their application (Article 34/Rule 39).[28]

43. JUSTICE is concerned that this amendment not only prevents domestic courts providing a remedy for violations of the Convention, but limits the ability of UK judges to help shape the application of the ECHR. It creates a significant risk that the UK will be found to be in violation of the right to a remedy (Article 13 ECHR) and other substantive obligations to protect individual rights under the Convention. This is inconsistent with the principle of subsidiarity whereby the UK takes primary responsibility for the national implementation of its obligations under the Convention.

---

[26] It is, in our view, questionable whether a Bill containing this provision could be reprinted with a valid Section 19(1)(a) Statement of Compatibility.

[27] If a Section 4 HRA 1998 declaration is the only remedy open to an applicant, they are not required to secure a declaration before their effective domestic remedies are exhausted and their application under the ECHR is admissible.

[28] Although Rule 39 is generally applied to cases where there is a risk of irreversible harm on deportation, its application is not routinely limited to Article 2 and 3 ECHR claims. http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf

These amendments seem inconsistent with the view regularly expressed by Government Ministers and others that domestic judges should be fully engaged in the consideration of the application of Convention rights sensitive to the wider public interest and the domestic legal framework. Far from "bringing rights home", these amendments would have the scope of the UK's obligations decided first in Strasbourg. This approach will not only lead to costly domestic and international litigation but would further call into question the UK's respect for its obligations under international law and its commitment to the international rule of law.

44. It is important if Parliament is asked to consider this amendment, it does so in full awareness that it is being invited to endorse a measure which is likely to lead to violations of the Convention if applied, with an associated risk the UK's credibility as a rights-respecting nation in the longer-term.

45. **JUSTICE recommends that Members oppose New Clause 15 and Amendment 62).**

Angela Patrick
Director of Human Rights Policy
JUSTICE
28 January 2013