Immigration Bill 2013 (Part 2)

Briefing for House of Commons Second Reading

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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 Bill will receive its House of Commons Second Reading only six sitting days after its publication. Given the complexity of this area of law we regret that more time has not been allowed for Parliamentarians to seek advice on the practical implications of the Government's proposals. The contracted timetable is particularly objectionable, given that the proposals in the Bill appear to suggest a step-change in how immigration is treated in this country.

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. Neither administrative review nor the limited opportunity for judicial review 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.

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.

2. 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

3. The Immigration Bill was introduced to the House of Commons on 10 October 2013, and it is scheduled to have its second reading on 22 October 2013, just six sitting days later. Although in strict compliance with the rules of House procedure, JUSTICE is concerned that this swift timetable may impact negatively on the ability of the House and its members to conduct informed and effective scrutiny. Individual members will be hampered in the material and advice available to them, as even the most expert organisations and individuals have struggled to provide detailed briefing within this timescale.[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

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[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

[3] Notably, the helpful House of Commons briefing paper, published on 16 October 2013, Research Paper 13/59, explains in a number of places that there has been no commentary or briefing on many of the clauses in the Bill. Although helpful, this

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. 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. **We urge Parliamentarians to require Ministers to explain why such speed is deemed necessary or appropriate in respect of this Bill. Without a clear explanation, or further elaboration on the evidence supporting the case for such drastic change to the current system, JUSTICE considers that it will necessarily be difficult for individual members to effectively approve or disapprove of the principle behind the measures in the Bill on Second Reading.**

4. In this necessarily short briefing, JUSTICE focuses 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.

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). 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

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means that the Library has had to provide background information and advice to MPs largely based on Government sources alone.

practice, Parliament should be slow to accede to the expansion of the role of immigration officers.

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 is appropriate in these circumstances; and whether Home Office and Parliamentary time might be better spent improving current practice.

7. 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 administrative authorities without effective means of oversight. We regret that these changes are proposed without clear justification and against the background of significant political tension. We intend to produce a more detailed briefing on the Bill in due course.

Immigration Bill: Part 2 and Appeals

Reducing opportunities for appeal

8. 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.

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[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/

9. 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.
  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.[5] 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.[6] 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

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[5] 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

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

"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.[7] In light of the historically poor performance of Government in 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.

e. 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. 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. 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 by shifting the burden of risk in most cases to individual solicitors is likely to reduce the availability of advice and representation significantly. [8]

f. 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

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

[8] 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

authorities. This seems contrary to good practice, and removes the incentive for good first tier decision making by immigration officers.

10. Clause 11 would further restrict the discretion of the Tribunal in those appeals which remain. It would change existing rules to provide that any new matter not previously considered by the immigration authorities – seemingly even if a failure to consider this matter is at the heart of the appeal – can only be considered by the Tribunal with the consent of the Secretary of State. This appears to place an unfair and unjustifiable litigation advantage in the hands of one party to proceedings. Controlling the proper scope of an appeal is a case management power more properly exercised by the court or Tribunal concerned. Other than granting greater control for the Home Office, it is unclear what genuine purpose this requirement would serve, particularly in light of the seriousness of the limited number of cases which this Bill proposes should now be in the purview of the Tribunal. If the Secretary of State refuses consent in say, an asylum claim – would this not create a rather circular fiction – whereby an individual is forced to lodge a fresh claim including the new material, then appeal further a second later decision? If so, this appears to create a significant duplication of effort with costs which are not quantified in the material accompanying the Bill, and creates new potential for delay within the Tribunal system. If there is evidence of abuse of the appellate system, JUSTICE considers that this evidence should be produced and should be addressed through changes – if necessary and justified – to the powers of the Tribunal, not new found discretion for the Secretary of State to effectively determine the scope of an appeal on a case-by-case basis.

Remove first, check later

11. 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.[9]

12. Clause 12 amends 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". [10]

13. 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.[11] 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 effective consideration must be treated as a serious impediment to effective consideration of the legal basis for the determination to remove the individual concerned.

14. JUSTICE has previously expressed concerns about the Secretary of State's power of certification in these cases. However, our concern is exacerbated by the likely restriction in access to judicial review to challenge 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 likely to be significantly restricted.[12] In practice, JUSTICE is concerned that only individuals with independent means are likely to be able to challenge certification by way of judicial review.

15. 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. 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.

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

[10] 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.

[11] Impact Assessement, page 7.

[12] 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.

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.

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

16. 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.[13] JUSTICE regrets the level of political tension that has been created around the determination of Article 8 ECHR claims.

17. 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 <u>already</u> 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'.[14]

18. 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:[15]

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[13] 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

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

[15] 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).

19. 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.

20. 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.

21. 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 and 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.

22. We are concerned that Clause 14 should not be presented as an opportunity to impose a series of tests which would seek to predetermine that deportation would be proportionate in set categories of case.[16] 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 delegated legislation. In our view, these were precisely the type of blanket rules which Convention rights were designed to avoid.

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[16] 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).