Criminal Justice and Immigration Bill
Briefing for Second Reading
House of Commons

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Introduction and summary

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.

2. The Criminal Justice and Immigration Bill received its first reading before the summer recess; we believe that it has its origins in policy initiatives of former ministers – several of which were misconceived. We are disappointed that it remains in its current form, as the Bill represents an opportunity to achieve fundamental reform in areas such as youth justice and indeterminate sentencing, where this is urgently needed. The need for reform has been underlined in recent months by prisons overcrowding crises, adverse court rulings regarding indeterminate sentencing and the inquests into the deaths of Adam Rickwood and Gareth Myatt in youth custody.

3. This Second Reading briefing is designed to provide an overview of our major concerns regarding the Bill. In short, regarding the criminal justice provisions in the Bill we believe that:

   - **The youth rehabilitation order should be amended to avoid the fast-tracking of young offenders into unnecessary custody;**

   - **In particular, there should be a separate intensive supervision and surveillance order (ISSO) sitting above the YRO in the sentencing structure;**

   - **More discretion than the Bill provides should be given to youth courts to impose referral orders;**

   - **Fundamental reform of the system of indeterminate sentencing for public protection (IPP) is needed;**

   - **We have serious concerns about the proposal to change the test for quashing convictions in the Court of Appeal (Criminal Division);**

- **The provisions regarding Violent Offender Orders (VOOs) are far too broadly drafted and may result in disproportionate restrictions being placed upon individuals;**

- **The premises closure powers in Part 9 of the Bill should never be used against a dwelling, and will result in innocent parties such as children being made homeless;**

4. We are very grateful to Helen Law of Matrix, who prepared the section of this briefing on clauses 115 to 122 of the Bill – Special Immigration Status. This follows our comments on the Bill's criminal justice provisions. Please note that the law in this section of the briefing is correct as at mid-July 2007.

Youth justice: Part I and Clause 9

Ensuring proportionality

5. The criminal justice system in general, and the youth justice system in particular, are far too often being asked to remedy the consequences of public service failure in other areas. While ironically, involvement in the criminal justice system may give a child or young person access to a service, such as mental health treatment, that they have not received before, we question whether these services are best provided through sentencing mechanisms.

6. The youth rehabilitation order (YRO) as proposed, offers an impressive menu of options to sentencers, many of which have a 'problem-solving' focus. However, we believe that there is a danger that, faced with a child who may be experiencing multiple problems (eg unsuitable living circumstances; mental health needs; drug misuse) magistrates will try to solve all these problems through sentencing – creating an overloaded order with which it will be extremely difficult for the child or young person to comply. They will then face breach proceedings, and, in some cases, a custodial sentence.

7. It is unclear to us why powers that can or should be exercised by local authorities or other professionals under, for example, the Children Act 1989, in order to meet the needs of a child at risk, should instead be operated by

the criminal courts as part of a criminal sentence. If anything, this reliance on the criminal justice system to initiate service provision encourages public authorities to ignore their responsibilities to children at risk of offending, thus perpetuating a situation of service failure.

8. Therefore, we believe that where it appears to the court that a child may be at risk of serious harm, the court should notify the relevant local authority/authorities so that if appropriate an investigation can be carried out under s47 of the Children Act 1989. This power could be used not only for child defendants but also, for example, in relation to a child witness or child relative of a defendant. When sentencing a child or young person, the court should bear in mind its power to request a s47 investigation; we hope that this would encourage proportionality in sentencing and focus the attention of local authorities on children who are offending and at risk of offending.

9. As a further safeguard against overloaded YROs, the order should also be required to be proportionate by reference not only to the seriousness of the offence (which is provided for by s148 Criminal Justice Act 2003) but by reference to the child's age and emotional and intellectual maturity. What is proportionate for a 16-year old of normal intelligence may not be proportionate for a 12-year old with developmental delay. An overloaded order simply encourages breach and is unlikely to foster a good attitude towards the order and the system as a whole.

The need for a separate intensive supervision and surveillance order (ISSO)

10. The inquests this summer into the horrific deaths in custody of two teenage boys, Adam Rickwood and Gareth Myatt, not only highlighted serious concerns about the use of 'restraint' against children but also point out the dangers of fast-tracking large numbers of often vulnerable children and young people into custody.

11. We welcome the attempt, in the form of the YRO with intensive supervision and surveillance, to create a robust alternative to custody. However, we believe that the special character of this 'ISS' sentence needs to be further emphasised – that it should always be tried before custody is considered unless the offending is exceptionally serious. We therefore believe that there

should be a separate ‘independent supervision and surveillance order’ (ISSO), a sentence sitting above the YRO. We would also restrict the use of detention and training orders (DTOs), so that no DTO could be passed in future unless the offender had previously received an ISSO. If the offending was so serious that immediate custody was genuinely necessary, s90/91 detention under the Powers of Criminal Courts (Sentencing) Act 2000 would remain available.[1]

12. These changes would effectively mean that no child could be sent to custody unless they had committed a very serious offence (or fulfilled the criteria in s226/228 Criminal Justice Act 2003) or they had previously received an ISSO. This would bring the UK closer to fulfilling its obligations under the UN Convention on the Rights of the Child which requires that the use of custody for under 18s should be a last resort and for the shortest possible period of time.

Breach of YRO

13. We are concerned by the rigidity of the breach provisions in Schedule 2 for YROs. A ‘three strikes’ in 12 months approach does not sound too harsh until one reflects that an ‘unacceptable failure’ may be a matter of being 5 minutes late for a session. Children have less control over their lives and the hours they keep than adults; furthermore, some children receiving YROs are likely to live chaotic lives where timekeeping is rare. Importantly, over-rigid provisions requiring the return of the child or young person to court are likely to affect the relationship of trust between YOT manager and offender which is very important in achieving lasting change to behaviour.

14. We are also concerned at the potential for YROs to escalate upon breach out of all proportion to the original seriousness of the offence. While the court must be able to sanction substantive breaches of its orders, escalating the requirements of an order excessively will simply set the child or young person up to fail and risk further breach. The unnecessary use of ISS and custody should be avoided at all costs, in order to prevent excessive burdens on

[1] Currently children can also be sentenced to indeterminate ‘detention for public protection’ or to an extended sentence under the Criminal Justice Act 2003. We do not believe that ‘IPP’ should apply to children.

the authorities and to avoid impeding rehabilitation.

Referral orders

15. Referral orders are one of the most positive aspects of the youth justice system at present: they offer a constructive alternative to mainstream sentencing and, since when completed the criminal record disappears, they do not impede children and young people from future employment and social inclusion. We believe that referral orders should be available in far less limited circumstances than they are at present (first conviction only – at least one offence must be subject of guilty plea) – the current system is far too rigidified to take account of the progressive development of children. To say that a young person who commits an offence at 16 cannot have a referral order because they have one previous conviction from when they were 12 is an arbitrary distinction. We are therefore disappointed that the proposed extension of the use of referral orders, in clause 21 of the Bill, is so narrow.

Sentencing – Part 2

16. Clauses 10 and 11 of the Bill are intended to 'rein in' sentencers from excessive use of community orders and, in summary cases, suspended sentences. However, we are concerned that they may not go about this in the best way. Clause 11 could be very confusing for sentencers: are they not, then, expected to pass a sentence commensurate with the seriousness of the offence and suitable for the offender, as s148 Criminal Justice Act 2003 states? Clause 10 risks tipping sentencers towards imposing immediate custody where they think an offence would have merited a suspended sentence – we doubt this is what was intended. It is important to recognise that the 'ratcheting up' of sentences is understandable in the light of focus upon a 'problem-solving' approach: where so many offences are motivated by, for example, drug addiction, mental health issues, etc., it is natural for sentencers to wish to prioritise programmes that address those issues over, for example, the use of a fine, even where the offending is minor. This however leaves the probation service with an excessive burden of supervision which would be better directed towards more serious offenders. We believe that a constructive alternative would be to ensure that sentencers can trigger

the provision of such services by the relevant agency (eg mental health, social services) and then deal with the offence proportionately.

IPP

17. We are relieved that, through the agreement of the Secretary of State for Justice to review the workings of the indeterminate sentence for public protection (IPP), the government is recognising that there are serious problems with this sentence. The numbers of IPP sentences imposed have far exceeded initial expectations, because the criteria for its use are far too broad. It must be recalled that, except in relation to the minimum length of the licence, the IPP sentence is **a life sentence**, but it is being imposed for relatively minor offending.

18. Where an offence is very serious, a life sentence will be available in all events: for example, rape, robbery and causing grievous bodily harm with intent all carry a discretionary life sentence. We do not believe that this type of sentence should be imposed where the relevant offence was other than very serious, merely on the basis of perceived future risk.

19. Further, the methods of risk assessment used for IPP have two faults. Firstly, IPP can be imposed merely on the basis of a pre-sentence report. We believe that if an effective life sentence is to be imposed, on the basis of risk, upon someone whose offence would not normally merit such a sentence, this should at least be done upon the basis of rigorous individual assessment. We are also concerned that risk assessments make it more likely that an IPP sentence will be handed out to a person with mental illness or a drug addiction, for example, meaning that they are being sentenced according to their status rather than their offending.

20. We therefore question the whole regime of IPP. In particular, it is inherently unsuitable for children – on whom it can be imposed – but whose level of future 'risk' should not be determined before they reach maturity.

21. However, if it is proposed that IPP should continue, at least in the short term, then it must be reformed in order to remain workable. In particular, it should only be used where the seriousness of the offence would normally have merited a lengthy determinate sentence – for example, an eight-year

sentence following a not-guilty plea, and the relevant courses and facilities must be put in place to ensure that the offender can progress to release. More rigorous assessment of the defendant should also be required before IPP can be imposed.

22. In clause 12, the government has missed an opportunity to propose wholesale reform of the system and is instead merely tinkering with IPP. Clause 12 itself is an inappropriate provision: it is intended to respond not to how IPP works but how other aspects of sentencing (eg automatic reductions for guilty pleas) have worked and also to how IPP 'sounds'. The government is concerned that the minimum term before release may be, or may sound, too short in some serious cases. However, the minimum term is determined by the seriousness of the offence, taking into account any discount for a guilty plea. If it is thought that consideration of seriousness produces too high a minimum term, then the answer is to change the sentencing bracket for the offence as a whole. If the discount for guilty pleas is thought to be too large then this should be reformed.[2] Merely to tinker with IPP, and to leave determinate sentences alone in these circumstances, is intellectually incoherent. If the real concern is that 'a minimum of five years' IPP sentence sounds less severe (though in fact it is more severe) than 'ten years' imprisonment', the answer is to change the way in which the sentence is *described* rather than how it works.

18. We would in all events recommend a change of terminology if IPP is to be retained. Describing a sentence as 'five years to life' or 'between five years and life' would bring home to the sentencer the seriousness of what they are doing by giving out such a sentence, and hopefully result in more infrequent use of IPP. Euphemism is, after all, a frequent contributor to injustice. A more realistic label would also demonstrate the true nature of the sentence to the public and those involved in the case.

Recall to prison – Clause 18

[2] For example, the 2007 revised version of the Sentencing Guidelines Council's definitive guideline *Reduction in Sentence for a Guilty Plea* allows for the level of reduction to be reduced where the evidence is overwhelming.

19. We are concerned that the Secretary of State wishes to have power to recall life sentenced prisoners without a recommendation from the Parole Board, even in cases where there is no urgency to do so before the Parole Board can convene. This may be prompted by concerns over the workload of the Parole Board, which is now having to cope with IPP. However, such operational concerns should not compromise basic fairness. An elected politician is not an appropriate person to determine the liberty of the citizen, as (s)he is subject to public disquiet and anger about individual cases.

Appeals – Part 3

20. The proposals in the Bill relating to appeals are derived from the 2006 consultation paper *Quashing Convictions*. JUSTICE, like many others, was very concerned by this paper, which we believed betrayed a lack of understanding of the function of the Court of Appeal (Criminal Division), which is a court of review – not of re-hearing. That consultation paper proposed that the Court of Appeal should uphold a conviction, even after a serious procedural irregularity, if the judges themselves were satisfied of the defendant's guilt. However, a court can only become genuinely satisfied of guilt or innocence by hearing the evidence in the case, which the Court of Appeal does not do. To provide for a full rehearing in the Court of Appeal would be extremely resource-intensive and would still compromise the primacy of the jury – one of the fundamental safeguards for fairness in our criminal justice system.

21. Further, the proposal that the Court should be able to uphold a conviction after a serious procedural irregularity – such as the fabrication of evidence or the obtaining of a confession by oppressive means – would risk giving a green light to the minority of investigators who might be – and have been in the past – tempted to use such methods.

22. In the Bill the government has modified the proposals, so that the conviction cannot be upheld if to do so would be incompatible with the defendants rights under the European Convention on Human Rights (ECHR). This, we believe, merely clarifies the position that would have applied in all events by virtue of the Human Rights Act 1998. Further, it does not remove all the problems with the proposal.

23. It is simply not the case that convictions are routinely quashed on minor 'technicalities', meaning that offenders escape justice. The Court of Appeal will uphold a conviction after a procedural irregularity if the safety of the conviction is not affected by it. Further, even where the conviction is unsafe, a retrial can be ordered if it is in the interests of justice to do so. A retrial in front of a new jury – rather than a determination of guilt or innocence by the Court of Appeal – is the appropriate response to a conviction quashed on procedural grounds, unless it would be unfair or otherwise inappropriate to hold one.

24. We therefore believe that this proposal should be removed from the Bill.

Violent Offender Orders – Part 8

25. We have very strong concerns about Violent Offender Orders (VOOs). They can be imposed in a wide range of cases and the obligations which can be placed on the person by such an order are almost unlimited. As has occurred with analogous civil orders, there is a serious risk that orders will be imposed at first instance with disproportionate conditions or in inappropriate circumstances, and that it will be left to the higher courts to correct the errors.

26. In particular, we are concerned that:

- there is *no maximum period* for which a VOO can be imposed – meaning that onerous obligations could be imposed over many years, amounting to a disproportionate and potentially life-long interference with liberty;
- there are no limits on the types or severity of obligations that can be imposed under a VOO – apart from the fact that the court must consider them 'necessary for the purpose of protecting the public from the risk of serious violent harm caused by the offender'
- a person may have committed a 'specified offence' and yet not be a dangerous person: for example, a doctor could commit manslaughter by gross negligence in the course of his profession; a middle-aged man may have a single conviction for s20 grievous bodily harm resulting from a fight as a young man but have lived a blameless life for many years since;
- there is no limit on how long ago the conviction could have occurred;

- VOOs are available for children – with no maximum time for which they can remain in force. Theoretically therefore a child convicted of s20 GBH at 14 could remain subject to life-long restrictions;
- Disproportionate orders could create a substantial burden of supervision for public authorities;
- Obligations imposed under a VOO could constitute a retrospective penalty for the offence;
- The provisions regarding VOOs are so broad as to compromise legal certainty.

27. We believe that in their current form VOOs could amount to punishment without a criminal trial and a retrospective penalty and therefore violate Articles 6 and 7 of the European Convention on Human Rights. Further, individual VOOs could also constitute disproportionate interferences with qualified rights under the Convention such as freedom of expression, association and privacy.

Anti-social behaviour – Part 9

28. We are very concerned by clause 103 and Schedule 17, which provide for the eviction of people from their homes in a wide range of circumstances. Such a serious interference with Article 8 European Convention on Human Rights would be incredibly difficult to justify. Mere 'disorder', even 'serious and persistent' disorder, is unlikely to justify the use of this power; the criteria in Schedule 17 are very broad. Further, the order will close the use of a property to all persons, not just those causing the disorder. For example, if a family with several children live at the property, the behaviour of one individual member of the family – or a visitor to one member of the family – is sufficient to trigger the closure of the property, rendering the entire family – including the children – homeless.

28. While the closure of commercial premises on the grounds of serious nuisance to the public may be justified, such power should not, in our view, ever be used in relation to a property being used as a dwelling. Homelessness should never be used as a punishment – a fortiori, it should not be imposed after merely civil proceedings, and against those who may be guilty of nothing

more than residing at the same address as a person who has caused disorder.

Special Immigration Status (clauses 115-122)

Introduction and background

29. Clauses 115-122 of the Bill introduce a new immigration status which purports to target 'foreign nationals involved in terrorism or serious crime … who cannot currently be removed from the UK for legal reasons.'[3]

30. The new status will apply to certain individuals who have been refused asylum but who cannot be deported for human rights reasons. Such persons are currently entitled to discretionary leave to remain for 6 months, subject to renewal for further periods not exceeding 6 months. Under the existing provisions there is no automatic entitlement to settlement after a certain period of discretionary leave in cases where the individual is excluded from Humanitarian Protection by virtue of their prior serious criminal conduct. In such cases, the Home Secretary need only consider entitlement to settlement after 10 years of discretionary leave, and even then may refuse it where it would be 'conducive to the public good' to do so.

31. The new status will remove from this category those people who the Home Secretary elects to designate as 'foreign criminals', or family members of such a person, under clauses 115-116. Flowing from designation are the consequences and powers set out in clauses 117-121, including that time spent under designation will not count for the purposes of an enactment about nationality. Significantly, the Home Secretary is granted powers to impose restrictions relating to residence, employment and reporting to the authorities on those he chooses to designate, with no greater supervision than that provided by judicial review.

32. The new status appears in part to be motivated by the strong findings of Sullivan J in the Administrative Court, later described as 'impeccable' by the Court of Appeal, in *S and others v Secretary of State for the Home*

[3] Statements of the then Home Office Minister, Baroness Scotland of Asthal, introducing the Bill on 26 June 2007: http://www.justice.gov.uk/news/newsrelease260607c.htm .

Department[4] (the 'Afghan hijackers' case') and the comments of the then Home Secretary and Prime Minister in relation to the same. Baroness Scotland of Asthal, then Home Office Minister, indicated when introducing the Bill that the new status is seen as a method of addressing the issues raised by these individuals.[5] It far from clear that the creation of a new status is necessary to achieve the Government's objectives in this regard, and no detailed explanation is offered for its need in the Explanatory Note. Moreover, any such advantages of the new status must be offset against two general and overarching consequences that would flow from its introduction:

- *Additional complexity*: it is somewhat incongruous that at the same time as proposing a Bill to create an entirely new immigration status, and one which will raise new legal questions and apply a different support model, the government also published a consultation paper entitled 'Simplifying Immigration Law'. The problems with the current law are identified in the Foreword:

  > The current legal framework is very complex. This complexity reduces the efficiency of decision-making processes, resulting in delay and the risk of mistakes. It can make it difficult for applicants to understand how they can come to or stay in the UK legitimately. It increases the likelihood of protracted legal challenge of refusals and it contributes to a lack of public confidence in the overall effectiveness of the system.[6]

  The creation of a new status can only serve to aggravate these existing problems.

- *Financial cost*: it is estimated that the creation of the new status will cost £1.1million per annum for three years.[7] It must be asked whether there is a better way such significant amounts of public money could be spent so as to remedy, rather than exacerbate, some of the problems in the immigration sphere set out in the Foreword to the recent consultation paper.

33. In addition to the general concerns raised above about the new status, JUSTICE considers that its definition is overbroad and its application

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4 [2006] EWHC 1111 (Admin); [2006] EWCA Civ 1157.

5 See for example, http://society.guardian.co.uk/crimeandpunishment/story/0,,2112251,00.html .

6 Published by the Border and Immigration Authority on 6 June 2007, available at http://www.ind.homeoffice.gov.uk/6353/6356/17715/immigrationlawconsultation .

7 Explanatory Note to the Criminal Justice and Immigration Bill, para 721.

potentially discriminatory within the meaning of Article 14 of the ECHR. The primary concerns can be categorised as those going to:

- Who can be designated and when;
- What are the consequences of designation;
- Who has the power to designate and how is the exercise of this power supervised and challenged.

Who can be designated and when (clauses 115-116)

34. Clause 115(2) permits designation of an individual who is a 'foreign criminal' liable to deportation, but who cannot be deported because of s6 HRA 1998. Clause 115(3) extends the power to include a family member of a person who meets the criteria for designation in clause 115(2), but it is notable that the Bill does not require the latter person to actually have been designated in order to permit designation of the family member. The definition of 'family' in section 5(4) of the Immigration Act 1971 applies to clause 115(3), such that the spouse, civil partner or dependent children of a 'foreign criminal' may be designated (with no apparent minimum age requirement).[8]

35. 'Foreign criminal' is defined in clause 116 as meaning a person who is not a British citizen and:

- who has been convicted of an offence in the UK for which he was sentenced to imprisonment for two years or more;[9]
- who has been convicted outside the UK of an offence for which he has been sentenced to imprisonment for two years or more, and in relation to which a sentence of two years or more could have been passed if he had been convicted in the UK of a similar offence;[10]
- who has been convicted in the UK of an offence specified by the Secretary of State, or has been convicted of an offence outside the UK which the Secretary of State certifies that, in his opinion, is similar to an offence so

[8] Clause 122(3).

[9] By reference to section 72(2)(a)-(b) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

[10] By reference to section 72(3)(a)-(c) of the 2002 Act.

specified.[11] Under the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes Order) 2004,[12] a very broad range of offences is caught by this definition. For example, theft and aggravated vehicle taking are included, as are several public order offences and criminal damage.

- in relation to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the UK prior to his admission in the UK as a refugee or acts contrary to the purposes and principles of the United Nations.[13]

36. In relation to the first three criteria, and contrary to the position under the 2002 Act, it is not possible for a designated person to rebut the presumption that he is a danger to the community of the UK, and the consequences that flow from that presumption. Similarly, the fact that the conviction or sentence is subject to, or could be subject to, an appeal is irrelevant to the operation of the Bill.[14]

37. JUSTICE makes the following further observations about this aspect of the Bill:

- The breadth of conduct giving rise to the possibility of designation is extraordinarily and inexplicably broad. Given that the intention is to target terrorists and serious criminals, there appears to be, and in fact has been, no justification for such an approach. The overbroad nature of the provisions is reinforced by the absence of any requirement that the Secretary of State considers that an individual poses a threat to the UK public before being able to designate him.[15] Accordingly, a person may pose absolutely no threat to

[11] By reference to section 72(4)(a)-(b) of the 2002 Act.

[12] SI 2004/1910.

[13] By reference to Article 1F of the Refugee Convention. Acts contrary to the purposes and principles of the UN is given a statutory meaning by s.54 of the Immigration, Asylum and Nationality Act 2006 which considerably broadens its usual interpretation and will apply to clause 116(4) so as to include within the new status persons who have taken political actions against their home governments.

[14] The usual caveats in section 72(6)-(7) of the 2002 Act to the operation of the section 72(2)-(4) presumptions are excluded by clauses 116(5)-(6) of the Bill.

[15] Indeed, the exclusion of the ability to rebut the presumption of posing danger to the UK public that accrues under section 72 of the 2002 Act suggests that it is the Government's intention that there should be no requirement upon it to establish such a threat in any specific case. Equally, the decision to include within the ambit of the new status those individuals who cannot be deported for Article 8 reasons (by virtue of clause 115(2)(b)) is a tacit acceptance by the Government that designation and/or the imposition of conditions is not dependent upon a person

the UK by virtue of their criminal convictions, but still be subject to designation and all the consequences that flow from it (in particular, restrictions upon their residence and employment, and reporting obligations). Such an approach can only be considered arbitrary.

- The ability to designate a family member of a 'foreign criminal' is again an unexplained and significant extension of an already broad power. There is no apparent justification for this approach, which seems predicated on the (unarticulated) assumption that the family member must also pose a threat to the UK community in some undefined and ultimately unspecified manner, simply by virtue of their relationship (potentially simply by dependency as a child) with the foreign criminal.

The consequences of designation (clauses 117-120)

38. The consequences of designation are three-fold:

- A designated person falls into an entirely new immigration status defined so as to prevent time spent designated counting for the purposes of an enactment about nationality (clause 117);
- Conditions may be imposed upon a designated individual (clause 118);
- A different support regime applies to designated persons as compared with those under an existing immigration status (clauses 119-20).

<u>Conditions</u>

39. One of the most obviously objectionable parts of the new scheme is the unfettered discretion it confers on the Secretary of State, or immigration officers, to impose restrictive conditions upon a person with no requirement that any necessity, or even any benefit, be demonstrated by way of justification.[16] To this extent, it is significantly broader than the power

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posing a threat to the UK public. Persons who pose such a threat are in reality likely to be deported even where doing so would interfere with their rights to a private and/or family life, because of the balancing exercise inherent in Article 8.

[16] It is notable that the Government is proposing the power to impose conditions on persons designated under the new status at the same time as amendments are being debated in Parliament to the restrictions that can be placed on any person granted leave to enter or remain in the UK: UK Borders Bill clause 16, amending s3 Immigration Act 1971. Clause 16 will permit the granting of leave to enter or remain with conditions of residence or reporting. The Government has expressly stated that it intends to use this power (potentially now *only*) in relation to those who have committed serious criminal offences:

conferred by the Prevention of Terrorism Act 2005 to make non-derogating control orders against persons suspected of involvement in terrorist related activity. Under s2(2)(b) of the 2005 Act it is a prerequisite that the Secretary of State considers that it 'is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.' No such requirement of necessity in pursuance of public protection, nor even a correlation with such a purpose, is required under the Bill.

40. The definition of what conditions may be imposed is nebulous (clause 118(2)): 'a condition may relate to: (a) residence, (b) employment or occupation or (c) reporting to the police, the Secretary of State or an immigration officer.' 'Relate to' is in itself a potentially very broad term. When combined with the requirement that a condition only 'may' so relate, the scope of the clause is considerably widened.

41. Within the three categories of example conditions that may be imposed, there is again considerable latitude. Residence conditions could mean anything from a requirement to generally reside at your home address, to effective house arrest under a curfew at a property many miles from your home. Some insight into the scope of restrictions on 'residence' can be seen from the breadth of conditions imposed in control orders made under the Prevention of Terrorism Act 2005.[17] In addition, a residence condition imposed under clause 118(2) may be enforced by way of electronic monitoring.[18] In another (disturbing) similarity with the control order legislation, failure to comply with

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'The proposed use is for people who have committed serious crimes in the UK but whose removal would breach international obligations.' (revised Regulatory Impact Assessment for the UK Borders Bill: http://www.ind.homeoffice.gov.uk/6353/6356/10630/ukbordersbillria.pdf)

The issue of duplication is said to be remedied by the Government by the fact that those designated under the new status are expressly not granted leave to enter or remain, such that they are not caught by the amendments to s3 of the 1971 Act: *Hansard* 12 July 2007 Col. GC256. There remains a question as to whether the dual amendments proposed by the UK Borders Bill and those in the CJI Bill will serve to complicate immigration law even further than that inherent in the creation of the new status.

[17] See by way of example the restrictions imposed in *Secretary of State for the Home Department v JJ and others* [2006] EWHC 1623 (Admin) (18 hour curfew at addresses different from the original home address, in all but one case); c.f. *Secretary of State for the Home Department v MB* (2006) HRLR 878 (residence at original address with no curfew requirement).

[18] By reference to section 36 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, which is applicable by virtue of clause 118(3) of the Bill.

any condition imposed under clause 118 without reasonable excuse will amount to an offence punishable with imprisonment, a fine or both.[19]

42. A further question is raised as to the compatibility of potential conditions with the ECHR. It is perfectly conceivable that conditions will be imposed on individuals that will infringe Convention rights, in particular Article 8. The Government will then be required to justify this interference, on grounds which are as yet not entirely clear. In addition, it may be necessary to consider whether Article 14 of the Convention is also engaged, by virtue of the conditions being discriminatory on the grounds of nationality. It is of course accepted that a state is entitled to treat non-nationals differently from nationals in the immigration context. However, the crux of that power is that differential treatment is justified by reference to the need for a state to regulate the entry into and expulsion from its territory by non-nationals. Measures which go beyond that objective, and trespass into other fields such as criminal justice, are likely to fall foul of the Article 14 prohibition.[20] It is therefore necessary to look carefully at the objectives which the Government seeks to achieve not only in creating the new status, but also in creating the power to impose conditions upon those designated as falling within it.

43. It is apparent both from the scheme and from the Explanatory Note thereto that the motivating factor for the new status is to limit the threat posed to UK society by foreign nationals who have committed criminal offences:

> Designated persons are persons who, because of their conduct, the Secretary of State is concerned to remove from the United Kingdom.[21]

Removal is a legitimate immigration objective, and one that the Government is entitled to vindicate through legislation. However, the imposition of restrictive conditions upon those persons who cannot be deported raises different issues. The conditions are capable of being imposed effectively as crime prevention measures, akin in many regards to bail conditions pending a criminal trial. At that point, the conditions reveal themselves not to be immigration measures, but criminal justice measures. In such circumstances, there is no valid distinction to be drawn between the UK criminal and the

[19] Clause 118(5)-(7); c.f. s.9 of the Prevention of Terrorism Act 2005.

[20] As was made clear by the House of Lords in *A and others v Secretary of State for the Home Department* [2005] 2 AC 68.

[21] Explanatory Note to the Criminal Justice and Immigration Bill, para 879.

foreign criminal: both are capable of posing a threat to the UK public by recidivist behaviour.[22] Consequently, there is no objective justification for the differential treatment, such that it is likely to infringe Article 14.

Support scheme

44. The new support scheme is dealt with in clauses 119-120. It is expressly modelled on the NASS scheme for asylum seekers set out in Part VI of the Immigration and Asylum Act 1999, but strips out and/or replaces some aspects of that provision.[23] In particular, clause 119(2)(a) disapplies section 96 of the 1999 Act but clause 119(3) imports obligations similar, although not identical, to those removed. Clause 119(4) provides that support may not be wholly or mainly by way of cash, where 'cash' does not include vouchers (clause 122(7)).

45. The primary effect of the new approach is to provide less detail and structure to the Secretary of State's obligations than exists under Part VI. The scope for appeals may be broadened accordingly, these being made the preserve of the Asylum Support Tribunal by virtue of clauses 119(1) and 120(3). The secondary effect is to still further complicate what is already a very complex area.

46. The Government has also recognised that, in certain cases, designation may result in an interference with a person's rights under Article 1 of Protocol 1 to the ECHR, by virtue of the loss of accrued property rights and the right to work, and that Article 14 may also be engaged.[24] In seeking to justify the difference in treatment as non-discriminatory, the Government relies on the decision of the European Court of Human Rights in *Moustaquim v Belgium.*[25] However, that case concerned the very different question of deportation of foreign criminals, not their treatment within the host state when deportation was not possible. In so far as the Government seeks to justify any interference with an individual's Article 1 Protocol 1 rights, it must do so by

[22] See by analogy the House of Lords decision in *A and others,* above, especially per Lord Bingham at para 54.

[23] Clauses 119(1)-(3).

[24] See paras 872-884 of the Explanatory Note to the Criminal Justice and Immigration Bill.

[25] (1991) 13 EHRR 802.

reference to an objective public interest benefit derived from the particular measure. Given that there is no requirement that the Government demonstrate any threat to the public posed by designated individuals, it is doubtful that this will be as simplistic as the Explanatory Note suggests. It seems unlikely, for example, that the Government would assert a legitimate public interest in restructuring housing rights as between UK nationals so as to prioritise those without criminal convictions, and without consideration of the relative threat posed by those with such convictions. Non-national status cannot be used as a justification for arbitrary distinctions.

Who has the power to designate and how is that power regulated

47. The power to designate an individual is conferred exclusively upon the Secretary of State by clause 115(1). Subsequently, either the Secretary of State or an immigration officer may impose a condition on a designated person (clause 118(1)). There is no statutory requirement, either at the time of designation or when imposing conditions, for the individual to be given reasons for the decisions made. Moreover, there is no statutory appeals procedure applicable to a decision to designate or impose a condition, such that the only method of regulation is by way of judicial review. Given the breadth of the discretionary powers granted to the executive under the proposals, and their potential impact upon the civil liberties of those subjected to them, this is a wholly inadequate supervisory mechanism.

JUSTICE

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