Criminal Justice and Immigration Bill

JUSTICE Briefing for House of Lords Second Reading

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Introduction and summary

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.

2. We have a number of concerns with the Bill and we regret that this briefing is unable to cover them all. Instead, this briefing focuses on those provisions that seem to us to pose the most significant interference with fundamental rights. These are the provisions relating to:

    - the recall of life prisoners (clause 31)
    - the amendment of the test for allowing criminal appeals (Part 3)
    - the possession of extreme pornographic material (clause 113)
    - the use of reasonable force for the use of self-defence (clause 128)
    - Violent offender orders (Part 9)
    - Special immigration status (Part 12)

Recall of life prisoners (clause 31)

3. Under the Crime (Sentences) Act 1997, the Home Secretary may only recall a prisoner serving a life sentence released on licence following either a recommendation of the Parole Board[1] or, in exceptional cases, 'where it appears to him that it is expedient in the public interest to recall that person before such a recommendation is practicable'.[2]

4. By contrast, clause 31 empowers the Home Secretary to recall a life prisoner at any time *without any requirement that it is in the public interest to do so*. There is no suggestion that the existing requirement of a recommendation from the Parole Board has ever inhibited the Home Secretary's ability to recall a life prisoner where he or she has deemed it necessary to do so, nor is there any evidence to show that the exceptional power to recall without a recommendation in the public interest has ever proved inadequate.

5. We can see no sound policy reason why the Home Secretary should be freed of the requirement to act in the public interest when recalling a prisoner. Absent such a safeguard, it is clear that an elected politician would be susceptible to public disquiet and anger about individual cases. The liberty of the subject, even that of a prisoner convicted of the most serious of crimes, is too important to be left vulnerable to such pressures.

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[1] Section 32(1) of the Crime (Sentences) Act 1997

[2] Section 32(2).

Amendment of test for allowing appeals (Part 3)

6. Clauses 42 to 45 seek to implement the government's proposals set out in its 2006 consultation paper *Quashing Convictions*, specifically 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.

7. In our view, this proposal betrays a profound lack of understanding concerning the role of the appellate courts. The Criminal Division of the Court of Appeal is a court of *review*, not of re-hearing. The determination of guilt or innocence in criminal cases does not fall to a court hearing an appeal: that function is reserved to the court at first instance which hears the evidence in each case.

8. Not only is the Court of Appeal not equipped to conduct a full rehearing of cases, especially the kind of fact-intensive inquiries involved in criminal matters, but it would be constitutionally improper for an appellate court composed entirely of judges to substitute their own findings of fact for those of a jury of the defendant's peers.

9. Not only does the government's proposal misunderstand the role of the courts, but it seriously misapprehends the importance of legality in the criminal process. The role of the courts is not to deliver justice by any means but justice according to the law. The idea that the Court of Appeal should be able to uphold a conviction notwithstanding a serious procedural irregularity – such as the fabrication of evidence or the obtaining of a confession by oppressive means – would compromise the role of the courts themselves. Just as the Appellate Committee of the House of Lords rejected the use of evidence obtained under torture on the basis that 'it corrupts and degrades the state which uses it *and the legal system which accepts it*',[3] it would bring dishonour to British courts to uphold an unsafe conviction wrought by serious illegality.

10. We note that the government has now modified the proposals so that a conviction is not unsafe 'if the Court thinks that there is no reasonable doubt about the appellant's guilt' (e.g. clause 42(2))[4], but that a court is not required to dismiss an appeal 'if they think that it would seriously undermine the proper administration of justice to allow the conviction to stand' (clause 42(2).[5]

11. In other words, clause 42(2) would require the Court of Appeal to dismiss an appeal against a conviction even though the court thought it *would* undermine the proper administration of

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[3] *A and others v Secretary of State for the Home Department* [2005] UKHL 71 at para 82 per Lord Hoffman [emphasis added].

[4] Inserting section 2(1A) of the Criminal Appeal Act 1968.

[5] Inserting section 2(1B) of the Criminal Appeal Act 1968.

justice, but that the undermining was not sufficiently 'serious'. We do not think a British court should ever be invited to distinguish between upholding convictions which 'seriously' undermine the proper administration of justice and those which do not. Under the existing terms of the Criminal Appeal Act 1968, it is perfectly open to the Court of Appeal to 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.

12. In our view, to allow the provisions contained in clauses 42 to 45 to become law would only undermine the integrity of the judicial function in criminal matters.

Possession of extreme pornographic material (clause 113)

13. We agree that the possession of 'extreme pornographic material' as defined in clause 113 may be both extremely distasteful and, in some cases, the rightful subject of criminal sanction. We acknowledge that the right to freedom of expression under Article 10 of the European Convention on Human Rights allows for regulation of such material, including to protect public health or morals, and to protect the rights of others. In particular, we note that the proposed definition of 'extreme pornographic material' includes a great deal of material whose manufacture and distribution is already prohibited by the criminal law, e.g. the production of a snuff film (involving 'an act which threatens … a person's life' within the meaning of clause 113(6)(a)) would already constitute a criminal offence.

14. However, to the extent that clause 113 goes beyond the possession of material whose production and distribution is already unlawful, we question the empirical foundation for the government's proposal to criminalize such material. The basis for the proposal appears to be a speculative causal connection between the possession of such material and a propensity to commit violent crime, particularly sexual offences. In our view, such a claim is not supported by evidence sufficient to justify the sanction of the criminal law. We are, moreover, concerned that the breadth of the definition of an 'extreme image' in clause 113(6) – while legitimately covering much that is already illegal – also includes much that is arguably innocuous (e.g. the simulated depiction of an act 'likely to result … in serious injury' (clause 113(6)(b)). Accordingly, we are concerned that such an over-inclusive definition may constitute a disproportionate interference with the right to free expression under Article 10 ECHR.

Reasonable force for the use of self-defence (clause 128)

15. The use of reasonable force in self-defence is an area of UK law that has been extremely well-settled for many years. As the then-Lord Chief Justice, Lord Woolf explained in 2001:[6]

> A defendant is entitled to use *reasonable force* to protect himself, others for whom he is responsible and his property.

16. The definition of what counts as 'reasonable force' is a question for the jury:[7]

> In judging whether the defendant had only used reasonable force, the jury has to take into account all the circumstances, including the situation as the defendant honestly believes it to be at the time, when he was defending himself. It does not matter if the defendant was mistaken in his belief as long as his belief was genuine.

17. When the defence of self-defence is raised by a defendant, the prosecution must prove to the criminal standard of proof that the defendant was *not* acting in self-defence. In other words, the prosecution must prove either that the defendant did not really believe he was acting in self-defence (e.g. the defendant is lying) *or* that the defendant used an *unreasonable* amount of force in the circumstances that the defendant honestly believed he was in.

18. There is one legitimate complaint concerning the existing law, which is that a person charged with murder who is found by the jury to have acted honestly in self-defence but nonetheless used an unreasonable amount of force would be guilty of murder rather than the lesser charge of manslaughter. However, this is an issue which is expected to be addressed by the reform of the law relating to homicide. It is certainly not addressed by the current clauses.

19. Indeed, in our view, the government's proposals to clarify the law relating to self-defence add precisely nothing to the existing law save for undue complexity and unnecessary confusion. In particular, clause 128(5)(b) requires a jury to have regard to the fact that:

> a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

20. Far from adding clarity to the existing law, clause 128(5)(b) converts a common sense observation into an abstruse and logically circular proposition. Parliament should not permit

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[6] *R v Martin* [2001] EWCA Crim 2245, para 4, emphasis added.

[7] Ibid, para 5.

the clear and sensible formulations of the common law to be marred by such unnecessary statutory ornamentation.

Violent offender orders (Part 9)

21. JUSTICE has serious 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.

22. 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.

23. 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. Furthermore, individual VOOs could also constitute disproportionate interferences with qualified rights under the Convention such as freedom of expression, association and privacy.

Special Immigration Status (Part 12)

24. Part 12 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'.[8]

25. 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.

26. 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 181-182. Flowing from designation are the consequences and powers set out in clauses 183-187, 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.

27. 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 Department[9] (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

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[8] 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 .

[9] [2006] EWHC 1111 (Admin); [2006] EWCA Civ 1157.

seen as a method of addressing the issues raised by these individuals.[10] 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.[11]

  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.[12] 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.

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

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

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

[12] Explanatory Note to the Criminal Justice and Immigration Bill, para 721.

Who can be designated and when (clauses 181-182)

29. Clause 181(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 181(3) extends the power to include a family member of a person who meets the criteria for designation in clause 181(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 181(3), such that the spouse, civil partner or dependent children of a 'foreign criminal' may be designated (with no apparent minimum age requirement).[13]

30. 'Foreign criminal' is defined in clause 182 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;[14]

    - 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;[15]

    - 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 specified.[16] Under the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes Order) 2004,[17] 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

[13] Clause 187(3).

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

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

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

[17] SI 2004/1910.

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.[18]

31. 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.[19]

32. 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.[20] Accordingly, a person may pose absolutely no threat to 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.

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[18] 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 182(4) so as to include within the new status persons who have taken political actions against their home governments.

[19] 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 182(5)-(6) of the Bill.

[20] 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 181(2)(b)) is a tacit acceptance by the Government that designation and/or the imposition of conditions is not dependent upon a person 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.

The consequences of designation (clauses 183-187)

33. 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 183);

- Conditions may be imposed upon a designated individual (clause 184);

- A different support regime applies to designated persons as compared with those under an existing immigration status (clauses 185-186).

Conditions

34. 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.[21] To this extent, it is significantly broader than the power 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.

35. The definition of what conditions may be imposed is nebulous (clause 184(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

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[21] 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:

> '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.

term. When combined with the requirement that a condition only 'may' so relate, the scope of the clause is considerably widened.

36. 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.[22] In addition, a residence condition imposed under clause 184(2) may be enforced by way of electronic monitoring.[23] In another (disturbing) similarity with the control order legislation, failure to comply with any condition imposed under clause 184 without reasonable excuse will amount to an offence punishable with imprisonment, a fine or both.[24]

37. 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.[25] 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.

38. 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:

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[22] 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).

[23] By reference to section 36 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, which is applicable by virtue of clause 184(3) of the Bill.

[24] Clause 184(5)-(7); c.f. s.9 of the Prevention of Terrorism Act 2005.

[25] 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.

> Designated persons are persons who, because of their conduct, the Secretary of State is concerned to remove from the United Kingdom.[26]

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 foreign criminal: both are capable of posing a threat to the UK public by recidivist behaviour.[27] Consequently, there is no objective justification for the differential treatment, such that it is likely to infringe Article 14.

Support scheme

39. 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.[28] In particular, clause 185(2)(a) disapplies section 96 of the 1999 Act but clause 185(3) imports obligations similar, although not identical, to those removed. Clause 185(4) provides that support may not be wholly or mainly by way of cash, where 'cash' does not include vouchers (clause 188(7)).

40. 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 185(1) and 186(3). The secondary effect is to still further complicate what is already a very complex area.

41. 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.[29] 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.*[30] 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

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

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

[28] Clauses 185(1)-(3).

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

[30] (1991) 13 EHRR 802.

as the Government seeks to justify any interference with an individual's Article 1 Protocol 1 rights, it must do so by 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

42. The power to designate an individual is conferred exclusively upon the Secretary of State by clause 181(1). Subsequently, either the Secretary of State or an immigration officer may impose a condition on a designated person (clause 184(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.

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JUSTICE is very grateful to Helen Law of Matrix Chambers for her assistance on the Part 12 of the Bill relating to special immigration status.