Immigration Bill 2015-16

House of Lords Report Stage

Briefing on Selected Amendments

March 2016

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Summary

JUSTICE is concerned about a number of provisions in the Bill. However, in this briefing, we concentrate on those provisions most closely within our area of expertise and those amendments already tabled or expected to be tabled. The following is a list of our recommended amendments in relation to those provisions.

- **JUSTICE recommends that the offence of illegal working (clause 32) is removed from the Bill because it is unnecessary and risks undermining important efforts made over recent years to address issues such as trafficking and modern-day slavery in the UK.**

- **JUSTICE recommends that the offence of leasing premises to those disqualified from renting (clause 37) is removed from the Bill or, at the very least, its coming into force is delayed, pending a full and comprehensive evaluation of the possible discriminatory effects of civil sanctions introduced for the same offence.**

- **JUSTICE recommends that the proposal to extend the 'deport first, appeal later' powers to all human rights based immigration appeals (clause 59) is removed from the Bill or, at the very least, its coming into force is delayed, pending a thorough evaluation of the extent to which requiring appellants to appeal from abroad denies appellants access to justice and breaches their human rights.**

- **JUSTICE recommends that schedule 10 is amended to provide a right of appeal against refusals of support and thereby safeguard refused asylum seekers from being left destitute in breach of Article 3.**

Introduction

1. Established in 1957, JUSTICE is an independent, all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

2. We have produced this briefing to inform the House of Lords Committee Stage debate. We have confined this briefing to those amendments already tabled or expected to be tabled. Where we do not comment on an issue in the Bill, this should not be read as approval.

Clause 32: Offence of illegal working

STAND PART DEBATE

To oppose the Question that clause 32 stand part of the Bill.

Purpose

3. To remove from the Bill the offence of working illegally.

Briefing

4. JUSTICE supports the stand part amendment tabled by Lord Rosser and Lord Kennedy of Southwark.[1]

5. Clause 8 of the Bill criminalises workers who are subject to immigration control and without leave in the UK, enabling the confiscation of their wages. Offenders convicted of illegal working are liable, upon summary conviction, to a fine and/or to imprisonment for up to 51 weeks in England and Wales and up to 6 months in Scotland and Northern Ireland.

6. JUSTICE is concerned that the provision to criminalise 'illegal working' contained in clause 8 of the Bill is unnecessary and potentially counter-productive.

7. There is already the power to prosecute those who require, but do not have, leave to enter or remain in the UK.[2] That power already seems unnecessary: to prosecute a person for lacking the requisite leave, rather than simply removing them from the UK, increases the burden on the justice system, increases demand for places in detention and thereby increases the cost to the taxpayer. However, if the underlying purpose of criminalising 'illegal working' in the Bill is to seek to deter migrants without leave from coming to the UK to work through the threat of criminal

[1] Amendment 52 in the marshalled list of amendments, 7th March 2016.

[2] Paragraph 24 Immigration Act 1971.

sanctions[3], then we would wish the House to note that such deterrence already exists in the power to prosecute those without leave to enter or remain in the UK.

8. Moreover, JUSTICE is concerned that specifically criminalising those who work is likely to increase their vulnerability and susceptibility to exploitation. Fear of prosecution and imprisonment is likely to deter the vulnerable, such as trafficked women and children, who are working illegally from seeking protection and reporting rogue employers and criminal gangs. This runs contrary to the Government's stated intention of combating labour market exploitation of vulnerable individuals,[4] and would undermine the important efforts made over recent years to address issues such as trafficking and modern-day slavery in the UK.

9. The Government states that the criminalisation of 'illegal working' would enable the earnings of 'illegal workers' to be seized under the Proceeds of Crime Act 2002.[5] JUSTICE notes that the seizure of earnings in such cases may not be cost-effective. The migrants concerned are typically in receipt of very low levels of remuneration. Research carried out by the Greater London Authority in 2009 found that almost half of migrants unlawfully present in the UK either were not working or had never worked (30 per cent and 19 per cent respectively); of those who did work, a third received less than the minimum wage, with the remainder being in the lowest paid jobs.[6] Such earnings may be vital not only to support the worker but also their families and savings, as a consequence, may be negligible. Therefore, leaving aside the moral question of whether it is right to seize earnings from such potentially vulnerable and exploited persons, it is likely that the cost of recovery will generally be greater than any earnings eventually seized.

10. The Minister of State in Committee referred to a letter which he wrote to Lord Rosser on 8th January in which he stated:

> In 2014-15, the courts approved the forfeiture of cash totalling £542,668 seized by immigration officers. Following criminal convictions for immigration-related offences courts ordered the confiscation of assets totalling £966,024. We expect that in-country seizure could double with the use of the extended powers enabled by the new illegal working offence

11. With respect to the Minister, JUSTICE considers that this is likely to be misleading. Criminal offences for immigration related offences would, by definition, currently not include convictions for illegal working. The £966,024 referred to by the Minister

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[3] See, for example, the Explanatory Notes to the Bill which present the offence of illegal working as tackling "one of the principal pull factors for illegal immigration": Home Office (2015) Immigration Bill: Explanatory Notes, published 17.09.2015, paragraph 5.

[4] *Ibid.*, paragraphs 3-5.

[5] *Ibid.*, paragraph 8.

[6] GLAEconomics (2009): Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK, available at http://www.london.gov.uk/mayor/economic_unit/docs/irregular-migrants-report.pdf

are the result of only 16 confiscation orders for immigration offences, or 14 if you discount two confiscation orders of £1 each, the vast bulk of which were for the offences of forgery and counterfeiting or assisting unlawful immigration (and similar) and conspiracy thereto.[7] Despite being specifically asked by Baroness Kennedy of the Shaws[8], the Minister has failed to explain how such rates of confiscation would carry over to the offence of illegal working. We suggest that it is misleading to do so in view of the very low levels of sums involved to which we have already referred.

12. Additionally, JUSTICE is concerned that the prospect of having their earnings seized is likely to further deter exploited persons from seeking protection and reporting rogue employers and criminal gangs.

13. The Minister of State stated in Committee:

> The offence is not aimed at the victims of modern slavery, where the statutory defence in Section 45 of the Modern Slavery Act will still apply, as will common-law defences, such as duress. The circumstances of someone's illegal working will be taken into account by the CPS and prosecutors in Northern Ireland and Scotland when deciding whether it is in the public interest to prosecute.[9]

Regrettably, this does not allay our concerns. The statutory defence in section 45 of the Modern Slavery Act 2015 only becomes relevant once a person has been arrested and charged and if the defence is made out. JUSTICE considers that the existence of a possible defence in the event of prosecution is unlikely to significantly diminish the fear of prosecution and imprisonment for illegal working of vulnerable and exploited persons. The fact that the CPS has discretion not to prosecute is highly unlikely to allay their fears either.

14. JUSTICE therefore considers that there is a lack of justification in the Bill for criminalising 'illegal working' and a real risk that it will only increase labour market exploitation of vulnerable individuals.

15. We note the Government amendment to clause 32 to be debated at Report[10] which would limit the offence of illegal working to those who know or have reasonable cause to believe that they are disqualified from working by their immigration status. Should clause 32 stand part of the Bill then JUSTICE would support the

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[7] HL 5290 - Immigration: Proceeds of Crime: Written question, 20 January 2016, available at http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-01-20/HL5290/

[8] HL 5291 - Undocumented Workers: Written question, 20 January 2016, available at http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-01-20/HL5291/

[9] Lord Bates, Hansard, Immigration Bill 2015-16 Committee stage: House of Lords, 18 January 2016, Column 624.

[10] Amendments to page 19, lines 6 and 7, and to page 20, line 1, in the name of Lord Bates.

amendment. However, we do not consider that the Government amendment is sufficient to address the mischief created by the offence.

Clause 37: Offence of leasing premises

STAND PART DEBATE

To oppose the Question that clause 37 stand part of the Bill.

Purpose

16. To remove from the Bill the offence of leasing premises.

Or, in the alternative:

PROPOSED AMENDMENT

Page 26, line 2, at end insert –

"(7) Subsection (2) shall not come into force until the Secretary of State has published, and laid before both Houses of Parliament, an evaluation of the provisions contained in sections 20 to 37 and Schedule 3 to the Immigration Act 2014.

(8) The evaluation provided for in subsection (7) must include an assessment of the impact of those provisions on—
(a) individuals who have a protected characteristic as defined in Part 2, Chapter 1 of the Equality Act 2010, and
(b) British citizens who do not hold a passport or UK driving licence."

Purpose

17. To delay the coming into force of the offence of leasing premises until such a time as the civil sanctions introduced for the same offence under the Immigration Act 2014 have been fully and comprehensively evaluated.

Briefing

18. JUSTICE recommends that clause 37 should not stand part of the Bill. However, in the event that such amendment does not find sufficient support within the House, we would recommend that Peers support the amendment tabled by Lord Rosser and Lord Kennedy of Southwark.[11]

19. Clause 37 of the Bill introduces a new criminal offence for landlords who know or have "reasonable cause to believe" that they are leasing their premises under a residential tenancy agreement to someone who is disqualified from renting by

[11] Amendment 66 in the marshalled list of amendments, 7th March 2016.

virtue of their immigration status[12] and extends the offence to agents who are responsible for a landlord committing such offence. The criminal penalties are severe, involving a potential sentence of up to five years' imprisonment and/or a fine.

20. JUSTICE is concerned that the severity of the criminal sanction and the application of the "reasonable cause to believe" clause is likely to result in landlords and agents being less willing to lease residential premises to those who do not have a British passport and who appear to be foreign, leading to discrimination against persons (including British citizens) based on name, language ability, accent, ethnicity, colour and/or cultural background. The consequences for those seeking accommodation, which is a fundamental necessity, are serious.

21. JUSTICE also considers the introduction of criminal sanctions to be premature. The civil sanctions introduced for the same offence under the Immigration Act 2014[13] have only recently been piloted in five regions of the West Midlands, with plans to roll out these provisions across England from February 2015, and their effect is not yet fully understood. The Home Office has published its evaluation of the pilot[14] but, despite being described by the Minister for Immigration as "extensive",[15] and by the Minister of State as "thorough",[16] it is based on a very small and, in parts, unrepresentative sample.[17] Further, although the Minister for Immigration claimed that the evaluation found "no hard evidence of discrimination",[18] a statement repeated by the Minister of State in Committee in the Lords,[19] it did uncover evidence of discrimination: a higher proportion of black and minority ethnic "mystery shoppers" asked to provide more information during rental enquiries and comments from landlords and landladies in focus groups indicating a potential for discrimination.[20] This evidence of potential discrimination is reinforced by: research conducted by the Joint Council for the Welfare of

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[12] Defined in Paragraph 21, Immigration Act 2014.

[13] Paragraph 23 Immigration Act 2014.

[14] Evaluation of the Right to Rent scheme: Full evaluation report of phase one, October 2015, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468934/horr83.pdf

[15] The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Report stage: House of Commons, 1 December 2015, Column 207.

[16] Lord Bates, Hansard, Immigration Bill 2015-16 Committee stage: House of Lords, 20 January 2016, Column 886.

[17] For example, of the 68 tenants surveyed, 60 were students (see Evaluation of the Right to Rent scheme, *supra*, top of page 38). For a more detailed critique of the Home Office evaluation, see the Joint Council for the Welfare of Immigrants' briefing on access to services for the Immigration Bill 2015-16 House of Lords Second Reading, pages 7-10, available at http://www.jcwi.org.uk/policy/parliamentary-briefings/immigration-bill-2015-house-lords-2nd-reading-briefing-access

[18] The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Report stage: House of Commons, 1 December 2015, Column 207.

[19] Lord Bates, Hansard, Immigration Bill 2015-16 Committee stage: House of Lords, 20 January 2016, Column 881.

[20] Evaluation of the Right to Rent scheme, *supra*, bottom of page 5.

Immigrants, which suggests that the civil sanctions have led to discrimination[21]; and the recent poll of over a thousand landlords by YouGov, on behalf of Shelter, which found that almost half of landlords who make decisions as to whom to let to, as opposed to leaving such decisions to an agent, would be less likely to consider letting to people who do not hold British passports or who 'appear to be immigrants' as a result of the having to check tenants' immigration status under the Immigration Act 2014.[22] Criminal sanctions, as contained in clause 13, risk exacerbating any discrimination resulting from the civil sanctions.

22. The Minister of State sought to persuade the House of Lords in Committee that requiring a landlord to check the immigration status of potential tenants is no more than an extension of checks that they would normally carry out in the course of letting their properties:

> First, it is worth pointing out that landlords already undertake a number of checks. It is standard for them to check people's identity to determine whether they are who they say they are. They take up credit references. It is standard to take up references from previous landlords to determine whether the tenants are suitable people. They require proof of employment. Therefore, a number of checks are already required. Establishing that somebody has a right to be in the UK and has the appropriate documents should be done already under best practice.[23]

With respect to the Minister, this does not address our concerns. The Minister may be right that, once a landlord has provisionally accepted an application for tenancy and is carrying out background checks, they may not be significantly deterred by the requirement to check the applicant's immigration status. Our concerns lie principally with discrimination at an earlier stage: faced with a number of prospective tenants over any given period, landlords are likely to discriminate in favour of applicants with British sounding names and/or British accents or those who can instantly allay the landlord's fears that they might be illegal immigrants by producing a British passport.

23. JUSTICE therefore recommends that, before introducing further measures aimed at tackling the same problem, the Government fully and comprehensively evaluates the operation of the corresponding provisions implemented under the 2014 Act so as to understand their effectiveness and any discriminatory effects that they have had. Further, in view of the concerns we raise above about the existing evaluation, we recommend that, in debating the amendment tabled by Lord Rosser

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[21] See the Joint Council for the Welfare of Immigrants' briefing on access to services for the Immigration Bill 2015-16 House of Lords Second Reading, pages 4-6, available at http://www.jcwi.org.uk/policy/parliamentary-briefings/immigration-bill-2015-house-lords-2nd-reading-briefing-access

[22] See Shelter Policy Blog, 23 September 2015, available at http://blog.shelter.org.uk/2015/09/the-governments-new-immigration-bill-even-more-bad-news-for-renters-and-landlords/

[23] Lord Bates, Hansard, Immigration Bill 2015-16 Committee stage: House of Lords, 20 January 2016, Column 883.

and Lord Kennedy of Southwark, the House also considers what data the Government would need to collect to show that the scheme is not having a discriminatory effect.

24. We note the Government amendment to clause 37 to be debated at Report[24] which would provide a defence to a landlord or landlady accused of renting to a disqualified person if they did not know or have reasonable cause to believe that the person was disqualified and if, on discovering or coming to have reasonable cause to believe this, they took "reasonable steps" to end the tenancy within a "reasonable period". Should clause 37 stand part of the Bill then JUSTICE would support the amendment. However, we do not consider that the Government amendment is sufficient to address the mischief created by the offence.

Clause 59: Certification of human rights claims

STAND PART DEBATE

To oppose the Question that clause 59 stand part of the Bill.

Purpose

25. To remove from the Bill the extension of the 'deport first, appeal later' provisions, introduced under the Immigration Act 2014, to all human rights claims.

Or, in the alternative:

PROPOSED AMENDMENT

Page 55, line 3, at end insert –

"(7) Subsection (1) shall not come into force until the Secretary of State has published, and laid before both Houses of Parliament, an evaluation of the provisions contained in section 17(3) of the Immigration Act 2014.

(8) The evaluation provided for in subsection (7) must include an assessment of the impact of those provisions in relation to—

(a) access to justice and human rights including for those individuals unable to afford the fee to lodge an appeal, unable to afford legal representation or with limited literacy in English and

(b) individuals whose appeals are not determined within six months of their removal from the UK."

[24] Amendments to page 23, lines 35 and 36, in the name of Lord Bates.

Purpose

26. To delay the coming into force of the 'deport first, appeal later' provisions, until such a time as the corresponding provisions introduced under the Immigration Act 2014 have been fully and comprehensively evaluated.

Briefing

27. JUSTICE supports the amendment, previously tabled but withdrawn by Lord Rosser, Lord Kennedy of Southwark, Lord Alton of Liverpool and Lord Ramsbotham at Committee Stage but, to our knowledge, as of 7th March, not tabled for Report, to leave out clause 59 from the Bill. However, in the event that such amendment does not find sufficient support within the House, we would recommend that, at the very least, the entry into force of clause 59 is delayed until its likely impact is better understood.

28. Clause 59 of the Bill extends the provisions first enacted in section 94B of the Nationality, Immigration and Asylum Act 2002, that require that applicants appeal against refusal of their immigration related human rights claims by the Secretary of State from *outside* the UK (the so-called 'deport first, appeal later' rule). The effect of section 94B (as inserted by the Immigration Act 2014) was to enable the Secretary of State to 'certify' that the deportation (primarily of foreign criminals) pending the determination of their human rights appeal would not cause "serious irreversible harm".[25] Clause 59 extends those provisions to *all* human rights appeals, not just the appeals of those liable to deportation.

29. JUSTICE is very concerned about the impact of section 94B on access to justice. The practical (and emotional) difficulties that appellants may experience in appealing from abroad, and the impact that this may have on their human rights appeal, have not been fully researched. However, early indications are that section 94B is preventing or, at the very least, deterring appellants from pursuing their human rights appeals: from July 2014 to August 2015, more than 1,700 foreign national offenders were removed under the 'deport first, appeal later' powers;[26] of these, only 426 appealed (25 per cent) against their deportation,[27] a marked drop from the 2,329 who appealed in the previous year (to April 2013);[28] of the 426 out-of-country appeals, 102 appeals were determined, 13 allowed and 89 dismissed,[29]

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[25] The phrase is used by the European Court of Human Rights in deciding whether to issue an indication to a member state that it should take certain averting action pending the hearing of the application to that Court.

[26] HC 11080 - Deportation: Appeals: Written question, 14 October 2015, available at http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-09/11080/

[27] *Ibid.*

[28] FOI release 28027, Number of foreign criminals successfully appealing against deportation using Article 8 of the ECHR, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271659/28027_-__Foreign_criminals_successfully_appealed_against_deportation_16-01-2014.pdf

[29] HC 11080 - Deportation: Appeals: Written question, *supra*, and

giving a 13 per cent success rate; this is in contrast to the 602 appeals that were successful in the previous year, a 26 per cent success rate.[30]

30. Factors that may prevent or discourage appeals from abroad or that otherwise impact on access to justice are likely to include:

    a. difficulties in understanding the appeals process and completing and submitting the relevant forms without legal representation;
    b. difficulties in paying for the fees required to lodge the appeal[31] especially whilst having to prioritise paying for food and shelter on return;
    c. the difficulty of arranging and paying for legal representation and liaising with any legal representatives thereafter;
    d. difficulties in obtaining, translating and submitting evidence to the tribunal, particularly in countries without the same quality of infrastructure or services as the UK or where the evidence itself is in the UK;
    e. practical difficulties in arranging to give evidence to the tribunal via video link or by telephone;
    f. difficulties the tribunal may have in assessing the appellant's evidence, and their credibility in particular, with the appellant not physically present before them;
    g. the demoralising effect of return or removal from the UK, especially on those separated from their families or with other strong ties to the UK; and
    h. the attention that such appellants have to give to their circumstances in the country of return in respect of support, shelter, food, employment, etc.[32]

31. The Advocate General for Scotland argued before the House of Lords at Committee Stage that an appeal from overseas can be a fair and effective remedy on the basis of the 38% success rate of entry clearance appeals.[33] With respect to the Advocate General, this may be rather misleading since very few of the factors mentioned above apply in such appeals. JUSTICE would recommend that the success rate of out-of-country appeals certified under the Immigration Act 2014 would give a more reliable indication of the fairness and effectiveness of such appeals; however, to our knowledge, owing to delays in hearing such appeals, these have barely begun to be heard.

HC 14794 – Offenders: Deportation: Written question, 4 November 2015 available at http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-11-04/14794/

[30] FOI release 28027, *supra*.

[31] Currently £140 for an oral hearing, £80 for a decision on the papers. See Her Majesty's Courts and Tribunal Service Fees Guidance, First-tier Tribunal (Immigration and Asylum Chamber), available at http://hmctsformfinder.justice.gov.uk/courtfinder/forms/t495-eng.pdf

[32] For a more detailed analysis of factors that may prevent or discourage appeals from abroad or that otherwise impact on access to justice, see the Joint Council for the Welfare of Immigrants' briefing on appeals for the Immigration Bill 2015-16 House of Lords Second Reading, available at http://www.jcwi.org.uk/policy/parliamentary-briefings/immigration-bill-2015-house-lords-2nd-reading-briefing-appeals

[33] Lord Keen of Elie, Hansard, Immigration Bill 2015-16 Committee stage: House of Lords, 3 February 2016, Column 1807.

32. The Advocate General referenced the Court of Appeal's decision in the joined cases of *Kiarie* and *Byndloss*[34] in which the Court of Appeal affirmed that the Secretary of State for the Home Department was entitled to rely on the independent specialist judiciary of the Immigration Tribunal to ensure that an appeal from overseas was fair and that the process was in line with legal obligations that arose under the ECHR.[35] JUSTICE notes in response that the cases of *Kiarie* and *Bydloss* are being appealed to the Supreme Court which may well take a different view. Moreover, as the Immigration Tribunal has barely begun to hear out-of-country cases involving removals or deportations of individuals, the Court of Appeal was not in a position, on the evidence before it, to assess whether or not the judiciary could ensure sufficient fairness. Given our concerns outlined above, JUSTICE suspects that the Court of Appeal might, in time, reach a different conclusion once such appeals begin to be heard. It should also be noted that the cases of *Kiarie* and *Bydloss* concern foreign national offenders, to whom the court may be less sympathetic to, whereas this Bill proposes to extend out-of-country appeals to all immigration appeals. Finally, we note that Mr Kiarie and Mr Byndloss were legally represented; JUSTICE is even more concerned about appellants without legal representation who, as the statistical evidence cited above (paragraph 29) indicates, are being prevented or, at the very least deterred, from submitting, much less pursuing, their appeals from abroad.

33. The Solicitor General has acknowledged that "evidence about the foreign prisoner appeals is still developing".[36] JUSTICE strongly urges the Government not to extend the ambit of section 94B until its implications for access to justice are better understood. The consequences of failing to do so are very serious. The allowed appeal rate against immigration (non-asylum) decisions ranges, depending on the type of case, from between a third to just under a half of all 55,000 odd appeals heard every year.[37] Quite aside from the human impact of separating individuals with strong Article 8 ECHR claims from their families, and the impact on children in particular, to risk denying appellants with human rights appeals access to justice could, by default, lead to human rights violations by the UK in hundreds, if not thousands, of cases each year.

34. Additionally, the only legal means of challenging a certificate issued under section 94B to the effect that serious irreversible harm will not occur is by way of judicial

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[34] *R (on the application of Kiarie) v Secretary of State for the Home Department; R (on the application of Byndloss) v Secretary of State for the Home Department* [2015] EWCA Civ 1020.

[35] Lord Keen of Elie, Hansard, Immigration Bill 2015-16 Committee stage: House of Lords, 3 February 2016, Column 1808.

[36] Robert Buckland MP QC, Hansard, Immigration Bill 2015-16 Committee Debate, 11th sitting, House of Commons (5 November 2015), Column 397.

[37] Table 2.5a Tribunals and gender recognition certificate statistics quarterly: April to June 2015, available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwir6eGLoeDJAhVCURoKHS55BLwQFggrMAI&url=https%3A%2F%2Fwww.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F459589%2Fmain-tables.xlsx&usg=AFQjCNHN4Ic0hliDIIrtxchBbbM3DqCjWQ&sig2=NnHSU_U62cEyebhx7aKDqg

review. As we discuss in more detail below (paragraph 42), this is a lesser remedy than a full merits appeal.[38] We also note, in that respect, the concerns raised by the Lords Constitution Committee in respect of the limited availability of legal aid to challenge certification.[39]

35. JUSTICE is therefore concerned that, subject to judicial review, very many families with meritorious Article 8 claims will be subjected to extensive separation (with all of the hardship and disruption that that will bring) pending their being able to bring and have their appeals determined. For the reasons given above, the appeal itself may be prejudiced by the fact that it was brought from abroad, leaving the family with the ultimate prospect of indefinite separation where they might otherwise have succeeded in their appeal and not had to bear any separation at all. The impact upon children and partners in such cases, including on British citizens and EU nationals, cannot be overstated.[40]

Part 5: Support etc for certain categories of migrants

PROPOSED AMENDMENT

Page 165, line 5, at end insert –

"( ) If the Secretary of State decides not to provide support to a person, or not to continue to provide support to him or her under this section, the person may appeal to the First-tier Tribunal."

Purpose

36. To provide a right of appeal against decisions of the Home Office to refuse or discontinue support under the new section 95A to refused asylum seekers who are destitute and face a "genuine obstacle" to leaving the UK.

Briefing

37. JUSTICE supports the amendment tabled by Lord Roberts of Llandudno.[41]

38. Part 5 and schedule 8 introduce changes to the way in which refused asylum seekers and others are supported by the Home Office where they would otherwise be destitute. The proposals include the repeal of section 4 of the Immigration and

[38] See paragraph 58.

[39] House of Lords Select Committee on the Constitution, 7th Report of Session 2015–16, Immigration Bill, 11th January 2016, paragraphs 41-50.

[40] For a more detailed analysis of concerns in respect of changes to asylum support in the Bill, please refer to the Asylum Support Appeals Project's Briefing for the House of Lords Second Reading, available at http://www.asaproject.org/wp-content/uploads/2013/03/ASAP-briefing-for-2nd-reading.pdf

[41] Amendment 117 in the marshalled list of amendments, 7th March 2016.

Asylum Act 1999 ("IAA 1999") and its partial replacement, *inter alia*,[42] by a new section 95A IAA 1999 for refused asylum seekers who are currently being supported under section 95 IAA 1999[43], who would otherwise be left destitute and who face a "genuine obstacle" to leaving the UK (paragraph 9 of schedule 10).

39. JUSTICE is particularly concerned that there is no provision in the Bill for a right of appeal against a refusal to provide support under the new section 95A IAA 1999. This is likely to lead to breaches of Article 3 ECHR in individual cases, is arguably in breach of Article 6 ECHR and EU Law, and may well increase the burden on the public purse.

40. There is currently a right of appeal to the First-tier Tribunal (Asylum Support) ('AST') against a decision to refuse or discontinue section 4 support.[44] The latest statistics from the AST suggest that Home Office decisions on asylum support are often wrong, with 62 per cent of appeals received by the AST resulting in a successful outcome for the appellant.[45] JUSTICE is very concerned that denying asylum support applicants the right to challenge potentially incorrect decisions risks breaching Article 3 ECHR. By definition, individuals claiming to be entitled to asylum support will be, or will be claiming to be, destitute; they may also have additional vulnerabilities, including physical or mental health problems. With no right of appeal against an incorrect decision, refused asylum seekers who are destitute and face a genuine obstacle to leaving the UK may be left in conditions that amount to inhumane and degrading treatment under Article 3 ECHR.

41. The Minister for Immigration defended the quality of Home Office decision-making on asylum support by citing the report of the Independent Chief Inspector of Borders and Immigration as evidence that 89% of refusals were reasonably based on the evidence available at the time.[46] However, in our view, this merely reinforces the need for a right of appeal: if, despite its best efforts, Home Office asylum support decisions are often incorrect, there is evidently a need for a fuller investigation of appellants' circumstances to be carried out so as to avoid breaching Article 3 ECHR.

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[42] The Bill also enables the Home Secretary to provide, or make arrangements for the provision of, facilities for the accommodation of individuals released on immigration bail in "exceptional circumstances" (paragraph 7 of schedule 9).

[43] The restriction of section 95A support to those currently in receipt of section 95 support is not necessarily clear on the face of the Bill but is explained in guidance published by the Home Office: 'Reforming support for migrants without immigration status: the new system contained in schedules 8 and 9 to the Immigration Bill' [now schedules 10 and 11], paragraph 30, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494240/Support.pdf

[44] Under section 103 Immigration and Asylum Act 1999.

[45] From September 2014 to August 2015, the Asylum Support Tribunal received 2067 applications for appeals against a Home Office refusal of asylum support. 44 per cent were allowed by the Tribunal and 18 per cent remitted by the Tribunal (sent back to the Home Office for it to take the decision afresh) or withdrawn by the Home Office.

[46] The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Report stage: House of Commons, 1 December 2015, Column 422.

42. JUSTICE is also concerned that denying destitute asylum seekers support with no right of appeal may breach Article 6 ECHR. According to the Government's ECHR Memorandum published with the Bill:

> As regards Article 6, there is no provision for decisions refusing support under section 95A to attract a right of appeal to the Tribunal; however any decision to this effect would be susceptible to judicial review and emergency injunctive challenge where appropriate. In the context of any judicial scrutiny of the exercise of the power, the person would be entitled under Article 6 to a fair and public hearing within a reasonable time by an independent tribunal established by law.[47]

However, judicial review, which is concerned with the lawfulness of the original decision, is a lesser remedy than a full merits appeal: the court will examine whether the decision was lawful but does not proceed to hear the evidence again and make a fresh determination on the merits. In the case of decisions based on fact (i.e. whether someone is destitute and whether there are genuine obstacles preventing them from leaving the UK), rather than law, judicial review proceedings may not afford asylum support appellants a sufficient opportunity to challenge findings of fact, contrary to the requirements of Article 6 ECHR, particularly where those findings of fact turn on an assessment of the appellant's credibility.[48]

43. Similarly, JUSTICE is concerned that this may breach EU Law. Asylum seekers[49] are entitled to the benefit of the minimum standards laid down in the EU Reception Directive,[50] which includes the right to an appeal or review, at least in the last instance, before a judicial body, against any negative decision on reception conditions.[51] The right to an effective remedy is, moreover, a general principle of EU law and is enshrined in Article 47 of the EU Charter of Fundamental Rights. EU law requires those rights which it protects to be practical and effective and not merely theoretical and illusory.[52] JUSTICE believes that the removal of the right of appeal against decisions to refuse or discontinue support may deprive individuals of a practical and effective remedy, notwithstanding the theoretical possibility of successfully challenging such decisions through judicial review proceedings.

44. The Minister for Immigration stated before the House of Commons Public Bill Committee that deciding whether or not there is a "genuine obstacle" to leaving the UK is a straightforward matter of fact and that, therefore, a right of appeal "is not

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[47] European Convention on Human Rights Memorandum, paragraph 109.

[48] *Tsfayo v United Kingdom* [2006] 48 EHRR 18.

[49] Including those who have made further submissions on protection grounds: *R (on the application of ZO (Somalia) and others)* [2010] UKSC 36.

[50] Directive 2003/9/EC of the Council and Parliament of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Official Journal L 031, 06/02/2003 P. 0018 - 0025

[51] Article 21 of Directive 2003/9/EC.

[52] In accordance with ECHR law (*Airey v Ireland* (1979-80) 2 EHRR 305), pursuant to Article 52 of the EU Charter of Fundamental Rights.

needed".[53] "Genuine obstacle" is not defined in the Bill as it is to be defined in regulations[54] – a point criticised by the House of Lords Constitution Committee[55] – but we can assume that it will be given a similar meaning to that currently used to determine support under section 4 IAA 1999 in most cases, namely whether or not the refused asylum seeker is unable to leave the UK or taking all reasonable steps to do so.[56] As section 4 IAA 1999 also only applies in cases of destitution, asylum support decisions under section 95A will therefore turn on very similar considerations to many current asylum support decisions under section 4 IAA 1999 and a right of appeal against such decisions will be no less needed than it is currently.

45. The Minister of State stated in Committee that:

> Few appeals currently hinge on whether there is a genuine obstacle preventing their departure from the UK. This is because the Home Office receives few applications for support on this basis.[57]

However, with respect to the Minister, this would be scant consolation for those who fall into that category in future: their rights under Article 3 ECHR would still be breached with no right of appeal. Moreover, if the Minister is correct and appeals of refusals under section 95A will be relatively few, then extending such right to section 95A decisions would cost the public purse very little whilst being of vital importance to asylum support applicants.

46. Finally, JUSTICE is concerned that leaving judicial review as the only means of challenging refusals of section 95A support will significantly increase the caseload of an already overloaded Administrative Court[58] and result in an increased burden on the public purse. Appeals to the AST are designed to be fast, inexpensive and accessible. There has never been any legal aid for representation before the AST and its judges are well used to dealing with litigants in person. There is also no need to seek urgent interim relief because, where an individual appeals against a

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[53] The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Committee Debate, 12th sitting, House of Commons (5 November 2015), Column 422.

[54] Paragraph 9(3) of Schedule 8.

[55] House of Lords Select Committee on the Constitution, 7th Report of Session 2015–16, Immigration Bill, 11th January 2016, paragraphs 4-9.

[56] The criteria for granting support under section 4 IAA 1999 are defined in section 3 Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005: to qualify for support the individual must appear to be destitute (section 3(1)(a)) and meet one of the criteria specified in section 3(2)(a) - 3(2)(e). Sections 3(2)(a) – 3(2)(c) deal with situations where an individual is unable to leave the UK or taking all reasonable steps to leave. The remaining two alternative criteria are: that the person is judicially reviewing the refusal of the asylum claim (3(2)(d)); or that support is necessary to avoid a breach of that person's rights under the ECHR (3(2)(e)).

[57] Lord Bates, Hansard, Immigration Bill 2015-16 Committee stage: House of Lords, 3 February 2016, Column 1830.

[58] Judicial Reviews of decisions on Section 4 IAA 1999 are still currently heard by the Administrative Court (rather than being heard by the Upper Tribunal, Immigration and Asylum Chamber.) As yet, we do not know whether the same would apply to decisions under the new section 95A.

decision to discontinue support, their support automatically continues pending the outcome of the appeal. By contrast, judicial review claims can be lengthy, expensive and time-consuming. JUSTICE questions whether, in an age of austerity, shifting cases from the AST to the Administrative Court is an appropriate use of resources.

JUSTICE
March 2016