Immigration Bill 2015-16

House of Commons Committee Stage

Briefing on Selected Amendments

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Summary

JUSTICE is concerned about a number of provisions in the Bill. In this briefing we concentrate on those provisions most closely within our area of expertise. As a result, the following amendments are not exhaustive.

- **JUSTICE recommends that the offence of illegal working 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 is removed from the Bill pending an evaluation of the possibly discriminatory effects of civil sanctions introduced for the same offence.**

- **JUSTICE recommends that paragraph 1(6) of Schedule 5 is either removed or amended to require the Secretary of State to have just cause before detaining an individual granted bail by the Tribunal.**

- **JUSTICE recommends that paragraphs 2(3), 2(4), 2(5), 6(5), 6(8), 6(9) and 6(10) of Schedule 5 are removed from the Bill as they allow for decisions of the First-tier Tribunal (FTT) in respect of bail to be over-ruled by the Secretary of State.**

- **JUSTICE recommends that paragraph 3 of Schedule 5 is amended so that mandatory considerations only apply to the Secretary of State, and not the FTT, thus avoiding any attempt to tie the hands of the Tribunal.**

- **JUSTICE recommends that paragraph 3(2)(e) of Schedule 5, which requires those deciding whether to grant bail to consider whether detention is necessary in a person's interests, is removed as a mandatory consideration because of the lack of safeguards in mental health cases.**

- **JUSTICE recommends that the following are added as mandatory considerations in paragraph 3 of Schedule 5 so as to limit the scope for a bail decision breaching an individual's human rights: the impact of detention on an individual's mental health; and the effect of the individual's detention on any children or other family members who may depend on the individual.**

- **JUSTICE recommends that Part 4 is removed from the Bill 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.**

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 Commons Committee Stage debate. Where we do not comment on an issue in the Bill, this should not be read as approval.

Clause 8: Offence of illegal working

PROPOSED AMENDMENT/STAND PART DEBATE

Page 4, line 39, omit clause 8

Purpose

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

Briefing

4. 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 would be 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.

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

6. There is already the power to prosecute those who require, but do not have, leave to enter or remain in the UK.[1] 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 tax payer. However, if the underlying purpose of criminalising 'illegal working' is to seek to deter migrants without leave from coming to the UK to work through the threat of criminal sanctions, then such deterrence already exists.

7. 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

[1] Paragraph 24 Immigration Act 1971

reporting rogue employers and criminal gangs. This runs contrary to the Government's stated intention of combating labour market exploitation of vulnerable individuals,[2] and would undermine the important efforts made over recent years to address issues such as trafficking and modern-day slavery in the UK.

8. 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.[3] JUSTICE notes that the seizure of earnings in such cases may not be cost-effective.

9. 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 most migrants unlawfully present in the UK were not working or had never worked (30% and 19% respectively); of those that did work, a third received less than the minimum wage with the remainder being in the lowest paid jobs.[4] Such earnings may be vital not only to support the worker but their families as well 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 likely be greater than any earnings eventually seized.

10. Further, where the worker was engaged in a criminal activity (beyond the fact of 'illegal working') the Proceeds of Crime Act 2002 would already apply.

11. 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.

Clause 12: Offence of leasing premises

PROPOSED AMENDMENT/STAND PART DEBATE

Page 8, line 10, omit clause 12

Purpose

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

Briefing

13. Clause 12 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

[2] Home Office (2015) Immigration Bill: Explanatory Notes, published 17.09.2015, paragraphs 3-5

[3] *Ibid.*, paragraph 8

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

residential tenancy agreement to someone who is disqualified from renting by virtue of their immigration status[5] 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.

14. 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 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.

15. JUSTICE also considers the introduction of criminal sanctions to be premature. Civil sanctions introduced for the same offence under the Immigration Act 2014[6] are currently being piloted in five regions of the West Midlands and the impact of those sanctions have not yet been evaluated. Early evidence suggests that they have led to discrimination.[7] Criminal sanctions, even if said to be only targeted at rogue landlords[8] – though there is nothing in the Bill to prevent their application to all landlords – risk exacerbating the problem.

16. JUSTICE 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.

Clause 29 & Schedule 5: Immigration bail

PROPOSED AMENDMENTS/STAND PART DEBATE

Page 79, line 22, omit paragraph 1(6)

Or, in the alternative,

Page 79, line 22, insert 'for breach of bail conditions' after 'detention'

Purpose

17. To remove from the Bill the power for the Secretary of State to detain an individual granted bail by the Tribunal without just cause.

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[5] Defined in Paragraph 21, Immigration Act 2014

[6] Paragraph 23 Immigration Act 2014

[7] House of Commons Library Briefing Paper: Number SN07025 - Private landlords: duty to carry out immigration checks, published 21.09.15:
http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07025

[8] Immigration Bill 2015-16 Factsheet – Residential tenancies (clauses 12-15)

Briefing

18. Clause 29 and Schedule 5 make significant changes to the powers of the Secretary of State and the First-tier Tribunal (Immigration and Asylum Chamber) ('FTT') in relation to immigration bail.

19. JUSTICE is concerned that the proposals in Schedule 5 will have a significant effect on the ability of the FTT to provide an effective safeguard against prolonged administrative detention.

20. The Home Office and Immigration Officers have wide powers of administrative detention for immigration purposes including detention powers pending decisions on whether to grant a person leave to enter or remain, and pending removal or deportation. There is no statutory limit on the period of time for which an individual can be detained, nor any provision for the automatic judicial oversight of the use of detention.

21. There is evidence that these powers have previously been misused by the Home Office. Between 2011 and 2014 it paid out £15 million in damages for unlawful detention.[9] A recent Parliamentary Inquiry[10] was critical of the Home Office's use of these powers and made significant recommendations for reform of the system, including the introduction of a 28-day time limit on detention and a robust system for reviewing detention during the early period, including consideration being given to the introduction of automatic bail hearings.[11]

22. While the ability of detainees to apply to the FTT for bail is no substitute for a proper system of automatic judicial oversight of detention, it remains an important safeguard. JUSTICE is concerned that the proposals in Schedule 5 weakens the FTT's ability to provide such a safeguard.

23. Paragraph 1(6) of Schedule 5 provides that a grant of bail does not prevent a person's subsequent re-detention. This is a significant departure from the current provisions where bail is granted by the FTT, under which re-detention is only permissible where the individual has breached the conditions of their bail. This also seems to conflict with the provision in paragraph 8(12) of the Schedule which requires that an individual who has been arrested for a breach of bail is re-released on the same conditions if the relevant authority decides that bail has not been breached. In *Mahmood (R on the application of) v Secretary of State for the Home Department* [2006] EWHC 228 (Admin) the High Court decided that it was not

[9] The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom - A Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, p. 21
https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf

[10] *Ibid.*

[11] Part III of the Immigration and Asylum Act 1999 would have introduced a system of automatic bail hearings (1) between 8 and 10 days of detention and (2) between 33 and 38 days of detention. It was never brought into force and was repealed by the Nationality, Immigration and Asylum Act 2002.

lawful for an Immigration Officer to exercise his power to detain an individual granted bail by the Tribunal unless there had been a material change of circumstances. As it stands, paragraph 1(6) would allow the Secretary of State to effectively ignore and over-rule the decision of an independent tribunal to grant bail. If that is not the intention, then JUSTICE recommends that this be made explicit in the Bill.

PROPOSED AMENDMENTS/STAND PART DEBATE

Schedule 5, page 80, line 5, omit paragraphs 2(3), 2(4) and 2(5)
Schedule 5, page 83, line 4, omit paragraph 6(5)
Schedule 5, page 83, line 12, omit paragraphs 6(8), 6(9) and 6(10)

Purpose

24. To remove from the Bill the power for the Secretary of State to override a decision of the Tribunal with regard to electronic monitoring or residence conditions placed on immigration bail.

Briefing

25. Paragraphs 2(3), 2(4), 2(5), 6(5), 6(8), 6(9) and 6(10) of Schedule 5 allow the Secretary of State to overrule decisions by the FTT about the appropriate conditions to be imposed on a grant of bail.[12] Where the FTT decides not to impose a condition of residence or electronic monitoring, the Secretary of State will be able to reverse that decision and impose such a condition or vary such condition. The imposition of these conditions – as the Government's ECHR memorandum[13] recognises – restricts individuals' liberty, has the potential to constitute a deprivation of liberty in certain circumstances, and interferes with their rights to respect for their private and family life under Articles 5 and 8 ECHR. JUSTICE is very concerned that these provisions allow the Secretary of State to overrule the decisions of an independent tribunal and are contrary to the rule of law. As Lord Justice Neuberger put it in giving the lead judgement in *R (on the application of Evans) v Attorney-General* [2015] UKSC 21:

> *A statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law.*

[12] Paragraph 6(8) would create a similar power where the FTT decides to vary the conditions of bail.

[13] Home Office, Immigration Bill: European Convention on Human Rights Memorandum, published 17.09.15, paragraphs 87-89

PROPOSED AMENDMENT

Schedule 5, page 80, line 18, omit 'or the First Tier Tribunal'

Purpose

26. To remove from the Bill mandatory considerations for the First Tier Tribunal when determining Bail.

Briefing

27. Paragraph 3 of Schedule 5 sets out mandatory considerations for the Secretary of State or the Tribunal when determining whether to grant immigration bail to a person and the conditions to be attached thereto. JUSTICE is concerned that this would interfere with the independence of the Tribunal judiciary in the exercise of their judicial function. Case law and guidance issued by the President of the FTT have established that a wide range of considerations are relevant to the lawfulness of immigration detention. Equally, the Court of Appeal has recently deprecated attempts to deduce maximum periods of lawful detention based on the periods of time for which detention has been held unlawful in others cases, emphasising that such decisions are inherently fact sensitive.[14] While the grant of bail is not dependent on a finding that detention has become unlawful, the process of weighing up the risks attached to granting bail involves taking account of similar considerations. JUSTICE therefore recommends that any attempt to restrict the discretion of judicial decision makers should be avoided.

PROPOSED AMENDMENT

Schedule 5, page 80, line 32, omit 'in that person's interests or'

Purpose

28. To remove from the Bill the requirement to consider whether detention is in that person's interests when granting Bail.

Briefing

29. JUSTICE is concerned by the inclusion among these mandatory factors of a requirement to consider "whether the person's detention is necessary *in that person's interests* or for the protection of any other person" (paragraph 3(2)(e) of Schedule 5; emphasis added). Clinical evidence suggests that immigration detention can impact on mental health; as a result, there have been five cases in the last few years in which the High Court has held that the long-term detention of mentally ill individuals has resulted in inhuman and degrading treatment contrary

[14] *R (on the application of Fardous) v Secretary of State for the Home Department* [2015] EWCA Civ 931

to Article 3 of the European Convention on Human Rights (ECHR).[15] The careful statutory scheme of the Mental Health Act 1983 applies equally to those subject to immigration detention and enables individuals suffering from mental disorders to be detained where necessary for their own health or safety or for the protection of others. The use of immigration detention powers on the basis that it is in an individual's own interest to be detained, without any of the safeguards contained in the Mental Health Act 1983, without any time limit or judicial oversight, and without any requirement for expert assessment by mental health professionals, is likely to give rise to further breaches of Article 3 ECHR.

PROPOSED AMENDMENT

Schedule 5, page 80, line 33, delete 'and' and insert new sub-paragraphs
( ) the length of detention to date;
( ) the prospects of removal;
( ) the impact of detention on an individual's mental health;
( ) the effect of the individual's detention on any children or other family members who may depend on the individual; and

Purpose

30. To introduce additional relevant factors that decision makers are required to consider when granting Bail.

Briefing

31. In addition to our general concern about paragraph 3, JUSTICE is concerned by the overwhelming emphasis in paragraph 3(2) on factors likely to militate in favour of detention. These mandatory factors do not include consideration of the length of detention to date or the prospects of removal, both of which have been repeatedly emphasised by the courts as key considerations in the lawfulness of detention.[16] Nor is there any express reference to the impact of detention on an individual's mental health, or to the need to take account of the effect of the individual's detention on any children or other family members who may depend on the individual, both important human rights considerations.

[15] *R (on the application of S) v Secretary of State for the Home Department* [2011] EWHC 2120; *R (on the application of BA) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin); *R (on the application of HA) v Secretary of State for the Home Department* [2012] EWHC 979; *R (on the application of D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin); *R (on the application of MD) v Secretary of State for the Home Department* [2014] EWHC 2249 (Admin)

[16] *R (on the application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, approved in *R (on the application of Lumba and Mighty) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245

Part 4: Appeals

PROPOSED AMENDMENT/STAND PART DEBATE

Page 34, line 3, omit clause 31

Purpose

32. 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.

Briefing

33. Part 4 (clauses 31-33) 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".[17] Part 4 extends those provisions to *all* human rights appeals, not just of those liable to deportation.

34. 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 assessed. However, early indications are that section 94B is preventing or, at the very least deterring, appellants from pursuing their human rights appeals: over 230 foreign offenders have been removed under the existing section 94B powers; of these only 67 have lodged an appeal; over 1,200 EEA foreign nationals have been removed under similar provisions and, again, only 288 have lodged an appeal.[18]

35. Factors that may prevent or discourage appeals from abroad or that otherwise impact on access to justice are likely to include: the difficulty of arranging and paying for legal representation and liaising with any legal representatives thereafter; difficulties in obtaining, translating and submitting evidence, including medical evidence, to the tribunal, particularly in countries without the same quality of infrastructure or services as the UK; practical difficulties in arranging to give evidence to the tribunal via video link; difficulties the tribunal may have in assessing the appellant's evidence, and their credibility in particular, with the appellant not physically present before them; the demoralising effect of return or removal from the UK, especially on those with strong ties to the UK; and the attention that such

[17] The phrase is taken from that 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.

[18] Immigration Bill 2015-2016 Factsheet – Appeals (clauses 31-33), p. 2

appellants have to give to their circumstances in the country of return in respect of support, shelter, food, employment, etc.

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.[19] 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.

37. JUSTICE considers that the "serious irreversible harm" threshold is not an adequate safeguard. The European Court of Human Rights has *generally* only invoked that provision in cases raising substantial concerns for returns under Article 3 ECHR as opposed to under Article 8 ECHR. The latter category of human rights claims are far less well protected. Indeed, the Secretary of State, in her published guidance, puts the threshold for Article 8 cases that may amount to "serious irreversible harm" extremely high:

"…the person has a genuine and subsisting relationship with a child or partner who is seriously ill, requires full-time care, and there is no one else who can provide that care."[20]

Additionally, the only legal means of challenging a certificate issued under section 94B to the effect that serious irreversible ham will not occur, is by way of judicial review, which is a lesser remedy than a full merits appeal.

38. Further, removing appellants with Article 8 ECHR claims from the UK may weaken those claims. Once a person has been removed, deported or otherwise left to pursue their appeal from abroad, the fact becomes a *fait accompli*. Their very deportation, removal or return may tend against their claim when the matter finally comes before the FFT. That is because, owing to the substantial delays that are presently prevailing in the listing of appeals before the FTT, the circumstances, as regards their Article 8 connections in the UK, may already have been weakened.

39. JUSTICE is therefore concerned that, subject to judicial review, the very restrictive nature of the "serious irreversible harm" test as applied by the Secretary of State, will result in very many families with meritorious Article 8 claims being 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 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

[19] Table 2.5a Tribunals and gender recognition certificate statistics quarterly: April to June 2015

[20] https://www.gov.uk/government/publications/certification-guidance-for-non-eea-deportation-cases-section94b

to bear any separation at all. The impact upon innocent children and partners in such cases, including on those who are British citizens, cannot be overstated.

JUSTICE
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