The Immigration Bill 2015

The hostile environment

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Cover image of fencing at Calais from the UK Home Office Flickr account: https://flic.kr/p/xaDbd4

Introduction

The Immigration Bill 2015 was published on 17 September 2015. It is very much continuation of themes established by the Immigration Act 2015. If limited to two words to describe the purpose and effect of the Bill, these would be “hostile environment”. These words were initially deployed in the context of terrorism, then applied also to serious crime and now to social policy.

The accompanying press release tells us about the intentions behind the Bill and provides a summary of what the Government would like the newspapers to say about the Bill:

> *People driving a car while in the country illegally face jail and having their vehicles seized under new powers announced in today’s Immigration Bill.*
>
> *A new offence of driving while unlawfully in the UK will see anyone convicted facing a sentence of up to six months in prison and an unlimited fine in England and Wales.*
>
> *Anyone arrested for the new offence could have their car impounded and, if convicted, forfeited. Immigration Enforcement officers will have new powers to search individuals and properties and seize driving licences if they suspect someone to be here illegally.*
>
> *The provisions in the new Bill to toughen our action against those with no right to be in the UK have three main themes:*
> - *new measures cracking down on the exploitation of low-skilled workers, increasing the punishments for employing illegal migrants, and strengthening sanctions for working illegally*
> - *building on the Immigration Act 2014 to ensure that only people living lawfully in the UK can have access to UK bank accounts, driving licences and rental accommodation*
> - *increasing powers to make it easier to remove people who have no right to be in the UK…*
>
> *…The new Bill builds on this work to reduce the ‘pull’ factors that draw illegal migrants to Britain and the availability of public services which help them to remain here unlawfully.*

It includes a range of new powers to:

- *tackle illegal employment, including a new offence of illegal working*
- *stop providing support to migrants who do not return home once all claims to asylum have failed*
- *strengthen our border security*
- *ensure all public employees in customer-facing roles speak good English*
- *electronically tag those on immigration bail*
- *create a new role of Director of Labour Market Enforcement*
- *impose a new skills levy on businesses bringing migrant labour into the country so we can reduce our reliance on imported labour, and boost the skills of young people in the UK.*

There are 8 parts to the Bill and we will examine the main provisions and purposes behind each part in turn.

Part 1 – Labour market and illegal working

The "factsheet" (low on facts, high on rhetoric) tells is that part 1 of the Bill will deal with exploitation in the labour market by:

- providing a logical enforcement strategy to crack down on serious exploitation of workers by establishing a new director who will oversee the relevant enforcement agencies
- making it a criminal offence to work illegally, seizing illegal workers' earnings as the proceeds of crime
- making it easier to prosecute employers who deliberately or 'turn a blind eye' to employing illegal workers, and making sanctions tougher
- creating powers to close businesses and apply special compliance measures to employers who continue to flout the law
- ensuring that licenses for the sale of alcohol and late night refreshments are subject to compliance with immigration laws

A new Director of Labour Market Enforcement will be appointed who will oversee the relevant enforcement agencies to provide a coherent enforcement strategy for non-compliance in the labour market, including serious exploitation of workers. The Director will set the strategic direction and budgets for the three current enforcement bodies, a team in HMRC which enforces the National Minimum Wage; the Gangmasters Licensing Authority; and the Employment Agency Standards Inspectorate. The Director will also publish an annual report and find time to be

> *leading an intelligence hub, with information drawn from the enforcement bodies and beyond, to provide a single view of risk and priorities across the spectrum of non-compliance – from accidental payroll errors to serious criminality.*

Whatever that means.

Part 2 – Access to services

We are told that Part 2 of the Bill will make it harder to live and work in the UK illegally by:

- making it easier for private landlords to evict illegal migrant tenants
- creating a new criminal offence for rogue landlords, dishonest landlords and agents who exploit migrants and repeatedly fail to carry out right to rent checks
- ensuring that those unlawfully present in the UK are not able to drive
- preventing illegal migrants from retaining UK driving licences
- delivering the Prime Minster's commitment to require banks and building societies to take action against existing account holders who are unlawfully residing in the UK
- placing a duty on banks and building societies to carry out periodic checks of the immigration status of existing current account holders

Over on the excellent Nearly Legal blog (about housing law rather than anything more risqué) we find a useful explainer on the background to where we are now:

> *The Immigration Act 2014 introduced the concept of the "right to rent". In short, if you don't have a right to rent (very broadly, if you're not lawfully present in the UK), then you're disqualified from renting most residential accommodation. The penalty, however, fell on the landlord or agent, who was liable for a civil penalty (a fine, with a right of appeal).*
>
> *Given that many landlords can't even get the tenancy deposit provisions right, the prospect of requiring them to identify Zambrano carers and other immigration issues was, frankly, ludicrous. So the government announced that the 2014 Act would be introduced on a trial basis in a few local authority areas.*

Following the general election, the government returned to this topic. The Prime Minister made a speech indicating that he wanted to make it easier to evict persons unlawfully present in the UK and then we got more detail in the Queen's Speech and in a subsequent CLG/Home Office announcement. Whilst this was going on, independent research into the 2014 Act trial areas revealed that the obvious discriminatory risks inherent in the legislation had indeed come to pass.

The author goes on to look at the provisions of the new Bill:

First, new criminal offences are created (cl.12, introducing new ss. 33A-C, 2014 Act). A landlord commits an offence if (i) his property is "occupied by an adult who is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement" (i.e. an adult without a 2014 Act "right to rent"); and, (ii) the landlord knows or had reasonable cause to believe that this is so (new s.33A(1)-(3)). It appears that can be committed either through own knowledge/belief or because the Secretary of State has served a notice on the landlord, informing him that the property is so occupied (s.33(5)). It is also possible to commit this offence where a limited right to rent has expired (s.33A(7)). Similar provisions exist for agents (s.33B).

The penalty is up to five years imprisonment (on indictment, 12 months on summary conviction) and/or a fine (s.33C). Now, I accept that five years is likely to be reserved for repeat offenders, but still, WTAF?!

Secondly, we have some major reforms to the law on eviction. Clause 13 introduces new s.33D, 2014 Act. It works like this. If the Secretary of State becomes aware that a person without a right to rent occupies the property, he serves a notice on the landlord (s.33D(2)). The landlord can then serve a notice on the tenant, giving 28 days notice (s.33D(3)-(4)), bringing the tenancy to an end. That notice is enforceable as if it were an order of the High Court (s.33D(6)). The service of the notice by the Secretary of State has the effect of turning the tenancy into an excluded tenancy (s.3A, Protection from Eviction Act 1977).

For assured and Rent Act tenants mandatory grounds for possession are also introduced (s.33E).

Part 3 – Enforcement

Part 3 of the Bill will allegedly strengthen “our” immigration enforcement response by:

- creating new powers for immigration officers, including search and seizure
- delivering on the manifesto commitment to tag all foreign criminals who are not detained but awaiting deportation
- reforming the legal framework to simplify the conditions that apply to illegal migrants who are not detained

What this means in reality is giving increasingly police like powers to immigration officers but with none of the safeguards, regulation, expertise, experience or training.

A person with leave to enter arrives in at the airport. Schedule 19(1) and (2) – the first section of Part 3 – gives immigration officers the power to curtail leave, rather to simply determine whether leave has been given and act accordingly. So someone arriving in the UK even with the appropriate leave will now have a lingering uncertainty as to whether they will be allowed in. This is likely to affect few migrants, but is indicative of the greater powers given to immigration officers throughout the Bill.

The rest of schedule 19, and schedule 20, provide that immigration officers who are already lawfully on premises may search for documents which: may be evidence to curtail leave to enter or remain in the UK; might help determine whether a person has employed an illegal worker; or might help determine whether a person has leased premises to those not in the UK legally.

If they find any such documents, the Bill gives the immigration officers the power to seize and keep them as long as they have reasonable grounds to believe that the documents are needed for the purpose for which they were taken, or in dealing with an objection to the penalty imposed, or for the purposes of any legal proceedings or appeals. The power to seize information includes taking computers on which documents are stored, if those documents cannot be printed.

For these powers to kick in, the person liable to be detained must be on the premises (so there can be no searches behind the person’s back); the immigration officer must have reasonable grounds to believe that there are such documents on the premises; and the immigration officer can only search

the premises to the extent that it is reasonably required for the purpose of discovering such documents.

These provisions chime in with the general increases of powers of immigration officers to resemble police powers, especially given the ominously wide wording, “has reasonable grounds for believing”. Owing to the wide wording, a challenge to excessively disruptive searches by overzealous immigration officers would appear difficult unless the searches border on the ludicrous.

The next section of the Bill – schedules 21 to 23 – will allow immigration officers, while carrying out their immigration duties, to seize anything which they reasonably believe to have been obtained in the commission of a criminal offence – that is, stolen – or is evidence in relation to an offence, if they reasonably believe that would be necessary to prevent the items being concealed, lost, tampered with or destroyed. The Bill gives immigration officers the duty to pass this information on to the relevant police or investigative officer as soon as is reasonably practicable. If there is no such person, the items must be returned. Items seized may be retained so long as is necessary in all the circumstances, but particularly if it will be used as evidence in a criminal trial or in a criminal investigation, or, if the item was stolen, to establish its true owner.

This section makes sense in obvious cases, where there are drugs lying on a table, but most of the time it is more difficult to tell what might be evidence for an offence. Immigration officers are unlikely to have as much training as the police on evidence-gathering, and will certainly have less experience than them in deciding what might be criminal evidence. Therefore giving immigration officers these new powers is likely to result in a significant number of mistakes, where documents are seized which do not turn out to be evidence of a crime. These searches are, by their nature, likely to focus on foreign-owned small businesses and those employing migrants. The 2015 Immigration Bill adds many provisions which will function as disincentives to employ migrant labour, of which this is one. In practice, it will be disruptive to foreign-owned small businesses, the vast majority of which operate legitimately. This provision will add to the atmosphere of xenophobia which the current government is fostering.

Schedule 25 gives the Secretary of State the power to direct an officer of a detention removal centre, prison, young offender institution, or short-term holding facility to order a detainee or prisoner to hand over all the relevant nationality documents in their possession. The relevant officer may, in the

course of other search duties, also seize nationality documents, but must seek the consent of the Secretary of State to retain the document. The officer may search the person, any of the person's belongings, the person's accommodation, or any item of the person's property in the detention centre or prison. This includes a strip search, but thankfully not intimate searches (of orifices which are not the mouth). Strip searches may be carried out in front of fellow detainees of the same sex but not of the opposite sex, or in front of other officers. The statute is fatally unclear whether the officer conducting the search may be of the same sex; it is silent on this point except for stating that a strip search may not be carried out in the presence of the opposite sex.

The only limit on this power is that the Secretary of State must have reasonable grounds to believe the relevant nationality document will be found by exercising the power. While this clause prevents harassment, it is rather obvious that the Home Office would only order documents to be produced if they thought that the documents would be produced. Given how distressing handing over all your documents is, one would hope there might be more safeguards than this. If the officer finds documents, they may seize and retain them, but must pass them as quickly as possible to the Secretary of State. The Secretary of State may keep them so long as they suspect that retention of the document may facilitate the removal of the person to whom the document relates – this suspicion will be almost impossible to disprove in court. Once that suspicion has ended, the documents must be returned to the person who previously possessed them.

The final section, Schedule 30, of Part 3 of the Immigration Bill irons out an existing gap in the statutes. The current situation is that when someone with valid leave to remain breaches their conditions, for instance through fraud, or gaining employment when a condition of their leave is not to work, they will have their leave immediately curtailed, be detained, and be given notice of removal. However, this procedure does not, at the moment, apply when, after someone has applied for further leave to remain, that person has been given interim leave by operation of section 3C of the British Nationality Act 1971. That interim leave, which will be beyond the date of expiry of the original period of leave, is not currently capable of being curtailed. This section of the Bill brings that situation into line.

Part 4 – Appeals

The context to the changes proposed in the Bill is that the Immigration Act 2014 restricted appeals to either human rights grounds or refugee grounds;

these are the only two types of appeal now available, basically. However, human rights appeals will include appeals against refusal of family immigration applications and perhaps some other situations, as discussed repeatedly on this blog (as long ago as October 2013 in fact: Appeals and the Immigration Bill).

So, a “human rights claim” is no longer to be seen under the Immigration Act 2014 as a claim outside the Immigration Rules, as was the case historically under previous legislation, it also includes any situation that engages human rights including within the Immigration Rules.

Under the Immigration Bill 2015, such appeals will only be able to be brought from outside the UK. This is to be achieved by extending the certification power introduced by the Immigration Act 2014 which is currently applied only to foreign criminals. In future it will apply to all immigrants.

Example

Two students, Alfred and Betty, meet at university, fall in love and marry. Alfred is British and Betty is not. They plan to live in one of their countries and given they met in the UK decide they would like to live in the UK. All is going well. Betty is working part time as a student, as she is allowed to, and her employer will offer her more hours if Betty is allowed to work more.

Betty applies as a spouse under Appendix FM of the Immigration Rules. Her application is refused. This could be because her relationship with Alfred is said by a Home Office official to be a sham, for example, or they do not meet the income threshold, or a mistake may have been made by the Home Office in assessing the very complex documentary evidence that has to be submitted.

Under the Immigration Act 2014, Betty’s application will be treated as a human rights claim because it involves Article 8, the right to private and family life. Betty would have a right of appeal against her refusal, and the couple can both attend the immigration tribunal to try and convince a judge that their relationship is genuine.

But not any more.

Under the Immigration Bill 2015, Betty’s right of appeal could only be exercised after she has left the UK. There will still be an appeal but Betty will

not be able to attend in person to try and convince the judge, which will make it rather harder for her and Alfred to succeed. Even if she is able to win despite the additional obstacles, she will also lose her job and be separated from Alfred for the duration of the appeal. Or Alfred will also have to leave the UK with her. At the moment, appeals are taking over 18 months to be heard then several additional weeks to be determined and implemented. If they win they can then return victorious but presumably very, very bitter at what they have been put through at the start of their married lives together.

There is a good chance that many people who would have appealed and won simply will not bother; they will move abroad instead. A few extra embittered British citizens leaving with their spouses will count towards the Government's elusive net migration target.

James Broken-shire apparently says:

> *"Through the Immigration Act 2014, we introduced a 'deport first, appeal later' rule for foreign national offenders.*
>
> *"And now, through the Immigration Bill, we will remove even more illegal immigrants by extending this rule to all immigration appeals, apart from where there is a risk of serious irreversible harm."*

What Broken-shire says is inaccurate, though. The power is not being extended to "illegal immigrants", it is being extended to all immigrants, including those that have been lawfully resident up until the Home Office have rightly or wrongly refused their immigration application. This is made clear by the rest of the appeals factsheet: "We now plan to extend this power to enable it to be applied to all immigration cases." The factsheet goes on to make plain that the power will be used to separate families, including parents from children.

There is an exception. Human rights appeals cannot be certified so as to be out of country only if this would be a breach of human rights or cause "serious irreversible harm". The Home Office and immigration tribunal interpretation of this exception is exceedingly narrow. A child being separated from a parent for the duration of the appeal process is not sufficient, for example, nor is being prevented from participating in family proceedings. The Court of Appeal is considering this issue shortly.

The summary on appeals from the overall impact assessment reads:

The Bill provides that an individual may be refused entry, required to leave or removed from the UK before they can exercise a right of appeal against the refusal of a human rights claim, where this would not breach their human rights or cause a real risk of serious irreversible harm or other breach of their human rights if removed before the appeal. This change will not affect asylum claims, where existing certification powers will continue to apply if the claim has been refused and is manifestly unfounded.

Where a breach of human rights would arise or there was a real risk of serious irreversible harm if any appeal had to be lodged from overseas, this new power could not be used to require individuals to depart from the UK before their appeal had been determined.

This change will create more opportunities for prompt removals in human rights cases. Individuals whose case is certified will be liable to removal soon after the refusal decision is made. This will reduce detention costs. There will be an increased incentive to cooperate with removal in order to access the right of appeal where this is only available from overseas. The absence of an in-country right of appeal will remove the opportunity to exploit the appeal process to extend the individual's stay in the UK, and remove the scope for existing human rights to be strengthened or additional rights accumulated while awaiting the outcome of that in-country appeal.

To achieve this, the actual change to the legislation itself is fairly minor. Basically, the new section 94B that was inserted by the Immigration Act 2014 into the Nationality, Immigration and Asylum Act 2002 is amended to omit the words "made by persons liable to deportation". It will in future read (new words in bold):

94B Appeal from within the United Kingdom: certification of human rights claims ~~made by persons liable to deportation~~

(1) This section applies where a human rights claim has been made by a person ("P") ~~who is liable to deportation under—~~

~~(a) section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good), or~~

~~(b) section 3(6) of that Act (court recommending deportation following conviction).~~

(2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, ~~removal of P to the country or territory to which P is proposed to be removed~~ ***refusing P entry to, removing P from or requiring P to leave the United Kingdom****, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).*

(3) The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if ~~removed to the country or territory to which P is proposed to be removed~~ ***refusing P entry to, removing P from or requiring P to leave the United Kingdom****.*

There is a consequential amendment to section 92(3)(a) as well.

Given that the immigration tribunal remains utterly impervious to modern means of communication, such as emails or Skype and video link evidence, it is hard to imagine that these new out of country appeals will allow for a fair trial of the issues, never mind the huge disruption they will cause to the lives of those affected, who will have to endure the long delays involved in immigration appeals.

Part 5 – Support for certain categories of migrant

This is what the Government tells us about Part 5:

Part 5 of the Bill redresses an imbalance between failed asylum seekers, who can and should leave the UK, and other categories of illegal migrant by removing the support that is currently available to failed asylum seekers but not to others who similarly have no right to be in the UK.

Safeguards are also put in place through these measures to prevent them impacting disproportionately on the vulnerable, or those who genuinely cannot leave the UK.

Contrast that with ILPA's initial analysis:

The Bill seeks to repeal section 4 of the Immigration and Asylum Act 1999 and replace this with a new section 95A of the Immigration and Asylum Act 1999 limited to providing support to failed asylum seekers who can show that they are destitute and that there is a genuine obstacle to removal. The Bill leaves the detail of what will be considered a genuine obstacle to removal and how support will be provided to the Home Office to determine in regulations. There would also be no right of appeal against decisions to refuse or discontinue support under this section.

Families with children who reach the end of the asylum process would no longer qualify for support under section 95 of the Immigration and Asylum Act 1999. This means they will be unable to access support if they do not meet the criteria of the new section 95A provision.

Support under section 95 Immigration and Asylum Act 1999 would be extended to those who lodge further submissions, however this only protects those making further submissions on refugee and humanitarian protection grounds and only if these have not been considered by the Home Office within a specified timeframe.

Part 6 – Border security

Part 6 of the Bill strengthens border control and security by conferring new powers and imposing new penalties.

Border Force are granted new powers to target people smugglers in UK territorial waters. These powers will include powers to:

- stop, board, divert and detain a vessel where there are reasonable grounds to suspect that it is being used to facilitate the breach of immigration law or is being used in connection with such facilitation;
- search a ship and anyone and anything on the ship to obtain information or evidence of the facilitation offence;
- arrest of any person reasonably suspected of being guilty of an offence of facilitation and seize relevant information or evidence;
- use reasonable force in the exercise of any of these powers or functions.

Airlines and airports will be encouraged to present arriving passengers to immigration control by imposing a new type of civil penalty for airlines or

airport operators who fail to direct passengers to immigration control. Apparently as many as *1,000 people* got lost at airports in this way last year. Given that over 241 million passengers passed through UK airports in 2014, this might not be considered *that* serious a problem. It is 0.000004%.

The detail of the scheme will be in secondary legislation and codes of practice, including the maximum penalty that can be imposed.

International travel bans will be automatically applied. Essentially, this will bypass the need to update the Immigration (Designation of Travel Bans) Order 2000 if a travel ban is imposed on an individual by either the United Nations' Security Council or by the Council of the European Union.

Part 7 – Language requirements for public sector workers

Part 7 of the Bill will apparently ensure there is no language barrier to British Citizens accessing public services by delivering the manifesto commitment to make sure those public sector workers who have customer facing roles can speak fluent English.

This will allegedly be achieved by imposing a code of practice for public sector employers, such as the NHS, the police and state- funded schools, setting out minimum standards of English for staff.

The level at which the English language requirement will be set is to be determined by regulations and is not revealed in the various "factsheets" and so forth. However, on 2 August 2015 at the height of the panic during the summer about refugees trying to enter the UK via Calais, this press release was published suggesting the level would be a C grade at GCSE:

> *New legislation requiring every public sector worker employed in a public-facing role to speak fluent English will be introduced in September, Cabinet Office Minister Matt Hancock confirmed today.*
>
> *This will mean that all public sector organisations must ensure that staff can communicate effectively with the public, to what is expected to be at least 'level 2' – equivalent to a C or above at GCSE.*

This requirement would increase depending on the nature of the role and profession. Doctors, for example, are already required to have a much higher level of English.

Organisations including the NHS, armed forces and state-funded schools will all be bound by a new code of practice which will be produced following a consultation in the autumn. The legislation and code of practice will apply to both existing and new employees working in public-facing roles.

Minister for the Cabinet Office Matt Hancock said:

> *"We are controlling immigration for the benefit of all hard-working people. That includes making sure that foreign nationals employed in customer-facing public sector roles are able to speak a high standard of English.*
>
> *We have already introduced tough new language requirements for migrants, now we will introduce new legislation in the forthcoming Immigration Bill to deliver the commitment made by the Prime Minister to go further."*

The government has already legislated to allow some health regulators to ask for evidence of English language competence from applicants trained in the EU who apply for registration with them, to work as healthcare professionals in the UK.

Primary legislation will be passed to extend this kind of language control to every public sector worker in a customer facing role. This will include police officers, social workers, teaching staff and assistants, Jobcentre Plus workers and local government employees.

This will be the first time there has been a co-ordinated approach to enforcing fluent English across the public sector and will create a consistent experience for taxpayers, while promoting integration and British values in the United Kingdom.

Given that the pass rate for GCSE English at grade C was 65.4% in 2015, this appears to mean that around a third of the population will be ineligible for public facing roles in public service.

Part 8 – Fees and charges

Part 8 of the Bill reduces demand for migrant labour in jobs that can be filled by domestic workers and consolidates charging arrangements for Home Office services by:

- introducing an immigration skills charge for employers who preferentially employed skilled migrants
- enabling civil registration to become financially self-supporting through fees, rather than relying on central government funding
- allowing the Registrar General to receive funding, from the registrars and superintendent registrars, for the services they currently provide for free
- maximising the flexibility of the passport fees framework to allow for cross-subsidy and over-cost recovery powers, while keeping down the cost of a standard passport application

This basically means more fees more often for more services. We get a glimpse into the thinking here with the factsheet:

> *Existing legislation governing the registration of births, deaths, marriages and civil partnerships is restrictive in terms of the products and services for which fees may be charged*.

The level at which the "immigration skills charge" will be subject to consultation before being imposed. Even the approximate level is completely unknown but it is likely to be punitive, as was the "immigration health surcharge". As observed recently by *The Economist*, these charges are part of a trend towards stealth taxation: *Paytriotism: Becoming British is a costly business* (16 April 2015).