Immigration Bill 2015-16

Briefing for House of Commons Second Reading

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Summary

The Immigration Bill 2015-16 received its first reading on 17th September, 2015. According to the Explanatory Notes published alongside the Bill, the purpose of the Bill is to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom.[1] The Bill contains a number of measures aimed at combatting illegal working and restricting access to services for irregular migrants, extends the enforcement powers of immigration officers, detainee custody officers, prison officers and prisoner custody officers as well as making changes to the appeals system, immigration bail and asylum support.

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 recommendations are not exhaustive and the Bill as a whole may require revisiting.

- **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 paragraphs 1(6), 2(3) and 2(4) 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 Home Office. JUSTICE further recommends that paragraph 3 of Schedule 5 is amended such that mandatory considerations only apply to the Secretary of State, and not the FTT, thus avoiding any attempt to fetter the discretion of the FTT. We also recommend that paragraph 3(2)(e) is removed as a mandatory consideration – because of the lack of safeguards in mental health cases – and that the following are added as mandatory considerations 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; the effect of the individual's detention on any children or other family members who may depend on the individual.**

- **JUSTICE recommends that the enforcement powers contained in Parts 2 and 3 of the Bill are removed pending an examination of how existing enforcement powers are used and that, where the Government concludes**

[1] Home Office (2015) Immigration Bill: Explanatory Notes, published 17.09.2015, paragraph 2 http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0074/en/15074en.pdf

that additional powers are needed, the case is put to Parliament for each additional power sought.

- **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. JUSTICE has for many years produced briefings and consultation responses on proposed asylum and immigration laws and policies and their interaction with domestic and international human rights law. In recent years we briefed Parliament on the Bills that became the Borders, Immigration and Citizenship Act 2009, the Criminal Justice and Immigration Act 2008 and the Immigration Act 2014.

4. This briefing sets out JUSTICE's initial response to the Bill.[2] As a result of the short Parliamentary time-table and the length of the Bill, JUSTICE has not been able to comment on each and every proposal which may be of concern. We also limit our comments to our areas of expertise. However, we note the concerns expressed by others including: the power to evict tenants without recourse to the courts;[3] changes to asylum support;[4] and the closure or freezing of bank account.[5] Silence on a specific provision, therefore, should not be read as approval.

Clause 8: Offence of illegal working

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.[6] 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

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[2] We acknowledge and are grateful to Alison Pickup of Doughty Street Chambers and Duran Seddon of Garden Court Chambers for their assistance in the preparation of this briefing.

[3] See, for example, the response by Shelter: http://blog.shelter.org.uk/2015/09/the-governments-new-immigration-bill-even-more-bad-news-for-renters-and-landlords/

[4] See, for example, the response by the Immigration Law Practitioner's Association: http://www.ilpa.org.uk/resources.php/31432/immigration-bill-2015-ilpa-briefing-for-second-reading-13-october

[5] *Ibid.*

[6] Paragraph 24 Immigration Act 1971

migrants without leave from coming to the UK to work through the threat of criminal sanctions, then such deterrence already exists.

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,[7] 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.[8] JUSTICE notes that the seizure of earnings in such cases may not be cost-effective.

10. 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.[9] 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 generally be greater than any earnings eventually seized.

11. 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.

12. 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

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 residential tenancy agreement to someone who is disqualified from renting by

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

[8] *Ibid.*, paragraph 8

[9] 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

virtue of their immigration status[10] 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[11] 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.[12] Criminal sanctions, even if said to be only targeted at rogue landlords[13] – 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

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

18. 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.

19. 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

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[10] Defined in Paragraph 21, Immigration Act 2014

[11] Paragraph 23 Immigration Act 2014

[12] 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

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

can be detained, nor any provision for the automatic judicial oversight of the use of detention.

20. 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.[14] A recent Parliamentary Inquiry [15] 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.[16]

21. 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.

22. 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 lawful for an Immigration Officer to exercise his power to re-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 Home Office 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.

23. Paragraphs 2(3) and 2(4) of Schedule 5 allow the Home Office to overrule decisions by the FTT about the appropriate conditions to be imposed on a grant of bail.[17] Where the FTT decides not to impose a condition of residence or electronic monitoring, the Home Office will be able to reverse that decision and impose such a condition. The imposition of these conditions – as the Government's ECHR

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[14] 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

[15] *Ibid.*

[16] 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.

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

memorandum[18] 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 Home Office to overrule the decisions of an independent tribunal and are contrary to the rule of law.

24. 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.[19] 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.

25. In addition to this 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.[20] 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.

26. JUSTICE is also 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 a number of 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 to Article 3 of the European Convention on Human Rights

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

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

[20] *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

(ECHR).[21] 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.

Part 3: Enforcement

27. Part 3 of the Bill (and some of the provisions made under Part 2: Access to Services)[22] significantly extend the enforcement powers held by immigration officers, in particular their powers to enter and search premises, to search individuals, and to seize and retain documents. In addition it confers on detainee custody officers, prison officers and prisoner custody officers powers to search for, seize and retain "relevant nationality documents", broadly defined as "a document which might (a) establish a person's identity, nationality or citizenship or (b) indicate the place from which a person has travelled to the United Kingdom or to which a person is proposing to go".[23] Detainee custody officers are allowed to carry out strip searches for this purpose.

28. The new powers given to immigration officers include powers:

    a. to enter premises to search for a UK driving licence if they reasonably suspect a person not lawfully resident in the UK has such a driving licence;[24]
    b. where already lawfully on premises, to search for documents which "may be evidence of a ground on which the person's leave to enter or remain in the United Kingdom may be curtailed";[25]
    c. to search for documents which might assist in determining liability for civil penalties for employing illegal workers or breaching the right to rent provisions;[26] and

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[21] *E.g. 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 S) v Secretary of State for the Home Department* [2014] EWHC 50; *R (on the application of MD) v Secretary of State for the Home Department* [2014] EWHC 2249 (Admin)

[22] Clause 16 creates a power to search for driving licences.

[23] Clause 24(15). Immigration Officers already have the power to search for such documents in property occupied by individuals arrested or detained under Schedule 2 of the Immigration Act 1971; and on the person of such individuals who have been arrested or detained, or who are held in custody in a police station: see paragraphs 25A-C of Schedule 2 Immigration Act 1971.

[24] Clause 16.

[25] Clause 19, inserting a new paragraph 15A into Schedule 2.

[26] Clause 20. According to the Explanatory Notes this is intended to involve "typically" searching for "evidence of illegal working such as pay slips or time sheets, and evidence of illegal renting such as tenancy agreements and letting paperwork".

d. to seize anything which has been obtained in consequence of the commission of an offence in order to prevent it being concealed, lost, damaged, altered or destroyed.[27]

29. JUSTICE is concerned about the extent of the powers conferred by the Bill on immigration officers, detainee custody officers, prison officers and prisoner custody officers. These are not part of the regular police force, are not trained to the same degree nor supervised accordingly. For example, the power granted to immigration officers to enter and search premises without a search warrant solely because they have "reasonable grounds to believe" that a person in the premises is in possession of a driving licence and is not lawfully resident in the UK is a significant, and arguably disproportionate extension of their current powers. Given concerns about the Home Office's ability to accurately identify who is and is not lawfully resident in the UK, [28] there are obvious risks to both British citizens and legal migrants, as well as to illegal migrants, that their right to respect for their private and family life and their home under Article 8 ECHR will be breached.

30. Also of concern are the broadly defined categories of documents for which immigration officers, detainee custody officers, prison officers and prisoner custody officers are empowered to search. While the powers of immigration officers to search for and seize these documents include the safeguard that they must not seize documents which they have reason to believe are legally privileged, there is no such safeguard in connection with searches by detainee custody officers, prison officers and prisoner custody officers for relevant nationality documents, or their seizure.[29] Although the Secretary of State is required to return documents seized by detainee custody officers, prison officers and prisoner custody officers for this purpose if they think it appropriate, there is nothing on the face of the statute requiring them to return such documents if they appear to be legally privileged. This absence of safeguards for legally privileged documents in the possession of detainees is a cause for serious concern and is likely to impede the fundamental right of access to justice.[30]

31. JUSTICE recommends that before such powers are conferred *en masse*, the Government examines how existing powers are being used and makes the case before Parliament for each additional power sought.

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[27] Clause 21. The Explanatory Notes makes clear that this is a significant extension of immigration officers' powers enabling non-PACE trained officers to seize material relevant to non-immigration related criminal offences.

[28] See, for example, the report by John Vine, the then Independent Chief Inspector of Borders and Immigration: 'An Inspection of Overstayers: How the Home Office handles the cases of individuals with no right to stay in the UK,' (May – June 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387908/Overstayers_Report_FINAL__web_.pdf

[29] Compare clauses 24-25 with the safeguards in paragraphs 25A(8) and 25B(8) of Schedule 2 of the Immigration Act 1971

[30] See, for example, Campbell v United Kingdom (1993) 15 EHRR 137 and *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26

Part 4: Appeals

32. 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".[31] Part 4 extends those provisions to *all* human rights appeals, not just of those liable to deportation.

33. 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.[32]

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

35. The lawfulness of the operation of section 94B is currently being considered by the Court of Appeal in two cases brought by individuals facing deportation.[33] Extending the ambit of the "deport first, appeal later" rule whilst the litigation is pending is premature. However, irrespective of the outcome of those cases, JUSTICE strongly urges the Government not to extend the ambit of section 94B until its

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[31] 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.

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

[33] C4/2015/0213 *R on the application of Byndloss -v- Secretary of State for the Home Department* [2015] and C2/2015/1004 *R on the application of Kiarie -v- Secretary of State for the Home Department* [2015]

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.[34] 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.

36. 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." [35]

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.

37. 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.

38. 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 to bear any separation at all. The impact upon innocent children and partners in such cases cannot be overstated.

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

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