



Immigration Bill 2015-16

Briefing for House of Lords Second Reading

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Summary

The Immigration Bill 2015-16 will receive its second reading in the Lords on 22nd December 2015. According to the Explanatory Notes published alongside the Bill in the Commons, 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 a full and comprehensive evaluation of the possible discriminatory effects of civil sanctions introduced for the same offence.**
- **JUSTICE recommends that paragraph 1(6) of schedule 7 is amended and paragraphs 2(3), 2(4), 2(5), 6(5), 6(8), 6(9) and 6(10) of schedule 7 are removed from the Bill or amended as they allow for decisions of the First-tier Tribunal in respect of bail to be overruled by the Home Office.**
- **JUSTICE recommends that paragraph 3(2)(e) of schedule 7 is amended because of the lack of safeguards in mental health cases, and that the following mandatory considerations are inserted in paragraph 3(2) of schedule 7 so as to limit the scope for bail decisions breaching individuals' 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 proposal to extend the 'deport first, appeal later' powers to all human rights based immigration appeals is removed from the Bill pending a thorough evaluation of the extent to which requiring**

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

appellants to appeal from abroad denies appellants access to justice and breaches their human rights.

- **JUSTICE cautions that, in changing asylum support arrangements, the Bill will lead to asylum support applicants being left destitute. We recommend that the Bill provides for a right of appeal against any refusal of asylum support for refused asylum seekers who are destitute and face a “genuine obstacle” to leaving the UK and, in the case of those making further submissions in respect of a claim for protection, does not withhold support for prescribed periods.**

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.
3. This briefing sets out JUSTICE’s initial response to the Bill. We limit our comments to our areas of expertise. However, we note the concerns expressed by others including, for instance, the power to evict tenants without recourse to the courts.² Silence on a specific provision, therefore, should not be read as approval.

Clause 8: Offence of illegal working

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 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.
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.³ 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’ in the Bill 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

² See, for example, concerns expressed by Shelter and the Residential Landlord’s Association, summarised in the House of Commons Library Briefing Paper Number 07304, 6 October 2015: Immigration Bill [Bill 74 of 2016-16], pp. 22-26, available at <http://researchbriefings.files.parliament.uk/documents/CBP-7304/CBP-7304.pdf>

³ Paragraph 24 Immigration Act 1971.

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.

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 2002.⁵ 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.
9. Further, we note that where the worker was engaged in a criminal activity (beyond the fact of 'illegal working') the Proceeds of Crime Act 2002 would already apply.
10. Finally, 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.
11. The Minister has stated in the House of Commons at Report Stage:

The Government would not want to prosecute those who have been forced to travel here and exploited for the profit of others, which goes to the heart of the matter. That is why the offence is not aimed at the victims of modern slavery. The statutory defence in section 45 of the Modern Slavery Act 2015 will apply.⁷

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.

⁴ Home Office (2015) Immigration Bill: Explanatory Notes, published 17.09.2015, 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

⁷ The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Report stage: House of Commons, 1 December 2015, Column 208.

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 13: Offence of leasing premises

13. Clause 13 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 virtue of their immigration status⁸ 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 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.

15. JUSTICE also considers the introduction of criminal sanctions to be premature. The civil sanctions introduced for the same offence under the Immigration Act 2014⁹ have only recently been piloted in five regions of the West Midlands and their effect is not yet fully understood. The Home Office has published its evaluation of the pilot¹⁰ but, despite being described by the Minister as “extensive”,¹¹ it is based on a very small and, in parts, unrepresentative sample.^{12 13} Further, although the Minister has claimed that the evaluation found “no hard evidence of discrimination”,¹⁴ it did uncover evidence of discrimination, with 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

⁸ Defined in Paragraph 21, Immigration Act 2014.

⁹ Paragraph 23 Immigration Act 2014.

¹⁰ 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

¹¹ The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Report stage: House of Commons, 1 December 2015, Column 207.

¹² For example, of the 68 tenants surveyed, 60 were students (see Evaluation of the Right to Rent scheme, supra, top of page 38).

¹³ 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, pp.7-10, available at <http://www.jcwi.org.uk/policy/parliamentary-briefings/immigration-bill-2015-house-lords-2nd-reading-briefing-access>

¹⁴ The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Report stage: House of Commons, 1 December 2015, Column 207.

groups indicating a potential for discrimination.¹⁵ To this should be added the evidence from the research conducted by the Joint Council for the Welfare of Immigrants, which suggests that the civil sanctions have led to discrimination.¹⁶ Criminal sanctions, as contained in clause 13, risk exacerbating any discrimination resulting from the existing civil sanctions.

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 32 & Schedule 7: Immigration bail

17. Clause 32 and schedule 7 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 7 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 can be detained, nor any provision for 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.¹⁷ A recent Parliamentary Inquiry¹⁸ 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.
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

¹⁵ Evaluation of the Right to Rent scheme, *supra*, bottom of page 5.

¹⁶ 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, pp.4-6, available at <http://www.jcwi.org.uk/policy/parliamentary-briefings/immigration-bill-2015-house-lords-2nd-reading-briefing-access>

¹⁷ 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, available at <https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf>

¹⁸ *Ibid.*

safeguard. JUSTICE is concerned that the proposals in schedule 7 weaken the FTT's ability to provide such a safeguard.

22. Paragraph 1(6) of schedule 7 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, if bail is granted by the FTT, 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 *R (on the application of S) 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 overrule the decision of an independent tribunal to grant bail.
23. The Minister stated before the House of Commons Public Bill Committee that the power to re-detain an individual under paragraph 1(6) of schedule 7 "is about ensuring that detention is still available as an option when an individual is on bail and there is a change of circumstances in their case."¹⁹ JUSTICE acknowledges that there are material changes of circumstances that may justify re-detaining an individual granted bail by the FTT. Such was the case in the case of *S v Secretary of State for the Home Department*, where detention was lawful in order to facilitate the claimant's earlier removal, the date of the flight removing him from the UK having been brought forward after he was granted bail by the FTT. Paragraph 1(6) of schedule 7 therefore needs amending so as to preserve the power of the Secretary of State to re-detain individuals in such circumstances whilst limiting her power to ignore and overrule decisions of the FTT.
24. Paragraphs 2(3), 2(4), 2(5), 6(5), 6(8), 6(9) and 6(10) of schedule 7 allow the Secretary of State to overrule decisions by the FTT about the appropriate conditions to be imposed on a grant of bail. 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 Memorandum'²⁰ 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 of the European Convention on Human Rights ('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. As Lord

¹⁹ The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Committee Debate, 10th sitting, House of Commons (3 November 2015), Column 365.

²⁰ Home Office, Immigration Bill: European Convention on Human Rights Memorandum, published 17.09.15, paragraphs 87-89.

Neuberger put it in giving the lead judgment in *R (on the application of Evans) v Attorney-General*:

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.²¹

25. The Minister has defended these provisions on the basis that the Secretary of State would only overrule decisions of the FTT where the latter had declined to impose a condition of residence or of electronic monitoring and that he expects the power to very rarely used “as the tribunal would normally impose a residence condition or tag when one is requested.”²² JUSTICE is concerned that the powers sought are therefore specifically aimed at overruling decisions of the FTT not to impose such conditions when these are requested. The supposition that the powers sought will be used “very rarely” does nothing to address the concern that they would be exercised contrary to the rule of law.
26. Paragraph 3 of schedule 7 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 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.²³ Nor is there any express reference to the impact of detention on an individual’s mental health, nor 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 of which are important human rights considerations.
27. 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 7, emphasis added). In 2010, the High Court found such an approach to be unlawful:

The use of immigration detention to protect a person from themselves, however laudable, is an improper purpose. The purpose of the power of immigration detention, as established in *Hardial Singh* and subsequent authorities, is the purpose of removal. The power cannot be used to detain

²¹ *R (on the application of Evans) v Attorney-General* [2015] UKSC 21, paragraph 51.

²² The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Committee Debate, 10th sitting, House of Commons (3 November 2015), Column 366.

²³ *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.

a person to prevent, as in this case, a person's suicide. In any event, it is unnecessary to use immigration detention for this purpose since there are alternative statutory schemes available under section 48 of the Mental Health Act 1948 or under the Mental Health Act 1983.²⁴

This analysis was endorsed by the Court of Appeal in 2011, and again in 2014.²⁵

28. There have also 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 amounted to inhuman and degrading treatment contrary to Article 3 ECHR.²⁶ JUSTICE considers that the use of immigration detention powers on the basis that it is in an individual's own interests 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.
29. We recognise that there may be circumstances where a decision to detain "in that person's interests" is unrelated to mental health issues. At the House of Commons Public Bill Committee Stage, the Minister gave the following examples:

For example, it may be necessary and appropriate in exceptional circumstances to maintain a short period of immigration detention when an individual is to be transferred to local authority care where otherwise they would be released on to the streets with no support and care. It may also be necessary for safeguarding reasons; for example, if an unaccompanied child arrives at a port, especially late at night, and there is uncertainty over whether there are any complicating factors.²⁷

However, JUSTICE is concerned that paragraph 3(2)(e) of Schedule 7 is, at present, too broadly drafted so as to permit detention purely on the basis of an individual's state of mind. We therefore recommend that the power be limited to instances where short-term detention is legitimately necessary (e.g. for the protection of minors or vulnerable adults pending more suitable arrangements.)

²⁴ *R (on the application of AA) v Secretary of State for the Home Department* [2010] EWHC 2265 (Admin) at paragraph 40.

²⁵ *R (on the application of OM acting by her litigation friend, the Official Solicitor) v Secretary of State for the Home Department* [2011] EWCA Civ 909 at paragraph 32 and *R (on the application of Das) v Secretary of State for the Home Department* [2014] EWCA Civ 45 at paragraph 68.

²⁶ 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 MD) v Secretary of State for the Home Department* [2014] EWHC 2249 (Admin).

²⁷ The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Committee Debate, 10th sitting, House of Commons (3 November 2015), Column 362.

Clause 34: Certification of human rights claims

30. Clause 34 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”.²⁸ Clause 34 extends those provisions to *all* human rights appeals, not just the appeals of those liable to deportation.

31. 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: from July 2014 to August 2015, more than 1,700 foreign national offenders were removed under the ‘deport first, appeal later’ powers;²⁹ of these, only 426 appealed (25 per cent) against their deportation,³⁰ a marked drop from the 2,329 who appealed in the previous year (to April 2013);³¹ of the 426 out-of-country appeals, 102 appeals were determined, 13 allowed and 89 dismissed,³² giving a 13 per cent success rate, half the success rate of (in-country) appeals determined in the previous year.³³

32. Factors that may prevent or discourage appeals from abroad or that otherwise impact on access to justice are likely to include: difficulties in understanding the appeals process and completing and submitting the relevant forms without legal representation; the difficulty of arranging and paying for legal representation and liaising with any legal representatives thereafter; 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; practical difficulties in arranging to give evidence to the tribunal via video link;

²⁸ 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.

²⁹ 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/>

³⁰ *Ibid.*

³¹ 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

³² HC 11080 - Deportation: Appeals: Written question, *supra*, and 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/>

³³ FOI release 28027, *supra*.

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 separated from their families or with other 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.³⁴

33. The Solicitor General has acknowledged that "evidence about the foreign prisoner appeals is still developing".³⁵ 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.³⁶ Quite aside from the human impact of separating individuals with strong Article 8 ECHR claims from their families, 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. 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.³⁷

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.

³⁴ 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>

³⁵ Robert Buckland MP QC, Hansard, Immigration Bill 2015-16 Committee Debate, 11th sitting, House of Commons (5 November 2015), Column 397.

³⁶ 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&usq=AFQjCNHN4lc0hiDIrtxchBbbM3DqCjWQ&sig2=NnHSU_U62cEyebhx7aKDqg

³⁷ Home Office, Certification guidance for non-EEA deportation cases: section 94B, published 30.10.15, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472596/Section_94B_Guidance_-_Non-EEA-30_October.pdf

35. 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.
36. 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 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 innocent children and partners in such cases cannot be overstated.³⁸

Part 5: Support etc for certain categories of migrants

37. 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 Asylum Act 1999 (“IAA 1999”) and its replacement, *inter alia*,³⁹ by:
- a new section 95A IAA 1999 for refused asylum seekers who are destitute and face a “genuine obstacle” to leaving the UK (paragraph 9 of schedule 8); and
 - extending support under section 95 IAA 1999 to refused asylum seekers who make further submissions in respect of a claim for protection which are not determined within a specified period (to be prescribed) (paragraph 3 of schedule 8).
38. In respect of the latter, JUSTICE is concerned that limiting support to those cases where the submissions have not been decided within a prescribed period, runs a serious risk of violating Article 3 ECHR. In *R (MK and AH) v SSHD*,⁴⁰ the High Court found that a previous Home Office policy of deferring decisions on whether to grant support under section 4 IAA 1999 for a minimum of 15 working days while

³⁸ See, for example, the report of the Children’s Commissioner on the impact on children of separation as a result of the Immigration Rules income requirements introduced in July 2012, available at <http://www.childrenscommissioner.gov.uk/sites/default/files/publications/SkypeFamilies-CCO.pdf>

³⁹ 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 7).

⁴⁰ *R (MK and AH) v SSHD and Refugee Action* [2012] EWHC 1896 (Admin).

it considered any further submissions was unlawful because it created an unacceptable risk of breaches of Article 3 ECHR by subjecting those concerned to periods of street homelessness and destitution. JUSTICE is concerned that, by denying support to refused asylum seekers who make further representations unless and until a prescribed period has elapsed, the measures in paragraph 3 of schedule 8 of the Bill will create a similarly unacceptable risk of breaches of Article 3 ECHR.

39. In respect of paragraph 9 of schedule 8, JUSTICE is seriously 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.⁴¹ 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.⁴² 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, destitute refused asylum seekers who 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 has defended the performance of the Home Office 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.⁴³ However, in our view, this merely reinforces the need for a right of appeal to allow a fuller investigation of the appellant's circumstances to be carried out and thereby avoid breaching their rights under Article 3 ECHR.
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

⁴¹ Under section 103 Immigration and Asylum Act 1999.

⁴² 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.

⁴³ The Rt Hon James Brokenshire MP, Hansard, Immigration Bill 2015-16 Report stage: House of Commons, 1 December 2015, Column 422.

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.⁴⁴

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.⁴⁵

43. Similarly, JUSTICE is concerned that this may breach EU Law. Asylum seekers⁴⁶ are entitled to the benefit of the minimum standards laid down in the EU Reception Directive,⁴⁷ 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.⁴⁸ 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.⁴⁹ 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. 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 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 decision to discontinue support, their support automatically continues pending the outcome of the appeal. By contrast, judicial review claims are 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.

⁴⁴ European Convention on Human Rights Memorandum, paragraph 109.

⁴⁵ *Tsfayo v United Kingdom* [2006] 48 EHRR 18.

⁴⁶ Including those who have made further submissions on protection grounds: *R (on the application of ZO (Somalia) and others)* [2010] UKSC 36.

⁴⁷ 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

⁴⁸ Article 21 of Directive 2003/9/EC.

⁴⁹ In accordance with ECHR law (*Airey v Ireland* (1979-80) 2 EHRR 305), pursuant to Article 52 of the EU Charter of Fundamental Rights.

