



House of Lords  
House of Commons  
Joint Committee on  
Human Rights

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# Asylum and Immigration (Treatment of Claimants, etc.) Bill

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**Fifth Report of Session 2003–04**

*Report, together with formal minutes and  
appendices*

*Ordered by The House of Lords to be printed 2 February 2004  
Ordered by The House of Commons to be printed 2 February  
2004*

**HL Paper 35  
HC 304**

Published on 10 February 2004 by authority of the House of Lords and  
the House of Commons London: The Stationery Office Limited  
£0.00

## JOINT COMMITTEE ON HUMAN RIGHTS

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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### Current Staff

The current staff of the Committee are: Paul Evans (Commons Clerk), Ian Mackley (Lords Clerk), Professor David Feldman (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

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## Summary

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The Committee reported on its initial consideration of the Asylum and Immigration (Treatment of Claimants, etc.) Bill in its Third Report of this Session. It now reports on its further consideration of the Bill in the light of the Government's response to the questions set out in the letter published as Appendix 1 to the Third Report. This Report refers to the Bill as amended in Standing Committee B in the House of Commons. It draws the attention of each House to the following matters:

### *In relation to clause 2:*

The Committee welcomes the Government's statement that it is considering whether any amendment is necessary to ensure that those who fall within the protection of Article 31 of the Refugee Convention, and who do have proper and justifiable reasons for arriving without a document, are not penalised (paragraphs 6–14).

The Committee considers that carriers should be required to inform travellers before embarkation of the likely consequences of destroying their travel documents, and of the benefits of retaining even a false passport (paragraphs 19–20) and that the steps taken to make them aware of the consequences of destroying their documents should be thorough and leave no room for misapprehension (paragraph 23).

### *In relation to clause 6:*

The Committee accepts that the presumption of damaged credibility from a failure to make a claim for international protection in the first safe country which a person reaches would be compatible with ECHR Article 13, but underlines the need for the deciding authorities to be conscious that a claimant whose credibility is deemed to be damaged could well be telling the truth none the less (paragraphs 31 and 32).

### *In relation to clause 7:*

The Committee draws attention to the potential state of destitution facing people from whom support is withdrawn, and to the fact that the Secretary of State has a serious obligation to undertake the most careful examination of the likely impact of withdrawing support in each case in order to avoid a violation of the right to be free of degrading treatment (paragraph 35).

The Committee notes that, although clause 7 is in itself compatible with the right to respect for family life under ECHR Article 8 and the right of children to have their best interests treated as a primary consideration in decision-making under Article 3 of the Convention on the Rights of the Child, violations of those rights could follow from the implementation of the clause in practice (paragraphs 42–45).

*In relation to clause 11:*

The Committee draws attention to relevant material to be taken into account when considering whether the proposed single-tier Tribunal is likely to be able to provide effective protection against, and effective remedies for, violations of Convention rights; and that remaining doubts make it especially important to consider the adverse impact upon the rule of law of the ouster of judicial review (paragraph 66).

The Committee considers that it could be strongly argued that there is a real danger that the ouster of judicial review of tribunal decisions contemplated by clause 11 would violate the rule of law (paragraph 71) and that the differences of legal authority and seniority between the proposed Tribunal on the one hand and the Court of Appeal and House of Lords on the other make it inappropriate to allow self-review by the Tribunal to be the only way of correcting errors which affect Convention rights or rights under the Refugee Convention (paragraph 73).

Although the Government did not intend clause 11 to exclude *habeas corpus* or actions for damages for unlawful detention, the Committee is concerned to note that Tribunal decisions violating Convention rights other than the right to liberty would be immune to challenge in the courts. The Committee hopes that the Government will be able to redraft the provision in a way which, as well as accurately reflecting its own intentions, adequately protects Convention rights and respects the rule of law (paragraphs 74–76).

*In relation to clause 15:*

The Committee considers that to require people to co-operate in obtaining papers necessary for their removal would be likely to engage the right to respect for private life under ECHR Article 8, and is not satisfied that the provision serves the legitimate aim of protecting the economic well-being of the country, or that it would in all cases be proportionate to the aim. It notes that an exercise of the power in an individual case could be unlawful by virtue of section 6 of the Human Rights Act 1998 (paragraphs 79–83).

*In relation to clause 16:*

The Committee is not persuaded that electronic monitoring could not lead to violations of Convention rights, or that the Tribunal would necessarily be able to provide an effective remedy for violations of those rights (paragraphs 84–87).

*In relation to clause 17:*

The Committee draws to the attention of each House the exceptional nature of the proposed power in clause 17 to search for material which would include items subject to legal privilege, its potential impact on Convention rights, and the need for additional safeguards (paragraphs 88–99).

*In relation to clause 21:*

The Committee considers that the provisions for setting fees give rise to a risk that there might be a violation of the right to be free of discrimination on the ground of property under ECHR Article 14 taken together with Article 8 and under ICCPR Article 26, and does not regard a power for the Secretary of State to make subordinate legislation allowing an officer to waive a fee in case of destitution (or, perhaps, other hardship) as a satisfactory protection for the right (paragraphs 100–103).





# Report

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## Background

1. In our Third Report of this Session, we drew to the attention of each House a number of concerns we had about the Asylum and Immigration (Treatment of Claimants, etc) Bill. In particular, we expressed concern about:

- a) the attempt in what was then clause 10 and is now clause 11 of the Bill to restrict the remedies for violations of Convention rights which would normally be available under section 7 of the Human Rights Act 1998;<sup>1</sup> and
- b) the questionable nature of the assumption in what were then clauses 11 and 12 and are now clauses 12 and 13 of the Bill that certain countries can always be regarded as “safe countries” in relation to the Refugee Convention or rights under the ECHR, either generally or for particular purposes.<sup>2</sup>

2. We also reported that we had asked a number of questions of the Government, and that we expected to report further on those matters in the light of the Government’s response. In particular, we were concerned about the following matters:

- a) issues relating to discrimination and the Refugee Convention in relation to clause 2 of the Bill, which would make it an offence to enter the United Kingdom without an immigration document which is in force and satisfactorily establishes the identity and nationality or citizenship of the person and any dependent child;
- b) the attempt in clause 6 to provide a framework of relevant considerations to be taken into account when a decision-maker in the immigration process is deciding whether or not to believe any statement made by or on behalf of a person who makes an asylum claim or a human rights claim;
- c) the provisions of clause 7, which would extend the power of the Secretary of State to deprive an unsuccessful asylum-seeker of support from public funds;
- d) clause 8, extending the powers of immigration officers to arrest people and to conduct searches;
- e) what was then clause 10 and is now clause 11, introducing a new, single-tier system of appeals in asylum and immigration cases, and excluding appeals to and judicial review by the courts in almost all cases;
- f) clause 13, removing the power of a court to release on bail a person whose deportation has been recommended following conviction of an offence;
- g) what was then clause 14 and is now clause 15, allowing the Secretary of State to require a person to take specified action, including providing information, documents,

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<sup>1</sup> Joint Committee on Human Rights, Third Report of 2003–04, HL Paper 23/HC 252, paras. 1.23–1.28.

<sup>2</sup> *ibid.*, paras. 1.29–1.33.

identification data and co-operation, in order to facilitate that person's deportation or removal by enabling a travel document to be obtained for the person;

- h) what was then clause 15 and is now clause 16, allowing an electronic monitoring requirement to be imposed on an applicant for immigration to complement a residence restriction, or as an alternative to a reporting restriction, or as a condition for immigration bail, without any ability to challenge the requirement judicially;
- i) what was then clause 16 and is now clause 17, allowing a JP to issue a warrant permitting the Immigration Services Commissioner to enter and search premises for material of substantial value to the investigation of an offence against section 91 of the Immigration and Asylum Act 1999 in certain circumstances, even if the material consists of items subject to legal professional privilege, excluded material or special procedure material; and
- j) what was then clause 20 and is now clause 21, allowing fees to be imposed for applications for nationality, leave to remain, work permits, etc., in excess of the administrative cost of processing the application and reflecting the benefits which the Secretary of State thinks are likely to accrue if the application is successful.

3. The questions were raised in a letter dated 6 January 2004 from our Chair to the Secretary of State for the Home Department (the Rt. Hon. David Blunkett MP).<sup>3</sup> The Government replied to our questions in the form of a letter from the Minister of State at the Home Office (Beverley Hughes MP) dated 22 January 2004 (hereafter 'the Government's response').<sup>4</sup>

4. We now report our view of the human rights implications of those provisions in the light of the Government's response. In what follows, we refer to the provisions of the Bill as amended in Standing Committee B in the House of Commons.

## **Clause 2: Offence of entering the UK without a valid immigration document**

5. Two issues arise: first, compatibility with Article 31.1 of the UN Convention Relating to the Status of Refugees (Geneva, 1951) (hereafter "the Refugee Convention"); secondly, compatibility with Article 6 of the ECHR.

### ***The Refugee Convention***

6. Article 31 of the Refugee Convention binds the United Kingdom in international law and gives rise to a legitimate expectation under English administrative law that claimants to refugee status will be treated in accordance with its provisions.<sup>5</sup> Article 31 provides—

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3 *ibid.*, See Appendix 1, pp. 23–32.

4 Appendix 1, pp. 36–49.

5 *R. v. Uxbridge Magistrates' Court, ex parte Adimi and others* [2001] QB 667, [2000] 3 WLR 434, [1999] 4 All ER 520, DC.

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

7. We find it difficult to reconcile clause 2 of the Bill with Article 31.1 of the Refugee Convention. Clause 2 would make it an offence punishable after trial on indictment by imprisonment for up to two years or an unlimited fine or both for a person, when first interviewed by an immigration officer after arrival in the United Kingdom, not to have with him an immigration document which is in force and satisfactorily establishes his or her identity and nationality or citizenship and those of any dependent child accompanying him or her.<sup>6</sup> There would be a defence available to a person who can prove that he or she and any dependent child is an EEA national or has a reasonable excuse for not being in possession of an appropriate immigration document. Deliberate destruction of the document would not be a reasonable excuse unless the person could prove that the destruction was for a reasonable cause or outside the control of the person charged, and does not include a situation where the person intends the destruction to delay the making or resolution of a claim to asylum, or to increase the chance of success, or to comply with the instructions or advice of a person who advises on or facilitates immigration to the United Kingdom.<sup>7</sup>

8. Article 31.1 allows states to impose criminal liability on people seeking refugee status who enter without authorization in some circumstances. In particular, it is permissible for a state to impose such liability on:

- a) people who do not come directly from the place where they allege they have suffered persecution;
- b) people (whether coming directly or indirectly from that place) who fail to present themselves to the authorities without delay;
- c) people who fail to show good cause for their unauthorized entry or presence in the country.

9. Clause 2 would impose liability on people who fall outside those three categories. The defences would allow people to escape punishment if they prove that they have a reasonable excuse for not being in possession of the appropriate documentation. People who have good cause for their unauthorised entry or presence in the United Kingdom will have to be able to show what would normally be regarded as a reasonable excuse for not having the required documentation.

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<sup>6</sup> Cl 2(1), (2), 7(a). A lesser penalty would be available following summary conviction: cl 2(7)(b).

<sup>7</sup> Cl 2(3)–(5).

10. However, the Bill would make it more difficult for asylum-seekers to discharge the burden of proving such an excuse. The Bill would impose on the asylum-seeker the burden of proving what happened in a country where he or she was allegedly suffering persecution or in transit. There may be little or no evidence of these matters apart from the asylum-seeker's word. This is likely to be a common problem: as Liberty points out, asylum-seekers often find it impossible to obtain travel documents from the authorities in countries where they are suffering persecution, and the need for some travel documents in order to satisfy carriers that they should be allowed on board aircraft or ships forces people to make use of false documents or to stow away without documents.<sup>8</sup> Even when the Immigration and Asylum Act 1999 came into effect, section 31 provided a defence against charges of forgery, deception or falsification of documents for people who are using false documentation to enter the country in circumstances covered by Article 31.1 of the Refugee Convention. Nevertheless, it seems that a significant number of people have been wrongfully imprisoned for such offences. JUSTICE has suggested a figure of 5,000; the Government's evidence to the Home Affairs Committee contested that figure, while accepting that there had been a significant number of convictions (although the Minister thought that the number was below 1,000), and asserting that, since the judgment of the Divisional Court in *Adimi*,<sup>9</sup> fewer than 20 people had successfully claimed compensation for wrongful conviction.<sup>10</sup>

11. Whatever the true figures may be, the proposed offence under clause 2 of the Bill is likely to affect a very large number of asylum-seekers, and there seems to be a real risk that the defence will fail to protect a significant proportion of them, giving rise to a real risk that the United Kingdom will fail to discharge its obligations under Article 31.1 of the Refugee Convention. The Home Affairs Committee has drawn attention to the importance of making it clear on the face of the Bill that there would be a "reasonable excuse" where the person had no practical way of obtaining valid documents, and to the risk that the Bill could criminalize genuine refugees fleeing persecution who are compelled to travel on false or invalid documents.<sup>11</sup> We agree.

12. In the light of this, we asked why the Government considered that the provisions of clause 2 are likely to allow asylum claimants to be dealt with in accordance with Article 31.1 of the Refugee Convention.

13. In its response, the Government said that it would "consider never having had a proper document to be a reasonable excuse for arriving undocumented ... We do not accept that someone would struggle to prove that this is the case". If a court would inevitably take the same view, we consider that it would go a long way to secure compliance with the United Kingdom's obligations under Article 31 of the Refugee Convention. However, we are not convinced that clause 2 as currently drafted would inevitably be interpreted in that way by a court.

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8 See [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk), *R. v. Uxbridge Magistrates' Court, ex parte Adimi and others* [2001] QB 667, [2000] 3 WLR 434, [1999] 4 All ER 520, DC.

9 *R. v. Uxbridge Magistrates' Court, ex parte Adimi and others* [2001] QB 667, [2000] 3 WLR 434, [1999] 4 All ER 520, DC.

10 Home Affairs Committee, First Report of Session 2003–04, Asylum and Immigration (Treatment of Claimants, etc.) Bill, HC 109, paras. 12–14.

11 *ibid.*, paras. 20 and 22.

14. We therefore welcome the Government's statement that it is "considering whether any amendment is necessary to ensure that those who fall within the protection of Article 31 and who do have proper and justifiable reasons for arriving without a document are not penalised". We recommend that a suitable amendment should be made; and we draw the matter to the attention of each House.

### **ECHR Article 6**

15. Placing on the accused the burden of establishing a defence to a charge, instead of requiring the prosecution to prove all elements necessary to guilt, is capable of engaging the right to a fair hearing in the determination of a criminal charge under ECHR Article 6.1, read together with the right to be presumed innocent until proved guilty under Article 6.2. The Government accepts this, but argues that it is justifiable to impose this burden on the accused because "it is a justified and a proportionate response to the legitimate aim of the statute in accordance with Strasbourg and domestic case law".<sup>12</sup>

16. The case-law establishes that it may be justifiable to reverse the burden of proof in some circumstances, even if the result is that the defendant has to disprove what would normally be regarded as a central element in the offence, such as intent. Whether it is permissible will depend on the circumstances of each case. If the provision gives rise to a presumption which is effectively irrebuttable by the defendant, there will be a violation of Article 6.1 and 6.2 because the accused will have been denied the opportunity for a fair hearing. On the other hand, a presumption against the accused can be justified if it is kept "within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence".<sup>13</sup> Much will depend on how the trial court ensures that the defendant has a fair opportunity to rebut the charge and decides whether the defendant has discharged the burden of proof. An important element of giving a fair opportunity to rebut the charge is ensuring that the burden imposed on the defendant is not unreasonable, but that cannot be decided until the prosecution has presented its case and at least some of the evidence against the accused is known.

17. For example, if the prosecution provides *prima facie* evidence that a defendant was in possession of articles which were likely to have been intended for use in terrorism, it is often not unreasonable to require the defendant to offer an innocent explanation for their possession, and if the defendant fails to provide one to infer an involvement in terrorism. In addition, the seriousness of the threat to society which the criminal penalty is designed to counteract may be relevant to the reasonableness of imposing a burden on the accused.<sup>14</sup> On the other hand, a very serious penalty may make it less reasonable to impose a legal or persuasive burden on the defendant, and it could be unreasonable to require a defendant to prove something for which will inevitably be very difficult for him or her to find evidence.

18. How is this likely to apply to a person charged with an offence under clause 2 of the Bill? The purpose of clause 2 is to encourage asylum-seekers to have documents, and to discourage them from destroying or giving to their (possibly illegal) immigration

12 Explanatory Notes para 136.

13 *Salabiaku v. France* (1988) 13 EHRR 379, Eur. Ct. HR, at para. 28 of the judgment.

14 *R. v. Director of Public Prosecutions, ex parte Kebilene* [1999] 3 WLR 972, HL, at pp. 999–1000 per Lord Hope of Craighead.

facilitators the documents used to get them onto flights. Such actions obstruct the determination of claims and also make it more difficult to discover the country to which a person whose asylum claim has been rejected should be removed. The clause would also be important in reducing the power of criminal facilitators.<sup>15</sup> We accept that these are legitimate aims.

19. On the other hand, the reversal of the burden of proof would impose on a refugee the task of proving something which by its very nature would be very difficult to establish. Ultimately the issue is likely to depend on the credibility of the asylum-seeker, but the Government has gone so far as to suggest that, because most carriers are required to ensure that passengers have appropriate documentation before embarking, a person entering the United Kingdom without a passport “may in many cases be assumed to have destroyed it en route”.<sup>16</sup> It would be particularly difficult for an asylum-seeker to establish a reasonable cause for not having valid documentation where the asylum-seeker was acting on the advice or instructions of a criminal facilitator (who may have subjected the person to considerable duress) and had no other source of advice about what would be needed by a United Kingdom immigration officer: clause 2(5)(b) provides that “‘reasonable cause’ does not include the purpose of— ... (iii) complying with instructions or advice given by a person who offers advice about, or facilitates, immigration into the United Kingdom”. As the Home Affairs Committee noted, this is likely to be a regular event, and there is a need to ensure that refugees have access to information before arrival in the United Kingdom about the potential consequences of deliberately losing or destroying their documentation.<sup>17</sup>

**20. In view of the pressure which people traffickers can put on asylum-seekers to destroy documents en route, we consider that carriers should be required to inform travellers before embarkation of the likely consequences of destroying their travel documents, and of the benefits of retaining even a false passport.**

21. In the light of this, it seemed when we first examined the Bill that it might be disproportionate to impose a burden of proof on the defendant to establish reasonable cause for not having valid travel documentation while excluding the defendant’s ability to assert as a “reasonable cause” a common and genuinely compelling reason for not having documentation. This will depend on the circumstances of individual cases, but would be likely to be a fairly widespread problem. In such cases, there would be a real risk that clause 2 would operate in such a way as to deprive the defendants of a fair hearing and violate the right to be presumed innocent until proved guilty according to law, under ECHR Article 6.1 and 6.2.

22. We therefore asked the Government why clause 2 (and particularly clause 2(5)) had been drafted in a way that appeared to give rise to such a risk. The Government’s response drew attention to the following factors.

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15 Evidence of the Minister of State at the Home Office, Beverley Hughes MP, to the Home Affairs Committee: see Home Affairs Committee, First Report of Session 2003–04, op cit., paras. 18–19.

16 Explanatory Notes para. 16.

17 See Home Affairs Committee, First Report of Session 2003–04, op cit., paras. 22–23.



- a) Only the person entering the United Kingdom knows whether he or she set off without documents or destroyed them on the way or soon after arrival. As the prosecution would have no means of proving why the person had no document, it is justifiable to place on the applicant the burden of proving that he or she had reasonable cause for not having a document.
- b) Clause 2(5) would not impose an extra burden on the applicant, but would merely limit the scope of the excuse, and so does not engage ECHR Article 6.

23. In the light of the Government's response, we accept in principle that it can be regarded as justifiable to place the burden on the defendant of proving that he or she is entitled to the benefit of the excuse. **Nevertheless, we draw the attention of each House to the view of the Home Affairs Committee that it will be necessary to ensure that immigrants have access to information about the legal effect of complying with instructions or advice from people who advise on or facilitate their immigration. In addition, we should not forget the state of confusion and fear in which many asylum-seekers, whether or not they have a well-founded claim, find themselves when attempting to enter the country, or the intimidation to which they may be subject by illegal people-traffickers. The steps taken to make the aware of the consequences of destroying their documents should be thorough and leave no room for misapprehension.**

### Clause 6: assessing the credibility of a claimant

24. Under clause 6 of the Bill, a “deciding authority”, when determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, would have to “take account of” any behaviour of the claimant which the deciding authority thinks is designed or likely to conceal information, mislead, or obstruct or delay, or which otherwise damages the claimant's credibility.<sup>18</sup> A “deciding authority” is (a) an immigration officer, (b) the Secretary of State, (c) an adjudicator or the Immigration Appeal Tribunal (unless and until the provisions of the Bill replacing them are passed and come into force) or the Asylum and Immigration Tribunal (if and when the provisions of the Bill establishing that body are passed and come into force), and (d) the Special Immigration Appeals Commission.<sup>19</sup>

25. The Bill provides that behaviour likely to conceal information, etc., is to include failure without a reasonable explanation to produce a passport, or production of an invalid passport, or destruction, alteration or disposal of a passport, ticket or other travel document, and failure without reasonable explanation to answer a question.<sup>20</sup> Furthermore, a failure to make an asylum or human rights claim while in a “safe country” (on which see clause 12 of and Schedule 3 to the Bill, and paragraphs 26–32 below) would automatically be treated as damaging the claimant's credibility, regardless of the circumstances.<sup>21</sup>

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18 Cl 6(1)

19 Cl 6(4), (7)

20 Cl 6(2)

21 Cl 6(3)

26. This might be thought to give rise to an evidential presumption that a person who behaves in such a way is not worthy of belief. If the presumption lacks a rational basis in a particular case, it might be capable of compromising the fairness of the procedure by which the deciding authority reaches its decision. The deciding authority is not generally required to treat the behaviour as damaging the claimant's credibility. Clause 6(1) normally only requires the deciding authority to take it into account when deciding whether to believe the claimant. If the circumstances are such that the behaviour does not appear to call the claimant's credibility into account, either generally or in relation to specific issues, the deciding authority would remain free to believe the claimant's statement after considering the behaviour in the light of all the circumstances.

27. However, clause 6(3) provides that one kind of behaviour, a failure to take advantage of a reasonable opportunity to make an asylum claim or a human rights claim in a safe country, is always to be regarded as damaging the claimant's credibility. When we first examined the Bill, this presumption seemed to us not to be logically related to the failure to take a reasonable opportunity to make a claim in a safe country. There is no reason to suppose that a person is not worthy of belief on any matter merely because he or she preferred to make a human rights claim in the United Kingdom rather than in another country. The failure to make the claim in another country might cast doubt on certain statements, but, we thought, could hardly be said to damage the claimant's credibility in relation to all statements. Imposing a presumption of damaged credibility regardless of the nature of the statement in relation to which credibility falls to be assessed seemed to us potentially to compromise the fairness of the decision-making process. This would not usually engage the right to a fair hearing under ECHR Article 6.1, because the matters for decision in an immigration context are not usually "civil rights or obligations" in relation to which the obligations under Article 6.1 arise. Nevertheless, it could engage Article 6 indirectly to the extent that the effect of the operation of the presumption would be to render a person liable to be deprived of a civil right or subjected to a civil obligation.

28. Furthermore, so far as human rights claims are concerned, the failure to provide a fair hearing could, we thought, engage ECHR Article 13, which binds the United Kingdom in international law although it is not one of the Convention rights which became part of domestic law by virtue of the Human Rights Act 1998. Article 13 provides—

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

29. ECHR Article 13 requires that a national authority or combination of national authorities complementing each other should be able to provide an effective and independent investigation of allegations that a person's Convention right has been violated, and should provide a final determination of the claim and an effective remedy for it. The Strasbourg Court has not so far found a violation of Article 13 on the basis that rules of evidence require an irrational inference to be drawn, but it seemed to us that such a requirement might tend to make any remedy less than effective, as clause 6(3) of the Bill would make it difficult, if not impossible, for a deciding authority to provide an effective remedy for an alleged violation of a Convention right to which the removal of a person making a human rights claim might give rise.



30. We therefore asked why the Government considered that clause 6(3) would be compatible with ECHR Article 13 in so far as the clause would require a deciding authority to infer that a person making a human rights claim, who has not taken advantage of a reasonable opportunity to make the human rights claim in a safe country, has thereby damaged his or her credibility.

31. The Government's response pointed out that:

- a) it is usually reasonable, in the Government's view, to require a person to make a claim for international protection in the first safe country which they reach;
- b) even if a person's credibility is deemed to be damaged, it would be open to a decision-maker to decide that the claimant's credibility had not been severely damaged, and to conclude that the claimant had made out his or her claim: the decision-maker would still have to consider all the circumstances of the case, and reach a decision in accordance with the United Kingdom's international obligations under the ECHR and the Refugee Convention;
- c) it would still be unlawful for a decision-maker to act in violation of rights under Article 6.

**32. We accept that it is legitimate for the Government to adopt this position, and we underline that the deciding authorities should at all times be conscious, when applying clause 6, that a claimant whose credibility is deemed to be damaged could well be telling the truth none the less.**

### **Clause 7: failed asylum-seekers: withdrawal of support**

33. At present, under the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002, a person whose asylum claim has been rejected may continue to be treated as an asylum seeker for the purpose of claiming support if the person has a dependent child as a member of his or her household.<sup>22</sup> Clause 7 of the Bill would allow the Secretary of State to prevent this. Clause 7 would insert a new paragraph 7A in Schedule Schedule 3 to the 2002 Act, allowing the Secretary of State to certify that in his opinion such a person has failed without reasonable excuse to take reasonable steps to leave the United Kingdom or to place himself in a position in which he would be able to leave the United Kingdom voluntarily. Fourteen days after the person has received or is deemed to have received a copy of the certificate, he or she would become ineligible for accommodation and welfare support from the local authority under sections 21 or 29 of the National Assistance Act 1948, support for the elderly from the local authority under section 45 of the Health Services and Public Health Act 1968, support from social services under various pieces of legislation including provisions of the Children Act 1989 and the Children (Scotland) Act 1995 which allow support for adults in certain circumstances, accommodation under the homeless persons legislation, promotion of well-being under section 2 of the Local Government Act 2000, and support from NASS under the

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<sup>22</sup> Immigration and Asylum Act 1999, s. 94(3A); Nationality, Immigration and Asylum Act 2002, s. 18(2).

Immigration and Asylum Act 1999 or the 2002 Act. In effect, the failed asylum-seeker would be left without any source of support from public funds.

34. This might have two consequences which could engage Convention rights and other human rights.

- a) The adult asylum-seeker might be left without any means of support, giving rise to a danger that he or she would undergo a degree of suffering amounting to inhuman or degrading treatment, violating the right to be free of such treatment under ECHR Article 3.
- b) Any dependent child of the asylum-seeker would be liable to be taken into the care of the local social services authority, which would continue to have responsibility for providing accommodation for the child under section 20 of the Children Act 1989 if the adult claimant were to be unable to provide it. As it would not be possible for the local social services authority to offer help to the adult on whom the child is dependent, there are likely to be a significant number of cases in which the authority could only discharge its responsibility towards the child by taking the child into its care. This would involve separating the child from his or her family, and would engage the right to respect for family life under ECHR Article 8.1. It would also engage rights under the Convention on the Rights of the Child (CRC), which binds the United Kingdom in international law although the rights are not directly actionable in courts and tribunals in the United Kingdom under domestic law.

### ***Inhuman or degrading treatment***

35. ECHR Article 3 provides: “No one shall be subjected to torture or to inhuman or degrading treatment”. The English courts have held that establishing a regime in which support can be withdrawn from a destitute asylum-seeker is an act which can subject the person to inhuman or degrading treatment, and that the Home Secretary has a duty under section 6 of the Human Rights Act 1998, in exercising his discretion, not to withdraw support if doing so would leave the asylum-seeker in a situation verging on the degree of severity which would engage Article 3.<sup>23</sup> Clause 7 of the Bill would leave the Secretary of State a discretion, and he would therefore continue to be under a duty to exercise the discretion in such a way as to avoid subjecting a destitute asylum-seeker to conditions verging on the severity necessary to violate ECHR Article 3. **The potential state of destitution that confronts people in this situation should be recognised. The duty on the Secretary of State is not a mere formality; it requires the most serious consideration in every case.**

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23 *R. (Q.) v. Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 3 WLR 365, CA.

### ***Respect for private and family life***

36. It has also been held that the Secretary of State, when withdrawing support from a claimant, may have to justify the action in terms of ECHR Article 8.<sup>24</sup> This provides—

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

37. Withdrawing support in accordance with clause 7 of the Bill in circumstances which are likely to lead to a child being separated from his or her carers and family members, and being placed in the care of a local authority, would engage the right to respect for private and family life under ECHR Article 8.1. The question is whether such action would be justifiable under Article 8.2. There is no doubt that the clause would provide a sufficient legal basis for the interference with the right to be “in accordance with the law”. The issues relate to:

- a) the legitimacy of the government’s aim in clause 7; and
- b) whether clause 7 is ‘necessary in a democratic society’ for the purpose, that is, whether it is a proportionate response to a pressing social need.

### ***A legitimate aim***

38. The Government’s aim is to provide both a deterrent to prevent people who could leave the country attempting to remain, and an incentive to them to leave in a dignified way with support when all avenues of appeal in the United Kingdom have been exhausted.<sup>25</sup> Since the claimants will at that stage have no right to remain in the United Kingdom, steps to encourage them to leave can be regarded as having the legitimate aim of preventing crime (remaining illegally in the country) as well as being in the interests of the economic well-being of the country by controlling the United Kingdom’s financial expenditure on those people.

### ***Necessary in a democratic society***

39. In view of the number of people thought to be remaining in the United Kingdom unlawfully after their applications for leave to remain have been rejected, it can be accepted that there is a pressing social need for the matter to be addressed.

40. When we first examined the Bill, we had some doubts as to whether clause 7 represents a proportionate response to that need, for four reasons.

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<sup>24</sup> *ibid.*, at para. 64.

<sup>25</sup> See Home Affairs Committee, First Report of Session 2003–04, *op cit*, para. 60.

- a) As the Home Affairs Committee noted (and considered to be unsatisfactory), the Government is unable to estimate the number of families who might be affected.<sup>26</sup> It is therefore impossible to be satisfied that the overall impact of the measure on children and their families (all members of which enjoy rights under ECHR Article 8) would be proportionate to the legitimate aim.
- b) The clause does not lay down any procedure to be followed before deciding to remove support. A similar failure to provide for a fair decision-making procedure has already been stigmatized by the Court of Appeal as violating the administrative law principle of fairness in relation to section 55 of the Nationality, Immigration and Asylum Act 2002.<sup>27</sup> Procedural safeguards, and their absence, are relevant factors when deciding whether an interference with a Convention right is proportionate. The Government told the Home Affairs Committee that immigration officers would be given guidance to ensure that support would not be withdrawn without clear evidence and an attempt to interview the family.<sup>28</sup> It is not clear that this would meet the requirements of the principle of fairness. In any case, the Government intends to give the guidance in a non-statutory, and therefore non-binding, form, which offers a very limited assurance of proportionality.
- c) There is an alternative to the withdrawal of support under clause 7: the families could be removed compulsorily before plunging adults into destitution and children into care. The Government has said that it does not routinely “seek the compulsory removal of all families illegally present in the UK because of the expense and difficulty of this option”.<sup>29</sup> The Government would act speedily to remove all members of any family whose child is taken into care following withdrawal of support under the measures in clause 7.<sup>30</sup> It does not seem unreasonable to expect Home Secretary to be able to determine whether a family falls into this category before making a decision to withdraw support under clause 7 of the Bill. That being so, it is similarly not unreasonable for the Government to recognize that those families should be compulsorily removed without the need for support to be withdrawn and the family split up, even for a short period.
- d) The Home Affairs Committee has concluded that the measures in clause 7 are likely to be counter-productive, because: it might drive failed claimants underground; some families might have an incentive to go underground while leaving their children in local authority care at public expense; there is a real prospect of the system spawning multiple legal challenges; and the duty to provide support where there is a threat to Convention rights may undermine the purpose of the proposal.<sup>31</sup>

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26 *ibid.*, para. 64.

27 *R. (Q.) v. Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 3 WLR 365, CA, at para. [69] et seq.

28 See Home Affairs Committee, First Report of Session 2003–04, *op cit*, para. 62.

29 *ibid.*, para. 63.

30 *ibid.*, para. 62.

31 *ibid.*, para. 66.

### ***The best interests of the child***

41. As the Refugee Children’s Consortium pointed out,<sup>32</sup> the idea of using children and the threat of taking them into care as a deterrent or incentive to persuade adults to co-operate with the authorities in removing them from the country seems to be at odds with the requirement of CRC Article 3.1: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

### ***Our inquiries and the Government’s response***

42. In the light of those concerns, we asked why the Government considered that the interference with the right to respect for private and family life, which would be a likely consequence of withdrawing support under clause 7, would be proportionate to the legitimate aim of removing people who are unlawfully within the United Kingdom, having regard to the points made by the Home Affairs Committee and the other matters mentioned here. We also asked whether, and if so why, the Government considers that the proposals in clause 7 comply with the United Kingdom’s obligation under CRC Article 3.1.

43. The Government’s response made the following points:

- a) the purpose of clause 7 is to ensure that families whose asylum claim has failed return, ideally in a dignified way rather than by compulsory removal, as soon as possible;
- b) the Government does not believe that it is right or justifiable that people should be able to continue living at public expense if they are able to return home and do not do so;
- c) the Government believes that providing support indefinitely provides an incentive not to leave the country;
- d) paragraph 3 of Schedule 3 to the Bill provides that those providing support would not be free of the power or duty to continue to do so to the extent that support is necessary to avoid breach of a person’s Convention rights;
- e) it is sometimes not practicable to remove people compulsorily, for example if the country to which the person would otherwise be removed does not issue a travel document for some reason;
- f) the Government is preparing a process which would include letters and an interview to ensure that families are fully aware of the consequences of not leaving the country, including the possibility that support may be withdrawn, and to ensure that enforced removal is effected whenever possible if a family is not cooperating;
- g) discussions are under way with the Local Government Association to establish ways in which a local authority might exercise their duties towards children where support is withdrawn;

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32 Refugee Children’s Consortium, [www.jcwi.org.uk](http://www.jcwi.org.uk)

- h) in relation to Article 3.1 of the CRC, the Government considers that clause 7 would be compatible, because it would not be in the children's best interests to continue to support them in a country where they have no future: parents would be free to take appropriate steps to leave the country and a local authority may still support children if the parents fail to take those steps, and would have to take any steps necessary to avoid a breach of rights under the ECHR.

44. In the light of these comments, **we accept that the Bill would not make it impossible to give appropriate protection to Convention rights, and we accept that it is not in a child's best interests to remain for a long period in a country where he or she has no prospect of being allowed to remain permanently.** However, we fear that in practice there could be many people (including children) who suffer severe hardship and violations of Convention rights if the interview system is not sufficiently robust to identify reliably those who lack the resources to support themselves.

45. **While clause 7 in itself is compatible with rights under the ECHR and the CRC, we fear that violations could all too easily follow in practice. We draw this to the attention of each House.**

### **Clause 8: additional investigatory powers for immigration officers**

46. Immigration officers already have powers of arrest without warrant, and of entry, search and seizure after arrest, in relation to immigration offences. Clause 8(1) and (3) would allow them to exercise those powers in respect of certain other offences if they come across evidence of the offences in the course of an immigration investigation. The offences would be:

- a) conspiracy to defraud;
- b) bigamy;
- c) making a false statement, or aiding or abetting such an offence, contrary to the Perjury Act 1861;
- d) in Scotland, knowingly giving false information to a district registrar of births, marriages and deaths;
- e) theft;
- f) obtaining property by deception;
- g) obtaining a pecuniary advantage by deception;
- h) false accounting;
- i) handling stolen goods;
- j) obtaining services or evading liability by deception;
- k) in Scotland, fraud, uttering and fraud, and reset;
- l) forgery;



- m) using, copying or using a copy of a false instrument; and
- n) making false documents.<sup>33</sup>

47. The proposed extensions to these powers engage the right to liberty (ECHR Article 5), the right to respect for private and family life, home and correspondence (ECHR Article 8), and (in relation to search of the person) the right to be free of degrading treatment (ECHR Article 3). When we first examined the Bill, it was not clear to us why the Government proposed to extend the powers to these offences, or why they were not to be exercisable in relation to other offences. As Liberty and ILPA pointed out, many of the safeguards attaching to the use of similar powers by police officers would seem to be absent:<sup>34</sup> the training in the use of the powers in the context of Code B of the Codes of Practice made under the Police and Criminal Evidence Act 1984; the statutory disciplinary code which applies to the police; arrangements for independent investigation of complaints against police officers arising from the use of the powers; and the supervision of complaints by the Police Complaints Authority. Although the Immigration Service would be bound by the obligations arising under the Human Right Act 1998, victims of an alleged abuse of power might not be able to challenge abuses of the powers in court or obtain compensation, because of the restrictions on remedies proposed in clause 11 of the Bill (see below).

48. We feared that this could give rise to a significant risk of violations of Convention rights, including those under ECHR Articles 5 and 8, while the absence of remedies may give rise to a violation of ECHR Article 13 where the alleged wrong amounts to a violation of a Convention right and of ECHR Article 6.1 when it consists of a violation of a civil right or obligation.

49. We therefore asked why the Government considered that there would be sufficient safeguards against abuse of the powers proposed in clause 8 (including expertise among immigration investigators in investigating the kinds of offences listed, training in the use of the powers and the application of the relevant Codes of Practice, independent investigation of complaints, supervision by the Police Complaints Authority, and availability of judicial remedies) to meet the requirements of ECHR Articles 5.1, 5.5, 6.1, 8, and 13.

50. The Government's response made the following points:

- a) clause 11 is concerned only with the protection from review or appeal of decisions of the proposed Tribunal when it considers appeals against immigration decisions. It would have no application to the remedies available to a person in respect of the exercise by members of the Immigration Service of powers in non-immigration cases;
- b) a person arrested under the new powers would have to be taken to the nearest designated police station, where the full protective regime of the Police and Criminal Evidence Act 1984 (PACE) and its associated Codes of Practice would apply;
- c) by virtue of section 145 of the Immigration and Asylum Act 1999, in England and Wales and Northern Ireland immigration officers must "have regard to" relevant

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33 Cl 8(2)

34 See [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk) and [www.ilpa.org.uk](http://www.ilpa.org.uk)

provisions of the PACE Codes of Practice specified in the Immigration (PACE Codes of Practice) Direction 2000;

- d) in Scotland immigration officers must work within the boundaries of the Criminal Procedure (Scotland) Act 1995, sections 13 to 15, under the Immigration Arrest (Scotland) Codes of Practice, which also directly apply the PACE Codes of Practice on search to immigration officers in Scotland;
- e) the policy is to allow only immigration officers who have undergone rigorous training (some details of which were provided) in respect of criminal investigations, including human rights matters, race relations and powers of arrest, to exercise the new powers;
- f) complaints against officers are handled by the Immigration Service Complaints Unit, whose work is scrutinised by the Immigration and Nationality Directorate Complaints Audit Committee (CAC), a member of which (the Independent Assessor) takes lead responsibility for monitoring cases involving a complaint about an arrest.

**51. The Government considers that these safeguards are sufficient to protect against abuse of the powers in clause 8. We accept this.**

### **Clause 11 (formerly clause 10): changes to the appeal system**

52. Clause 11 of the Bill would make fundamental changes to the immigration and asylum appeal and review systems, replacing them with a single level of appeal from a decision of the immigration officer in most cases. At present, there is a multi-tiered system for making and reviewing or appealing against immigration decisions. An initial decision by an immigration officer may (depending on the nature of the decision) be subject to administrative review, appeal to an adjudicator, further appeal to an Immigration Appeal Tribunal on a point of law, and then subject to judicial review by the High Court (with appeals, with permission, to the Court of Appeal and House of Lords) or appeal to the Court of Appeal (Civil Division), with a final appeal (with leave) to the House of Lords. Other routes of appeal or review apply to decisions by the Secretary of State, and decisions involving national security considerations which go to the Special Immigration Appeal Commission, with further appeals to the Court of Appeal and (with leave) House of Lords.

53. Clause 11(1) of, and Schedules 1 and 2 to, the Bill would replace the adjudicators and the Immigration Appeal Tribunal with a single-tier Asylum and Immigration Tribunal. As JUSTICE pointed out, this would be inconsistent with the recommendations of the report on the tribunal system by Sir Andrew Leggatt, which recommended that the inconsistent arrangements relating to appeals from tribunals should be replaced with a unified appellate body covering different fields of expertise.<sup>35</sup>

54. In addition, clause 11(7) would introduce a new section 108A into the Nationality, Immigration and Asylum Act 2002. When we first examined the Bill, it seemed to us that it would cut off all appeals to and judicial review by the ordinary courts in immigration matters except where a person is challenging a Home Secretary's certificate allowing

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<sup>35</sup> See [www.justice.org.uk](http://www.justice.org.uk), Sir Andrew Leggatt, *Tribunals for Users—One System, One Service*, Part I, ch. 3, para. 3.8 (London, March 2001).



removal to a safe country and treating the person's claim in this country as unfounded, or is alleging bad faith on the part of the Tribunal (although the Special Immigration Appeal Commission would be unaffected). It seemed to us that it would also exclude *habeas corpus* applications in immigration cases. The only remedy for a person wishing to challenge a decision of the Tribunal would be to ask the Tribunal to review its decision (clause 11(6), introducing a new section 105A to the 2002 Act), unless the person is challenging a certificate allowing the removal of the person to a safe country and treating the person's claim in this country as unfounded, or is alleging that a member of the Tribunal has acted in bad faith, in which case the High Court would be able to entertain an application for judicial review (proposed new section 108A(1)–(3)). The President of the Tribunal would be allowed to refer a point of law for the opinion of an appellate court, but would be under no obligation to do so, and the opinion of the court would not bind the Tribunal when it comes to make its decision.<sup>36</sup>

55. There seemed therefore generally to be no right to challenge a decision of the single-tier Tribunal on the ground that it has acted incompatibly with a person's Convention rights.

56. The Home Affairs Committee, when it considered these provisions, concluded that the proposed changes would make it:

... difficult to allay fears that some further cases might have been successful at a second appeal. Implementation of the Government's proposals must, therefore, be accompanied by a demonstrable improvement in the quality of initial decision-making ... We recommend that the implementation of the new asylum appeals system should be *contingent* on a significant improvement in initial decision making having been demonstrated. In particular, the relevant sections of the Act should not be brought into force until the statistics show a clear reduction in the number of successful appeals at the first-tier, adjudication level.<sup>37</sup>

57. The Government's proposals have attracted powerful criticism.<sup>38</sup> Many of the objections to the proposals cite their impact on principles central to the rule of law, including the right to have access to the courts, and refer to the fact that there is no evidence that anything is wrong with the way in which the courts and the Immigration Appeal Tribunal currently operate in the field of asylum and immigration.<sup>39</sup> Ousting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals. Clause 11 of the Bill seeks to make the immigration and asylum process operate outside normal principles of administrative law and legal accountability. This sets a dangerous precedent: governments may be encouraged to take a similar approach to other areas of public administration.<sup>40</sup> Here, we confine ourselves to the human rights implications of the proposals, but they must be considered in the light of the constitutional background.

36 Proposed new s. 108B of the Nationality, Immigration and Asylum Act 2002, to be inserted by cl 10(7).

37 See Home Affairs Committee, First Report of Session 2003–04, op cit., para. 43 (italics in original; other emphasis removed).

38 Ibid., paras. 35–37.

39 See [www.justice.org.uk](http://www.justice.org.uk)

40 See [www.ilpa.org.uk](http://www.ilpa.org.uk)

58. Apart from the fact that the rule of law is a fundamental principle inherent in international human rights law, it is inherent in the fundamental law of the British constitution. It includes the civil right of everyone within the jurisdiction of the United Kingdom to have unimpeded access to the ordinary courts to test the legality not only of administrative decisions but also of the decisions of inferior tribunals. That is an essential element in the British system of government under law.<sup>41</sup>

59. In India and Bangladesh, Commonwealth countries with written constitutions expressly empowering the legislature to amend the constitution, the Supreme Court of each country has decided that the power of amendment, even when exercised in accordance with the letter of the constitution, cannot be used to abrogate or destroy an essential feature of the constitution, for example, by preventing access to the ordinary courts by way of judicial review, or by interfering with judicial independence.<sup>42</sup>

60. The issues raised by the statutory ouster of judicial review may raise similarly important and controversial issues under the unwritten British constitution in reconciling the fundamental principles of parliamentary sovereignty and the rule of law.<sup>43</sup>

61. At the height of the Second World War when our nation was facing a threat of imminent invasion, a clash between these fundamental constitutional principles was avoided by preserving judicial review of the use of emergency powers of detention without trial. It is highly important for Parliament to consider whether cogent and convincing reasons have been advanced in accordance with the principle of proportionality to justify the ouster of judicial review contemplated by Clause 10 not in wartime and not in the context of terrorism but in relation to asylum appeals.

62. The Government considers that the proposals raise “issues under article 13 of the ECHR in relation to the removal of appeal rights. People may also wish to challenge whether their substantive Convention rights under articles 3 and 8 will be jeopardised by the absence of a further tier of appellate rights”.<sup>44</sup> We agree that these Convention rights are engaged.

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41 In *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2003] 3 WLR 252 at [26] Lord Steyn stated that “the right of access to justice ... is a fundamental and constitutional principle of our legal system. Access to law is crucially important in the refugee context, hence the importance of judicial review, because of “the gravity of the issue” since “the most fundamental of all human rights is the individual’s right to life” and the asylum decision “may put the [individual]’s life at risk” (*R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514 (HL), 531E-G per Lord Bridge of Harwich)’.

42 See e.g., *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 (Supreme Court of India); *Minerva Mills v Union of India* AIR 1980 SC 1789 (Supreme Court of India); *Anwar Hossain Chowdhury v Bangladesh* 41 DLR 1989 App Div 165 1989 BLD (Spl 1). In *Société United Docks v. Government of Mauritius* [1985] AC 585, the Judicial Committee of the Privy Council left open (at 609, per Lord Templeman) the question whether under the constitution of Mauritius a Constitutional Amendment Act constituted an unconstitutional interference with the Supreme Court of Mauritius.

43 As Lord Bridge observed in *X Ltd v Morgan-Gampian Ltd* [1991] 1 AC 1 (HL) at 48E: “The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen’s courts in interpreting and applying the law.” Sir John Donaldson MR put it in this way (*R v HM Treasury, ex p Smedley* [1985] QB 657, 666C-D): “Although the United Kingdom has no written constitution, it is a constitutional convention of the highest importance that the legislature and the judicature are separate and independent of one another, subject to certain ultimate rights of Parliament over the judicature which are immaterial for present purposes. It therefore behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so.” Sir John Donaldson continued: “ ... I would hope and expect that Parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the courts.”

44 Explanatory Notes para. 138.

63. In the Explanatory Notes to the Bill, the Government argued that the proposals were compatible with the rights—

... Article 13 does not require the provision of multiple tiers of appeal. What it requires is access to an independent national authority with powers to provide effective redress. The single tier Tribunal will meet this test. It is wholly independent of the initial decision-making body. The single tier tribunal will provide an effective remedy as Article 13 requires and will safeguard appellants' Convention rights including those referred to in Articles 3 and 8.

64. We agree that Article 13 does not require multiple tiers of appeal. However, the Government's assertion that the Tribunal would provide an effective remedy for people alleging violation of Convention rights is at present speculative. Much will depend on the way in which the Tribunal is funded and staffed. The transitional provisions made in Part 2 of Schedule 2 to the Bill would make any adjudicator appointed under section 81 of the Nationality, Asylum and Immigration Act 2002 a member of the Tribunal (together with any legally qualified member of the Immigration Appeal Tribunal), and any member of staff of such adjudicators would become a member of staff of the Tribunal.<sup>45</sup> The figures for appeals from adjudicators show that in 2002 (when the Tribunal had power to hear appeals on questions of fact as well as law, a power withdrawn by the Nationality, Immigration and Asylum Act 2002) adjudicators determined 64,405 appeals in asylum cases, of which they allowed 22% and dismissed 76%, the remainder being withdrawn.<sup>46</sup> In the same year, the Immigration Appeal Tribunal decided 22,825 applications for leave to appeal,<sup>47</sup> and gave leave in about one third of them.<sup>48</sup> Of those, 2,015 (36%) were dismissed; 620 (11.14%) were allowed; and 2,700 (48.51%) were referred back to an adjudicator for further consideration.<sup>49</sup> In other words, in the one-third of asylum cases decided by adjudicators which went on appeal to the Tribunal, nearly 60% (or almost one in five of all cases heard by adjudicators) resulted in an error calling for correction.

65. This level of error is worrying. It seems to be largely due to the poor quality and poor presentation of the decisions which adjudicators have to review, and the pressure of time and the heavy caseload under which adjudicators are working. There is no likelihood of speedy improvements on either count if the proposed new Tribunal is established. It would inevitably face an overwhelming volume of cases, because it would have to deal with all those cases currently dealt with by adjudicators which are not appealed to the Immigration Appeal Tribunal. If no additional public sector expenditure on the Tribunal is contemplated, it is, in our view, unlikely that it will be able to provide an effective remedy for Convention rights, bearing in mind that the word "effective" imports the idea of a remedy which is reasonably timely and delivered reasonably reliably and efficiently.

45 Sch. 2, paras. 27–29.

46 Tina Heath, Richard Jeffries and Adam Lloyd, *Asylum Statistics United Kingdom 2002* (London: Home Office, 2003), Table 7.1.

47 *ibid.*, Table 7.2.

48 *ibid.*, p. 10, para. 27.

49 *ibid.*, Table 7.2. The report erroneously states (p. 10, para. 27) that 75% of appeals were dismissed.

66. We therefore asked for details of the Government's estimates of proposed staffing and funding for the new Tribunal. The Government has provided these.<sup>50</sup> **We draw them to the attention of each House as relevant material when considering whether the proposed Tribunal is likely to be able to provide effective protection against, and effective remedies for, violations of Convention rights. In our view, very serious doubts remain that make it especially important to consider the adverse impact upon the rule of law of the ouster of judicial review.**

67. We raised with the Government the human rights implications of making the Tribunal the final arbiter of a claim that it has acted incompatibly with a Convention right would be to deprive the victim of an effective remedy from an independent tribunal. As the Government accepts, to be effective for the purposes of ECHR Article 13 a remedy must be available from a national authority which is independent. We were concerned that the Tribunal might not be sufficiently independent when deciding whether its own decision or conduct had violated a Convention right.

68. The Government replied that Article 13 does not require multiple levels of appeal. However, as the Refugee Legal Centre pointed out in a letter to our Chair,<sup>51</sup> there is also a risk that denying people in the immigration system the judicial remedies for their Convention rights which are available to citizens would infringe the right to be free of discrimination on the ground of nationality in the enjoyment of the right to an effective remedy for violations of Convention rights (ECHR Article 14 taken together with Article 13).

69. The Government further considered that the risk that the Tribunal would violate Convention rights was low, and the risk is even lower in view of the fact that immigration and asylum appeals do not concern the determination of a person's civil rights and obligations. The Government drew attention to the high moral and professional capacity of those appointed as adjudicators and Tribunal members.

70. We accept that the current adjudicators and members of the Immigration Appeal Tribunal are highly capable professionals who do their work to the best of their considerable ability. However, we have already noted the difficulties under which they labour, and the effect which this has had in the past on the error rate. If such an argument were well-founded, it could be invoked in other cases where inferior tribunals take decisions affecting individual rights and freedoms. The argument requires an especially compelling justification where the rights at stake involve protection against well-founded fears of torture and persecution by those seeking asylum and protection as refugees under international law. Although the Government is right to say that relatively few immigration and asylum cases determine rights and obligations which would be regarded as "civil" for the purpose of ECHR Article 6.1, we note that many asylum and all human rights claims concern people who claim to be at risk of having their human rights violated if they are not allowed to remain in the United Kingdom. As the Refugee Legal Centre pointed out,<sup>52</sup> several articles of the ECHR (including Articles 2, 3 and 8) impose positive obligations on

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50 See Appendix 1, pp. 42–43.

51 See Appendix 2, pp. 49–51.

52 *ibid.*, p. 50.

the State to take reasonable steps to protect rights against infringement. Accuracy of decision-making is therefore vital to the protection of their Convention rights.

**71. We have carefully considered the Government's arguments, but consider that it could be strongly argued that the ouster of judicial review of tribunal decisions contemplated by clause 11 has not been justified by any argument advanced by the Government. There is a real danger that this would violate the rule of law in breach of international law, the Human Rights Act 1998, and the fundamental principles of our common law.**

72. The Government's response went on to note that there are precedents for courts being effective in correcting errors by reviewing their own decisions in appropriate cases, and to point out that the Tribunal would have this power.

**73. We accept that there is such a power in the House of Lords and the Court of Appeal, and that is necessary in a court of last resort. However, we consider that the immense differences of legal authority and seniority between the proposed Tribunal on the one hand and the Court of Appeal and House of Lords on the other make it inappropriate to allow self-review by the Tribunal to be the only way of correcting errors which are likely in many cases to affect people's Convention rights or rights under the Refugee Convention. We draw this to the attention of each House.**

74. The Government also told us that it did not intend to extend the range of remedies available from a Tribunal to protect human rights. In particular, we had asked why access to mandatory orders and damages would be excluded when they would sometimes be necessary to protect Convention rights effectively, and could be obtained from a court, if a person had access to one, but not from the Tribunal, by virtue of section 8 of the Human Rights Act 1998. However, the Government told us that it had not intended clause 11 to be interpreted as restricting access to the courts as much as we had assumed. In particular, the Government did not intend clause 11 to restrict the availability of *habeas corpus*, or to deprive a person of a right to damages for unlawful detention, or to remove the freedom to seek judicial review of a decision which cannot be appealed to the Tribunal.

75. It seems to us that this would leave many cases in which there could be a serious threat to fundamental human rights yet clause 11 would exclude the jurisdiction of the courts. For example, *habeas corpus* protects only the right to liberty of the person. There would be no access to courts to protect other Convention rights from being violated by immigration and asylum decision. Some of these rights are of even greater importance than the right to liberty of the person, including the rights to life and to freedom from torture and inhuman or degrading treatment or punishment, to say nothing of the right to a fair trial and the right to respect for family life. Under clause 11, it would be impossible for an applicant to initiate a challenge before the ordinary courts to a decision of the Tribunal which fails to protect any Convention right other than the right to liberty of the person (unless the Home Secretary has prevented the consideration of a human rights or asylum claim by certifying that it is ill-founded, or the applicant can provide significant evidence that a member of the Tribunal has been actuated by dishonesty, corruption or bias: see proposed new section 108A(4) of the Nationality, Immigration and Asylum Act 2002). Equally, it would be impossible for a person whose Convention rights are violated by an immigration decision and who cannot obtain redress from the Tribunal to seek other judicial remedies, including



damages, for the violation it has resulted in the detention of the person in violation of ECHR Article 5.

**76. For these reasons we are not reassured by the Government's explanation of its intentions in proposing clause 11. Nevertheless, we welcome the Government's agreement to consider amending proposed new section 108A(2)(e) to make it reflect accurately the Government's intentions. As currently drafted, the provision seemed to us to have been carefully crafted to achieve exactly the result which the Government now disclaims, and we are relieved that this was not the case. We hope that the Government will be able to redraft the provision in a way which, as well as accurately reflecting its own intentions, adequately protects Convention rights and respects the rule of law. We draw this to the attention of each House.**

### **Clause 14 (formerly clause 13): removal of power to grant bail**

77. We raised with the Government the effect of clause 14, relating to the power to detain a person pending removal or deportation notwithstanding that a court had previously granted bail, on the right to liberty of the person under ECHR Article 5. The Government's response explained that the purpose of the provision is not to prevent a court from granting bail to an immigration detainee, but to prevent the grant of bail by a court in an unrelated matter from preventing the detention of a person pending deportation or removal.

**78. In the light of the Government's explanation, we accept that this clause does not give rise a significant threat of a violation of a Convention right.**

### **Clause 15 (formerly clause 14): Power to require co-operation of deportees**

79. Clause 15 would allow the Secretary of State to require a person to take specified action, including providing information, documents, identification data and co-operation, in order to facilitate that person's deportation or removal by enabling a travel document to be obtained for the person. Failure to co-operate would be an offence. The clause as drafted would enable the administration to abuse the power by demanding information and co-operation which can then be used to facilitate the person's deportation later, and to allow the Secretary of State to require any person to co-operate even if that person is in no danger of deportation or removal, with refusal to co-operate being an offence.

80. The provision seems to us to engage the right to respect for private life under ECHR Article 8.1, and is very widely drawn. When we first examined the Bill, it seemed to us that the powers of the Secretary of State and the definition of the offence in clause 15 would go far beyond the particular mischief at which the clause is directed, namely the difficulty of arranging necessary travel documents to allow people to be removed or deported without the assistance of the person in providing information needed to obtain a travel document on their behalf from the person's Embassy or High Commission.<sup>53</sup> We feared that it might

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<sup>53</sup> Explanatory Notes para. 84.

therefore be difficult to justify as being proportionate to a pressing social need so as to be “necessary in a democratic society” for a legitimate aim under ECHR Article 8.2.

81. We raised the matter with the Government. In its response, the Government said that it believes that any interference with Article 8 rights would be both justified and proportionate both to the pursuit of effective immigration control and to the economic well-being of the country. Failure to co-operate or take required steps can cause delay and may be done on purpose to frustrate the process. This undermines the efficacy and credibility of the immigration system. The purpose of clause 15 is to ensure that there is a sanction for obstruction.

82. We note, first, that the pursuit of effective immigration control is not in itself one of the purposes for which it is legitimate, under ECHR Article 8.2, to interfere with the right to respect for private life. The Government does not explain in its response exactly how, or how severely, obstructing the immigration process damages the economic well-being of the country.

**83. We therefore cannot say that we are satisfied that the provision serves a legitimate aim, or that it would in all cases be proportionate to the aim. We recognise that any individual requirement imposed pursuant to clause 15 which interferes with the right to respect for private life would have to be capable of being shown to serve a legitimate aim and to be proportionate to it in the circumstances of the case, in order to be a valid requirement (because it would otherwise be unlawful by virtue of section 6 of the Human Rights Act 1998). However, we draw the matter to the attention of each House, as Members of each House may wish to seek further information from the Government about the extent of any damage to the economic well-being of the country resulting from obstruction of the immigration system.**

### **Clause 16 (formerly clause 15): electronic monitoring**

84. Clause 16 would allow an electronic monitoring requirement to be imposed on an applicant for immigration to complement a residence restriction or as a condition for immigration bail, or as an alternative to a reporting restriction. This engages the right to respect for private life under ECHR Article 8.1. Although the step may be justifiable under Article 8.2 as being in accordance with the law and being necessary in a democratic society for the prevention of crime (illegal immigration), there would be no power to challenge the decision to impose a monitoring requirement, because of the restriction on remedies contained in clause 11.<sup>54</sup>

85. We therefore raised with the Government the possibility that this might result in the absence of an effective remedy for a violation of a Convention right under ECHR Article 13, and a violation of the right of access to a court for the determination of one’s civil rights (such as the right to be free of an assault) as required under ECHR Article 6.1.

86. The Government’s response is in two parts. First, the Government reiterates its confidence in the ability of the Tribunal to provide effective remedies. Secondly, the

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<sup>54</sup> See [www.ilpa.org.uk](http://www.ilpa.org.uk)

Government considers that in practice it would be unlikely that any Convention rights would be affected, because it intends that an electronic monitoring requirement would be imposed only with the consent of the subject, and would require the subject's consent to operate effectively.

87. We have already expressed our concern about the logistical capacity of the Tribunal to provide reliably effective remedies for violations of Convention rights [paragraphs 64 to 66 above], and we will not repeat it here. As to the consensual nature of electronic monitoring, we appreciate that the subject's co-operation would be needed to some extent. **Clause 16(2)(a) states that a person "may be required to co-operate with electronic monitoring", and the reference to co-operation is repeated in clause 16(5). However, we do not regard co-operation as being the same as consent. The fact that the subject may be "required to co-operate" shows that the co-operation may be against the subject's will. That being so, we are not persuaded that there is in practice no significant risk of an interference with Convention rights. Any such interference would require to be justified. We draw this to the attention of each House.**

### **Clause 17 (formerly clause 16): Search warrants for the Immigration Services Commissioner**

88. Clause 17 would amend the Immigration and Asylum Act 1999, introducing a new section 92A allowing a JP to issue a search warrant allowing the Immigration Services Commissioner to enter and search premises where there are reasonable grounds for believing that an offence under section 91 of the Act has been committed, that there is likely to be evidence on the premises of substantial value to the investigation of the offence, and that one of a number of conditions is met. (Section 91 of the 1999 Act makes it an offence for a person to provide immigration advice or immigration services if he or she is not registered with the Commissioner under section 84 of the Act, or if he or she is subject to an order made by the Immigration Services Tribunal or a professional disciplinary body restricting or prohibiting the provision of advice or services by that person following a disciplinary charge.)

89. Proposed new section 92A(7)(c) would make the power applicable to material even if it consists of items subject to legal professional privilege or the categories of confidential or journalistic material known as excluded material and special procedure material under the Police and Criminal Evidence Act 1984.

90. The provisions of proposed new section 92A engage ECHR Articles 6 (right to a fair hearing), 8.1 (right to respect for private life, home and correspondence) and 10.1 (right to freedom of expression). Confidential material is protected under ECHR Article 8.1, and lawyer-client communications attract particularly strong protection: any interference must be justified by reference to specially compelling considerations if it is not to violate Article 8.<sup>55</sup> The European Court of Human Rights recognizes that the ability to communicate freely and privately with one's legal adviser is an essential element in a fair trial, so interfering with lawyer-client communications may violate ECHR Article 6.1.<sup>56</sup> The right to legal

55 See e.g. *Campbell v. United Kingdom* (1992) 15 EHRR 137, Eur. Ct. HR; *Niemietz v. Germany* (1992) 16 EHRR 97, Eur. Ct. HR; *Foxley v. United Kingdom* (2000) 31 EHRR 637, Eur. Ct. HR.

56 *Niemietz v. Germany*, above, at § 37 of the judgment.



professional privilege is similarly protected as a fundamental right under English common law.<sup>57</sup> Where the material sought or seized is journalistic material, even if it is not confidential it is protected by ECHR Article 10, which protects journalists' working materials and sources of information as part of the protection for a free press which is regarded as essential to maintaining freedom of expression in a democratic society.<sup>58</sup>

91. Interference can be justified under ECHR Articles 8.2 and 10.2 if the interference is in accordance with the law (or prescribed by law) and necessary in a democratic society for one of the legitimate purposes listed in those paragraphs. Clause 17 would provide an adequate legal basis for the use of the powers to be in accordance with the law or prescribed by law. The prevention of crime is a legitimate purpose under both paragraphs.

92. However, we raised with the Government the question whether it is compatible with the right to a fair hearing under ECHR Article 6.1. We also asked whether it would be "necessary in a democratic society", that is, a proportionate response to a pressing social need, in relation to a legitimate aim for the purposes of Articles 8 and 10, to interfere with the sensitive categories of lawyer-client communications, confidential personal communications and journalistic material in order to investigate a suspicion that an offence of offering immigration advice or assistance without being registered is being committed.

93. We were particularly concerned at what appeared to us to be a lack of strong safeguards in the proposed new section 92A or in the background of applicable rules and guidance. Where a draconian power to interfere with rights under ECHR Articles 8 and 10 is conferred—

... the implementation of the measures must be accompanied by effective safeguards which ensure minimum impairment of the right to respect for his correspondence. This is particularly so where ... correspondence with the [complainant's] legal advisers may be intercepted.<sup>59</sup>

94. In its response, the Government did two things. First, in relation to the reasons for allowing a warrant to issue to search for items subject to legal privilege, the Government pointed out that the Commissioner, in order to stop unscrupulous advisers who are believed to be preying on the vulnerable, needs to examine the material which by its nature usually includes correspondence and advice passing between the advisor and the client. However, the Government also pointed out that the purpose is not to use those confidential communications and advice against the client, but rather to use it against the unscrupulous adviser. The Government said that section 93 of the Immigration and Asylum Act 1999 would limit disclosure of the information by the Commissioner to anyone for a purpose other than the prosecution of unregulated advisers. Secondly, in relation to the safeguards, the Government drew attention to the need to satisfy a Justice of the Peace.

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57 *B (A Minor) v. Director of Public Prosecutions* [2000] 2 AC 428, HL; *R. (Morgan Grenfell & Co. Ltd.) v. Special Commissioner of Income Tax* [2002] UKHL 21, [2002] 2 WLR 1299, HL.

58 *Goodwin v. United Kingdom* (1996) 22 EHRR 123, Eur. Ct. HR.

59 *Foxley v. United Kingdom*, above, at § 43 of the judgment. See also *Campbell v. United Kingdom*, above, at §§ 46 and 48 of the judgment.

95. In our view, the protection offered by a Justice of the Peace is limited. It is only as good as the information provided by the applicant allows it to be. Where the Commissioner, rather than a constable, applies for a warrant it is not clear how far the applicant or the Justice of the Peace would feel obliged to comply with the requirements of the Police and Criminal Evidence Act 1984 and the Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises, issued under it. The limited research which has been conducted on the examination by Justices of the Peace of applications for search warrants suggests that there is a considerable variation between Justices in the rigour with which the examination is conducted.<sup>60</sup>

96. We note further that section 93(2) and (3) of the Immigration and Asylum Act 1999 would allow the Commissioner to disclose information if disclosure is necessary in the public interest, having regard to the rights and freedoms or legitimate interests of any person (clause 93(3)(d)). It is not clear how this would be interpreted in the context of information subject to legal privilege indicating that the client is guilty of a criminal offence.

97. Furthermore, we note that the 1984 Act absolutely prohibits the issue of a warrant to search for items subject to legal privilege, and requires an application for access to or production of the less sensitive categories of confidential and journalistic materials to be made to a circuit judge (usually *inter partes*) rather than to a Justice of the Peace, in order to ensure that adequate safeguards are observed. The power to issue a warrant proposed here is thus novel, both because of the type of material which can be sought and because of the low level of the judiciary to which an application for confidential material would be made under clause 17.

98. **We draw to the attention of each House:**

- a) **the exceptional nature of the proposed power of search in Clause 17 of the Bill;**
- b) **its potential impact on Convention rights; and**
- c) **our view that there is a need for additional safeguards in respect of legally-privileged material relating to the clients of immigration advisers.**

99. On the other hand, we are glad that the Government is considering, with the Commissioner, the extent to which excluded material and special procedure material might be relevant to the investigations, and whether the clause should be amended accordingly.

### **Clause 21 (formerly clause 20): fees for immigration applications**

100. Clause 21 proposes a power for the Secretary of State to set fees for applications and certain other processes which exceed the cost of determining the application or undertaking the process. In particular, the Secretary of State would be allowed to calculate

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<sup>60</sup> See K. Lidstone and V. Bevan, *Search and Seizure under the Police and Criminal Evidence Act 1984* (Sheffield: University of Sheffield Faculty of Law, 1992); D. Dixon et al., "PACE in Practice" (1991) 141 NLJ 1586, 1587.

the level of the fee by reference to the potential benefits which the Secretary of State thinks are likely to accrue to the applicant if the application is successful or the process is completed.<sup>61</sup> This could allow the Secretary of State to impose very high fees, on the footing that the right to British nationality, leave to remain in the United Kingdom, or (perhaps most of all) a work permit are economically valuable, even if the application is not being made for economic reasons. Such fees could place an impossible hurdle in the way of applicants who do not have a large amount of ready cash. The fee structure could, deliberately or not, discourage poor people from making applications, or in some cases make it financially impracticable for them to do so. It could amount to indirect discrimination against poor people: a standard fee set at too high a level would impose a condition on applicants which could be met significantly more easily by wealthy people than by poor people, and it might mean that only wealthy people would be able to apply.

101. When we first examined the Bill, we took the view that this could discriminate on the ground of wealth in a matter touching their private lives, engaging the right to be free of discrimination in the enjoyment of Convention rights under ECHR Article 14 taken together with Article 8. It could also be contrary to ICCPR Article 26, which provides so far as relevant—

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as ... property ...

Article 26 binds the United Kingdom in international law, although the right to be free of discrimination on the ground of property is not part of domestic law.

102. We therefore asked the Government why it considered that fees calculated on the basis set out in clause 21(1) and (3) would not impact on poor people in such a way as to be incompatible with the right to be free of discrimination on the ground of property under ICCPR Article 26. (The issues are essentially the same under ECHR Article 14.) The Government replied that it would be open to the Secretary of State to address in subordinate legislation the problem of fees being so high as to discriminate in an unjustified way, allowing fees to be waived in such circumstances. The Government also notes that Treasury approval would be needed before an order imposing an enhanced fee could be made.

**103. These points do not seem to us to address what we consider to be the fundamental problem: the clause contemplates setting a fee by reference to a speculative future benefit rather than to either the cost of processing the application or the applicant's ability to pay. We do not regard a power for the Secretary of State to make subordinate legislation allowing an officer to waive a fee in case of destitution (or, perhaps, other hardship) as a satisfactory protection for the right to be free of discrimination. We draw this matter to the attention of each House.**

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<sup>61</sup> Cl 20(1), and see also 20(3) in relation to consular fees.

## Other matters

104. We note, and draw to the attention of each House, the following additional points made in the Government's response.

- a) In relation to clauses 12 and 13 (formerly clauses 11 and 12), mentioned in our Third Report, it would be possible (notwithstanding clause 11) for a person to seek judicial review of a Home Secretary's certificate that a person comes from a safe country of origin or could be removed to a safe third country.<sup>62</sup>
- b) Schedule 3 to the Bill has been amended to bring the provisions on safe third countries more closely into line with those on safe countries of origin.

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<sup>62</sup> Note, however, the view of the Refugee Legal Centre: see Appendix 2.

# Formal Minutes

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**Monday 2 February 2004**

Members Present:

Jean Corston MP, in the Chair

Lord Campbell of Alloway

Lord Judd

Lord Lester of Herne Hill

Baroness Prashar

Mr David Chidgey MP

Mr Kevin McNamara MP

Mr Richard Shepherd MP

Mr Paul Stinchcombe MP

Mr Shaun Woodward MP

The Committee deliberated.

Draft Report [Asylum and Immigration (Treatment of Claimants, etc.) Bill], proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 104 read and agreed to.

*Resolved*, That the Report be the Fifth Report of the Committee to each House.

*Ordered*, That certain papers be appended to the Report.

*Ordered*, That the Chairman do make the Report to the House of Commons and that Baroness Prashar do make the Report to the House of Lords.

[Adjourned till Monday 9 February at Four o'clock.]

# Appendices

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## 1. Letter from Beverley Hughes MP, Minister of State, Home Office

Thank you for your letter of 6 January outlining comments on the Asylum and Immigration (Treatment of Claimants, etc.) Bill raised by your Legal Adviser. Please find responses on the questions raised outlined below.

**Question 1. In the light of these considerations, why does the Government consider that the provisions of clause 2 are likely to allow asylum claimants to be dealt with in accordance with Article 31.1 of the Refugee Convention?**

Article 31 provides that refugees shall not be penalised on account of their illegal entry or presence in the UK if they come directly to the UK, present themselves without delay to the authorities and show good cause for their illegal presence or entry.

Clause 2 is aimed at penalising those people who arrive in the UK without the documents they must have used to get to the UK. Its purpose is to catch those people who deliberately destroy or dispose of passports to avoid proper immigration control. We do not consider that a refugee needs to destroy or dispose of documents, having used those documents at the start of a journey, in order to find safety in the UK.

We do recognise that refugees may find it more difficult to obtain proper documents or may be unable to travel on their own documents. It is for these cases, and a limited number of other situations, that the clause provides a defence of a reasonable excuse. We would consider never having had a proper document to be a reasonable excuse for arriving undocumented, as might be the case for a refugee who was unable to obtain a passport but nevertheless managed to travel to the UK.

We do not accept that someone would struggle to prove that this is the case. For example in the case of a person who flees their country without a passport and is smuggled on to a plane or bribes an airport official, it is reasonable to expect that they would be able to give a clear and detailed account of how that took place, why they did not have a document, how documents in their country are issued etc.

Having said that, we do take our international obligations seriously and do not wish to penalise those who have very real and proper reasons for arriving without a document. With that in mind, and following discussions that took place during the Commons Committee stage of this clause, we are considering whether any amendment is necessary to ensure that those who fall within the protection of Article 31 and who do have proper and justifiable reasons for arriving without a document are not penalised.

**Question 2. Why does the Government consider that reversing the burden of proof would be a proportionate response to the legitimate aim, particularly having regard to clause 2(5) (which limits the circumstances in which a defendant would be able to claim to have had reasonable cause for destroying documents)?**

A provision which interferes with the presumption of innocence can be compatible with Article 6 of the ECHR if it is directed to a legitimate aim and the interference is no more than is necessary to meet that aim (i.e it is proportionate). We consider that the reversal of the burden of proof in this offence is both for a legitimate aim and proportionate.

The problem of abuse of the asylum and immigration systems is recognised to be a matter of public concern and we believe that our attempts to counter such abuse would be considered to be for a legitimate aim. We accept that some people (in the main those who claim asylum) who arrive in the United Kingdom without documents or inadequately documented may have good reasons for doing so. However a significant proportion deliberately destroy or dispose of their documents in order to enhance their claim (by obscuring their identity and/or nationality or claiming that they come from a country which they do not) or to thwart their removal in the event of a failed claim. Ultimately removal from the United Kingdom may be delayed indefinitely if a replacement document cannot be obtained on a person's behalf (the country concerned may not issue a travel document or accept an EU letter unless it is satisfied of both the person's true identity and nationality, which can be difficult to establish if someone has destroyed their documents).

Whether a person sets off on their journey without documents or whether they destroy them on the way or soon after arrival is something that is peculiarly in that person's knowledge. There might be occasions when, if the burden were on the prosecution to disprove a defence, its task would be a straightforward one. Those cases where a person boards a flight in their own name with their documents and disembarks without them. It will be unlikely that they will be able to offer an acceptable excuse as to why that is. However in those cases where a person claims that they never had a document or where they boarded the plane using a different name to that which they offered on arrival, it is difficult to see how the prosecution could disprove an excuse if the burden of doing so rested with it. In such cases any excuse that the defendant may have for not having the documents on arrival is peculiarly in his or her own knowledge and we believe, therefore, it is justifiable to require the defendant to prove this him or herself.

We do not believe that clause 2(5) impacts on the provision's compatibility with article 6. Clause 2(5) merely provides that certain conduct may not amount to a defence of arriving in the United Kingdom without a document.

**Question 3. Why does the Government consider that clause 6(3) would be compatible with ECHR Article 13 in so far as the clause would require a deciding authority to infer that a person making a human rights claim, who has not taken advantage of a reasonable opportunity to make the human rights claim in a safe country, has thereby damaged his or her credibility?**

We do not consider it irrational for a deciding authority to regard it as damaging the credibility of a person making an asylum or human rights claim if they fail to take advantage of a reasonable opportunity to apply for protection in a safe third country through which they pass en route to the United Kingdom. It is in our view legitimate to expect a person who is genuinely in need of international protection to apply for such protection in the first safe country they reach, subject to the reasonable opportunity proviso included in clause 6(3).

The extent to which failure to seek protection in a safe country before arriving in the United Kingdom will damage a person's credibility is not fixed by clause 6. The deciding authority will have discretion to decide the weight to give to this failure, taking account of all factors relevant to the claim. The requirement to take that behaviour into account is not determinative of credibility and does not displace the obligation to consider all the circumstances of the case.

Similarly, there is nothing in clause 6 which requires or permits a deciding authority to act in breach of the European Convention on Human Rights (or the Refugee Convention). If a deciding authority considers that a person's asylum or human rights claim has been



successfully made out, notwithstanding the fact that they did not take up the opportunity of applying for protection elsewhere, then that person will not be removed.

Clause 6 does not alter the fairness of the initial decision making in that the merits of any asylum or human rights claim will still be considered in accordance with our international obligations under the Refugee Convention and the European Convention on Human Rights. Claimants will have a right of appeal against a refusal of their claim and the appellate authority will determine that appeal in accordance with those obligations.

**Question 4. In the light of these considerations, why does the Government consider that the interference with the right to respect for private and family life, which would be a likely consequence of withdrawing support under clause 7, would be proportionate to the legitimate aim of removing people who are unlawfully within the United Kingdom?**

Clause 7 adds a fifth class of ineligible person to schedule 3 Nationality, Immigration and Asylum Act 2002 (NIA). For the purposes of NASS support (part vi Immigration and Asylum Act 1999) a person continues to be treated as an asylum seeker while his household includes a dependent child who is under 18 while he and the child remain in the United Kingdom. That is subject to paragraph 6 of schedule 3, if he fails to comply with a removal direction (i.e he is then ineligible for support notwithstanding his continued presence in the UK). Clause 7 applies to those whose asylum claims have failed and whose appeal rights are exhausted. The intention of the clause is to ensure that those families whose asylum claim, after full and fair consideration, has failed return home as soon as possible. The Government does not believe it is right or justifiable that persons should be able to continue living at public expense if they are able to return home and do not do so. The clause is designed to encourage people to make a dignified return home rather than facing compulsory removal (although the Committee should note, in any event, that the latter is not always possible – see further below). The Government believes that allowing families to receive support indefinitely when their asylum claim has been rejected acts as an incentive to frustrate the removal process and therefore the asylum system. Clause 7 is an important part of the Government's reforms to bring further order to, and confidence in, the asylum system.

Paragraph 1 of Schedule 3 sets out all those provisions under which the ineligible persons may not receive support. Paragraph 3 provides that paragraph 1 does not prevent the exercise of a power or the performance of a duty to the extent that its exercise or performance is necessary for the purpose of avoiding a breach of a person's Convention rights. This provision impacts on all those who may potentially provide support to failed asylum seeking families including both the Secretary of State and local authorities. Schedule 3 also contains a requirement at paragraph 13 for a local authority to inform the Secretary of State if it is asked to provide support to anyone who it thinks may be covered by paragraph 1. That requirement is extended by clause 7 to those who the local authority believes may be ineligible for support by virtue of it.

Subject to the provisions noted above, the Government comments further on the operation of Clause 7 and its compatibility with Article 8 below.

The clause applies to those who the Secretary of State certifies have failed either to take reasonable steps to leave the UK or to place themselves in a position whereby they are able to leave the UK. Dealing with each in turn:

(i) those who the Secretary of State certifies are failing, without reasonable excuse, to take reasonable steps to leave the UK voluntarily. In other words those who can but are not returning home. If this is the case and is certified as such then support will cease 14 days



after receipt of that notification by the person concerned. The Government does not accept that in such cases there will be an interference with the family's (or its individual members) rights under Article 8 since certification will only occur in cases where the family are able to retain their unity by returning to their country of origin. If the family were to choose not to do so, then it is considered that any resulting interference with their private or family life would be proportionate to the pursuit of effective immigration control and to the economic well-being of the country. Assistance for voluntary returns is available, for example through the Voluntary Assisted Returns and Reintegration Programme operated by the International Organisation for Migration. Voluntary return is clearly preferable where children are involved, hence the Government's desire to encourage return by this route. Furthermore, enforced removal is also an expensive process involving considerable Immigration Service resources;

(ii) those who the Secretary of State certifies are failing to take reasonable steps to place themselves in a position in which they are able to leave the UK voluntarily. In the main this will apply to those on whose behalf the Immigration Service needs to apply for a travel document but who are failing to cooperate with steps to obtain one on their behalf. They may, for example, be required to provide biographical details, details of their education, contact details of friends or relatives in their country of origin or attend at an interview at the embassy concerned. The country concerned will only issue a document if it is satisfied of both the person's (family's) true identity and nationality. At present a family can fail to cooperate with steps required to obtain a document on their behalf whilst at the same time and potentially indefinitely (or at least until the children in the family reached 18) carry on being supported. As noted above a removal direction cannot be issued unless a person has a travel document. In these circumstances, therefore, it is simply not open to the Government to remove families as suggested by the Committee, and indeed frequently people do not cooperate precisely because they are aware that it will frustrate the Government's attempts to remove them.

In these circumstances the Government accepts that there may be a period of time between support being withdrawn and, if that step then compels a family to start co operating, the issuing of the document itself. If the parents were unable to care for or support their children during this period and had no other means of doing so (friends, family, community) then obviously the local authority would have to consider at that stage whether it had to take any steps (such as supporting or accommodating the child) to protect the child's interests. None of the provisions in schedule 3 NIA, including the proposed clause 7, prevent the Secretary of State or a local authority from exercising a power or duty to the extent necessary to avoid a breach of a person's Convention rights. Necessarily, therefore, in the circumstances described above, either the Secretary of State or the relevant local authority would have to consider whether despite the certification it did need to provide support so as to avoid a breach of Convention rights. In the context of Article 8, this would mean that support would be made available wherever it was considered that a failure to provide it would result in an interference with private or family life which was disproportionate to the aims pursued.

The Government is currently drawing up a process that will include a series of letters and an interview. This will ensure that families are fully aware of the consequences of their actions and the possibility that support may eventually be withdrawn. It will also ensure that, in the event a family is not cooperating, an enforced removal is effected whenever possible. Discussions are also taking place with the Local Government Association with a view to establishing the ways in which local authorities might exercise their duties towards children in those instances where support is withdrawn.

**Question 5. Does the Government consider that the proposals in clause 7 comply with the United Kingdom's obligation under CRC Article 3.1 to make the best interests of children a primary consideration in all decision-making which affects them, and if so, why?**

The Government believes its proposals are in accordance with Article 3.1 of the UNCRC. As described in response to the question above, any withdrawal of support will be entirely avoidable if the parents in the family take appropriate steps to return home or to place themselves in a position whereby they may be returned home. It is only if they fail to take these steps that the Government will consider withdrawal of their support. If it does this then the children in the family may still be supported if it is considered necessary, albeit by the relevant local authority. It will be up to the local authority to determine how best it should provide that support, although it is prohibited from supporting the parents as well unless it is necessary to do so to avoid a breach of the ECHR. The Government does not think that continuing to support a family in a country in which it has no long-term future is in a child's best interests. It would delay the family's eventual resettlement and would be contrary to public policy.

**Question 6. In the light of this, why does the Government consider that there would be sufficient safeguards against abuse of the powers proposed in clause 8 (including expertise among immigration investigators in investigating the kinds of offences listed, training in the use of the powers and the application of the relevant Codes of Practice, independent investigation of complaints, supervision by the Police Complaints Authority, and availability of judicial remedies) to meet the requirements of ECHR Articles 5.1, 5.5, 6.1, 8, and 13?**

Clause 8 provides immigration officers with a power of arrest without warrant, in respect of a number of specified offences. However, this power will only be exercised where the specified offence is encountered as part of an immigration investigation or operation. The clause specifically states that in order for the power of arrest to apply, an immigration officer must have formed a reasonable suspicion that a person has committed or attempted to commit an offence to which the section applies "in the course of exercising a function under the Immigration Acts".

Concern has been expressed that the effect of clause 10 would lead to possible breaches of the ECHR where powers under clause 8 are exercised, in that victims of an alleged abuse of power might not be able to challenge that alleged abuse in court or obtain compensation. This is not the case. Clause 10 relates specifically to challenges to the decision of the Tribunal when it is considering appeals against immigration decisions as defined in section 82 of the 2002 Act and has no direct link to clause 8. A person who alleges that an arrest under clause 8 was unlawful will still be able to seek judicial review or habeus corpus.

In cases where an arrest is made in reliance on the new power, the arrested person will have to be taken to the nearest, designated police station. Upon arrival at the police station the continued detention of that person will have to be authorised by the custody officer. Once booked in, any person arrested will be subject to the safeguards provided by the Police and Criminal Evidence Act 1984 ("PACE").

In addition, by virtue of section 145 of the Immigration and Asylum Act 1999, in England, Wales and Northern Ireland, immigration officers exercising their powers to question, search or arrest must have regard to the relevant specified provisions of PACE codes. The Immigration (PACE codes of Practice) Direction of 2000 sets out the relevant powers and the provisions of the codes that must be adhered to. For example, an immigration officer who wishes to arrest a person without a warrant must have regard to every provision contained within PACE codes C, D and E.

Neither section 145 of the 1999 Act nor PACE applies in Scotland. However, the Immigration Service in conjunction with the Crown Office has drawn up the Immigration Arrest (Scotland) Codes of Practice. These Codes specify that immigration officers exercising powers of arrest in Scotland shall work within the boundaries of the provisions sections 13 to 15 of the Criminal Procedure (Scotland) Act 1995 (reading those provisions to refer to “immigration officer” rather than “constable”). Further, when exercising powers of search under the Immigration Act 1971, the Codes specify that immigration officers must have regard to the PACE Codes of Practice.

As a matter of policy, only immigration officers who have undergone rigorous training in relation to criminal investigations will be allowed to exercise these new powers. The training will include relevant training in human rights issues and their impact on arrest and investigation, race relation issues and powers of arrest. The latter will include further guidance on areas such as proportionality and reasonableness.

The PACE codes of practice form the basis for the training package for immigration officers who are to undertake arrest duties and to work as part of the crime investigation teams. The training covers all areas that are essential to staff who will be undertaking arrests and investigation of crimes. Thirteen days of the fifteen day course for crime investigation teams are founded on the principles and application of PACE and cover areas such as searches, interviewing, custody, emergency first aid and the rights of the individual. A separate course is provided for arrest training and again the core basis for the training is the PACE codes of practice, where officers are trained in how to lawfully implement the powers of arrest and appropriate use of restraint techniques.

Where a complaint is made there are clearly defined procedures for the handling of complaints against members of the Immigration Service and others for which the Service has responsibility. The Immigration Service Complaints Unit handles such complaints. The work of the Unit is scrutinised by the Immigration and Nationality Directorate, Complaints Audit Committee (CAC) who are an independent body appointed by the Immigration Minister to monitor the complaints procedure of the Immigration and Nationality Directorate (IND), including those of the Immigration Service. The committee’s terms of reference, as defined by the relevant Minister are:

*“The IND Complaints Audit Committee should satisfy itself as to the effectiveness of the procedures for investigating complaints. It will be involved in the investigation of systems and procedures used in dealing with complaints but will not take part in the individual decisions. It will have access to all papers on compliance investigations. In complaints arising from the exercise of powers by immigration officers under sections 128 – 138 of Part VII of the Immigration and Asylum Act 1999, the Committee will be provided with a copy of the complainant’s letter as soon as possible after receipt. The Committee will have the opportunity to comment on the form which the investigation should take and will be kept informed of the progress of the investigation. The Committee will draw the attention of IND management to any weakness or any quality of service deficiencies identified within established procedures and working practices, and will make an annual report to the Home Secretary.”*

In keeping with this undertaking the CAC have an enhanced role in relation to any complaints arising from an immigration officer exercising a power of arrest. The CAC members take the lead responsibility for monitoring these cases. The appointed CAC member is known as the Independent Assessor (IA) and the IA will be notified when such a complaint is received. Investigators, who have been specially trained in all aspects of the relevant law, PACE codes of practice and enforcement practice will carry out the enquiries into the complaint. Upon receipt, the investigation report will be forwarded to the IA who is able to make comments or recommendations at this stage. He will be appraised regularly

of the progress of the investigation and may make recommendations or comments at any stage during the process. The Immigration Service Complaints Unit completes the final response to the complainant, and this is forwarded to the IA who will have a further opportunity to comment before the response is despatched.

In light of the strict procedures that are in place with regard to the exercise of arrest powers and the fact that there are specific, independent monitoring systems in place with regard to complaints, together with the scrutiny of the courts with regard to prosecution of such cases, the Government is satisfied that there are sufficient safeguards in place against the abuse of the powers provided for in clause 8.

**Question 7. What are the Government's estimates of:**

**(a) the number of full-time and full-time-equivalent members who would be appointed to the proposed Asylum and Immigration Tribunal;**

As the legislation provides for a transfer of all existing IAA and IAT judiciary to the IAT, the judicial complement will be the same as in question 7(b).

**(b) a statement of the current number of full-time and full-time-equivalent adjudicators and members of the Immigration Appeal Tribunal;**

The current number of full-time and full-time-equivalent adjudicators and members of the IAT is as follows:

- IAT: 1 President
  - 1 Deputy President
  - 33 salaried Vice Presidents
  - 32 fee paid legally qualified Chairs
  - 33 fee paid lay members (not transferring to AIT)
- IAA: 1 Chief Adjudicator
  - 1 Deputy Chief Adjudicator
  - 9 Regional Adjudicators
  - 7 Deputy Regional Adjudicators
  - 146 salaried full-time adjudicators
  - 454 fee-paid adjudicators [full- and part- time]

**(b) the current number of staff of the Immigration Appeal Tribunal and the adjudicators;**

The IAT has 89 permanent administrative staff. The IAA has 994 members of staff of which 173 are permanent part-time or casual part-time.

**(c) the current member and staff costs of the adjudicator and Immigration Appeal Tribunal system; and**

The current staff and judicial costs of the IAA and the IAT are £54.8 million, which breaks down as follows: £18.0 million for salaried judiciary (both tiers); £16.5 million for fee-paid judiciary (both tiers); £1.6 million for travel and subsistence (of which 90% is generated by fee-paid judiciary); and £17.1 million of IAA staff costs and £1.6 million of IAT staff costs. The forecast for judicial fees is based on judicial numbers and the current year plan of judicial sittings for fee-paid judiciary in both tiers.

**(e) the estimate of member and staff costs for the first year of operation of the proposed new Tribunal?**

The current year pay-bill (for year 2002/03) has total costs of judiciary and staff of £54.8 million. There may be a proportional increase in salaried adjudicators' fees, due to the new Tribunal having more senior judiciary (supervisory judges). This could feasibly be calculated as a 5% increase on the current bill of £18.0 million, making a further £0.9 million. However, we can subtract forecasted fees of £1.7 million for lay members who will not be present in the AIT.

An estimated figure therefore may be:

£19.0 million for salaried judiciary (rounded up)

£14.8 million for fee-paid judiciary (minus lay members)

£1.6 million judicial travel and subsistence

£18.7 million staff costs

The total estimated staff and judicial costs are therefore £54.1 million. Please note that this does not account for inflation or projected pay increases between this financial year and the implementation date of the new Tribunal.

**Question 8. Why does the Government consider that it would be compatible with ECHR Article 13 to restrict review by and appeal to the courts so as to make the proposed Tribunal the final arbiter of a claim that it has itself violated a Convention right?**

The Government has already stated its view that Article 13 does not require the provision of multiple levels of appeal in the explanatory notes to the Bill. What is required is access to an independent national authority with strong enough powers to provide effective redress. The Government's stance is that the Tribunal will meet these requirements in a way specifically relevant to the issues that arise in immigration and asylum cases.

The Government wishes to maintain scope for domestic redress to address such violations as might occur, but considers that it is justified in forming the view that the risk that the Tribunal's judiciary might violate an appellant's Convention right is low. In the four years since the Human Rights Act 1998 came into force very few cases have alleged violations by judicial act, and such violations are rendered even less likely in immigration and asylum appeals which do not concern the determination of a person's civil rights and obligations for the purposes of ECHR Article 6(1) (*Maaouia v France* (2000) 33 EHRR 42). What the Government does not accept, however, is that in order to provide effective protection against violations by judicial act, the United Kingdom is bound to retain the multi-tiered hierarchy of courts.

The Government has confidence in the judiciary at all levels within the United Kingdom. The requirements for appointment as adjudicators and Tribunal members and the

procedures for judicial appointments ensure that those who are appointed are of high moral and professional capacity.

It has never been the case that HRA 1998 provides that every single allegation of violation by a judicial act is open to higher court scrutiny. Section 9(1) states as follows:

9(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—

- (a) by exercising a right of appeal;
- (b) on an application (In Scotland a petition) for judicial review; or
- (c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.”

There is no forum for an allegation that the House of Lords has violated a Convention right, nor is there for judicial acts of the Divisional Court when it is exercising jurisdiction over matters for which it is the “final” level of appeal.

Nor would the Government accept that a forum has to be provided to enable any complaint to be aired regardless of the strength or weakness of the complaint. There are permission stages both in appeals to the IAT and in seeking judicial review. The inclusion of a requirement for a clear error of law as the threshold requirement for tribunal review is, in the Government’s view a particularly appropriate way of addressing the level of risk.

**Question 9. Why does the Government consider that the restriction of recourse to the courts, coupled with the absence of a power for the Tribunal to give a full range of remedies (including injunctions and damages) for violations of human rights, would be compatible with the right to an effective remedy for alleged violations of Convention rights as required by ECHR Article 13?**

In response to the particular point raised by the Committee, the Government does not accept that a judge exercising the Tribunal review jurisdiction is not independent of the judge who heard the appeal. The Government contends that the Tribunal system stands as an effective remedy satisfying our international obligations under article 13. The Government has decided that it wishes to go further than this, empowering a reviewing judge to consider cases raising a clear error of law.

The Government firmly rejects any implication that a differently constituted Tribunal, i.e. a different immigration judge or panel of immigration judges, would lack independence of the original immigration judge who heard the appeal. We are not aware of any jurisprudence contradicting this view, and such a view would be inconsistent with the understanding of what is embraced by the principle of the independence of the judiciary. Not only are judges independent of the executive, they are independent of each other in the determination of cases. Every judge in deciding a case does so according to his own judgement. He or she has to apply his or her own mind and is not to be influenced by any other judge in an improper way. Whilst the proposed new section 105A is novel as a statutory provision, it is consistent with the existing practices of the House of Lords and the Court of Appeal, which will in appropriate circumstances review their own decisions in the exercise of their inherent jurisdiction: for example the House of Lords in *ex parte Pinochet (No.2)* [2000] 1 AC 119 and the Court of Appeal in *Taylor v Lawrence* [2002] 2 All ER 353.



The senior immigration judiciary who presently sit part time as Vice-Presidents of the Immigration Appeal Tribunal, include several who are also serving Circuit Judges. The current IAT President is a High Court judge. The involvement of judges of differing backgrounds and experience, strengthens the perception of independence and infusion of the standards of the mainstream courts within the Tribunal.

The powers which a court or tribunal needs in order to ensure effective redress are those relevant to the performance of the functions conferred upon it by statute or subordinate legislation. The Bill does not alter substantively the range of issues that come within the Tribunal's jurisdiction – they remain those appeal rights relating to immigration and asylum claims set out in Part 5 of the Nationality, Immigration and Asylum Act 2002. The Government does not see any need to add to the range of remedies which the Tribunal require to perform its functions.

However, the Government recognises, on considering the Committee's view of the effect of clause 10, that section 108A(2)(e) may be capable of being interpreted as restricting access to the courts to a greater extent than is intended. Its intended purpose is to prevent a person who has unsuccessfully appealed to the Tribunal against an immigration decision, or who had a right of appeal to the Tribunal which he did not exercise, from disputing subsequently the lawfulness of the immigration decision. It is the immigration decision which provides the legal basis for detaining a person for removal. This would undermine the finality of the Tribunal's decision. It is not intended that clause 10 should affect the remedy of habeas corpus nor any right the person has to damages where he has been unlawfully detained. Nor is it intended to exclude judicial review where a person has no right of appeal against a particular immigration decision. The Government will give consideration to amending this subsection to make its scope clearer.

**Question 10. Why does the Government consider that a system which denies detainees the right to apply to a court for bail, or to obtain judicial remedies (including compensation) for a violation of a Convention right by the proposed new Tribunal, would be compatible with the right to compensation for a violation of ECHR Article 5 (see Article 5.5) and the right to an effective remedy by an independent authority guaranteed by Article 13?**

The Committee's description does not appear to reflect accurately the effect of the clause 13.

Clause 13 does not deny anyone the right to apply to a court for bail, nor does it prevent a court from granting bail. The true effect of the clause is that it ensures that where a person is the subject of deportation action, and detention under Immigration Act powers is appropriate, and bail has been granted by a court in an unrelated matter (for example a criminal case), that grant of bail does not prevent detention on immigration grounds. This puts people who are detained under Schedule 3 to the Immigration Act 1971 pending the making of a deportation order in the same position *vis a vis* bail granted by a court, as those detained under that Schedule pending removal once a deportation order has been made, and as those detained as illegal entrants or overstayers under Schedule 2 to the 1971 Act. For both the latter 2 categories, it has always been the case that the grant of bail by a court does not prevent detention on immigration grounds.

This does not mean that someone who is detained pending a decision whether or not to make a deportation order following a court recommendation or pending the making of an order is prevented from applying for bail. As the explanatory notes make clear, detainees will continue to be able to apply for bail from the Immigration Service or the appropriate appellate authority by virtue of paragraph 2(4A) of Schedule 3 to the 1971 Act.



As is the case with the IAA at present, the Tribunal will not be responsible for the initial decision that a person should be detained; it will not hear appeals against detention, nor will it have jurisdiction to determine whether or not a person has been lawfully detained. Consequently, the provisions in clause 10, which provide for the exclusivity and finality of the Tribunal's jurisdiction, will not change in any way the current procedures for challenging the lawfulness or reasonableness of a decision to detain someone under Immigration Act powers.

Neither clause 10 nor clause 13 has any effect on the judicial remedies available to someone who has been detained in contravention of Article 5 of the ECHR. It is true that the effect of clause 10 will be to prevent judicial review of a decision by the Tribunal not to grant bail. However, the granting of bail presupposes that the detention was lawful in the first place. If it is alleged that the detention is unlawful, the proper remedy is to seek judicial review, or to apply for *habeas corpus*. As noted above, neither clause 10 nor clause 13 is intended to affect either process, .

**Question 11. Why does the Government consider that clause 14 as currently drafted is sufficiently focused on the mischief to make it a proportionate interference with the right to respect for private life under ECHR Article 8?**

Clause 14 makes it an offence if a person fails to take steps that he is required to take by the Secretary of State so that a travel document may be obtained by or for that person. The Secretary of State may only, under this clause, require a person to take such steps if the action will enable a travel document to be obtained by or for him and possession of that document will facilitate that person's removal or deportation from the United Kingdom. The provisions under which a person may be removed are specified at clause 14(7). Necessarily the Secretary of State can only require these steps to be taken if he believes that removal or deportation is in prospect under these provisions. So, for example, a British citizen could never be at risk from this offence.

We believe that if there is any interference with Article 8, for those people for whom there is a prospect of removal or deportation, it is both justified and proportionate. Obtaining a travel document on a person's behalf can be a lengthy and difficult process and requires that person's cooperation. Failure to cooperate or take required steps can result in considerable delay and is often done deliberately in order to frustrate the process. Delays and, in some circumstances, complete obstruction of removal undermines the efficacy and credibility of a properly functioning immigration system. We need to take steps to combat this and ensure that removal cannot be obstructed without sanction.

In the circumstances, therefore, we believe that any resulting interference with Article 8 as a result of the operation of this clause will be proportionate both to the pursuit of effective immigration control and to the economic well being of the country

**Question 12. Why does the Government consider that the remedies for abuse of the power to impose a requirement of electronic tagging under clause 15 would be sufficiently comprehensive to meet the requirement for an effective remedy before a national authority under ECHR Article 13 where the tagging infringes the right to respect for private life under ECHR Article 13, and the right to have access to a court under ECHR Article 6.1 when the tagging infringes a civil right (such as the right to be free of assault)?**

The Tribunal is a public authority under a duty to act compatibly with the ECHR and the Government has already stated its view that the risk that the Tribunal's judiciary might violate an appellant's Convention rights is low. In practice it is intended that an electronic monitoring condition will only be imposed, and can only operate, with the consent of the

subject. The availability of electronic monitoring will form part of the process of considering an application for bail or temporary release/admission. In making such an application, it will be for individuals to decide whether they are willing to consent to and abide by an electronic monitoring requirement. It is intended that each case will be carefully assessed to determine whether the use of electronic monitoring is both appropriate and proportionate. As the scheme will operate on the basis of consent, it is unlikely that any convention issues will arise.

**Question 13. In view of the level of seriousness of the offence of offering immigration advice and assistance, and any safeguards against improper use of the power by the Commissioner, why does the Government consider that proposed new section 92A of the Immigration and Asylum Act 1999, which would be inserted by clause 16 of the Bill, and particularly 92A(7)(c) making possible search for and seizure of lawyer-client communications, other confidential material of a personal nature, and journalistic material, would be a justifiable interference with ECHR Articles 6.1, 8 and 10?**

Clause 16 of the Asylum and Immigration (Treatment of Claimants, etc.) Bill makes provisions for a power of entry, search and seizure to be granted to the Immigration Services Commissioner ("the Commissioner"). This power will enable the Commissioner to investigate more effectively the criminal offence, set out in section 91 of the Immigration and Asylum Act 1999, of providing immigration services when unqualified to do so. The power applies to material likely to be of substantial value to the investigation of the offence. That material may include material subject to legal privilege, excluded material or special procedure material.

Investigating suspected cases of the section 91 criminal offence is part of the Commissioner's duty. The rationale behind that duty, as described in the Commissioner's last annual report, is "to root out unscrupulous advisers who were believed to be preying on the vulnerable". Most of the information required by the Commissioner in order to prosecute the offence pertains, by its very nature, to correspondence and advice which has passed between the adviser concerned and his clients. If the Commissioner is to be given a search and seizure power which will facilitate investigations of offences under section 91, that power must apply to material subject to legal professional privilege.

The rationale behind the doctrine of legal professional privilege is that the administration of justice requires that everyone should be able to consult a lawyer (or in this case an immigration adviser), or prepare a case for litigation, without fear that any information given to his lawyer or adviser will later be revealed in court against his wishes and interests. The doctrine thus protects those being advised, primarily in the context of litigation in which they are involved.

Clause 16 is not intended to compromise those who have received advice from unregulated advisers. The OISC has no remit and no power to investigate the client and his immigration status. Onward disclosure by the Commissioner of information he has obtained is limited by section 93 of the Immigration and Asylum Act 1999. The purpose of the power is to obtain information to prosecute unregulated advisers, not to investigate the immigration status of those they are advising.

The power is subject to the requirement of a warrant. Before he can exercise the power of entry, search and seizure, the Commissioner must satisfy a Justice of the Peace of a number of conditions which are intended to ensure that the power is used appropriately and proportionately. If the Justice of the Peace considered that there was any defect in the Commissioner's proposal, a warrant would not be issued. We are considering, with the Commissioner, the extent to which excluded material and special procedure material

would be of value to his investigations and if it is appropriate to amend this provision we will do so.

**Question 14. Does the Government consider that fees calculated on the basis set out in clause 20(1) and (3) would not impact on poor people in such a way as to be incompatible with the right to be free of discrimination on the ground of property under Article 26 of the International Covenant on Civil and Political Rights, and if so, why?**

We do consider that fees calculated on the basis set out in clause 20(1) and (3) would not impact on poor people in such a way as to be incompatible with the rights under Article 26 of the International Covenant on Civil and Political Rights.

Clause 20 does not make the setting of fees at an above cost level mandatory. It will always be in the discretion of the Secretary of State whether any fee should be levied using this power. This discretion, along with the associated discretion as to how high any fee levied using the power will be, is not unfettered. As is clear from clause 20(1) and (3), the decision whether to set a fee under this power and at what level must be intended to "*reflect the benefits that [the Secretary of State] thinks are likely to accrue*" to the ultimate beneficiary of the application. Additionally, of course, in exercising his discretion the Secretary of State will have regard to all relevant factors in order to ensure that any fee levied is reasonable in all the circumstances and accords with the usual principles of administrative decision-making.

Furthermore, each of the fee-setting powers to which this clause applies enable the Secretary of State to make different provision for different cases. In particular the Committee is referred to:

- section 1 of the Consular Fees Act 1980;
- section 41(3) of the British Nationality Act 1981;
- section 166(3) of the Immigration and Asylum Act 1999; and
- section 122(3) of the Nationality, immigration and Asylum Act 2002.

Accordingly, should the Secretary of State conclude that the setting of a fee may act as an effective disincentive, or bar, to the making of applications by the economically disadvantaged or that high fee levels would amount to unlawful discrimination against such a category of applicant it will be open to him to make provision addressing this in the secondary legislation that sets the relevant fee. Provision of this kind may, for example, include the exempting of certain categories of potential applicant from the relevant fee or the prescription of a lower fee that would apply to that category specifically.

Indeed, there is already provision of this kind in the Consular Fees Regulations 1981 (which are made under section 1 of the Consular Fees Act 1980, to which the new charging power is applied by clause 20(3) of the Bill). Regulation 7 of these Regulations states that:

*"A consular officer is authorised to waive fees as follows;*

*(a) where the consular officer so decides on the ground of proved destitution ... "*

As explained above, the flexibility exists for the Secretary of State to make similar provision in relation to all the types of fees to which the new powers apply should he deem it necessary to do so.

Finally, it should not be overlooked that the making of any instrument, with the exception of an Order in Council under section 1 of the Consular Fees Act, that seeks to levy fees at a level over and above the cost of providing the service in question is subject to Treasury approval (see clause 20(1)). This is an extra check on the level of fee that might ultimately be set using this new power.

Although no specific questions are raised on clauses 11 and 12 you mention your concerns highlighted in a previous report about the restriction on appeal rights for applicants making asylum or human rights claims certified to be clearly unfounded and that the provisions in clause 10 of the Bill heighten those concerns because of the restrictions on appeal rights contained in those provisions. However, as you point out in the first paragraph of your comments on clause 10, judicial review remains available under new section 108A (3)(b)(i) of the Nationality, Immigration and Asylum Act 2002, which includes reviewing certificates issued under section 94 of the 2002 Act (the safe country of origin provisions) and Schedule 3 to this Bill (the safe third country provisions). So the provisions in clause 10 do not lessen the scope that exists to review decisions in country before a person is removed following the issuing of a certificate under section 94 and in future under Schedule 3. The Committee will wish to note that the Government has laid amendments in relation to Schedule 3 bringing the provisions on safe third countries more closely into line with those on safe countries of origin.

I am copying this letter to David Lammy.

22 January 2004

## 2. Letter from Refugee Legal Centre

The Refugee Legal Centre is an independent charity providing advice and representation to asylum seekers and those seeking protection from removal from the UK on human rights grounds. We have considerable casework experience as one of the largest specialist organisations in this field. We write following the publication yesterday of your Committee's preliminary report on the Asylum (Treatment of Claimants, etc) Bill.

The purpose of this letter is to confirm that:

- (i) The Refugee Legal Centre shares the concerns articulated by the Committee in its preliminary report about clauses 10 and 12 of the Bill;
- (ii) We have received advice on clauses 10 and 12, which raises additional concerns relating to Articles 2, 3, 6, 8 and 14. Our concerns are summarized below.
- (iii) A fully reasoned opinion elaborating on the matters summarized below is being finalized and should be available by Friday 6 February in case that might assist the Committee's consideration of these difficult provisions.
- (iv) We would like to comment further on clauses 10 and 12 once the Government's response to the Committee's letter to the Secretary of State (which was appended to the preliminary report) has been published.

### *Summary of concerns re Clause 10*

In summary, clause 10 gives rise to a significant risk of incompatibility with the UK's ECHR obligations in the following respects:

(1) excluding any right of appeal from or review of the new Tribunal's decisions, and purporting to subject s. 7(1) of the Human Rights Act 1998 to the provisions making the Tribunal's decision exclusive and final, gives rise to a real likelihood that the UK will be found to be in breach of Article 13 ECHR which guarantees the right to an effective remedy in respect of Convention violations. The proposed new single-tier Tribunal will be a public authority for the purposes of the HRA, and therefore under a duty to act compatibly with Convention rights, but if the statutory ouster clause is applied by the courts the effect will be that there is no right to challenge a decision of the Tribunal before an independent body on the ground that the Tribunal has itself acted incompatibly with an individual's Convention rights. Nor will there be any opportunity to obtain the full range of remedies which may be necessary to protect the Convention right. The proposed powers in the Tribunal to review its own decisions and to refer a point of law to a higher court do not meet the Article 13 objection because the Tribunal is still the final arbiter of whether it has itself acted incompatibly with a Convention right, and lacks the power to award the remedies which may be necessary to give effective protection to Convention rights.

(2) the enactment of clause 10 may also lead to a finding that the UK is in violation of the positive obligation implicit in Articles 2, 3 and 8 to provide necessary procedural safeguards for the effective protection of the substantive rights protected by those Articles, which may require in certain circumstances that there be access to an effective judicial procedure to avert a possible future breach of the substantive protections afforded by those Articles. The principle of the rule of law is a concept inherent in all the Articles of the Convention. It is a principle of particular importance in the context of interferences by public authorities with the rights of individuals, and implies a need for effective judicial protection. The exclusion of any right of access to the ordinary courts from decisions of the new Tribunal risks a breach of the implicit procedural obligation in Articles 2, 3 and 8 to make a judicial procedure available as part of the necessary domestic law guarantees against arbitrary interference with those Convention rights.

(3) the removal of the second tier of appeal and the exclusion from access to the higher courts from the single tier tribunal will, in the absence of an effective mechanism for ensuring that all decisions of the single tribunal which are capable of going wrong can be corrected, inevitably lead to violations of Articles 2 and 3 ECHR in asylum appeals where genuine asylum seekers are wrongly returned to countries where they face persecution or death, and to violations of Article 8 in immigration appeals where individuals are wrongly returned in breach of their right to respect for their family life or home.

(4) the enactment of clause 10 will also give rise to a serious risk of a finding of violation of Article 14 of the Convention in conjunction, first, with Article 6(1) and/or Article 13, and, second, with Articles 2, 3 and 8, because it will amount to a breach of the UK's obligation under the Convention to secure to everyone within its jurisdiction access to judicial protection in relation to acts of the administration which is not less favourable than the judicial protection afforded to UK nationals as regards legal challenges to acts of the administration affecting both their Convention rights and their other fundamental interests; and that less favourable treatment lacks an objective and reasonable justification. Although decisions concerning the entry, stay and deportation of non-nationals do not directly engage Article 6(1) because they do not determine civil rights, it is clear from *Belgian Linguistics (No. 2)* (1968) 1 EHRR 252 at para. 9 that a State which goes beyond the strict requirements of Article 6(1), e.g. by providing a right to apply for judicial review or an appeal on a point of law from administrative tribunals to the higher courts cannot exclude certain categories of people from access to those remedies without a reason for doing so which satisfies the requirement of objective and reasonable justification.

The decision of the Court of Appeal in *A, X and Y and other v Secretary of State for the Home Department* [2002] EWCA Civ 1502 (in respect of which leave has been granted by the House of Lords; appeal due to be heard in October 2004) cannot be interpreted to mean that differential treatment of foreign nationals is justifiable for all purposes. Pending determination of the appeal by the House of Lords, the decision of the Court of Appeal should be interpreted as applying to the very particular context of detention of non-nationals for the purposes of protecting national security in the unusual situation where the State would usually have the power to remove but for Article 3 ECHR. It does not follow from that decision that non-nationals can be treated differently for all purposes, least of all for the purpose of removing the most fundamental right of access to court in relation to Convention violations.

*Summary of concerns re clause 12*

The enactment of clause 12 and Schedule 3 also gives rise to a significant risk of incompatibility with the Convention in the following respects:

(5) the measures will deprive asylum seekers of any opportunity of having determined any arguable claim that deporting them to a designated third country will violate their Convention rights, in breach of Article 13 ECHR in conjunction with Articles 2 and 3;

(6) they will lead to violations of Article 3 in meritorious cases, because asylum seekers with well-founded Convention claims will be removed without any opportunity of having their claim determined;

(7) they risk a finding of a violation of Article 14 in conjunction with Article 6(1) and/or Article 13, and in conjunction with Articles 2 and 3, because those non-nationals subject to these measures are treated less favourably in remedial terms than nationals who wish to complain about a violation of their Convention rights, and there is no objective and reasonable justification for such less favourable treatment.

As stated above, if further information or clarification of the above matters might assist the Committee, we would be happy to provide it.

*27 January 2004*

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