

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

**Liberty's Committee Stage briefing on the
Immigration Bill**

October 2015

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/publications/1-policy-papers/index.shtml>

Contact

Isabella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie

Policy Officer

Direct Line 020 7378 3654

Email: sarao@liberty-human-rights.org.uk

Introduction

Following a speech in which the Home Secretary told Conservative Party Conference that the pace of immigration was damaging social cohesion, the House of Commons is being asked to consider a package of proposals which will facilitate discrimination and encourage aggressive and divisive enforcement activity. Both Government and independent evidence now shows that the 'right to rent' scheme, backed up by criminal sanction in this Bill and set to be rolled out nationally, has led to discrimination. A new illegal driving offence including extensive search and seizure powers will exacerbate concerns about the discriminatory impact of current vehicle stop powers. The Prime Minister is right to say that *"you can't have true opportunity without real equality"*, but a pledge to *"end discrimination and finish the fight for real equality"* is hollow when issued against the backdrop of a Bill which will fundamentally damage race relations.¹

This Bill will certainly help to create the 'hostile environment' the Government craves, with undocumented workers criminalised and pushed into abusive and exploitative employment, mainstream asylum support provision removed from many families with small children and aggressive immigration raids ramped up and extended into every area of the community. At the same time, scrutiny of notoriously poor Home Office decision-making will be reduced with the removal of in-country appeal rights and a shift from judicial to executive control over immigration bail. The Government shows no signs of engaging with well-established concerns about Home Office record keeping, administrative decision making and intelligence gathering, nor is it prioritising investment in well-planned and implemented programmes to encourage voluntary departure.

Despite the growing cross-party consensus on the need for a time-limit on immigration detention, no such provision is included in the Bill. Liberty believes that the use of limitless detention – unashamedly for administrative convenience and far removed from the enforcement of removal decisions – represents one of the greatest stains on this country's human rights record in recent decades. This Bill provides an opportunity to address this grave injustice.

¹ The Independent, *Tory Party Conference 2015: David Cameron's speech in full*, 7th October 2015. Available at: <http://www.independent.co.uk/news/uk/politics/tory-party-conference-2015-david-camerons-speech-in-full-a6684656.html>.

Part 1 – remove illegal working offence

Page 4, line 39, omit clause 8.

Effect

This proposed amendment would remove provision for a stand-alone offence of illegal working.

Briefing

Those who work without lawful status in the UK are already liable to prosecution for immigration offences such as unlawful entry, or unlawfully remaining beyond the expiry of leave, but clause 8 of the Bill creates a stand-alone offence of illegal working for anyone who works while unlawfully resident, or works in contravention of a requirement of leave which prohibits employment.

The Government argues it is committed to tackling slavery, trafficking and exploitation in the labour market, but Focus on Labour Exploitation argues that proposals to criminalise vulnerable workers will create *“the perfect conditions for the exploitation of migrant workers to thrive. We know that exploitation depends on worker vulnerability, marginalisation and fear – which will be the consequence of these new measures.”*² Research carried out by IPPR in 2011 demonstrates the level of exploitation to which irregular migrants are exposed:

...it was evident from their accounts that irregular migrants are frequently treated worse than British and regular migrant workers. Our interviewees had experienced jobs that offered no holiday pay, sick pay or maternity pay. Some had been paid much less than the NMW...Some had also worked for employers who retained their papers. The interviewees spoke of being patronised, abused and threatened, and felt that they were offered ‘the worst jobs’.³

A two year study completed by City University in 2013 found that a separate system of norms operate in the illegal employment market leading to a disregard for the law. Undocumented migrants described poor treatment and harsh conditions. Some spoke of not

² Focus on Labour Exploitation, ‘UK IMMIGRATION BILL COULD CREATE PERFECT CONDITIONS FOR MODERN SLAVERY WARNS FLEX’, 25th August 2015. Available at: <http://www.labourexploitation.org/#!UK-IMMIGRATION-BILL-COULD-CREATE-PERFECT-CONDITIONS-FOR-MODERN-SLAVERY-WARNS-FLEX/chyn/55dc340e0cf20831ee3da673>.

³ IPPR, *No Easy Option: Irregular Immigration in the UK*, Tim Finch and Myriam Cherti, April 2011. P. 45.

being paid and told they “*had no papers so couldn’t prove anything*”.⁴ Others described the kind of employer willing to take the risk of hiring an undocumented worker: “*some of the employers were too afraid to employ you if you don’t have papers; others really don’t mind*”. For those willing to employ this individual, irregular status was a positive advantage: “*it was cheaper to hire me than somebody with papers*.”⁵

For the employers willing to take the risk for the financial benefits of an illegal workforce, criminalisation of the worker plays into a narrative of coercion and control. The very worst of these employers are already willing to risk the far higher penalties involved in the commission of offences around modern slavery and trafficking, physical abuse and even manslaughter, for example in the appalling case of the cockle-pickers who drowned in Lancashire in 2004. These employers will increasingly become the only port of call for desperate people, fuelling an underground labour market characterised by abuse and exploitation. Their hand will be strengthened by the introduction of a new criminal offence targeting working in particular, which will add force to threats that individuals must accept conditions or face not only removal but also criminal sanction.

The reality is that immigration objectives – themselves not served by forcing irregular migrants further into the shadows – are prioritised by this Government, not only over the protection of mainstream Labour standards, but also over the prevention and detection of the egregious human rights violations involved in trafficking and exploitation.

Part 2 - repeal right to rent and remove corresponding provisions in the Bill

Page 8, line 10, omit clauses 12-15 and insert the following new clause -

“Repeal of right to rent

Omit sections 20 to 37 of the Immigration Act 2014 (residential tenancies).”

Effect

This amendment would repeal the entire right to rent scheme as contained in the 2014 Act and extended in the present Bill.

Briefing

⁴ See Undocnet presentations at: <http://www.undocnet.org/events/>.

⁵ Ibid.

The Home Office published the results of research evaluating the impact of the pilot implementation of the right to rent scheme (“the evaluation”) on the first day of Committee consideration of the Bill.⁶ Through a combination of surveys, interviews and a ‘mystery shopping’ exercise, the evaluation sought to address implementation of the scheme, awareness of its requirements, enforcement outcomes, impacts on tenants - including discrimination, impacts on the housing sector and impacts on local authorities and the voluntary and community sector (VCS).

Discrimination

The pilot was carried out over a short, six month period, at a quiet time in the rental market. The rental market in the pilot area is further less competitive than that in other areas of the country, most notably London. This notwithstanding, evidence of discriminatory impacts was gleaned.

The quantitative results produced by the survey are seriously undermined by the fact that the tenant group was largely comprised of students. The evaluation acknowledges that students are “*a group whose right to rent tended to be seen as relatively easy to check*” and who are likely to have support in accessing the rental market.⁷ They are therefore less likely to be affected by, or concerned about, the implications of right to rent. The sample group of 68 tenants is therefore entirely unrepresentative and as the Home Office acknowledges “*should be read as primarily reflecting the views of the student community, rather than being generalised to the wider tenant group*”.⁸ Further of the 68 tenants surveyed 71% were UK citizens and 66% were White. Such respondents are obviously less likely to be concerned about the implications of the scheme for them. They are hardly the main focus of concern about discriminatory impacts. This notwithstanding, 15% of tenants expressed concern that they would be treated unfairly under the right to rent scheme and 9% expressed concern that they would be unable to secure accommodation due to not having correct documentation.

The evaluation accepts that risks of discrimination were identified in focus group discussions which spanned “*attitudes towards potential tenants with time-limited leave to remain, with one apparent instance of a tenancy being refused for this reason; a preference for tenants whose right to rent was easy to check...a preference for ‘lower risk’ tenants (for example people with local accents) for whom landlords felt they need not carry a Right to Rent*”

⁶ All documents available at: <https://www.gov.uk/government/collections/migration-research-and-analysis>

⁷ Evaluation of the Right to Rent scheme, p. 24.

⁸ Research with landlords, letting agents and tenants, p. 11.

check.”⁹ One landlord expressed the view that “*if the applicants were White and had a ‘Brummie’ accent, they didn’t need to put them through the [Right to Rent] process*”¹⁰ and focus groups of landlords found “*a lack of understanding among some landlords (but not letting agents) around the right to rent of prospective tenants with limited leave to remain in the UK*”.¹¹ Some of the landlords included in the focus groups suggested that they would not rent to potential tenants with limited as opposed to permanent leave to remain in the UK, including one who gave an example of turning down a tenant because he had eight months leave to remain left on his visa.¹² A focus group of letting agents produced evidence that some landlords had instructed them not to let to non-EEA nationals or to any ‘foreigners’.¹³

Of the voluntary and community sector organisations contacted as part of one of the ‘pulse checks’ over a third reported receiving complaints from the people they worked with. Of these complaints 80% raised discrimination, 70% charges to right to rent checks, 60% exploitation and 40% discrimination specifically associated with not wanted to check a particular document. Out of the 5 housing associations contacted for structured interviews, one reported experiences of potential tenants not being able to provide required documentation. The landlords surveyed and included in the focus groups raised this as a potential issue, although they did not reference specific examples.

Respondents involved in interviews and focus groups identified the concern that British citizens who have limited documentation and don’t, for example, have a British passport could find it harder to access rented accommodation. These concerns should be viewed in the context of findings that demonstrate a significant increase in the extent to which photo ID is requested by landlords under the right to rent scheme.¹⁴ Of those tenants surveyed, only 8 in 23 were subject to a right to rent check, but 2 out of the 8 found it difficult to provide the required documentation. The evaluation accepts that this indicates *that “some prospective tenants may struggle to find acceptable documentation easily”*.

A ‘mystery shopper’ exercise was also conducted to assess the discriminatory impact of the scheme. This part of the evaluation provided for 322 encounters to take place. These were split between pilot and comparator areas. Pairs of participants comprised Black and Minority Ethnic (BME) participants with accents “*typical of the country of origin*” and White participants with a “*British accent*” (WB).

⁹ Evaluation of the Right to Rent scheme, p. 24.

¹⁰ Research with landlords, letting agents and tenants, p. 22.

¹¹ Research with landlords, letting agents and tenants, p. 22.

¹² Research with landlords, letting agents and tenants, p. 23.

¹³ Research with landlords, letting agents and tenants, p. 22.

¹⁴ Evaluation of the Right to Rent scheme, p.25.

On a number of occasions the Home Office comments on the limited reliability of the mystery shopper survey due to insufficient sample sizes. At the outset we are told that “*statistical significance testing was not conducted on the data due to the relatively modest number of individual mystery shops completed at a sub-group level*”.¹⁵ In relation to the follow-up encounters, we are told “*small sample sizes inhibit the ability to draw robust conclusions around subsequent provision of property details, the source of any property details provided and offers of viewings*”.¹⁶ Unlike with an optional survey-type scenario, it was entirely clear to the Home Office from the outset how many participants there would be and how they would be subdivided, it must also have been relatively clear that follow-up contact with estate agents would occur in a far smaller section of the whole.

The Home Office claims of this exercise that it is designed to follow the shopper’s “*journey through a typical tenant enquiry scenario*”,¹⁷ but the research does not assess outcomes, failing to address the crucial question: are BME individuals less able to secure a tenancy than their WB counterparts under right to rent? Instead the mystery shopping exercise considers the experience of ‘shoppers’ when making initial inquiries with estate agents and landlords; the experience of being questioned about or required to present documentation going to the question of immigration status, or more broadly qualification to rent; offers to view properties and follow up contact by estate agents.

The broader evaluation asserts, of the mystery shopping exercise, that: “*no major differences in tenants’ access to accommodation*” were found as between the pilot area and a comparator area outside the pilot scheme. Where less favourable treatment for the BME group was found, this was explained away by reference to other factors. For example, where BME participants were found to be less likely to receive a prompt response to an initial email inquiry in the pilot area (a discrepancy not repeated in the comparator area, where BME groups were marginally more likely to receive a prompt response), the evaluation report comments that this “*could imply a difference linked to the scheme. However, this may not be due to ethnicity as shoppers contacted the agents at different times over the fieldwork period, so it may instead reflect a change in available stock.*”¹⁸

¹⁵ Mystery shopping to test the potential for discrimination within the private rental sector, p. 9.

¹⁶ Mystery shopping to test the potential for discrimination within the private rental sector, p. 27.

¹⁷ Mystery shopping to test the potential for discrimination within the private rental sector, p. 11.

¹⁸ The evidence, such as it is, shows some discrepancies between BME and WB categories in the pilot area, some of which are replicated in the control area (outside of the pilot area). In the pilot area, the WB group were a third less likely to receive a prompt to their initial email enquiry (60% of the WBA group compared to 40% of the BME group), in the comparator location the BME group were marginally more likely to receive a prompt response to their email enquiry than the WBA group (47% and 43% respectively).

Other of the assumptions made about results similarly sweep aside discriminatory explanations for discrepancies in treatment. For example, in the control area, a higher percentage of the BME participants were dealt with by the first member of staff they spoke to when making a telephone enquiry, this then shifted in the pilot group so that marginally more of the BME participants were passed to a colleague than was the case for the WB group. The suggestion made in the paper is that having your call transferred indicates that it is being taken more seriously. The evaluation does consider the possibility that transferring the call suggests the original staff member does not wish to deal with the call, however this second possibility is rejected with very little explanation. The evaluation fails to consider the possibility that BME calls in the pilot areas are more likely to be transferred because they are perceived to involve greater complexity or potential risk and therefore transferred to experienced colleagues.

Even more striking is the reasoning employed around questions asked to assess qualifications for renting (outside of the issue of immigration status). Higher proportions of the BME group were asked about a guarantor, a referee and their employment than was the case for the WB groups. This disparity between BME and WB participants was significantly greater in the pilot area. The report considers that there are two possible explanations for this: (i) an expression of greater interest in the BME group and a decision to take their cases more seriously; or (ii) a desire to place greater obstacles in the path of this group. The former is picked *“as these are questions that would ultimately need to be asked of all potential tenants before a property is rented, it seems likely that, rather than being discriminatory, these questions are being asked earlier in the rental property search process for BME shoppers in order to ascertain eligibility.”* Surely an equally valid reading of this data is that the BME group is less trusted and therefore asked for reassurance about financial position and broader references before the enquiry is progressed. No explanation is given for the report’s thesis that estate agents take the enquiries of BME individuals more seriously than those of their WB counterparts and therefore ask for supporting documentation earlier on.

Across the comparator and pilot areas, BME groups were disproportionately questioned about nationality and residency status. In the pilot area BME enquirers were less likely to be told that suitable rental property would become available in future where they were not given the opportunity to view a property and were more likely to be told about additional fees linked to renting than their WB counterparts. The ‘right to rent’ scheme was only specifically mentioned to 6 ‘shoppers’ all BME and all in the pilot area. There were also clear reports of discrimination, including an incident where a shopper was told that if he was *“under the scheme”* the landlord was *“not going to bother because he had a local person who wanted*

the property and it was much easier to rent to them".¹⁹ It is a bold landlord who is willing to explain such reasoning to a tenant, it is at least arguable that a significantly larger group of landlords would think this but not say it, perhaps finding some other reason for ultimately picking a 'local' White British tenant over their BME counterpart. In a further incident an estate agent told a BME shopper:

*"They needed to look at what they had that was suitable for me and they needed to check with the landlords on whether the landlord wanted to do the Right to Rent check because it cost extra."*²⁰

The Home Office evaluation results are compromised by small sample sizes, unrepresentative surveys that fail to engage those likely to be most affected by the scheme and a failure to assess the outcome of the rental process, i.e. whether a tenancy is ultimately secured. This notwithstanding, the research highlights some worrying examples of discrimination, which are liable to proliferate should the scheme be rolled out nationally, including to areas with extremely competitive rental markets. This should be read together with JCWI's evidence that 42% of landlords said they were less likely to consider somebody without a British passport and 50% felt discrimination was a factor in the refusal of a tenancy. One person was told "no passport equals no home".²¹ Both the evidence of Government and the JCWI now indicates that the pilot implementation of right to rent produced discriminatory outcomes.

Ineffective and unworkable

Of the 109 individuals 'identified' in the first six months of the scheme only 9 were ultimately removed. Considering that just 63 of the 109 were 'not previously known' to the Home Office, it is at least very unclear that these individuals would not have been removed in any event. Only 22 of the 68 surveyed tenants and 22 out of 34 voluntary community services felt informed about right to rent. 70 of 114 landlord respondents felt informed, but 22 out of 37 small-scale (1 property) landlords felt poorly or not at all informed. In the qualitative assessment, many small-scale landlords were said to be "unaware" of the scheme.

The pulse check survey found that 14 out of 55 letting agents had received complaints from landlords or potential tenants about the scheme. The most frequently mentioned complaints were about discrimination and checks delaying tenancies from starting (both 9 out of 14). Other complaints mentioned were around people not understanding the immigration system

¹⁹ Evaluation of the Right to Rent scheme, p. 24.

²⁰ Evaluation of the Right to Rent scheme, p. 24.

²¹ JCWI, "No Passport Equals No Home": An independent evaluation of the 'Right to Rent' scheme, 3 September 2015.

(8 out of 14) and additional work for landlords (5 out of 14). Of those letting agents who had not received complaints about the scheme, 22 out of 41 indicated that this was because they believed that people had not been impacted by the scheme.” In total, 52 % (59 of 114) of respondents to the landlords survey said they had concerns about the scheme. In the landlords survey, in particular, there was a view, expressed by many respondents in write-in comments, that they felt the scheme meant that they were carrying out a role that should be done by Immigration Officers. As to the perceived benefits of the scheme by landlords, the report is clear and damning: “84 per cent of landlords (96 out of 114) and letting agents (46 out of 55) said they had not noticed any benefits from the scheme...”.

The Government’s evaluation demonstrates that the scheme is not only having a discriminatory impact, it is reaping at best marginal and at worst no real enforcement benefits and causing consternation in the sector.

Part 2 – remove provision for driving search and seizure powers

Page 16, line 33, omit clause 16.

Effect

This proposed amendment would remove provision for the power to carry out searches relating to driving licences held by those without lawful residence in the UK.

Briefing

In England & Wales, police officers’ powers to stop motor vehicles are contained in section 163 of the Road Traffic Act 1988 which states: “*a person driving a motor vehicle on a road must stop the vehicle on being required to do so by a constable in uniform*”. This power is not currently subject to the requirements of the PACE Code of Practice and does not require an officer to have a particular reason to stop a motor vehicle nor for the officer to explain why he or she has carried out the stop. Once a vehicle has been stopped, an officer can require the driver to produce their driving licence.²² Beyond this the officer can ask the driver to account for themselves.²³

²² Section 164, Road Traffic Act 1988.

²³ Liberty believes that the law urgently needs to be reformed to require that police constables only stop vehicles when they have an objective reason to do so, and that they are required to make a record of such stops as they are currently required to do for all other statutory stop powers. Use of this power should also be brought within Code A.

In 2014, as part of her drive to combat discriminatory police stop and search the Home Secretary commissioned HMIC to review police use of section 163 RTA to establish it is being used effectively and fairly.²⁴ Given that there is no national recording requirement, HMIC was unable to provide information on the volume of traffic stops each year. HMIC asked forces to conduct self-assessments of their use of the RTA power and found that only 3 police forces have a policy on its use and only two forces reported that they collected and recorded information about the use of the power. HMIC further commissioned a survey of 10,094 members of the public about the use of the power. The survey indicates that 7-8% of white drivers who responded were stopped in their vehicles in the last two years compared with 10-14% of Black and minority ethnic drivers. The survey also suggested that BME drivers were more likely not to be provided with a reason for the stop and are more likely to have their vehicle searched. Yet, white drivers are proportionately more likely than BME drivers to be arrested or result in prosecution which suggests that BME drivers are more likely to be stopped for no reason. 73% of Black respondents agreed or strongly agreed with the statement that the police unfairly target people from ethnic minorities for traffic stops. The Bill seeks to add routine immigration checks - backed up by intrusive search and seizure powers – into this toxic mix.

Clause 16 amends schedule 2 of the Immigration Act 1971 to provide a power for an authorised officer (police, immigration officers or third parties designated by the Secretary of State) to search premises - including a vehicle or residence an individual occupies or is present in when encountered – where the officer has “*reasonable grounds for believing*”: (i) an individual is in possession of a driving licence and is not lawfully resident; and (ii) the licence is on the premises. Authorisation should be sought from a senior officer where “*reasonably practicable*”. A further power in similar terms would allow police, IOs and designated third parties to search an individual for a driving licence.²⁵ The Bill also makes provision for seizure and retention of licences.²⁶

Liberty is deeply concerned about the existing power to stop vehicles without reason. As no reason is required to conduct a traffic stop, there is nothing to prevent routine stops to ascertain immigration status. This lax power, together with the new offence and related search and seizure powers could see police and immigration officers stop vehicles without

²⁴ HMIC, *Stop and search powers 2: are the police using them effectively and fairly?*, March 2015. Available at: <https://www.justiceinspectors.gov.uk/hmic/wp-content/uploads/stop-and-search-powers-2.pdf>.

²⁵ Where the officer has reasonable grounds for believing the person is not lawfully resident, is in possession of a licence and that licence may be concealed on the person.

²⁶ The driving licence must then be passed on to the Secretary of State. Where the licence is not ultimately revoked it must be returned to the holder.

reason, demand papers (in this case driving licences) and then on the basis of body language infer reasonable suspicion to conduct intrusive searches of persons and vehicles. Current guidance instructs IOs that the threshold for reasonable suspicion of an immigration offence may be met where they observe a person having “*an adverse reaction to an immigration presence*”.²⁷ Examples of an “*adverse reaction*” include a sudden change in direction, walking away, a change in pace, hanging back from the barriers or seeking to limit interaction. The guidance instructs “*under these circumstances the IO may lawfully seek to stop that person with a view to asking them consensual questions about their identity and leave status*”.²⁸ The guidance then further instructs IOs that if a person attempts to leave while being consensually questioned, this may give rise to sufficient grounds to arrest the individual.

Part 2 – remove offence of ‘driving whilst an illegal immigrant’

Page 19, line 33, omit clause 17.

Effect

This proposed amendment would remove the offence of driving without lawful residence in the UK.

Briefing

Clause 17 creates an offence of driving whilst in the UK unlawfully, attracting a maximum custodial sentence of 51 weeks and/ or a fine. The Bill provides for vehicle seizure where a person is arrested and for a court to order forfeiture on conviction. The implications of this provision can only be fully understood when considered in conjunction with search and seizure powers set out in clause 16 and considered above. All drivers, but in particular drivers from minority ethnic groups are liable to be effected by these provisions, with discrimination in road traffic searches already an established concern.

Given the already unsatisfactory police practice in relation to traffic stops and its disproportionate use against BME groups, such operations will only add to - and potentially greatly exacerbate - the reality and perception of discrimination.

²⁷ Home Office Enforcement Instructions and Guidance, Chapter 31: Enforcement Instructions, 31.19.5 *Basis to stop individuals*.

²⁸ *Ibid.*

Part 3 – end speculative spot-check

Page 23, line 10, at end insert -

“(2A) In paragraph 2(2) after “examine” insert “at the point of entry into the United Kingdom.”

Effect

Schedule 2, paragraph 2 of the 1971 Act (ostensibly a power dealing with individuals on arrival in the UK for the purposes of determining whether they have, or should be given leave to enter or remain) has been used by the Home Office as justification for conducting speculative, in-country spot-checks involving ‘consensual interviews’. This proposed amendment would expressly limit this power to examination at the point of entry.

Briefing

There is no freestanding right to stop and search people to establish their immigration status away from the border.²⁹ Despite this, the power has been gradually claimed by the Home Office with no regard for community relations. The Home Office takes the 1987 case of *Singh v Hammond* as authority for the proposition that Schedule 2, paragraph 2 examinations in relation to those ‘*who have arrived in the United Kingdom*’³⁰ can be carried out in-country. At Chapter 31 of the Home Office Enforcement Instructions and Guidance, the Department sets out the grounds on which it believes that reasonable suspicion can be formulated:

“Reasonable suspicion that an individual may be an immigration offender could arise in numerous ways but an example might be where an individual attempts to avoid

²⁹ When Liberty first heard of speculative street and transport hub-based operations being conducted in 2012 we wrote to the then UKBA questioning the authority for the practice. UKBA then suspended the operations nationwide and reviewed its guidance. The operations were then re-instated - with amended guidance –at the end of 2012. We understand that the Guidance was amended again following the high profile public backlash against the use of the powers over summer of 2013.

³⁰ Immigration Act 1971, sub-paragraph 2(1). In *Singh v Hammond*, the Court of Appeal held that a Schedule 2, paragraph 2 in-country examination can take place away from the place of entry if the immigration officer has some information which causes him to inquire whether the person is a British citizen and if not whether he may enter without leave or should be given leave. The Court of Appeal in this decades old judgement, however, was clear that “the case does turn very much on its own facts” which involved an immigration amnesty and an IO’s specific and defined suspicion of identity deception.

passing through or near a group of IOs who are clearly visible, wearing branded Home Office clothing, at a location which has been targeted based on intelligence suggesting that there is a high likelihood that immigration offenders will be found there. This behaviour could not necessarily be considered to be linked to, for example, evading payment of the train fare if IOs are wearing vests or other items of work wear which clearly show which agency they belong to. In such circumstances the IO could legitimately stop the individual and ask consensual questions based on a reasonable suspicion that that person is an immigration offender.”³¹

It is on the basis of this woefully lax interpretation of reasonable suspicion and a spurious extrapolation of a 1987 judgment that the Home Office first started running divisive in-country fishing expeditions in ethnically diverse areas of the UK. When Liberty objected to the operations in 2012, UKBA suspended them nationwide and reviewed its guidance. The operations were then re-instated - with amended guidance - culminating in the controversial and divisive operations in London in August 2013. Anecdotal evidence suggests that members of ethnic minorities were targeted during these operations which led to public outcry.

Part 3 – a code of practice for immigration enforcement

Page 32, line 36, at end insert the following new clause -

“Requirement for a code of practice

- (1) Sections 19-27 may not be brought into force until such time as the requirement in subsection (2) is met.
- (2) The Secretary of State must issue a code of practice governing the examination and search of any person or premises by an Immigration Officer.
- (3) The code of practice is to apply to the exercise by an Immigration Officer of the powers contained in the Immigration Acts.
- (4) A court or tribunal in civil or criminal proceedings must take the Code of Practice into account when determining any question arising in the proceedings to which the Code is relevant.
- (5) Before issuing a code of practice, the Secretary of State must publish a draft code and -
 - (a) consult publically on the draft code; and
 - (b) lay the draft code before Parliament.”

³¹ Home Office Enforcement Guidance and Instructions, paragraph 31.19.4.

Effect

This proposed amendment would require the Secretary of State to publish a Code of Practice governing Immigration Officer use of powers of examination and search before a significant extension of those powers through the Bill can be introduced.

Briefing

There is an urgent need to address serious inadequacies in the current use of search powers by immigration officers and in particular the use of powers to conduct immigration raids. Home Office Guidance suggests that enforcement raids on premises and businesses are directed on the basis of specific intelligence about an individual who doesn't have leave to be in the UK, however evidence reveals that Home Office 'intelligence' is often weak, inaccurate or speculative. Successive reports by the Chief Inspector of Borders & Immigration paint a picture of an immigration service hampered by years of poor administration and IOs that pay scarce attention to the legal constraints on their powers. The Chief Inspector conducted an inspection of the IO power to enter business premises without a search warrant between October – November 2013.³² He reported that 59% of the cases he examined lacked the required justification for the use of the power and a further 12% had insufficient information for him to form an opinion. He also reported highly varying use of the power across the country. In South London it was used in two-thirds of its illegal working operations, while in East London it was used in 3%.

The Chief Inspector further found widespread non-compliance with the guidance and ineffective processes for ensuring that staff were complying with legislation and guidance. The power is only intended to be used where swift action is required in circumstances where there is an immediate threat of absconding, yet in only 5% of cases was consideration of application for a warrant evidenced. In 22% of cases considered *"the grounds were speculative. They did not provide sufficient information to reach the higher threshold of believing offenders to be on business premises"*.³³ In some cases even the lower threshold of having reasonable grounds to suspect had not been met. On occasion the intelligence described was vague to the point of meaninglessness – e.g. a raid on a fast food outlet justified on the basis that previous raids on fast food outlets had resulted in immigration offenders being apprehended.³⁴ Staff training was inadequate across all enforcement grades and *"it was apparent that a significant number of staff and managers were either ignorant of*

³² Under section 28CA IA 1971. Chief Inspector of Border and Immigration, *An inspection of the use of the power to enter business premises without a search warrant*, (October – November 2013), Independent Chief Inspector of Borders & Immigration, March 2014.

³³ *Ibid.*, paragraph 1.8.

³⁴ *Ibid.*, paragraph 4.18.

*the guidance or were choosing to ignore it.*³⁵ The age of intelligence relied upon ranged from 7 to 157 days old.

Liberty further urges Parliamentarians to push for more reliable information about the relative impact and effectiveness of immigration raids. The Home Office does not document the number of people questioned during raids or so called ‘street operations’. This is in contrast to statutory requirements for the police to record their use of stop and search powers and the ethnicity of those stopped. Statistics concerning the number of individuals questioned in country by immigration officials or caught up in immigration raids should be published and Liberty urges parliamentarians to request this information from the Home Office. This will give a clearer picture of the impact of these operations on different sections of the community.

The Home Office does collate statistics for the number of arrests made during enforcement raids and subsequent removals. In 2014, 4437 arrests were made and there were 1025 removals as a result of raids – a 23% success ratio. In assessing the effectiveness of this policy and strategy, it would be useful to be able to compare the statistics for raid-enforced removals with the statistics for voluntary departures following contact by the authorities. The Home Office’s record on keeping voluntary departure statistics is poor. However the 2014 the Chief Inspector reported that Capita succeeded in persuading roughly 1165 people to voluntarily depart over a 19 month period following contact. It is instructive that this less costly, aggressive and divisive approach appears to harness the same results as the raids.

Part 3 – a time-limit on immigration detention

Schedule 5, page 87, line 20, omit clause 16 and insert:

- “16 (1) Schedule 2 (detention of persons liable to examination or removal) is amended as follows.
- (2) Omit paragraphs 21 to 25 and 29 to 34.
- (3) At the end of paragraph (4) insert:
- (5) A person detained under this paragraph must be released on bail in accordance with Schedule 5 to the Immigration Act 2016 after no later than the twenty-eighth day following that on which the person was detained.”

³⁵ Ibid., paragraph 1.12.

Effect

This amendment would insert a new sub-paragraph into Schedule 2, paragraph 16 of the Immigration Act 1971 to require that an individual be released on bail (under the Schedule 5 provisions set out in this Bill) after no more than 28 days in immigration detention.

Briefing

Current policy stipulations which dictate that detention should be “*used sparingly and for the shortest period necessary*” have proved meaningless in practice.³⁶ In recent years the Home Office has repeatedly been found to have unlawfully detained individuals for protracted periods. In 2014, the High Court found the 11 month detention of a woman seeking to join her husband in the UK under the refugee family reunion rules to be a violation of both Article 5 (right to liberty) and Article 3 (freedom from torture, inhuman and degrading treatment) as protected by the Human Rights Act.³⁷ In 2012, the Court of Appeal found that a claimant of disputed nationality, detained for an overall period of 22 months, had been unlawfully detained in circumstances where there was insufficient prospect of removing him within a reasonable period.³⁸ In the same year, the Home Office were found to have falsely imprisoned a Zimbabwean man detained under immigration powers over a 13 month period between November 2007 and January 2009. The court found that from May 2008 there was no realistic prospect of removing him due to official Government policy to suspend removals because of the violence and dire humanitarian conditions in Zimbabwe in the wake of general elections held in the March 2008.³⁹

The UK is currently the only country in the EU which does not place a time-limit on immigration detention. As the analysis of the Parliamentary Inquiry into the use of immigration detention in the UK (“the Inquiry”) shows, the longer an individual is detained, the less likely it is that that person’s detention will end in removal.⁴⁰ Of the 178 people detained for 12 months or more and released from detention in the year ending March 2015,

³⁶ Home Office Enforcement Instructions and Guidance, Chapter 55.1.3.

³⁷ *R (MD) v Secretary of State for the Home Department* [2014] EWHC 2249 (Admin).

³⁸ *Bizimana, R (on the application of) v Secretary of State for the Home Department* [2012] EWCA Civ 414 (02 April 2012).

³⁹ *AM v Secretary of State for the Home Department*, Central London County Court, 2012, judgment available at:

http://www.bhattmurphy.co.uk/media/files/AM_Zimbabwe_v_SSHD_approved_judgment.pdf.

⁴⁰ Report, page 23.

38% were removed compared to the 57% ultimately released.⁴¹ A team leader from the Prisons Inspectorate told the Inquiry that “a quarter of the prolonged detention cases they looked at were as a result of inefficient case-working”.⁴²

The frustrating truth is that protracted detention does not even serve administrative convenience; it is simply a pointless waste of human life and public funds. In an examination into the economic case for detention published in September 2012, Matrix Chambers found:

In the UK, over the next 5 years the benefits of timely release of detainees who would have eventually been released anyway exceed the cost of timely release by £377.4 million. Timely release will generate £344.8 million in cost savings due to reduced time spent in detention. In addition, another £37.5 million will be saved due to reduced unlawful detention costs.⁴³

In a harrowing report into the systemic failings at Yarl’s Wood IRC, HMIP added its voice to the growing consensus that limitless detention must end.⁴⁴ Pointing to cases of individuals detained for months – some for well over a year thanks to inexcusable administrative delays – the Chief Inspector called for a strict time limit on the length of detention.

Detention without limit is an invitation to abuse. Medical evidence suggests that the mental health of detainees deteriorates significantly after around a month in detention.⁴⁵ The JCHR has called for a maximum time-limit of 28 days on the detention of asylum seekers.⁴⁶

Liberty supports the calls of those organisations working routinely to support and protect vulnerable detainees in their calls for a statutory time-limit on immigration detention of 28 days as an absolute minimum of protection.⁴⁷

⁴¹ Immigration Statistics, paragraph 13.3. Available at: <https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2015/immigration-statistics-january-to-march-2015>.

⁴² Report, pg 19.

⁴³ Matrix Evidence, ‘An economic analysis of alternatives to long-term detention: Final Report’, September 2012, page 9.

⁴⁴ Report on an unannounced inspection of Yarl’s Wood Immigration Removal Centre, HM Chief Inspector of Prisons, 13 April – 1 May 2015. Available at: <https://www.justiceinspectors.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2015/08/Yarls-Wood-web-2015.pdf>.

⁴⁵ Dr Katy Robjant, 1st Oral Evidence Session, 17 July 2014 told the Panel that “those who were detained for over 30 days had significantly higher mental health problems than those who were detained for under 30 days.” Report, page 19.

⁴⁶ JCHR, *The Treatment of Asylum Seekers Tenth Report of Session 2006–07, Volume I – Report and formal minutes*, paragraph 276.

⁴⁷ See the recommendations of Detention Action (*Written evidence to the Parliamentary inquiry into the use of immigration detention in the UK*, July 2014) and Women for Refugee Women (*Detained: women asylum seekers locked up in the UK*, January 2014).

Part 3 – automatic immigration bail hearings

Schedule 5, page 78, line 41, after sub-paragraph (2) insert:

“(2A) The following provisions apply to a person is being detained under any of the provisions mentioned in sub-paragraph (1)-

(a) The Secretary of State must arrange a reference to the First-tier Tribunal for it to determine whether the detained person should be released on bail no later than the eighth day following that on which the detained person was detained.

(b) The First-tier Tribunal hearing a case referred to it under this section must proceed as if the detained person had made an application to it for bail.

(c) The First-tier Tribunal must determine the matter before the tenth day following that on which the person concerned was detained.

Effect

This proposed amendment would require the Home Secretary to refer a case to the Tribunal for consideration of bail no later than 8 days after an individual is placed in immigration detention. The Tribunal must determine the application after no more than 10 days from the date an individual was placed in detention.

Briefing

Immigration detainees have no automatic right to have their detention reviewed by the courts. Instead new arrivals must wait a week before they are permitted to apply to for bail; if no application is made, detention is not reviewed by the Tribunal.⁴⁸ The requirement that a detainee initiate a bail application is practically concerning, particularly for the significant number of detainees with poor or no literacy, who speak no English or who have mental health problems. At a more general level, concerns have been repeatedly expressed about failures to adequately explain the existence of, and the procedure for, accessing immigration bail. In a December 2012 report, HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration remarked:

During our interviews, we were surprised that of those detainees held for more than

⁴⁸ Immigration Act 1971, Schedule 2, paragraph 22(1)(a) and (1B).

six months, nine (19%) said they had never made a bail application. This may have been because detainees were unaware of bail processes and/or had poor legal advice. A number of detainees said they did not know how to apply for bail or clearly needed help to navigate the process.⁴⁹

These problems are exacerbated by the lack of availability and sometimes poor quality of legal advice available to those in detention, including practical difficulties in accessing those legal services which are provided.⁵⁰

Liberty supports the Inquiry's calls for the introduction of a "*robust system for reviewing the decision to detain early in the period of detention.*"⁵¹ Increased judicial oversight will ensure that the decision to detain is treated with the gravity it deserves. The above proposed amendment would partially reintroduce provision for automatic bail hearings initially included in the Immigration and Asylum Act 1999, but repealed in 2002 before it could be brought into force.⁵² Provision originally made in the 1999 Act would have provided for automatic bail hearings within the first 8 days of detention.⁵³

Part 3 – considerations for a grant of bail

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

Schedule 5, page 80, line 33, omit "and".

Schedule 5, page 80, line 32, omit sub-paragraph (f) and insert:

- (f) whether the person's removal from the UK is imminent, and
- (g) such other matters as the Secretary of State or the First-tier Tribunal thinks relevant."

Effect

This proposed amendment would remove a requirement that that the Tribunal or the Secretary of State have regard to - when considering a grant of bail - whether continuing immigration detention is necessary in a person's best interests. It would insert a new

⁴⁹ *The effectiveness and impact of immigration detention casework: A joint thematic review by HM Inspectorate of Prisons and the Independent Chief Inspector of Borders and Immigration*, December 2012, para 4.9.

⁵⁰ Report, page 45-46.

⁵¹ Report, page 9.

⁵² Amendment in the names of Lord Roberts of Llandudno and Lord Ramsbotham.

⁵³ Original s44 of the Immigration and Asylum Act 1999 now repealed.

provision requiring that the imminence of removal be expressly taken into account on consideration of whether to grant immigration bail.

Briefing

In 2010 the High Court found that:

The use of immigration detention to protect a person from themselves, however laudable, is an improper purpose. The purpose of the power of immigration detention, as established in *Hardial Singh* and subsequent authorities, is the purpose of removal. The power cannot be used to detain a person to prevent, as in this case, a person's suicide. In any event, it is unnecessary to use immigration detention for this purpose since there are alternative statutory schemes available under section 48 of the Mental Health Act 1948 or under the Mental Health Act 1983.⁵⁴

This analysis was endorsed by the Court of Appeal in 2011 and again in 2014.⁵⁵

If a person has a mental health problem which requires some restriction on liberty, that is a matter for our dedicated mental health framework. If an individual is vulnerable to crime or mistreatment, they must be protected by law enforcement and other appropriate agencies in the community. Conversely the imminence of removal is a critical factor when considering whether detention should continue, as the Home Office acknowledges in its own policy guidance.⁵⁶

Part 3 – remove executive power to override the judiciary on bail conditions

Schedule 5, page 80, line 5, omit sub-paragraphs (3)-(5).

Schedule 5, page 83, line 4, omit sub-paragraph (5).

Schedule 5, page 83, line 12, omit sub-paragraphs (8)-(10).

Effect

This set of proposed amendments would remove provision which would allow the Secretary of State to override a decision of the Tribunal with regard to electronic monitoring or residence conditions placed on immigration bail.

⁵⁴ *R (on the application of AA) v Secretary of State for the Home Department* [2010] EWHC 2265 (Admin), see in particular paragraph 40.

⁵⁵ *R (on the application of OM acting by her litigation friend, the Official Solicitor) v Secretary of State for the Home Department* [2011] EWCA Civ 909 at paragraph 32 and *R (on the application of Das) v Secretary of State for the Home Department* [2014] EWCA Civ 45 at paragraph 68.

⁵⁶ Home Office Enforcement Instructions and Guidance, Chapter 55.1.3.

Briefing

The Bill will bring many more people within the immigration bail regime whilst simultaneously shifting control of bail and restrictions on liberty from the judiciary to the executive, including a far reaching power for the Home Secretary to override the decision of the Tribunal on electronic monitoring and residence conditions. This is an unjustified Home Office incursion into the judicial sphere in a matter affecting the liberty of the individual.

Part 3 – re-instate provision for bail accommodation

Schedule 5, page 83, line 22, omit paragraph 7, sub-sections (1), (2), and (3) and insert-

“The Secretary of State must provide, or arrange for the provision of, facilities for the accommodation of persons released on immigration bail.”

Effect

This proposed amendments would remove a provision which on its face would only empower the Secretary of State to provide accommodation to those on immigration bail and who are unable to secure a private address for themselves after they have already been released on bail. The proposed amendment restores the power, provided by section 4(1)(c) of the Immigration and Asylum Act 1999, for the Secretary of State to provide such accommodation pursuant to a detainee’s application for bail to the Tribunal.

Part 4 – remove provision for the certification of human rights cases

Page 34, line 3, omit clause 31.

Effect

This provision would remove an extension of “deport first, appeal later provisions” to include all human rights appeals.

Briefing

Part 4 of the Bill deals with appeal rights, dramatically extending a system of Home Secretary certification resulting in the removal of in-country appeal rights. Even prior to the 2014 Act, statutory provision was in place to certify a claim where an individual would be removed to one of a list of designated 'safe' countries or because the Secretary of State determines there is no reason to think that human rights or Refugee Convention obligations would be breached by returning an individual.⁵⁷ The 2014 Act extended certification and the removal of in-country appeal rights to deportation appeals raising human rights issues to be certified.⁵⁸ The present Bill proposes the extension of these provisions to all human rights appeals, save for cases involving humanitarian protection or the Refugee Convention.

Part 4 of the Bill is designed to target Article 8 cases involving the right to respect for private and family life. Where a claim to remain in the UK to reside with, for example a British spouse, a minor child or an elderly relative requiring care, is refused by the Home Office, the applicant will be forced to return to his or her country of origin and to attempt to bring an appeal from there, save where the Home Office considers that removal at this stage would represent a human rights violation.⁵⁹ If implemented, these proposals will not only result in the temporary separation of families for many months while appeal hearings are allocated and the appeals determined, it will substantially reduce the prospect of a fair hearing, leading to permanent injustice. Many family life cases are refused by the Home Office on the grounds that it does not accept the genuineness of a relationship. It is hard to fathom how a couple would be able to establish the strength and genuineness of their relationship with one party excluded entirely from proceedings. This situation is exacerbated by practical difficulties of accessing and using video link technology in an appeal. Evidence from a barrister provided to the Court of Appeal as part of the challenge to certification referenced above, helps to illustrate the problem:

Had a CMRH for a client removed following an unsuccessful challenge to the s.94B certification. He was asking for a video link enabled court so he could participate in his appeal, – a private life claim. Tribunal's stance is that they have the facility for a video link to be provided, but at the cost of the client, who will need to pay for the use of the room in the British High Commission, and security staff to man it, and provide

⁵⁷ The 2002 Act, section 94.

⁵⁸ Section 94B of the Nationality, Immigration and Asylum Act 2002 removes the in-country appeal right wherever the Home Secretary 'considers' that removal would not breach human rights. This requirement is elaborated at subsection 94B(3) as including, in particular, a conclusion that removal would not expose the appellant to 'a real risk of serious irreversible harm'.

⁵⁹ Nationality, Immigration and Asylum Act. ss 94(3)B and in particular where the Home Secretary considers there is "a real risk of serious and irreversible harm"

his own “tech support” to ensure that the link connects with the Tribunal’s facility. Neither the Tribunal nor the SSHD is willing or able to bear the costs.⁶⁰

Individuals further generally have no access to legal aid for the purposes of appeals on Article 8 grounds.⁶¹

All this must be seen in the context of notoriously low quality Home Office decision making. Tribunal statistics for the period April-June 2015, reveal that 39% of immigration and asylum appeals were allowed by the First Tier Tribunal, that is some 6081 people who succeeded on appeal in this period alone, before consideration of those who ultimately go on to succeed before the Upper Tribunal.⁶² In the face of consistent reports of bad administration, inefficiency and poor-quality decision making, rather than attempting to improve the system, the Government apparently wishes to insulate itself from effective challenge. Long-standing concerns about the quality of Home Office decision making further mean that assessments of whether serious and irreversible harm would be occasioned by removal simply cannot be relied upon. The option to raise challenges to unlawful certification in judicial review proceedings will remain and to the extent that this option is practically available, the valuable time of senior judges will be used up in pointing out basic errors in Home Office decision making. For many, however, and particularly in light of reforms to judicial review and legal aid provision, judicial review will not be practically accessible.

Part 5 – removal of the exclusion of support for families with small children

Page 93, line 37, omit sub-paragraph (5).

Effect

This proposed amendment would ensure the continuation of section 95 support for households with minor children.

Briefing

Currently, under section 95 of the Immigration and Asylum Act 1999 (“the 1999 Act”) accommodation and financial support is available to those with ongoing asylum claims,

⁶⁰ “Report: “*Serious irreversible harm*” test case heard in Court of Appeal”, 25th September 2015. Available at: <https://www.freemovement.org.uk/report-serious-irreversible-harm-test-case-heard-in-court-of-appeal/>.

⁶¹ Save in the event that exceptional funding.

⁶² In the Upper Tribunal, appeals by both the Home Office and individual applicants are heard, this appeal right. These statistics include some categories of case which won't be affected by the provisions in the Bill, such as asylum appeals, but managed migration cases made up more than half of the cases disposed of by the First-Tier Tribunal. Managed migration appeals are currently generated by people already in the UK who will be hit by proposals set out in the Bill.

where they are destitute, or liable to become so within a 14 day period. Section 94(5) provides for this support to continue to be provided to families after an asylum claim has been finally rejected, where the household includes minor, dependent children born prior to the final determination of an asylum claim. This is subject to a specific power to remove support where the Home Secretary certifies that a family has failed, without reasonable excuse, to take steps to leave the United Kingdom voluntarily.⁶³ This power has not been routinely used, following its pronounced failure to facilitate removal when piloted in 2005.⁶⁴ The Bill goes significantly further than this specific power by providing for the blanket removal of section 95 support for families once a claim has been finally rejected. Under the Bill, section 95 support will only be available where a protection claim is on-going; whilst further submissions are made to the Secretary of State if they are made on protection grounds; or if such further submissions have been rejected by the Home Office, but the individual has permission to judicially review the Home Office decision.

Destitution as a means of enforcement

Provision which will see section 95 support withdrawn from families must be seen in the context of clauses of the Bill which create a freestanding offence of illegal working and provide for the seizure of earnings; provide for the closure and freezing of bank accounts; and lock those without leave (including asylum seekers granted “immigration bail” pending the outcome of a claim) out of the private rental sector. It is clear that the Government views destitution as a legitimate way of enforcing removal and deterring migrants from coming to the UK. This approach not only ignores the evidence, it demonstrates a callousness which is increasingly coming to characterise UK immigration and asylum policy. The present proposals follow drastic cuts in support payments for asylum seeking families. The support provided to those still within the asylum system - and hitherto to families whose claims have been rejected - under section 95 of the 1999 Act, was set at a bare minimum and has since been significantly reduced. Under new rates introduced in August this year, support for a couple with two children fell from £178.44 to £147.80 and for a couple with one child from £125.48 to £110.85. Support for a single parent with two children falls from £149.86 to £110.85 and for a single parent with one child from £96.90 to £73.90. Healthcare for those refused asylum in the UK is further already severely restricted and the Secretary of State for Education recently announced an investigation into the extent to which the prospect of an

⁶³ Nationality, Immigration and Asylum Act 2002, Schedule 3(7A) as inserted by section 9, Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

⁶⁴ *Family Asylum Policy: the Section 9 Implementation Project*, Home Office Border & Immigration Agency. Available at: <http://webarchive.nationalarchives.gov.uk/20140110181512/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/section9implementationproj.pdf>.

education constitutes a “pull factor” for migrants.⁶⁵ In the frantic bid to introduce ever more severe and biting hardships, the Government is willing to see children left without the basic necessities of life.

The Government argued in its recent consultation document that the removal of support is a way to “reinforce our immigration controls” and suggests that, when support is removed, “some failed asylum seekers will necessitate less enforcement activity”.⁶⁶ In the Impact Assessment accompanying the consultation proposals, however, the Government acknowledges that the prospect of behavioural change is too speculative to form part of a cost-benefit analysis of the proposals:

...the financial value of support available is small in comparison to the benefits of living and working in the UK, and as the behavioural response to the withdrawal or restriction of support is difficult to evidence, even after changes have been introduced, we have not made any estimate of additional savings resulting from any behavioural response to the measures proposed.⁶⁷

The counter-productive nature of policy which relies on destitution as an enforcement tool was neatly summarised by the current Secretary of State for Work and Pensions in a 2008 report:

If asylum is refused, asylum seekers are often left without support and usually without permission to support themselves through work... It also appears that a British government is using forced destitution as a means of encouraging people to leave voluntarily. It is a failed policy: only one in five leaves voluntarily. This contrasts diametrically with Sweden, where, this year, only one in five had to be forced to leave. The rest did so voluntarily. Sweden achieves this by treating refused asylum seekers in a humane and reasonable manner...⁶⁸

Arguments about the enforcement benefits withdrawal or reduction of support to families are even more directly met by reference to a 2005 Home Office pilot of a current power, rarely

⁶⁵ ‘Nicky Morgan orders immigration review to examine ‘education tourism’’, 16th August 2015, The Telegraph: <http://www.telegraph.co.uk/news/uknews/immigration/11805477/Nicky-Morgan-orders-immigration-review-to-examine-education-tourism.html>

⁶⁶ *Reforming support for failed asylum seekers and other illegal migrants: Impact Assessment*, page 5 and 13.

⁶⁷ *Impact Assessment*, page 6.

⁶⁸ *Restoring Trust in the UK Asylum System*, The Centre for Social Justice: Asylum and Destitution Working Group, December 2008. Preface by Iain Duncan-Smith at page 4.

used, to halt support for families. That provision, much like the present proposal, was justified as an enforcement measure. Data collected at the end of the year-long pilot period, however, found that those subject to the power to remove support were no more likely to leave the UK than a control group, but that those in the pilot group were almost twice as likely to have their asylum support removed. Significantly the evaluation report also noted that, “[e]vidence suggests a significant number of the families may have absconded from accommodation because of concerns about the section 9 process”.⁶⁹ Unsurprisingly the Home Office concluded that the power to remove section 95 support from families:

...did not significantly influence behaviour in favour of co-operating with removal... this suggests that the section 9 provision should not be seen as universal tool to discourage departure... We therefore do not propose that the section 9 provision should be used on a blanket basis by Border and Immigration Agency case owners in the future.⁷⁰

The recommendation was that a power to remove support should be retained and could be considered on a case-by-case basis by case-owners if it was felt this could encourage removal in particular circumstances. 8 years on from the publication of this analysis of the evidence, the Government seeks to introduce a broader measure than that piloted in 2005. The changes set out in the Bill offer similarly poor prospects of facilitating removal but carry crushing and far-reaching human consequences.

Destitution as a deterrent

The Government also argues that provision of subsistence support sends the “*wrong message*” to prospective migrants and that withdrawal of support *will “remove incentives for migrants to remain in the UK”*.⁷¹ In the words of Home Office Minister, James Brokenshire, the Government hopes to demonstrate that the UK is not “*the land of milk and honey*”,⁷² or in the words of the Home Secretary that “*Britain’s streets are not paved with gold*”.⁷³ Available evidence reveals the fallacy in this approach. A Home Office Research Study published in

⁶⁹ *Family Asylum Policy: The Section 9 Implementation Project*, paragraph 2.2.

⁷⁰ *Family Asylum Policy: The Section 9 Implementation Project*, para 4.3.

⁷¹ *Reforming support for failed asylum seekers and other illegal migrants*, paragraph 7 and 10.

⁷² *Concerns raised over plan to strip failed asylum seeker families of benefits*, The Guardian, 2nd August 2015. Available at:

<http://www.theguardian.com/uk-news/2015/aug/02/concerns-raised-plan-strip-failed-asylum-seeker-families-benefits>.

⁷³ *Migrants think our streets are paved with gold*, The Telegraph 1st August 2015. Available at: <http://www.telegraph.co.uk/news/uknews/immigration/11778396/Migrants-think-our-streets-are-paved-with-gold.html>.

2002 concluded that:

There was very little evidence that the sample respondents had a detailed knowledge of: UK immigration or asylum procedures; entitlements to benefits in the UK; or the availability of work in the UK. There was even less evidence that the respondents had a comparative knowledge of how these phenomena varied between different European countries.⁷⁴

This Home Office commissioned research also found that asylum seekers have little control over where they apply for asylum concluding:

...it is important to note that agents were critical determinants of the destination eventually reached by asylum seekers...if individual asylum seekers wanted to leave their home country they had to give over control of migration decision-making to these paid facilitators.⁷⁵

This was confirmed by a 2011 review of the 19 main OECD recipient countries for asylum applications carried out by the Centre for Economic Policy Research.⁷⁶ The review concluded that tightening of welfare provision did not have any deterrent effect.⁷⁷ In the UK specifically, the introduction of the separate and reduced support arrangements for asylum seekers in 1999 had no deterrent effect. Applications for asylum, excluding dependants, rose by 25,000 to 71,100 in 1999,⁷⁸ in 2000 applications rose by a further 13% to 80,315.⁷⁹ The Home Office should engage with the analysis of the Secretary of State for Work and Pensions:

The Government claims that the asylum system is effectively reducing the numbers of asylum seekers entering the UK. However this report shows that the rise

⁷⁴ V.Robinson, *Understanding the decision-making of asylum seekers*, University of Wales, July 2002, page viii.

⁷⁵ *Understanding the decision-making of asylum seekers*, page 19.

⁷⁶ *Seeking Asylum Trends and Policies in the OECD*, Timothy J Hatton (University of Essex, Australian National University, and CEPR), July 2011.

⁷⁷ *Seeking Asylum Trends and Policies in the OECD*, see e.g. sections 8.2 and 9.3.

⁷⁸ ASYLUM STATISTICS UNITED KINGDOM 1999:

<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs/hosb1700.pdf>.

⁷⁹ ASYLUM STATISTICS UNITED KINGDOM 2000:

<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs/hosb1701.pdf>.

of asylum numbers at the turn of the millennium and subsequent fall since 2003 is an international phenomenon....⁸⁰

Impact on local authorities

In its efforts to assuage any fears of local authorities that responsibility to support desperate families may fall on them, the callous disregard for the welfare of children which lies at the heart of the present proposals is thrown into sharp focus. In its recent consultation document, the Government was at pains to demonstrate that no further obligations will be placed on local authorities to save children from destitution as a result of the removal of central government funding. The consultation paper highlights the extent to which local Government is already immune from the usual duty to provide for vulnerable children with “*a range of local authority administered welfare provisions... generally unavailable to failed asylum seekers and their families...*” and limitations on the child protection duties which arise under the Children Act 1989 “*and equivalent legislation*”.⁸¹

Despite these assurances, it seems inevitable that some costs will be transferred to local authorities because the removal of accommodation and support, from children in particular, risks violations of the Article 3 prohibition on inhuman and degrading treatment. The consultation paper accepts that support may be provided by local authorities where an Article 3 breach would otherwise ensue and outlines its willingness to discuss any costs which are transferred in this way. In reality, the Government may find that local authorities are not as desperate to evade their responsibilities to the vulnerable as central Government. Following the piloting of powers to remove support from asylum seeking families in 2005, local authorities expressed concern that the removal of provision created “*difficulty in reconciling what they considered to be the conflicting principles of child welfare and section 9*” (powers to remove support).⁸²

⁸⁰ *Restoring Trust in the UK Asylum System*, page 4.

⁸¹ *Reforming support for failed asylum seekers and other illegal migrants*, paragraph 39. Schedule 3 of the 2002 Act severely restricts broader local authority support obligations in the case of refused asylum seekers, save where a human rights breach would ensue.

⁸² Home Office, *Section 9 Implementation Project Report*, page 2. Available at: <http://webarchive.nationalarchives.gov.uk/20140110181512/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/section9implementationproj.pdf>.

Part 5 – permission to work for asylum seekers after six months

Page 100, line 16 at end insert the following new clause-

“Permission to work

- (1) The Immigration Act 1971 is amended as follows.
- (2) After section 3(9) (general provisions for regulation and control) insert—
 - “(10) In making rules under subsection (2), the Secretary of State must have regard to the following.
 - (11) Rules must provide for persons seeking asylum, within the meaning of the rules, to apply to the Secretary of State for permission to take up employment and that permission must be granted if—
 - (a) a decision has not been taken on the applicant’s asylum application within six months of the date on which it was recorded, or
 - (b) an individual makes further submissions which raise asylum grounds and a decision on that fresh claim or to refuse to treat such further submissions as a fresh claim has not been taken within six months of the date on which they were recorded.
 - (12) Permission for a person seeking asylum to take up employment shall be on terms no less favourable than those upon which permission is granted to a person recognised as a refugee to take up employment.””

Effect

This proposed amendment would provide for asylum seekers to be able to work if their claim is not determined within the Home Office target time of six months.

Briefing

Whilst the proposed changes to asylum support do not constitute an effective means of enforcement or deterrence, they would create financial savings, at least for central Government (although the extent to which these costs would be transferred to local Government is discussed further above). These savings would be paid for by the abject suffering of destitute people and – because the evidence shows some will abscond - by compromises to the integrity of the immigration system.⁸³

⁸³ Ibid., During the Home Office pilot, section 9 frustrated removal by encouraging people to abscond.

If the Government seeks to find financial savings from the asylum support system there are many more constructive and humane ways to do so, most obviously by allowing more asylum seekers to work whilst their claims are processed, generating additional tax revenue and significant savings from the asylum support system.

Part 5 – appeal right for section 95A support

Page 90, line 28, omit “omit section (2A)” and insert “in section 2A for “accommodation” each time it occurs substitute “support” and for “section 4” each time it occurs substitute “section 95A”.

Page 90, line 30, for after “section 95” insert or “section 95A”

Effect

This amendment would re-insert a right of appeal against a decision to refuse destitution support.

Briefing

The Asylum Support Tribunal statistics reveal that – for the period 1st September 2014 to 28th February 28 2015 –approximately two thirds of appeals were either allowed, remitted, or resolved by an acknowledged from the Home Office about flaws in decision making. Furthermore, the Asylum Support Appeals Project records:

In 2014–15 ASAP assisted 674 appellants, of which 64.5% were able to access support as a result of their appeal. In the first quarter of 2015-16 (April – June) ASAP assisted 221 appellants, 73% of which either won their appeal or had it remitted resulting in them accessing support they had previously been denied.⁸⁴

To ensure a bare minimum of protection against widespread destitution caused by administrative error a right of appeal against the refusal of section 95A support must be included in this Bill.

⁸⁴ ASAP’s response to ‘Reforming support for failed asylum seekers and other illegal immigrants’. Available at: <http://www.asaproject.org/wp-content/uploads/2015/09/ASAP-response-to-HO-Consultation-on-Asylum-Support-7-9-15.pdf>