Liberty’s Committee Stage Briefing on the Immigration Bill in the House of Lords

February 2014
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/policy/

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Introduction

1. Successive administrations, in fraught attempts to look tough on immigration, have preferred endless reams of new legislation to the rather dull task of tackling widely acknowledged delays and inefficiency in the administration. The Immigration Bill continues this trend. It is a deeply irresponsible piece of legislation which, far from encouraging public confidence in the system, would allow the Government to shirk its responsibilities and insulate itself from challenge. The provisions of this Bill add to the layers of painful complexity which have come to characterise our immigration law, meaning that it is scarcely understandable by trained practitioners, never mind those subject to immigration control and the general public.

2. In this briefing we address Parts 1 and 2 of the Bill. In summary, Part 1 of the Bill reduces protections against bad and unlawful decision-making which may result in an individual being wrongly removed from the UK or placed in immigration detention. It also provides for an open-ended extension of the circumstances in which force can be used to enforce immigration powers. Clause 5 appears to be an attempt to extend the legally dubious practice of in-border immigration spot-checks to allow immigration officials to collect biometric information on the spot. Part 1 also introduces new powers to search individuals and premises which sit uncomfortably within a confusing mass of overlapping existing provision.

3. Part 2 of the Bill addresses appeals against immigration decisions, variously eroding appeal rights, making them practically inaccessible, curtailing judicial discretion and shielding the Home Office from challenge. The latest statistics reveal that 32% of deportation decisions and 50% of entry clearance applications were successfully appealed last year.\footnote{Number of First Tier Tribunal (Immigration and Asylum) Appeals Determined at Hearing or on Paper, by Outcome Category and Case Type, 2007/08 to 2012/13. Available at: https://www.gov.uk/government/publications/tribunal-statistics-quarterly-and-annual-jan-mar-2013-2012-13.} Depressingly, the Government’s response to this high margin of error is not to seek to improve the quality of its decision making, but rather to reduce the opportunities for challenge.
Part 1 – Removal and Other Powers

Removal directions

4. Clause 1 of the Bill deals with administrative removal of foreign nationals and appears to be an attempt by the Government to speed up the removal process and reduce procedural safeguards designed to ensure that individuals can challenge erroneous decision-making. In its recent report on the Bill, the JCHR argued that a requirement of written notice for family member liable to removal, notably absent from clause 1, should be included in the Bill. Liberty further notes that while draft Regulations make provision for written notice to be given to family members, they do not stipulate a notice period, nor do they require an individual to be informed of the avenues available to challenge removal. This is the case notwithstanding the obvious potential vulnerability of the people involved, including children and dependant elderly relatives. Liberty believes that this Bill must make legislative provision for written notice to be served, in a timely manner and to set out the legally available avenues of challenge. This is the absolute minimum that fairness demands.

Reasonable force

5. Schedule 1, paragraph 5 of the Bill extends the power of immigration officers to use reasonable force where necessary, so that it applies to all current and future immigration powers under any of the Immigration Acts, and not simply to specified powers under the 1971 and the 1999 Immigration Acts.

6. Liberty accepts that the use of reasonable force may be necessary and proportionate in relation to some immigration powers (e.g. removal), but we are deeply concerned by a power that would allow force to be permitted across the board without reference to the type of power being exercised and the necessity of force. Tragic incidents involving the death or serious injury of those forcibly removed from the UK highlight the care with which the Government must approach the extension of use of force powers for immigration officers. Liberty believes there are serious gaps in the current training provided for the exercise of force by immigration officers and contractors; and in particular around the use of restraint techniques. Our concerns are exacerbated by the Government’s apparent willingness to...

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2 Joint Committee on Human Rights, Legislative Scrutiny: Immigration Bill, para 27.

3 Please see Liberty’s dedicated briefing on Schedule 1, paragraph 5 of the Bill for recent examples of misuse of force: http://www.liberty-human-rights.org.uk/sites/default/files/Liberty%20briefing%20on%20extension%20of%20use%20of%20force%20powers%20in%20Schedule%20of%20the%20Immigration%20Bill.pdf.
blithely extend the circumstances in which force can be used, without making its case or establishing additional protections.

Bail

7. Clause 3 would impose disturbing new restrictions on applications for immigration bail. The Bill provides that where directions requiring removal within 14 days are in force, an individual may not be granted bail without the consent of the Secretary of State. Sub-clause 3(3) requires provision to be made in the Tribunal Procedure Rules requiring the Tribunal to dismiss applications for bail made within 28 days of a previous application which has been dismissed by the Tribunal without a substantive hearing. The Procedure Rules must further specify that applications for release on bail pending appeal are dismissed - without a hearing - when they are made within 28 days of a prior application unless a material change can be demonstrated on the papers.

8. Every year thousands of people are locked up in immigration detention centres. Many are detained for months or years despite guidance suggesting that detention pending removal from the UK should happen when removal is ‘imminent’. Government policy is not to detain survivors of torture or those with serious medical conditions or mental health problems except in the most exceptional circumstances; however in practice survivors of rape and torture, pregnant women and those with severe mental and physical health problems are often found to be in detention. Liberty believes that immigration detention should only be used as an extreme last resort and for very time-limited periods where it can be independently shown to be necessary. We are concerned that, in reality, it is frequently used for administrative convenience and extends far beyond reasonable time-limits, frequently due to inefficiency or disorganisation in the system. The right to apply for bail and to have that application substantively considered by a judge is an essential protection in this system. The provisions set out in this Bill carve out dangerous exceptions and like so much else in this Bill, seem designed to insulate the Home Office from challenge where it makes poor decisions.

9. The simple fact of directions for removal within 14 days is not sufficient grounds to assume that bail should not be granted. On any common sense analysis there are factors which bluntly challenge that assumption. Those suffering psychological or physical illness,

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4 The Immigration Bill, sub-clause 3(2).
6 Ibid, section 55.10.
pregnant women, the recently bereaved and those who are primary care givers to young children are obvious examples of individuals who should be able to challenge detention notwithstanding the existence of removal directions. Liberty is further concerned that it will be open to the Home Office to issue rolling removal directions, effectively preventing bail applications on an indefinite basis unless the Home Secretary gives her consent.

10. Proposed new requirements prohibiting repeat applications save where a material change in circumstances is demonstrated are also seriously flawed. Liberty believes that deprivation of liberty for a period of 28 days in circumstances where no offence has been committed is extremely difficult to justify. The very least individuals can expect in these circumstances is a right to challenge their incarceration.

Biometrics

11. Clauses 4 - 10 set out new provisions around biometric information in the context of immigration applications. They entail an extension of the situations in which biometric information can be required and recorded. Liberty believes that biometric information should only be collected where strictly necessary to support the proper administration of our immigration system.

12. Of particular concern is clause 5 which extends powers that currently apply to immigration detainees to individuals who are not in immigration detention. At present these powers allow immigration officials and other parties authorised by the Home Secretary to ‘take all such steps as may be reasonably necessary for photographing, measuring or otherwise identifying’ a person detained under paragraph 16, Schedule 2 of the 1971 Act. Detention under paragraph 16 can occur to allow immigration officers to examine those entering the UK to determine whether they are British citizens or individuals with valid leave to enter and pending a decision on whether to grant leave to remain. The effect of clause 5 is to extend broad and intrusive powers to ‘identify’ an individual so that they apply not just to those detained but also to those ‘liable to be detained’ under paragraph 16.

13. If clause 5 is enacted, biometric information will able to be taken by immigration officers’ in-country, without arrest, from anyone deemed ‘liable to be detained’ regardless of whether they are a British citizen or not. As drafted the power will also be enforceable via the use of ‘reasonable force’ if somebody resists a request to provide their biometrics.

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7 Currently set out at paragraph 18(2), Schedule 2 of the Immigration Act 1971
14. At present fingerprints and biometric information can only be taken in-country, without consent, following an arrest for a recordable offence.\(^8\) Clause 5 represents a sweeping change to this position and runs counter to earlier reforms by this Government to impose greater safeguards on the taking and retention of biometric information.\(^9\)

15. It is on the basis of a dubious interpretation of another power contained in Schedule 2 of the 1971 Act (and a further dubious extrapolation of a 1987 judgment) that the Home Office first started running divisive in-country spot-check fishing expeditions at transport hubs and in ethnically diverse areas of the UK. The Home Office’s interpretation of the 1987 case of \textit{Singh v Hammond} is that Schedule 2, paragraph 2 examinations in relation to those ‘\textit{who have arrived in the United Kingdom}’\(^10\) can be carried out in-country as well as at the border. 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:

\begin{quote}
“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 passing through or near a group of Immigration Officers (IO) 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.”
\end{quote}

16. Instead of reflecting on the climate of fear and damage to race relations that results from speculative in-country immigration enforcement - and its dubious legal authority - the Home Office now seeks new powers that will likely be used, to disastrous effect, alongside those currently claimed. If clause 5 of the Bill is brought into force, immigration officers will claim the power to not simply stop and question people at tube stations and on streets

\(^{8}\) Sections 61 and 63 of the Police and Criminal Evidence Act 1984.
\(^{9}\) See reforms to police retention of fingerprint and DNA information introduced via the Protection of Freedoms Act 2012.
\(^{10}\) Immigration Act 1971, sub-paragraph 2(1).
\(^{11}\) Home Office Enforcement Guidance and Instructions, paragraph 31.19.4.
around the country who they perceive as avoiding their gaze, but to photograph and collect the intimate biometric information of such individuals. We urge you to resist this power.

**Part 2 – Appeals**

*Clause 11 (removal of appeal rights)*

17. Clause 11 will act to significantly reduce the kind of cases which attract appeal rights and the grounds on which appeals can be brought. Whilst cases which raise issues of international protection or human rights will remain subject to independent statutory appeal before a Tribunal, in other matters where the lawfulness of Home Office decision making is called into question, claimants will be left with nothing more than a poorly articulated system of administrative review which provides neither the independence nor the procedural protection of judicial oversight.

18. In the face of consistent reports of bad administration, inefficiency and poor-quality decision making, rather than attempting to improve the system, the Government is removing opportunity for effective challenge. The option to raise challenges to unlawful decision making before the High Court in judicial review proceedings will remain and to the extent that this option is practically available, the valuable time of High Court judges will be used up in pointing out basic errors in Home Office decision making. For many, however, and particularly in light of proposed reforms to judicial review and legal aid provision, judicial review will not be practically accessible, leaving individuals without any form of redress and the Home Office with no imperative to improve its processes. The JCHR has also sought to analyse clause 11 in the context of judicial review and legal aid reforms, concluding:

> “when viewed in this broader context, limiting rights of appeal to the extent that they are restricted in the Bill constitutes a serious threat to the practical ability to access the justice system to challenge unlawful immigration and asylum decisions.”

19. Liberty further shares concerns expressed by the JCHR that the significant limitation of appeal rights proposed by clause 11 would be incompatible with the common law right of access to the courts to challenge unlawful decision making. Administrative review and

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12 See successive HASC reports, most recently, the *Eight Report of Session 2013-14* and the *Fourth Report of Session 2013-2014*, in which the Committee raised concerns at the apparently sudden decision to abolish UKBA and the lack of clarity around the new system. HASC also questioned how another transfer of functions would improve the longstanding failings of immigration administration.

particularly review by a failing department found to be suffering from ingrained cultural deficiencies is on no interpretation an adequate substitute for accessible judicial oversight.

Clause 12 (non-suspende appeal rights)

20. Clause 12 of the Bill deals with the location from which an appeal may be brought. It provides that, where an appeal is brought on asylum or humanitarian protection grounds the appeal is to be brought from within the UK unless it is certified as clearly unfounded. Existing provisions allow for certification 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 an individual's human rights would be breached on return, or that an individual can be removed to a country in conformity with the refugee Convention.¹⁴

21. In so far as claims relate to asylum and humanitarian protection, the Bill introduced no substantive change to the location of the appeal. However if deportation is challenged on human rights grounds, a proposed new certification provision would apply, removing the in-country appeal right wherever the Home Secretary ‘considers’ that removal would not breach human rights protection. This requirement is elaborated as including, in particular, a conclusion that removal would not expose the appellant to 'a real risk of serious, irreversible harm'.¹⁵ Thanks to late amendments introduced by the Government at Committee Stage, this clause is now even broader in its reach than was originally proposed, allowing the Home Office to operate a policy of 'deport now, appeal later' not just in relation to specified foreign national offenders but in relation to any individual - and her family members – whose presence in the UK is deemed by the Home Secretary not to be conducive to the public good. However the decision on the issue of irreversible harm, which may well be hotly contested by the applicant is left, unilaterally, to the Home Office.

22. The Government argues that this test reflects the test used by the European Court of Human Rights.¹⁶ The obvious difference is that the Court is an independent judicial body, while under the Bill the assessment would be made by the Home Office, without the appellant having an opportunity to challenge its reasoning or conclusions before an Immigration Judge.

¹⁴ The 2002 Act, section 94.
¹⁵ New section 94B(2)-(3) of the 2002 Act, as inserted at sub-clause 12(3).
¹⁶ Home Office Fact Sheet on Appeals:
23. Whilst the decision to certify a case could be challenged in judicial review proceedings, proposed reforms to judicial review and in particular the removal of legal aid funding for those who cannot meet stringent residence requirements, will mean this option is not practically available to many. To the extent this provision is based on the need to have faith in the decision making of Home Office officials, we should remember that 1 in 3 deportation cases are successfully appealed.17

24. These concerns are clearly shared by the JCHR, which concluded, following legislative scrutiny of the Bill:

“We are not satisfied with the Government’s reliance on the continued availability of judicial review to challenge the Secretary of State’s certification that a human rights appeal can be heard out of country, having regard to the unavailability of legal aid to bring such a claim and the proposed reforms of judicial review.”18

Clause 14 (Article 8): public interest considerations

25. The Article 8 right to respect for private life protected by the Human Rights Act provides a framework of protection allowing a fact-sensitive balancing exercise to be carried out between the rights of an individual and the wider public interest in issues such as immigration control. Whilst it is legitimate for Parliament to make legislative prescription about the requirements of the public interest, clause 14 goes further than that, with proposed new subsections 117(B)(4)-(5) prescribing the weight to be attached to private life in prescribed circumstances.

26. Liberty believes this is a serious and unconstitutional incursion into the judicial function. The JCHR also raised pronounced concerns about these sections following its scrutiny of the Bill, noting:

“we are uneasy about a statutory provision which purports to tell courts and tribunals that “little weight” should be given to a particular consideration in such a judicial balancing exercise. This appears to be a significant legislative trespass into the judicial function. We

note that the Government did not provide us with any other examples of such statutory provisions, which suggests that this approach may be unprecedented."\(^{19}\)