

**LIBERTY**

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's briefing on the Immigration Bill  
for Second Reading in the House of  
Commons**

**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/policy/>

## **Contact**

Bella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: [bellas@liberty-human-rights.org.uk](mailto:bellas@liberty-human-rights.org.uk)

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: [rachelr@liberty-human-rights.org.uk](mailto:rachelr@liberty-human-rights.org.uk)

Sara Ogilvie

Policy Officer

Direct Line 020 7378 3654

Email: [sarao@liberty-human-rights.org.uk](mailto:sarao@liberty-human-rights.org.uk)

## Introduction

1. A week after 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. There is already evidence 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.<sup>1</sup>

2. 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.

3. 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.

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

## **Immigration control: In-country and in the private sphere**

4. Parts 1 and 2 of the Bill set out a package of proposals which would increase the burdens placed on private individuals to enforce immigration control in the workplace, the private rental sector and in banks. During the passage of the 2014 Act, former Immigration Minister, Mark Harper MP demonstrated the unworkability of in-country, layperson, immigration control when he resigned from Government on discovering that he was employing an undocumented migrant. Despite assiduous efforts Mr Harper was unable to accurately determine the immigration status of his employee for several years. If the Immigration Minister - with expert guidance and support at his disposal - is unable to accurately discharge a so-called 'light touch' and 'proportionate' duty it is inconceivable that millions of other employers and landlords, with no expertise or experience of immigration law, will fare any better.

5. Parts 1 and 2 also include criminal offences for irregular migrants who work or drive in the UK. There are already a range of criminal offences on the statute book to deal with those who enter the country illegally, overstay or breach conditions. The Chief Inspector of Borders and Immigration has remarked on the lack of enforcement activity:

Section 24 of the Immigration Act 1971, under which those without leave to remain may be prosecuted as overstayers, is seen as ineffective by enforcement staff and is very rarely used: annual convictions for overstaying, for example have been in single figures for the last five years.<sup>2</sup>

6. As the Home Office is showing little sign of enforcing existing offences, we can only suspect that the headline-grabbing new offences created in this Bill come with the principal purpose of extending entry, search, seizure and arrest powers encouraging dangerous and speculative fishing expeditions that will further divide our communities.

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<sup>2</sup> Independent Chief Inspector of Borders and Immigration, '*An Inspection of Overstayers: How the Home Office handles the cases of individuals with no right to stay in the UK*', May-June 2014. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/387908/Overstayers\\_Report\\_FINAL\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/387908/Overstayers_Report_FINAL_web.pdf). 9.7.

## Part 1, clauses 8 and 9 - ineffective workplace enforcement and the exacerbation of labour exploitation

7. 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.<sup>3</sup> The maximum penalty on conviction is a 51 week prison sentence and a fine. Prosecutors would be required to consider whether to apply on conviction for a case to be committed to the Crown Court for the purposes of asset confiscation.<sup>4</sup> The Bill also expands the scope of, and increases the sanctions for, the existing offence of knowingly employing an illegal worker.<sup>5</sup> Under the Bill the threshold for the offence will be lowered to include employing somebody with “reasonable cause to believe” he or she is an illegal worker. The maximum custodial sentence is increased from 2 to 5 years.

8. 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.”*<sup>6</sup> 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.’<sup>7</sup>

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<sup>3</sup> Work is defined broadly as including any contract to sell goods or enter into an apprenticeship. See proposed new Section 24B(9).

<sup>4</sup> Under the Proceeds of Crime Act 2002, s70.

<sup>5</sup> Clause 9.

<sup>6</sup> Focus on Labour Exploitation, ‘UK IMMIGRATION BILL COULD CREATE PERFECT CONDITIONS FOR MODERN SLAVERY WARNS FLEX’, 25<sup>th</sup> August 2015. Available at: <http://www.labourexploitation.org/#!UK-IMMIGRATION-BILL-COULD-CREATE-PERFECT-CONDITIONS-FOR-MODERN-SLAVERY-WARNS-FLEX/chyn/55dc340e0cf20831ee3da673>.

<sup>7</sup> IPPR, *No Easy Option: Irregular Immigration in the UK*, Tim Finch and Myriam Cherti, April 2011. P. 45.

9. 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 being paid and told they *“had no papers so couldn’t prove anything”*.<sup>8</sup> 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.”*<sup>9</sup> 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.

10. 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, clauses 12-15 – escalation of ‘right to rent’ and the impact on race relations

11. The Bill inserts four new criminal offences into the right to rent scheme. Two cover circumstances where a landlord or agent enters into a tenancy with a disqualified person with knowledge or the reasonable belief that the tenant was so disqualified. A further two occur where the tenant becomes ineligible to rent during the course of the tenancy and the landlord knows, or reasonably believes this to be the case, but fails to notify the Secretary of

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<sup>8</sup> See Undocnet presentations at: <http://www.undocnet.org/events/>.

<sup>9</sup> Ibid.

State as soon as reasonably practicable.<sup>10</sup> Both sets of offences carry a maximum custodial sentence of 5 years.<sup>11</sup>

12. The Bill would make termination of a tenancy where an occupant is disqualified from renting, an implied term of residential tenancies. Clause 13 allows a landlord to evict a tenant where the Secretary of State provides written notice that a tenant is disqualified from renting.<sup>12</sup> Secretary of State notice is to be enforceable in the same way as a High Court Order, meaning that a landlord can seek enforcement of the order through the courts. Clause 15 allows for the extension of any or all of the provisions on residential tenancies set out in the Bill, or provisions with “*similar effect*” to be extended Wales, Scotland or Northern Ireland by secondary legislation.

13. Significant concerns about the original ‘right to rent’ scheme were raised by Parliamentarians during the passage of the 2014 Act, with Labour and Liberal Democrat members in particular insisting on a provision which would ensure a clear and thorough impact assessment could be made following a regional pilot before any extension of the scheme nationally. Then Home Office Minister, Norman Baker, reassured the Commons Public Bill Committee in November 2013 that the last Immigration Bill contained:

...provisions to ensure that the scheme can be scrutinised to see how it has worked. Those provisions indicate the Government’s commitment to making sure that should it wish to do so, Parliament can scrutinise the implementation of the scheme following the first stage.<sup>13</sup>

The Minister made clear that both he and then Immigration Minister, Mark Harper:

...agree that it is sensible to proceed step by step and to look at the scheme after the first pilot. If it has worked properly, without encountering the concerns that Members on both sides of the Committee have rightly expressed, I have no doubt that it will be

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<sup>10</sup> Provision is made for an immigration officer to arrest, without warrant a person he reasonably suspects has committed or attempted to commit any of the new offences.

<sup>11</sup> Where the offence is committed by a body corporate, the director, manager, secretary or a member of that organisation may also be held criminally responsible where they are found to have consented to or connived in the commission of the offence.

<sup>12</sup> Notice given by a landlord to terminate a tenancy may specify the date on which the tenancy comes which must be at least 28 from the date of termination of the contract.

<sup>13</sup> Public Bill Committee, the Immigration Bill, 7th November 2013, column 242.

taken further. If serious problems have arisen, nobody, including my hon. Friend, will want to take the scheme further.<sup>14</sup>

14. In the Lords, Parliamentary Under-Secretary of State for the Home Office, Lord Taylor reassured Peers pushing for the scheme to be subject to a clear pilot and evaluation that:

...the Government's intention is that the provisions relating to landlords and their agents will be subject to a phased implementation on a geographical basis. This will allow a proper evaluation of the scheme to ensure that it delivers its objectives without unintended consequences such as discrimination...The Government have agreed that we will initiate the first phase from October 2014; that a formal evaluation will be produced; and that decisions on implementing the scheme more generally will be taken in the next Parliament on the basis of this proper evaluation.<sup>15</sup>

15. A pilot implementation of the scheme took place in parts of Birmingham, Walsall, Sandwell, Wolverhampton and Dudley from December 2014 – May 2015. We are yet to see the promised evaluation, but regardless, in May 2015, the Prime Minister announced his intention to roll the scheme out nationally.<sup>16</sup> With the present Bill the scheme is to be drastically escalated. The Government's failure to publish an evaluation report suggests either that it does not take the issue of discrimination in housing provision seriously or that it has something to hide. It further demonstrates disrespect for Parliament following assurances that an opportunity for scrutiny on the basis of a thorough evaluation report, would be provided.

16. As it is, the only evidence we have of the impact of the pilot comes from an evaluation carried out by the Joint Council on the Welfare of Immigrants (JCWI).<sup>17</sup> JCWI worked together with a number of organisations, including Shelter and the Chartered Institute of Housing to draft surveys for landlords, agents, tenants and lodgers. They further held meetings with local organisations in the pilot area and had discussions with local residents and local government representatives. They received evidence from student organisations, housing charities, local authorities, legal organisations and local and national

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<sup>14</sup> Public Bill Committee, the Immigration Bill, 7th November 2013, column 242.

<sup>15</sup> House of Lords Hansard: 10 Mar 2014 : column 1648.

<sup>16</sup> PM speech on immigration, 21<sup>st</sup> May 2015. Available at: <https://www.gov.uk/government/speeches/pm-speech-on-immigration>.

<sup>17</sup> JCWI, "No Passport Equals No Home": An independent evaluation of the 'Right to Rent' scheme, 3 September 2015.

charities working with migrants and BME groups. This evidence included 17 case studies of instances of discrimination. 42% of landlords who responded to JCWI's survey said 'right to rent' had made them less likely to consider somebody who does not have a British passport, 27% were reluctant to engage with those with foreign accents or names. 73% of non-British nationals were asked whether they had permission to be in the UK. Tellingly the only British citizen asked to prove his or her status did not identify as white British. 50% of respondents who had been refused a tenancy felt that discrimination was a factor in the refusal. 65% of landlords were much less likely to consider tenants who could not provide documents immediately. JCWI point out this has serious implications for the 17.5% of British citizens who do not own a passport. 40% of landlords in the pilot area and 57% nationally felt that they had not properly understood 'right to rent' or simply were not aware of the changes. 65% of landlords either had not read or felt they did not understand the 'Code of Practice on Avoiding Discrimination'. 77% of landlords were not in favour of a national roll-out of the scheme.

17. The JCWI's evaluation provides clear and damning evidence of discrimination despite the fact that the West Midlands rental market is less competitive than that in some areas of the country. In response to the announcement earlier this year that 'right to rent' would be extended nationally, the Residential Landlords Association expressed concern about the impact of proposals:

...especially in areas of high demand like London, where many landlords will not want to take the risk of ending up on the wrong side of the law and so may deny accommodation to those who are entitled to be in the UK.<sup>18</sup>

Unsurprisingly the RLA has also expressed concern that the new proposals set out in the Bill follow so close on the heels of the introduction of 'right to rent', before the scheme has bedded in or been properly evaluated:

...Given the existing confusion over Right to Rent checks and documents the addition of a new criminal penalty seems premature, especially as the consultation in the West Midlands has not yet finished.<sup>19</sup>

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<sup>18</sup> Residential Landlords Association, *IMMIGRATION PLANS COULD SEE LAWFUL TENANTS DENIED A HOME*, 3<sup>rd</sup> August 2015. Available at: <http://news.rla.org.uk/immigration-plans-could-see-lawful-tenants-denied-a-home/>.

<sup>19</sup> Ibid.

18. Government data further shows that it is highly unlikely ‘right to rent’ will bring any significant enforcement gains. A Home Office Freedom of Information Act response reveals that in the period 1<sup>st</sup> December to 30<sup>th</sup> April, only 13 requests for checks resulted in a landlord or agent being informed that an individual did not have the right to rent, overall just 17 irregular migrants were brought to the Home Office’s attention through the scheme in the same period and there were only 14 instances of enforcement action being taken against an irregular migrant.<sup>20</sup> It is far from clear that this enforcement action resulted in removal as the Home Office states that it does not hold information on the number of individuals who actually left the UK as a result of the scheme.<sup>21</sup> Despite the low levels of awareness about the requirements of the scheme highlighted by the JCWI survey, only 2 landlords were issued with a civil penalty under the scheme in the 5 month period in question.<sup>22</sup>

19. Whilst enforcement impacts are likely to be underwhelming or non-existent the implications on race relations will be only too real. There is no doubt that the extension of right to rent, both geographically and in terms of the draconian amendments made in this Bill will make Britain a less friendly place to be for those who belong to an ethnic minority or have a foreign sounding name or accent.

#### Part 2, clause 17 - driving whilst illegal

20. 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 below. 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 as discussed in greater detail below.

#### Part 2, clause 18 and schedule 3 - bank accounts

21. Schedule 3 would place new obligations on banks to carry out periodic checks on current accounts at such frequency as the Treasury may require in regulations. This involves banks checking their records against Government data held by a third party to ascertain

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<sup>20</sup> See FOI response to JCWI request, “No Passport Equals No Home”, Annex A.

<sup>21</sup> Ibid., Annex A.

<sup>22</sup> Ibid., Annex A.

whether account holders, signatories or other beneficiaries are disqualified from holding an account because they are unlawfully resident.<sup>23</sup> On identifying a disqualified person, the bank is required to notify the Secretary of State and provide any additional information prescribed in Treasury regulations. The Secretary of State may apply for any or all of the individual's accounts to be frozen where she concludes that the person is disqualified. An application to the court for a freezing order may be made without notice and may or may not be subject to exceptions allowing for e.g. the withdrawal of basic living or legal expenses.<sup>24</sup> Further details around Government policy on freezing orders will be set out in a code of practice. Where the Secretary of State decides not to apply for a freezing order, she must notify the bank of its obligation to close or prevent access to specified accounts as soon as reasonably practicable (subject to limited delays e.g. to facilitate the repayment of an overdraft).

22. These new checks will apply to everybody with a bank account in the UK. Administrative error in Home Office enforcement is a well-known phenomenon discussed in greater detail below. The implications of the Government getting it wrong are stark. Whilst a freezing order must be made by a Court, the backstop obligation for banks to close accounts on notification by the Secretary of State is subject to no due process protection. Like the individuals who erroneously received notification text messages telling them to leave the country in 2013, it seems almost inevitable that people with the right to be in this country will have to grapple with erroneous bank account closures.

### **Enforcement: clumsy, divisive and ineffective**

23. Powers of entry, search, arrest and seizure are littered throughout the Bill and a dedicated set of provisions on Immigration Officer ("IO") enforcement powers is set at Part 3, clauses 19-28. This Bill would significantly extend IO powers currently contained in Part 3 of the 1971 Act. At present, IOs have the power to enter and search premises with or without a Magistrates search warrant for the purpose of arresting a person for a range of offences or for administrative arrest of a person liable to detention under paragraph 16 of schedule 2 of the 1971 Act. The powers contained in this Bill will relax thresholds for entry, create powers to close premises and business, outsource further police like powers to IOs (such as evidence-gathering) and make many more thousands subject to the coercive powers of IOs.

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<sup>23</sup> Banks will be required to make arrangements with the organisation or authority holding relevant immigration data and pay the fees involved.

<sup>24</sup> The court may vary or discharge an order on application by the Secretary of State or the account operator. The court's decision on the imposition of a freezing order is subject to appeal.

Parts 1 and 2 - in-country arrest, entry, search and seizure powers – employees, employers, licensed premises, landlords, estate agents.

24. The new offence of illegal working and the expanded offence of employing somebody with “*reasonable cause to believe they do not have the right to work*” are accompanied by broad provision for arrest, entry and search with and without a warrant by police and immigration officers.<sup>25</sup> Clause 10 and schedule 1 create sweeping new powers for an IO to enter premises for the purpose of ascertaining whether illegal working is happening in the context of a licensed activity. This is the widest possible entry and search power – it does not require suspicion of illegal working. Currently immigration officers require “*reasonable belief*” that immigration offenders are present before entering premises.

25. Clause 12(6) would allow an immigration officer to arrest, without warrant, a landlord or estate agent he reasonably suspects of committing the residential tenancy offences created by clause 12.<sup>26</sup> As originally proposed the ‘right to rent’ scheme would be enforced via a civil scheme whereby the Home Office would issue a *notice of potential liability* to those landlords suspected of being in breach which would be followed by further investigation, and if necessary a *notice of liability*. The landlord/letting agent would then have the right to object to and then appeal to the courts if dissatisfied with the Home Secretary’s consideration, on grounds that either the person on whom the notice is served is not liable; the person had a statutory excuse; or that the level of penalty is too high. On any analysis, a civil scheme with appeal routes and judicial oversight is a world away from a summary arrest-without-warrant power exercised by IOs.

Part 1, clause 11, schedule 2 - powers to close businesses and premises

26. Clause 11 and schedule 2 provide IOs with the power to close businesses via a new civil scheme of closure notices. This scheme would allow IOs to close an employer’s premises where satisfied, on reasonable grounds, that an employer is employing an adult illegal worker and either the employer has an unspent conviction for employing an illegal worker under the new expanded offence or the employer has been fined, in the past 3 years, under the existing civil penalty regime for employing an illegal worker (or has at any time failed to pay such a civil penalty).<sup>27</sup> The effect of the notice is to restrict or prohibit access and to prevent or restrict work being carried out on the premises. The maximum duration of

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<sup>25</sup> Subclause 8(4)-(8). Subclauses 9(3)-(4)

<sup>26</sup> Subclause 12(6).

<sup>27</sup> Schedule 2, subparagraphs 1(1) and 1(3)-(8).

a closure order is 24 hours or 48 hours if issued by an immigration inspector.<sup>28</sup> Where an illegal working closure order is imposed (and not subsequently cancelled), an IO must apply to the courts for an illegal working compliance order which must be considered within 48 hours of service of the closure notice. A compliance order can be issued on the same grounds as a closure order where the court is also satisfied that the order is necessary, on an ongoing basis, to prevent an employer from employing an illegal worker. A compliance order can restrict or prohibit access to the premises for up to two years.

#### Part 2, clause 16 - driving – search and seizure

27. 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.<sup>29</sup> Beyond this the officer can ask the driver to account for themselves.<sup>30</sup>

28. 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.<sup>31</sup> The Bill also makes provision for seizure and retention of licences.<sup>32</sup>

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<sup>28</sup> Or another rank of official where prescribed by the Secretary of State.

<sup>29</sup> Section 164, Road Traffic Act 1988.

<sup>30</sup> 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.

<sup>31</sup> 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.

<sup>32</sup> 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.

29. Liberty is deeply concerned that the existing power to stop vehicles without reason, combined with the Home Office's wide-ranging interpretation of the *Singh v Hammond* judgment (discussed in more detail below), will open the door to routine traffic stop operations. This model could see police and immigration officers stop vehicles without 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. 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.<sup>33</sup>

### Part 3, clauses 19-28 - additional powers for IOs

30. Sub-clause 19(2) extends the grounds on which an IO may examine an individual after arrival in the UK to include examination for the purposes of determining whether, although leave is valid, it ought to be curtailed. Sub-clause 19(3) extends powers to conduct searches in connection with removal. It would allow an IO already lawfully present on a premises (where a person subject to immigration control is also present) to search the premises for evidence that there are grounds on which the individual's leave ought to be curtailed. The power extends to requiring that documents in electronic form be produced in a readable format, with a backstop power to seize devices.<sup>34</sup> Sub-clauses 19(4) and (5) extend powers for IOs to enter and search premises where a person is arrested or detained under immigration powers and to search a person arrested under such powers. As under 19(3) IOs would be able to require an individual to grant access to documents stored in electronic form.

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<sup>33</sup> 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. 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.

<sup>34</sup> If such a document is not forthcoming, the officer may seize the device on which it is stored. The only exception to this wide-reaching power is for documents subject to legal professional privilege.

31. Clause 20 creates a new search power allowing an IO already lawfully on premises to search for documents “*which might be of assistance*” in determining whether a person is liable to a civil penalty imposed in relation to employing somebody working unlawfully or renting to a disqualified individual.<sup>35</sup> Clause 21 provides for a broad new power to seize anything discovered during the exercise of immigration powers where an IO has reasonable grounds to believe: (i) it was obtained as a result of commission of an offence; (ii) it constitutes evidence in relation to that offence; and (iii) that seizure is necessary to prevent concealment, loss or alteration of the item.

32. Clause 24 allows the Secretary of State to direct a custody officer to require a detained person to hand over nationality documents or alternatively to search for and seize such documents.<sup>36</sup> This power allows for a strip search to be carried out. Reasonable force may be used in the exercise of the search power contained in this section. Clause 25 provides a catch-all power allowing an IO to seize a nationality document found whilst conducting a search under powers other than those outlined at clause 24.<sup>37</sup>

#### *Divisive and ineffective in-country immigration raids*

33. Current Home Office Guidance on immigration enforcement pays lip service to routine in-country enforcement raids being a “*significant and radical departure*” from previous practice.<sup>38</sup> However, despite the wording of the guidance, evidence shows that the use of the powers is not “*strictly controlled*” and they are already subject to widespread abuse and misuse. Over the past few years there has been a dramatic shift in immigration enforcement in favour of heavy-handed raids on residences, business and speculative street operations. In 2013 this approach was rolled out alongside a poster campaign and a Home Office van deployed to diverse areas of the city urging those in the UK illegally to “Go Home” and

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<sup>35</sup> The searching officer must have reasonable grounds to believe that relevant documents are on the premises. This power also provides for access to documents stored in electronic form and where not forthcoming, the power to seize devices.

<sup>36</sup> The Secretary of State may make any such direction where the detained person has been, is or will be – either due to Secretary of State or automatic provisions - subject to a deportation order. The Secretary of State must reasonably believe a relevant nationality document will be found.

<sup>37</sup> The consent of the Secretary of State must be sought to retain the document and then pass it on to the Secretary of State. Provision is made for retention of documents by the Secretary of State where retention may help to facilitate removal.

<sup>38</sup> Home Office Guidance, Enforcement visits, chapter 31: “*All enforcement visits constitute immigration work of the most sensitive kind. An undertaking has been given to Parliament that IOs will not carry out speculative immigration visits (‘fishing’ expeditions)...allowing IOs to carry out arrests in the community is a significant and radical departure from previous practice, which is why the implementation of these powers is strictly controlled. Ministers have given an undertaking to Parliament that no IO will exercise the powers unless he has been properly trained to do so and has been designated by the director.*”

making misleading claims about enforcement activity.<sup>39</sup> In 2013 these twin strategies led to a significant public backlash and genuine and widespread fears about increased victimisation and damage to race relations.<sup>40</sup> This was also the year the Chinese community in Chinatown, London, took to the streets to protest what they described as racist raids.<sup>41</sup>

34. Liberty believes that an increasingly clumsy approach to immigration enforcement risks the same or worse for community relations as blunt and discriminatory police stop and search. While the Home Secretary has rightly recognised the negative and counterproductive impact of ill-targeted stop and search and sought to curtail broad powers in this area and improve police practice, the Home Office appears wilfully blind to the impact of their new immigration enforcement practice which is even more intrusive and just as discriminatory in practice.

35. 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.<sup>42</sup> 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 found widespread non-compliance with the guidance and ineffective processes for ensuring that staff were

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<sup>39</sup> The van stated "106 arrests last week in your area". Following hundreds of complaints, the Advertising Standards Agency conducted an inquiry and ruled that because the data didn't relate to the previous week and because it covered a substantial area of North London (much more significant than the area in which the posters were displayed) it was misleading.

<sup>40</sup> BBC: Immigration Spot Checks: Equality Watchdog Investigates, 3<sup>rd</sup> August 2013 available at - <http://www.bbc.co.uk/news/uk-23552088>. Following the summer operations, the Equality & Human Rights Commission launched an investigation into suspected racial profiling by immigration officials; the former Shadow Immigration Minister, Chris Bryant wrote to the Immigration Minister questioning the legal basis for the arrests and the UKIP leader, Nigel Farage said the government was "panicking", trying to "sort the problem out in an overly fast and heavy handed manner".

<sup>41</sup> Chinatown businesses shut down in protest over racist raids by immigration officers, 24 October 2013, *Evening Standard*, <http://www.standard.co.uk/news/london/chinatown-businesses-shutdown-in-protest-over-racist-raids-by-immigration-officers-8900920.html>

<sup>42</sup> 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.

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”*.<sup>43</sup> 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.<sup>44</sup> Staff training was inadequate across all enforcement grades and *“it was apparent that a significant number of staff and managers were either ignorant of the guidance or were choosing to ignore it.”*<sup>45</sup> The age of intelligence relied upon ranged from 7 to 157 days old.

36. There is little 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.

37. 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.

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<sup>43</sup> Ibid., paragraph 1.8.

<sup>44</sup> Ibid., paragraph 4.18.

<sup>45</sup> Ibid., paragraph 1.12.

## *Speculative searches*

38. There is no freestanding right to stop and search people to establish their immigration status away from the border.<sup>46</sup> Despite this, the power has been gradually claimed by the Home Office with no regard for community relations. Reasonable suspicion safeguards have come to be virtually meaningless in practice. Current guidance instructs IOs that the threshold for reasonable suspicion of an immigration offence may be met when they are stationed in public areas where immigration offenders are thought to gather and observe a person having “*an adverse reaction to an immigration presence*”.<sup>47</sup> 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*”.<sup>48</sup> 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.

39. The power is justified by reference to schedule 2, paragraph 2 of the 1971 Act which is 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.<sup>49</sup> In the 1971 case of *Singh v Hammond*, the Court of Appeal held that such an 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.<sup>50</sup> 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

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<sup>46</sup> 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.

<sup>47</sup> Home Office Enforcement Instructions and Guidance, Chapter 31: Enforcement Instructions, 31.19.5 *Basis to stop individuals*.

<sup>48</sup> *Ibid.*

<sup>49</sup> Specifically “an immigration officer may examine any persons who have arrived in the United Kingdom by ship or aircraft (including transit passengers, members of the crew and others not seeking to enter the United Kingdom) for the purpose of determining—(a) whether any of them is or is not a British citizen; and (b) whether, if he is not, he may or may not enter the United Kingdom without leave; and (c) whether, if he may not— (i) he has been given leave which is still in force, (ii) he should be given leave and for what period or on what conditions (if any), or (iii) he should be refused leave.

<sup>50</sup> [1987] 1 All ER 829

deception.<sup>51</sup> Nonetheless *Singh* has been used by the Home Office as authority for speculative ‘consensual interviews’ that are now encouraged through Guidance. The significant expansion of in-country powers for IOs provided for in this Bill must be seen against this backdrop.

### *Bad administration and poor intelligence*

40. The information held by the Home Office regarding suspected irregular migrants is notoriously poor, badly managed and out of date. In 2012 the Chief Inspector of Borders & Immigration reported that the Home Office had no effective national strategy for dealing with people who had been refused an extension of their stay but had not departed.<sup>52</sup> At that time there were 159,313 records of that type – described as being in the Migration Refusal Pool (MRP). The Home Office then undertook a restructuring of immigration enforcement and entered a contract with Capita to assist with removals.

41. The Chief Inspector reported on progress in 2014 and disclosed that he had been informed of “*the existence of a further 223,600 records pre-dating 2008 which had not previously been included within the MRP.*”<sup>53</sup> He noted that this information had not been reported to Parliament at the time of his inspection. The Inspector found that of the 120,000 whose cases were sent to Capita less than 1% had left as a result of Capita’s intervention. Perhaps most disturbingly he reported:

I was disappointed to find a high level of inaccuracy in the classification of MRP records, with more than a quarter of departures in my sample being incorrectly recorded. Furthermore, I found that individuals had been wrongly recorded as immigration offenders, which could lead to their being stopped and delayed at the border.<sup>54</sup>

The wholesale extension of IO powers granted in the present Bill (combined with the powers in the 2014 Act) will lead to significant numbers not just being wrongly stopped and delayed

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<sup>51</sup> Glidewell LJ noted that the immigration officer had reason to believe that the appellant might be remaining unlawfully “*once it came to his notice that the appellant had entered in one name, had entered illegally and had previously entered under another name before his original entry*”.

<sup>52</sup> The Hampshire and Isle of Wight inspection report was published on 5 July 2012 and can be accessed on the Independent Chief Inspector’s website at <http://icinspector.independent.gov.uk/wp-content/uploads/2012/06/ICIBI-Inspection-of-Hants-IOW-LIT.pdf>.

<sup>53</sup> Independent Chief Inspector of Borders and Immigration, *An Inspection of Overstayers: How the Home Office handles the cases of individuals with no right to stay in the UK*, May- June 2014, December 2014.

<sup>54</sup> *Ibid.*

at the border but being swooped on during intimidating and aggressive raids in their communities.

42. This picture of inaccurate and poor record keeping tallies with the fallout from Capita's 2013 initiative to text a portion of those believed to make up the MRP suggesting that they didn't have the right to remain. It was widely reported that they texted a number of people who had been in the UK with leave for decades including veteran civil rights campaigner Suresh Grover who has lived in Britain since 1966 and holds a British passport.<sup>55</sup> The Home Office received almost 200 complaints following this exercise.

### *Enforcement capacity*

43. Liberty also questions the extension of powers and new eye-catching offences when evidence points to the fact that the Home Office is struggling to juggle its existing powers of intelligence gathering and enforcement. Last month the BBC's File on Four reported on cuts being made to the Immigration Service. According to that report:

Immigration Services Union say 350 jobs have already gone - that's about 10% of enforcement staff - and there are further, deeper cuts possibly on the way. "Dave", an enforcement officer in the South East, says cuts to the service are having other effects. Intelligence is often dated and where previously they would always carry out recce of premises before they were raided, in the past few months that's changed.<sup>56</sup>

44. In 2014, the Chief Inspector reported that:

...senior managers said that it had not been practical to model the likely impact of the provisions in the Immigration Act 2014, in terms of the effect either on irregular migration or on the enforcement caseload.<sup>57</sup>

He also concluded that the Home Office is not currently resourced to meet the enforcement challenge of an increased workload of referrals:

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<sup>55</sup> Home Office 'Go Home' texts sent to those with the right to remain, The Telegraph, 18 October 2013, <http://www.telegraph.co.uk/news/uknews/immigration/10387658/Home-Office-go-home-texts-sent-to-people-with-right-to-remain.html>

<sup>56</sup> BBC File on Four, Working in the Shadows, 22<sup>nd</sup> September 2015, transcript available at - [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/22\\_09\\_15\\_fo4\\_workingintheshadows.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/22_09_15_fo4_workingintheshadows.pdf)

<sup>57</sup> Paragraph 9.13.

Significant improvements in the capability to monitor an increasing caseload, more effective prioritisation of cases, more streamlined case working procedures and an increase in case working and enforcement resources will all be required if [Removals Core Casework] is not to become a point of failure in the strategy for driving down irregular migration.<sup>58</sup>

#### *Lack of training and accountability for immigration officers*

45. Immigration officers undertake much less training than police constables and are much less well equipped to take on the sensitive tasks of search, seizure and gathering evidence for non-immigration related crime. There is little reliable and independent information available concerning IO's behaviour and use of powers. While the IPCC is formally responsible for handling serious complaints about IOs use of police-like powers, the group of people that IOs have most contact with are foreseeably much less likely than the general population to make complaints. Those removed will have no practical recourse to make a complaint, and those who aren't removed and have an ongoing claim or appeal may feel unwilling to make a complaint about the authorities fearing that it would affect the outcome of their case. There are also more likely to be language and information barriers that prevent complaints being made to the IPCC.

46. The prosecution of seven people accused of arranging sham marriages was halted in October 2014 and dismissed on the grounds that the prosecution had failed to disclose material to the defence and three IOs had acted in "bad faith". The judge said that he was convinced the officers had deliberately concealed material and lied on oath.<sup>59</sup> The IPCC is now conducting a criminal investigation into the conduct of three immigration enforcement officers during an enforcement operation and subsequent trial.<sup>60</sup> Given the low volume of prosecutions for immigration offences, there is barely any judicial oversight of immigration enforcement operations, and it is alarming that in one of the small number of cases to come before the criminal courts, this judicial finding was reached. This ruling combined with the highly critical reports of the Home Affairs Select Committee, the Chief Inspector and the poor track record of the immigration service over many years, makes it difficult to have faith in the culture of the immigration service and the use of coercive powers by IOs.

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<sup>58</sup> Paragraph 9.15.

<sup>59</sup> R v Ntege and Others, Ruling on Defence Application to Stay for Abuse of Process - [file:///C:/Users/bellas/Downloads/14.10.21-R-v-Ntege-and-others-on-abuse-of-processes-by-IOs%20\(1\).pdf](file:///C:/Users/bellas/Downloads/14.10.21-R-v-Ntege-and-others-on-abuse-of-processes-by-IOs%20(1).pdf)

<sup>60</sup> <https://www.ipcc.gov.uk/news/ipcc-investigating-conduct-immigration-enforcement-officers-over-sham-marriage-trial>

## Clause 36 and schedule 8 - maritime enforcement

47. Schedule 8 of the Bill extends IO powers beyond UK soil. It grants the power for IOs, the police and the armed services to stop, board, divert and detain ships for the purpose of investigation of three offences - assisting unlawful immigration, assisting an asylum seeker to arrive in the UK and assisting entry to the UK in breach of a deportation or exclusion order. It also extends powers to pursue ships sailing through different parts of the UK territorial waters where an audio or visual signal has been given for the ship to stop and it has not done so. The powers are exercisable when there are reasonable grounds to suspect the ship is involved in facilitation offences.

48. This extension of power is incredibly dangerous and if granted will result in serious harm and even death. This Schedule appears to be the Home Secretary's first attempt to re-write the rules on asylum and to seek to close Britain's borders to those fleeing persecution as announced, to widespread condemnation, at the 2015 Conservative Party Conference. It continues a trend of trying to push the UK border away from the shore to another country or territory. As has been seen in Calais, this irresponsible approach to asylum and immigration causes enormous human misery. At least 3,000 people from Syria, east Africa and Afghanistan are currently sleeping rough in squalid and insanitary conditions in a makeshift camp. Despite additional sniffer dogs and fences, people continue to risk their lives to reach the UK.

49. Granting IOs powers to pursue and enforce their mandate at sea will similarly not deter asylum seekers, but may instead encourage them to take further risks if they believe they need to avoid detection. If 2015's refugee crises has taught our Government anything, it should be that the sea is a fatally dangerous place for refugees and migrants and that immigration enforcement is best conducted on land. Two people reportedly died in August after trying to swim the English Channel and it was reported on 6<sup>th</sup> October that French rescuers had pulled seven Syrians from the sea near Calais who were trying to swim to a boat heading to the UK.<sup>61</sup> It is not difficult to imagine how desperate asylum seekers may take further risks if they fear their vessel is being pursued and will be entered and searched by IOs. The Government will likely claim that these powers will deter people smuggling and those seeking to claim asylum in the UK. This is what the Home Secretary claimed when she advocated the cessation of the search and rescue operations in the Mediterranean earlier this year. Her policy had fatal consequences - her claims that shutting down these

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<sup>61</sup> Seven Syrian refugees rescued from Calais Port, The Guardian, 6<sup>th</sup> October, 2015, <http://www.theguardian.com/world/2015/oct/06/seven-syrian-refugees-rescued-from-calais-port>.

operations would act as a disincentive to desperate people were patently unfounded as the body count from this period clearly demonstrates.

50. These measures are totally unnecessary. The Government has presented no evidence that there is a problem with ships facilitating unlawful entry nor that Britain is facing unusual levels of asylum. Despite Europe facing the worst humanitarian refugee crisis since the Holocaust, the number of asylum applications to the UK has actually fallen. In 2014 The UK received 31,400 asylum applications. This was less than Germany (166,800), France (63,100), Italy (56,300) and Sweden (81,300) and well below the UK peak in 2003 of 84,130. Following her Party Conference speech the Home Secretary's new tack seems to be to try and discourage our empathy by depicting asylum seekers who manage to get close to the UK border as rich, lucky and therefore unworthy. Liberty urges parliamentarians to challenge and reject this appalling political trickery and to stand firm on the UK's proud tradition of offering succour to those in need.

### **The hostile environment - destitution as a means of immigration enforcement**

#### Part 5, clause 4 and schedule 6

51. 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, 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.<sup>62</sup> This power has not been routinely used, following its pronounced failure to facilitate removal when piloted in 2005.<sup>63</sup> 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

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<sup>62</sup> Nationality, Immigration and Asylum Act 2002, Schedule 3(7A) as inserted by section 9, Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

<sup>63</sup> *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>.

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.

52. Current section 4 provision for cashless support for migrants who would otherwise be destitute is repealed by the Bill and replaced with provision to be included in a new section 95A to the 1999 Act. Section 4 support is paid onto cards and is set at a lower rate than section 95 support. We anticipate a similar approach will be taken to support under section 95A where the Home Secretary decides to provide it. Unlike section 4 support, section 95A support is to be restricted to asylum seekers whose claims have failed and their dependants, where they are destitute or likely to become so within a prescribed period, face a genuine obstacle to return and meet such other requirements as may be prescribed. Support will be excluded for those who have not made asylum claims, save for limited provision elsewhere in the Bill for bail accommodation and minimal related support when a person is released from detention on immigration bail.<sup>64</sup> The Bill expressly allows for section 95A support to be provided in the form of vouchers.<sup>65</sup> Provision is to be for what the Secretary of State deems to be essential living needs (further prescription in this regard is left to regulations) and accommodation. Much of the detail of the section 95A scheme is left to secondary legislation, with the Secretary of State left to describe in regulations what criteria must be met in determining whether or not to provide support or to continue to do so; what condition must be met to access support; what amounts to a genuine obstacle to return; and the extent of support, including making particular provision for a class of cases. There will be no right of appeal against a decision to refuse or discontinue support.

#### *Destitution as a means of enforcement*

53. 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

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<sup>64</sup> Schedule 5, paragraph 7 reinserts some of the provision made at section 4 of the Immigration and Asylum Act 1999. It provides for the Secretary of State, in exceptional circumstances, to arrange for “*facilities for accommodation*” to be provided to a person released on bail where the Secretary of State has provided the bail address and the person would not, without this intervention, be able to support him or herself at the address. As under section 4, where a person is able to stay with a friend or family member and so names a bail address of his or her own choice, they would not qualify for any assistance. A payment may be made to the individual – again only in exceptional circumstances - to allow them to comply with other conditions of bail.

<sup>65</sup> Schedule 6, para 10(3)).

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 education constitutes a “pull factor” for migrants.<sup>66</sup> 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.

54. 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”.<sup>67</sup> 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.<sup>68</sup>

55. 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:

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<sup>66</sup> ‘Nicky Morgan orders immigration review to examine ‘education tourism’’, 16<sup>th</sup> August 2015, The Telegraph: <http://www.telegraph.co.uk/news/uknews/immigration/11805477/Nicky-Morgan-orders-immigration-review-to-examine-education-tourism.html>

<sup>67</sup> *Reforming support for failed asylum seekers and other illegal migrants: Impact Assessment*, page 5 and 13.

<sup>68</sup> *Impact Assessment*, page 6.

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...<sup>69</sup>

56. 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 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”.<sup>70</sup> 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.<sup>71</sup>

57. 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.

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<sup>69</sup> *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.

<sup>70</sup> *Family Asylum Policy: The Section 9 Implementation Project*, paragraph 2.2.

<sup>71</sup> *Family Asylum Policy: The Section 9 Implementation Project*, para 4.3.

## *Destitution as a deterrent*

58. 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*”.<sup>72</sup> 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*”,<sup>73</sup> or in the words of the Home Secretary that “*Britain’s streets are not paved with gold*”.<sup>74</sup> Available evidence reveals the fallacy in this approach. A Home Office Research Study published in 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.<sup>75</sup>

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.<sup>76</sup>

59. 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.<sup>77</sup> The review concluded that tightening of welfare provision did not have any deterrent effect.<sup>78</sup> In the UK

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<sup>72</sup> *Reforming support for failed asylum seekers and other illegal migrants*, paragraph 7 and 10.

<sup>73</sup> *Concerns raised over plan to strip failed asylum seeker families of benefits*, The Guardian, 2<sup>nd</sup> August 2015. Available at:

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

<sup>74</sup> *Migrants think our streets are paved with gold*, The Telegraph 1<sup>st</sup> August 2015. Available at: <http://www.telegraph.co.uk/news/uknews/immigration/11778396/Migrants-think-our-streets-are-paved-with-gold.html>.

<sup>75</sup> V. Robinson, *Understanding the decision-making of asylum seekers*, University of Wales, July 2002, page viii.

<sup>76</sup> *Understanding the decision-making of asylum seekers*, page 19.

<sup>77</sup> *Seeking Asylum Trends and Policies in the OECD*, Timothy J Hatton (University of Essex, Australian National University, and CEPR), July 2011.

<sup>78</sup> *Seeking Asylum Trends and Policies in the OECD*, see e.g. sections 8.2 and 9.3.

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,<sup>79</sup> in 2000 applications rose by a further 13% to 80,315.<sup>80</sup> 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 of asylum numbers at the turn of the millennium and subsequent fall since 2003 is an international phenomenon....<sup>81</sup>

### *Impact on local authorities*

60. 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”.<sup>82</sup>

61. 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

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<sup>79</sup> ASYLUM STATISTICS UNITED KINGDOM 1999:  
<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs/hosb1700.pdf>.

<sup>80</sup> ASYLUM STATISTICS UNITED KINGDOM 2000:  
<http://webarchive.nationalarchives.gov.uk/20110218135832/http://rds.homeoffice.gov.uk/rds/pdfs/hosb1701.pdf>.

<sup>81</sup> *Restoring Trust in the UK Asylum System*, page 4.

<sup>82</sup> *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.

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).<sup>83</sup>

### *Saving money*

62. Whilst the proposed changes 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.<sup>84</sup>

63. 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.

## **The Rule of Law and due process protection**

### Part 4, clause 31 - removal of accessible appeal rights

64. 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 claims 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.<sup>85</sup> The 2014 Act extended certification and the removal of in-country appeal rights to deportation appeals raising human rights issue to be

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<sup>83</sup> 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>.

<sup>84</sup> *Ibid.*, During the Home Office pilot, section 9 frustrated removal by encouraging people to abscond.

<sup>85</sup> The 2002 Act, section 94.

certified.<sup>86</sup> The present Bill proposes the extension of these provisions to all human rights appeals, save for cases involving humanitarian protection or the Refugee Convention.

65. 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 and in particular expose the appellant to “*a real risk of serious irreversible harm*”.<sup>87</sup> This test is already applied in deportation matters and has been the subject of a recent challenge before the Court of Appeal. In submissions, the Home Office sought to justify proposals by reference to the public interest in removing foreign national offenders, a justification which cannot be applied to an extension of the provision to human rights appeals brought by people who have committed no offence. The Government has decided to push ahead with the extension of these provisions without the benefit of the Court of Appeal’s decision on the implications for justice of out-of-country appeals and the extent to which the rights of children are given due consideration in the certification process.<sup>88</sup>

66. 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 hearings, 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

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<sup>86</sup> 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’.

<sup>87</sup> 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”

<sup>88</sup> Mia Light, “*Report: “Serious irreversible harm” test case heard in Court of Appeal*”, 25<sup>th</sup> September 2015. Available at: <https://www.freemovement.org.uk/report-serious-irreversible-harm-test-case-heard-in-court-of-appeal/>.

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 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.<sup>89</sup>

Individuals further generally have no access to legal aid for the purposes of appeals on Article 8 grounds.<sup>90</sup>

67. 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.<sup>91</sup> 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 3, clause 30 - power to cancel leave

68. Provision to extend certification set out in Part 4 of the Bill is part of a broader trend towards the reduction of judicial oversight and due process protection and the expansion of unchecked executive reach. Clause 30 inserts additional provision for the cancellation of leave in circumstances where continuing leave is granted pending the consideration of a

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<sup>89</sup> “Report: “*Serious irreversible harm*” test case heard in Court of Appeal”, 25<sup>th</sup> September 2015. Available at: <https://www.freemovement.org.uk/report-serious-irreversible-harm-test-case-heard-in-court-of-appeal/>.

<sup>90</sup> Save in the event that exceptional funding.

<sup>91</sup> 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.

claim. This clause alters current provision which specifies that where an individual applies to extend leave before the expiry of existing leave, leave is to continue on the original basis until the Home Office has considered the application and appeal rights have been exhausted. Under the Bill the Home Office could cancel leave meaning an individual is unable to work, rent, drive or hold a bank account. Such individuals would be effectively forced to abandon all the crucial elements of daily life. Should leave ultimately to be granted the individual may well be unable to secure work or accommodation on the same or similar terms.

### Part 3, clause 29 and schedule 5 - immigration bail

69. A new immigration bail system is outlined under clause 29 and schedule 5 of the Bill. Paragraph 1 extends the application of immigration bail to all those not actually in detention or granted leave to enter or remain. Under the Bill, individuals previously granted temporary admission, release or release on restrictions, will all be subject to immigration bail. Paragraph 2 sets out the conditions upon which an individual may be granted bail, providing the Home Secretary with a new power to impose residence or electronic monitoring conditions on anyone granted immigration bail. Subparagraph 3(8) specifies that the commencement of bail may be postponed until arrangements have been put in place to facilitate the conditions imposed, most obviously electronic monitoring.

70. Paragraph 3 sets out the factors to be taken into account when considering a grant of immigration bail and deciding which condition(s) to impose. Subparagraph 3(3) replicates provision preventing a grant of bail by the Tribunal until 8 days after an individual's arrival in the UK. Subparagraph 3(4) repeats restrictions on immigration bail set out in the 2014 Act preventing a grant of bail, without the consent of the Secretary of State, where removal directions are set for within 14 days. Paragraph 9 replicates provision made in the 2014 Act preventing repeat applications for bail within a period of 28 days unless *"the person demonstrates there has been a material change in the person's circumstances."*<sup>92</sup>

71. Under the Bill, the power to vary conditions is to rest with the authority which granted bail, save where the Tribunal directs that the Secretary of State is to have the power to vary conditions. The Secretary of State, however, does not require the Tribunal's permission to impose a condition relating to residence or electronic monitoring (where the Tribunal declines to do so) or to vary a residence condition imposed by the Tribunal. If the Tribunal

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<sup>92</sup> Subclause 9(4).

removes or varies a condition on residence or electronic monitoring, the Secretary of State can re-impose or change the condition.

72. 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 place electronic monitoring and residence conditions on bail in all cases. A large number of asylum seekers, previously granted temporary admission will now be seen exclusively through a prism of detention and bail, casting aspersions of illegitimacy and even criminality.

## **Conclusion**

73. During the passage of the Immigration Act 2014, the Church of England expressed concern that the legislation “*could foster a culture of suspicion and undermine elements of social cohesion, by planting a ‘border in every street’.*”<sup>93</sup> Liberty agrees and we believe this Bill will take us further down that path. This country has traditionally rejected in-country immigration control. Regular and routine identity checking will affect the civil liberties of all members of the community, however these policies will be most keenly felt by ethnic minority individuals or those who appear not to be British because of their name or accent. The significant expansion of IO powers set out in this Bill is particularly concerning given the divisive impact of aggressive enforcement activity in recent years and longstanding problems with Home Office record keeping and intelligence gathering. A removal of in-country appeal rights and a diminution in judicial oversight of the immigration bail system will lead to injustice and threaten basic rights and freedoms.

**Rachel Robinson**  
**Bella Sankey**

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<sup>93</sup> *Migrants and the Christmas Season*, Martin Kettle, 6th December 2013, available at: <http://www.sheffieldmethodist.org/wp-content/uploads/2014/01/kettleMigrantsandtheChristmaseason121213.pdf>.