

**Legislative Scrutiny – Immigration Bill**

**Government response to the Joint Committee on Human Rights,  
Eighth Report of Session 2013–14**

1. The Committee’s conclusions and recommendations on particular issues raised by the Immigration Bill are set out below, together with the Government’s response.

**Removal and enforcement powers**

2. The Committee welcomed the Government’s clarification of the intended definition of “family member” for the purpose of the single power of removal and the express acceptance by the Government that the exercise of the power of removal of such family members remains subject both to existing immigration law and any relevant international obligations, as well as the clarification that family members will always be notified if they are facing removal.
3. The Committee recommended the regulation-making power in clause 1(6)(c) of the Bill be amended to reflect the Government’s clarification that a family member who is to be removed will always be given notice.

Government response

4. The Government is grateful to the Committee for its comments on the Government’s clarification of these proposals. The Government will give consideration to the Committee’s suggested amendments to the Bill.

**Appeal rights**

5. The Committee set out its concern that the significant limitation of appeal rights against immigration and asylum decisions was not compatible with the common law right of access to a court or tribunal and the right to an effective remedy, particularly in light of:
  - cases where under the Bill there would be no right of appeal and the relatively high proportion of such appeals which currently succeed due to shortcomings in the quality of decision-making;
  - the importance of appeals as a means of enforcing the children duty in s.55 of the Borders, Citizenship and Immigration Act 2009;
  - the lack of information about the proposed new system of administrative review; and
  - the likely cumulative impact of proposed changes to legal aid and judicial review on the practical effectiveness of judicial review as a remedy for those seeking to challenge the lawfulness of immigration decisions on grounds other than those covered by the surviving rights of appeal.
6. The Committee also expressed its view that the Tribunal should decide whether it is within its jurisdiction to consider a new matter raised on appeal, not the Secretary of State, and that the Tribunal should only permit a new matter to be raised if there were good reasons for not raising the matter before the Secretary

of State. The Committee recommended amending the Bill to leave open to the Tribunal the question of whether or not it may consider a new matter.

7. The Committee was 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, given the proposed reforms of judicial review and the unavailability of civil legal aid to bring such a claim.
8. The Committee said that it was satisfied the provisions introduced by clause 14 of the Bill are not on their face incompatible with Article 8 of the European Convention on Human Rights (ECHR). However, the Committee is uneasy with a statutory provision that "little weight" should be given to a particular consideration in a judicial balancing exercise, recommending that the Bill be amended to omit the direction about the weight to be given to the person's private life or relationship and to ensure that Parliament does not trespass into the judicial function.
9. Finally on this Part, the Committee welcomed the Government's clarification that nothing in the Bill is intended to change or derogate from the children duty in s.55 of the Borders, Citizenship and Immigration Act 2009 but flagged a danger that front-line immigration officials implementing the legal regime will be unclear about the relationship between the s.55 duty and the new tests introduced by the Bill. The Committee recommended new guidance is issued to ensure the Government's stated intention about the unaffected status of the children duty is achieved in practice. The Committee also asked the Government to confirm that the s.55 children duty will apply to children who are not within the Bill's definition of a "qualifying child."

## Government response

10. The Government notes the Committee's comments. However, the Government believes it is important that a full right of appeal before the Tribunal is limited to those cases where fundamental rights are engaged. Furthermore, it is the Government's view that it is right for the Secretary of State rather than the Tribunal to decide whether the Tribunal may consider a new matter. The Tribunal was created by legislation which establishes the scope of its jurisdiction. It is an appellate Tribunal established to decide an appeal against a decision made by the Secretary of State, not a Tribunal established to make decisions instead of the Secretary of State.
11. The Government published a detailed statement of intent at Committee stage of the Bill about the new system of administrative review. This is available on the Bill's web pages at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/254851/Sol\\_Administrative\\_review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254851/Sol_Administrative_review.pdf). The administrative review process will provide a quicker and cheaper process to correct case working errors where there is no longer a right of appeal. Judicial review will remain available to challenge decisions that are not resolved by administrative review. Judicial

review is the appropriate forum to consider whether a decision is in accordance with the law.

12. The right of access to a court or Tribunal is preserved in all cases where it is alleged an unlawful decision has been made as either an appeal can be brought or judicial review proceedings commenced.
13. On judicial review, the Government does not believe that the wider reforms being made to judicial review will result in any threat to the practical ability of individuals to challenge immigration decisions where those challenges have merit. The reforms to judicial review are to reduce the burden placed on the courts by unmeritorious claims. Legal aid reform will not substantively alter the current position of immigration applicants. Legal aid is currently available to asylum claimants for appeals to the Tribunal and will remain so after the civil legal aid residence test, if approved by Parliament, comes into force. Legal aid is in general not currently available for other immigration applicants for appeals to the Tribunal so the introduction of the residence test will not substantively alter their position.
14. On the provision in clause 14 for courts and tribunals to give “little weight” to certain factors when determining the lawfulness of decisions engaging Article 8 ECHR, Article 8 ECHR requires the Secretary of State and the courts to weigh individual rights to respect for private and family life against the public interest in controlling immigration, protecting the public and other factors. It is right and helpful that Parliament should set out what the public interest requires, in the clear and practical terms reflected in clause 14. The Government believes that it is entirely appropriate for Parliament to express clearly in primary legislation its view of the public interest considerations relevant in such cases. The bill reflects the case law and the Committee acknowledges that the proposals do not go so far as to instruct the courts on the decision to be taken in individual cases or oust the courts’ jurisdiction.
15. On the s.55 children duty, the Government welcomes the Committee’s recommendation for new guidance to be issued to front-line immigration officials. Guidance is always kept under review and updated to reflect legislative developments and the Government intends to do so in this case. The Government can confirm, as requested by the Committee, that the s.55 children duty applies to all children in the UK, not only those within the Bill’s definition of a “qualifying child.”

## **Access to services**

16. The Committee expressed its concern that the proposals in the Bill on residential tenancies could give rise in practice to breaches of Article 3 of the ECHR for those people who have no right to remain in the UK but face genuine barriers to leaving. The Committee’s view is that this depends to a large extent on how the Secretary of State’s residual discretion to grant permission to occupy residential premises will operate in practice and does not feel that sufficient detail has been provided on the discretion point.

17. In addition, the Committee urged the Government to explain to Parliament the safeguards that exist to mitigate in practice the possible negative impact of the residential tenancy provisions on children.
18. The Committee welcomed the publication of draft Codes of Practice and the Government's commitment to monitor for evidence of discriminatory behaviour in the private rented sector but, in view of what in the Committee's view is a heightened risk of discrimination on racial grounds against ethnic minority prospective tenants, asked that the provisions not be commenced until the Equality and Human Rights Commission and the Government Equalities Office are both satisfied there are sufficient safeguards in place to prevent such discrimination from arising in practice.
19. The Committee believes that there remain questions to be answered about whether there is a rational connection between the Government's aim of ensuring that a person's access to free health care is commensurate with their immigration status and the selection of a threshold of indefinite leave to remain as a criterion.

## Government response

20. The Government does not agree with the Committee that the proposals in the Bill will give rise in practice to breaches of Article 3 of the ECHR in the case of people who have no right to remain in the UK but face genuine barriers to leaving. Under existing arrangements, asylum seekers who are destitute may be housed through Home Office funding until the determination of their asylum claim and any appeal related to that claim. Support can continue even after a person has been refused asylum in the UK but this is intended only as a residual, temporary measure until such time as a person becomes removable from the UK, when the Government expects them to leave.
21. The factors taken into account when considering whether accommodation may be provided by the Government to individuals who are destitute include situations where:
- individuals are taking all reasonable steps to leave;
  - individuals are unable to travel because of a physical or medical impediment;
  - the Secretary of State is satisfied that there is no viable route of return;
  - permission has been granted to pursue a Judicial Review; or
  - the accommodation is necessary to avoid a breach of individuals' human rights.
22. The Government considers that sufficient safeguards will be in place to ensure that migrant children will not be exposed to an undue risk of homelessness or separation from family members. In respect of those who receive support from the Secretary of State under the arrangements referred to above, an additional safeguard exists whereby a family will normally be allowed to remain in that accommodation until they are able to leave the UK. In relation to those who are self-supporting, the provisions in the Bill do not require any landlord to take action to evict tenants who are disqualified from renting. Migrants who are seeking new

accommodation will be able to demonstrate their entitlement to rent in a straightforward manner. Those who are disqualified from renting by their immigration status but who have a genuine barrier to leaving will be able to seek a right to rent on a discretionary basis, and the decision whether to grant this will include a consideration of the best interests of a child and their needs, as required by section 55. This consideration will take place whether the child is living with the migrant who is otherwise disqualified from renting, in local authority care, or living in any other alternative arrangement.

23. Beyond the facility for the Secretary of State to authorise persons to rent who face a recognised barrier to return, it is also important to bear in mind that the Bill exempts certain classes of accommodation from the checking requirement to protect vulnerable groups; this includes accommodation provided as a result of a statutory duty or relevant statutory power exercised by a local authority and hostels for the homeless operated by registered housing associations or charities. These exemptions also provide important safeguards in this area.
24. As the Bill sets out, the Code of Practice relating to discrimination will only be laid before Parliament after consultation with the Commission for Equality and Human Rights and the Equality Commission for Northern Ireland. The Government, however, will make it quite clear in guidance, Codes and communications that the requirement to conduct an immigration status check must be applied in a consistent manner by landlords and agents, regardless of race or perceptions as to race. The vast majority of migrants here are settled or lawfully here and landlords will not be able to defend any unlawful discrimination by reference to the need to conduct such status checks.
25. In respect of healthcare, it is long-established Government policy that a migrant's immigration status determines their entitlement to most state benefits and social housing. Immigration legislation largely restricts access to these benefits to those with indefinite leave to enter or remain. The proposals contained in the Immigration Bill bring the Government's policy on migrant access to free of charge healthcare in line with wider existing policy.
26. Those with indefinite leave to remain have made a long-term commitment to this country and contribute accordingly. Whilst many temporary migrants may also contribute, for example through payment of tax, they do not make the same long-term commitment. Temporary, non-EEA migrants also apply to come to the UK for specific purposes, such as to work or study. It is reasonable therefore to expect them to be self-supporting during their limited time here. This is why they are not generally entitled to state benefits. The Government has adopted a proportionate approach to regulating their access to the NHS in the Immigration Bill by introducing an immigration health surcharge to be paid alongside immigration applications; the Government believes this is the most cost effective means of ensuring temporary migrants contribute towards the NHS commensurate with their more limited immigration status. We have made clear that vulnerable groups such as asylum seekers, refugees, victims of human trafficking and children in local authority care will be exempt from the surcharge requirement and will continue to enjoy free access to the NHS. Moreover, the Government will continue to uphold the established principle that immediately

necessary or urgent treatment will never be withheld, irrespective of a patient's chargeable status.

## **Sham marriages/civil partnerships**

27. The Committee drew Parliament's attention to what it called the 'questionable strength' of the evidence relied on by the Government to demonstrate the necessity for legislation to supplement powers that already exist to combat sham marriages and said there was little firm evidence of the scale of the problem beyond the recent sustained increase of 800 to 900 in the number of annual reports of suspicious marriages or civil partnerships. The Committee encouraged the Government to work closely with the Equality and Human Rights Commission (EHRC) to identify suspect proposed marriages or civil partnerships without resorting to unjustified discrimination on grounds of nationality.

## Government response

28. The Government notes the Committee's comments but believes that the referral and investigation scheme contained in Part 4 of the Bill is a proportionate response to the problem of sham marriages and civil partnerships. These pose a significant threat to immigration control and the new scheme will provide additional time, where there are reasonable grounds to suspect a sham, for the Home Office to investigate the genuineness of the couple's relationship before the marriage or civil partnership takes place, enabling enforcement or other immigration action to be taken in cases found to be a sham. The Government has published a detailed explanatory paper containing background information, as well as details of how it is expected that the referral and investigation scheme would operate in practice, on the Bill's web pages at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/256257/Sham\\_Marriage\\_and\\_Civil\\_Partnerships.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/256257/Sham_Marriage_and_Civil_Partnerships.pdf).

29. In designing and operating the scheme and, in particular, the approach taken to the assessment of proposed marriages and civil partnerships referred under it, the Government will work with the EHRC to ensure that this does not involve unlawful discrimination on nationality grounds.