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Select Committee on the Constitution

6th Report of Session 2013–14

Immigration Bill

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Immigration Bill

1. The Immigration Bill was brought from the Commons on 30 January 2014 and had its second reading in the House of Lords on 10 February. It is currently being considered by a committee of the whole House.

2. The bill makes provision for a variety of aspects of immigration law. This report draws three clauses of the bill to the attention of the House.

Clause 11

3. Legislation in force lists 14 different immigration decisions in respect of which there is a right of appeal. These include refusals of entry, refusals to vary leave to enter and remain, and decisions to remove and deport. Clause 11(2) will replace this variety of appeal rights with a right to appeal where the Secretary of State has: refused a protection claim made by a migrant; refused a human rights claim made by a migrant; or revoked a protection status. Clause 11(4) provides that the only grounds on which the appeal rights in clause 11(2) may be exercised are human rights grounds.

4. Although this is not provided for on the face of the bill, the Government's policy is that in other cases (where there is no right of appeal to the Tribunal) there may be an administrative review. The administrative review process would in appropriate cases be subject to judicial review. A Home Office *Factsheet* (October 2013) accompanying the bill states that the administrative review will be "performed by someone other than the original decision maker. While a review is pending the person in question will not be required to leave the country. If the migrant has permission to work or study they will normally be able to continue to do so while the review is pending".

5. Clause 11 constitutes a significant streamlining of appeal rights in respect of immigration decisions. There is no ouster of judicial review in the bill, so **the constitutional question is whether clause 11 undermines the common law right of access to justice**. The Joint Committee on Human Rights concluded that it did.[1] The Government disagree: their view is that in the cases where it is most needed—i.e. cases raising questions of rights—a full right to appeal is preserved.[2] In other cases there may be access to the courts via the ordinary law of judicial review. That said, it is on any view disturbing that a high proportion of immigration appeals to the Tribunal currently succeed (indicating, perhaps, that many administrative decisions are wrongly made): in 2012–13 50% of entry clearance appeals succeeded, as did 49% of managed migration appeals and 32% of deportation appeals. Given this record, it may be questioned whether administrative review will be sufficient.

6. Clause 11(5) provides that the Tribunal may not consider a "new matter" on appeal unless the Secretary of State consents: according to the bill's explanatory notes, this is to prevent appellants from raising new grounds before the Tribunal until the Secretary of State has had a chance to consider

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1 Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* (8th Report, Session 2013–14, HL Paper 102, HC 935), paragraph 39.

2 See, for example, the comments of the minister Lord Taylor of Holbeach: HL Deb, 10 February 2014, col 416.

them.[3] The Government accept that new evidence that supports grounds of appeal should be capable of being raised for the first time at the appeal. Clause 11(5) is targeted, in the Government's view, not at new evidence but at new grounds or reasons for wanting to enter or remain in the UK. However, concern remains about whether clause 11(5) is compatible with the right of access to court and the rule of law.[4] Given that the Secretary of State would be a party to any relevant appeal, there is also a concern as regards equality of arms and common law principles of natural justice.

7. The phrase "unless the Secretary of State has given … consent" in clause 11(5) suggests that in the absence of such consent it would be unlawful for the Tribunal to consider the matter in question. Yet the purpose of the clause is not to grant to the Secretary of State a veto over matters that may be considered by the Tribunal, but merely to ensure that the Tribunal does not consider grounds or reasons which have not first been considered by the Secretary of State. On this view, clause 11(5) as currently drafted appears to go further than is required in order to meet the Government's stated purpose.

8. **We draw these matters to the attention of the House.**

Clause 14

9. Clause 14 is a constitutional innovation. In order to understand why, we need to set out some background.

10. For several years Home Office ministers have been concerned about court and tribunal rulings which have prevented them from deporting people. There is a presumption, for example, that migrants who are convicted of serious criminal offences will be deported upon release from imprisonment. In a series of cases it has been ruled that particular deportations in these circumstances disproportionately interfere with the right to family life under article 8 of the European Convention on Human Rights and are therefore unlawful. Proportionality is a general legal principle. In essence, it requires the court to ask the following questions: (i) whether the objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to that purpose; (iii) whether a less intrusive measure could have been used; and (on some accounts) (iv) whether, having regard to these matters and the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.[5] For present purposes, point (iv) is the most contested aspect of proportionality. The House of Lords ruled in a unanimous opinion in a leading case in immigration law in 2007 that this aspect of the doctrine "should never be overlooked or discounted".[6] The constitutional difficulty with this element of proportionality was captured by Laws LJ in a recent judgment, when he said: "there is real difficulty in distinguishing this from a political question to be decided by the elected arm of government".[7]

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3 Explanatory notes (HL Bill 84–EN), paragraph 80.

4 Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill* (8th Report, Session 2013–14, HL Paper 102, HC 935), paragraph 45.

5 *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, paragraph 20.

6 *Huang v SSHD* [2007] UKHL 11, paragraph 19.

7 *R (Miranda) v SSHD* [2014] EWHC 255, paragraph 40.

11. This is not the place for a full rehearsal of how proportionality has come to feature in our domestic public law. For present purposes three points suffice. First, proportionality is a relatively recent arrival as a ground of judicial review in our domestic public law (although it has a longer heritage as a matter of European law). Secondly, it can be a more invasive technique of judicial review than the traditional common law grounds of review (often referred to as *Wednesbury* unreasonableness). Thirdly, it is a test that mixes elements of legal inquiry with more political questions that, as Laws LJ put it, are properly "to be decided by the elected arm of government".

12. These are delicate matters of constitutional balance and judgement. Nonetheless—and this is the crux of the matter as far as the Immigration Bill is concerned—there is nothing in any of the domestic jurisprudence to suggest that proportionality is exclusively a matter for the courts. Parliament also has a meaningful contribution to make in ensuring compliance with the requirements of the Convention, including the principles of legal certainty and proportionality. This is reflected in the Human Rights Act 1998 itself, in the courts' case law and in constitutional practice. Under the Act ministers and Parliament review the compatibility of bills with Convention rights.[8] The judicial role comes into play only after a bill is enacted. In numerous cases the Supreme Court has recognised that there is a constitutionally important role for parliamentarians in deciding how individual rights and the public interest should be balanced. In *AXA General Insurance*, for example, Lord Hope of Craighead noted that "elected members of a legislature … are best placed to judge what is in the country's best interests as a whole" not least because of "the advantages that flow from the depth and width of the experience of … elected members and the mandate that has been given to them by the electorate".[9]

13. In October 2011 the Home Secretary said in her speech at the Conservative party conference that the courts were "misinterpreting" their powers under the Human Rights Act to prevent her from deporting "foreign criminals" from the UK on the basis that such deportations were a disproportionate interference with the right to respect for family life under article 8 of the European Convention on Human Rights. The Secretary of State amended the Immigration Rules to address the matter in June 2012. A Home Office publication, *Statement of Intent: Family Migration*, published alongside the revised Rules, explained how the revised Immigration Rules would "set out proportionate requirements that reflect, as a matter of public policy, the Government's and Parliament's view of how individual rights to respect for private or family life should be qualified in the public interest". The Government hoped that this would mean that "failure to meet the requirements of the rules will normally mean failure to establish an article 8 claim".[10] The *Statement of Intent* emphasised that "the courts will continue to determine individual cases according to the law but, in doing so, they will be reviewing decisions taken under Immigration Rules which expressly reflect article 8". The rules would "for the first time reflect the view of the Government and Parliament" as to how article 8(1) should, as matter of public policy, be qualified in the public interest under the terms of article

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8 Human Rights Act 1998, section 19.

9 [2011] UKSC 46, paragraph 49.

10 *Statement of Intent: Family Migration* (June 2012), paragraph 7.

8(2).[11] The *Statement of Intent* recognised that "this does not mean that the Secretary of State and Parliament have the only say on what is proportionate".[12]

14. In *MF (Nigeria) v SSHD* the Upper Tribunal held that MF's deportation (he had been convicted of handling stolen goods) would be a disproportionate interference with his step-daughter's article 8 right to family life. His deportation fell within the revised Immigration Rules but was nonetheless held to be unlawful, the Upper Tribunal ruling that the new rules could not be construed as providing a complete code for article 8 claims. The Secretary of State's appeal to the Court of Appeal was unsuccessful.[13] The court held that the Human Rights Act requires that new rules must be interpreted consistently with Strasbourg jurisprudence. It would appear from *MF (Nigeria)* that the Government's attempt to use the Immigration Rules to settle how the courts should rule on the proportionality of decisions to deport foreign national criminals may have been unsuccessful. Hence clause 14 of the Immigration Bill.

15. Clause 14 sets out in primary legislation what the public interest factors are in immigration decisions that engage article 8 (private and family life) considerations. Within clause 14 there are specific provisions concerning foreign criminals. The clause provides that the maintenance of effective immigration controls is in the public interest because migrants are less of a burden on taxpayers and are better able to integrate into society. In making decisions about the impact of immigration decisions on article 8 rights, "little weight should be given" to a private life or to a relationship formed by a person at a time when the person is in the UK unlawfully. Likewise when the person's immigration status is "precarious". Further, clause 14 provides that "the deportation of foreign criminals is in the public interest". The more serious the offence committed, the greater the public interest in deportation. A range of detailed provisions explain how this public interest should be weighed in different circumstances.

16. The Joint Committee on Human Rights noted that "there is nothing inherently incompatible with the Convention in Parliament spelling out … its detailed understanding of the requirements of relevant Convention rights in particular contexts. Indeed, such an exercise could be considered to be Parliament's fulfilment of the important obligation imposed upon it by the principle of subsidiarity".[14] It stated that "the provisions in the bill which seek to guide courts and tribunals in their determination of article 8 claims in immigration cases do not purport to go so far as to determine individual applications in advance or to oust the courts' jurisdiction".[15]

17. The JCHR also commented on the provisions purporting to tell courts and tribunals that "little weight" should be given to certain considerations: "that appears to us to be a significant legislative trespass into the judicial function".[16] This conclusion speaks directly to the core constitutional principle of the separation of powers. However, we note that the provisions

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11 *Ibid.*, paragraphs 10–11.

12 *Ibid.*, paragraph 39.

13 [2013] EWCA Civ 1192.

14 *Op. cit.*, paragraph 55.

15 *Op. cit.*, paragraph 56.

16 *Op. cit.*, paragraph 60.

of clause 14 will, if enacted, fall to be interpreted and applied in particular cases by the courts in the ordinary way. In so doing the courts will be bound under section 3 of the Human Rights Act 1998 to read and give effect to clause 14 compatibly with Convention rights (so far as it is possible to do so).

18. On any view **clause 14 is a significant innovation. We draw it to the attention of the House.**

Clause 60

19. As the law stands no-one may be deprived of their citizenship if the result of that deprivation would be that the person becomes stateless.[17] Those British citizens who hold dual nationality may be deprived by the Secretary of State of their British citizenship (because even after deprivation they would continue to hold the nationality of the other state of which they are a citizen). If the Secretary of State wishes to deport a dual national from the UK because in the Secretary of State's view that person's presence in the UK is no longer conducive to the public good (for example, for reasons of national security), the Secretary of State must first deprive the dual national of his or her British citizenship. This is because British nationals may not lawfully be deported from the UK: only persons subject to immigration control may be lawfully deported.

20. There have been cases where the Secretary of State has sought to act in this way but where the matter has been successfully appealed to the courts. The most important is *Al-Jedda v SSHD*.[18] Born an Iraqi citizen in 1957, Al-Jedda was granted British nationality in 2000. The effect of this was that, under Iraqi law, he lost his Iraqi citizenship. He now lives in Turkey. From 2004–07 he was detained without charge by British forces in Iraq, on suspicion of membership of a terrorist group. The House of Lords upheld the lawfulness of his detention in 2007, but Al-Jedda successfully took the matter to the European Court of Human Rights. The Secretary of State wished to deprive Al-Jedda of his British citizenship, arguing in essence (here we are summarising a complex legal argument) that to do so would not render him stateless as he could apply to the Iraqi authorities for re-instatement of his Iraqi nationality. In October 2013 the UK Supreme Court unanimously rejected this argument. In so doing Lord Wilson, giving the judgment of the court, spoke of "the evil of statelessness"[19] and cited, among other authorities, article 15(1) of the Universal Declaration of Human Rights, which provides that "Everyone has the right to a nationality".

21. Clause 60 of the bill would amend section 40 of the British Nationality Act 1981 ("BNA") such that the Secretary of State would be empowered to deprive someone of their citizenship, even if that would make them stateless, as long as two conditions are met: that the person is a naturalised British citizen and that the deprivation is conducive to the public good because the person has conducted himself in a manner which is "seriously prejudicial to the vital interests of the United Kingdom …"

22. In 1966 the UK ratified the UN Convention on the Reduction of Statelessness ("the 1961 Convention"). Article 8(1) of this Convention

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17 British Nationality Act 1981, section 40(4).

18 [2013] UKSC 62.

19 Paragraph 12.

prohibits a state from depriving a person of his nationality if such were to cause him to be stateless. There are two exceptions. The first is if the nationality had been obtained by misrepresentation or fraud. The second applies if domestic law at the time of ratification permitted deprivation on grounds of conduct seriously prejudicial to the vital interests of the state.

23. The explanatory notes to the bill state that the amendment of BNA s. 40 by clause 60 would return the law to how it was in 1966, when the UK ratified the 1961 Convention. BNA s. 40, as it is currently in force (having been amended on several occasions), goes "further than [is] necessary in order to honour the UK's existing international obligations".[20]

24. If this analysis is correct—and it rests upon a unanimous decision of the UK Supreme Court from 2013—it would seem to follow that the amendment provided for in clause 60 is compatible with the UK's international law obligations.

25. Despite this, the House may wish to scrutinise the provision carefully. It was introduced into the bill only at report stage in the House of Commons: it was not therefore subject to scrutiny by a Public Bill Committee in that House. The shadow Home Secretary tabled a manuscript amendment which would have put in place an explicit requirement for judicial assessment of any decision by the Secretary of State to exercise the new clause 60 power. Responding to this amendment, the Secretary of State confirmed that there would be a full right of appeal, and that "people need not have been convicted of an offence to be deprived of their citizenship".[21] A number of questions may be asked about clause 60, including the following:

    - Is it a response to a general problem or is it designed to address only the particular case of *Al-Jedda*; if the former, could the Government provide details of further instances?
    - Is it intended that the power be exercised only in respect of naturalised citizens who are not in the United Kingdom?
    - What would happen to any naturalised citizen in the United Kingdom who is made stateless by the exercise of the power? Would such a person be able to work / be housed / have access to healthcare, etc?
    - What would happen to any dependants of a person who is rendered stateless by the exercise of the power?
    - Should the new power be exercisable not by the Secretary of State but by a court on the application of the Secretary of State?

26. **The House may wish to bear these questions in mind as it scrutinises clause 60.**

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[20] *Al-Jedda v SSHD*, paragraph 22.

[21] HC Deb, 30 January 2014, col 1045.

APPENDIX: DECLARATION OF INTERESTS

The following interests were declared in respect of this report—

Lord Goldsmith

President of the Bar Pro Bono Unit
Chairman of the Trustees of the Access to Justice Foundation