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Draft Immigration Bill 2009 Migration Watch Comments

SUMMARY OF RECOMMENDATIONS

Note : In this summary and in the text which follows, our comments which involve adding new provisions to the draft Bill are shown in bold type.

- Concern expressed that the alternative option of straightforward consolidation of existing statutes, followed subsequently by consideration of substantive changes has not been considered. Paragraphs 1¹-7.
- Need for schedule of derivations and destinations. Paragraph 9.
- **Balanced migration. Bill should include power for Secretary of State to limit numbers in particular categories of permitted migrants. Paragraph 10.**
- Clause 9, creating power of Secretary of State to issue immigration permissions to specified categories of persons should be omitted. Paragraphs 11-12
- Clear distinction should be drawn between “asylum seeker” and “refugee” in Clause 318. Paragraphs 13-14.
- Provision in Clause 318 for criminal courts to be able to overturn Secretary of State’s refusal of asylum or humanitarian protection should be deleted. Paragraphs 15-16.
- **Section 8 of the 2004 act should be re-enacted. Paragraph 17.**
- **The bill should provide specifically that asylum and immigration appeals are to be conducted on an inquisitorial rather than an adversarial basis. Paragraphs 18-19.**

1 This draft (Draft B) is a much enlarged version of the draft originally published in July 2008 (Draft A) and the comments which we made on that draft are to be found at paragraph 8.28 of legal briefing papers on our website. Studying and commenting on Draft B is a major undertaking which will take some time. These comments therefore are a first instalment, dealing with the same topics which we raised in our comments on Draft A , taking account of detailed changes which appear in a comparison between the two Drafts.

2 Draft A had 214 Clauses, four Schedules and ran to 127 pages. Draft B has 347 clauses, seven Schedules and runs to 222 pages. Admittedly the difference in length is in large measure accounted for by the fact that several parts of the Bill had yet to be drafted when Draft A was published,. However, the basic provisions on the appeals system have now been taken out of the Bill altogether and are contained in an order to be made under the Tribunals, Courts and Enforcement Act 2007. The Command Paper 7730 which accompanies the draft Bill acknowledges at pages 18-19 that provisions on the regulation of immigration advisers, marriage

to British citizens and permanent residents, marriage to EEA nationals, public funds and the common travel area are yet to be drafted. Furthermore, some provisions contained in existing legislation have so far been omitted from either draft and it may well be that the government will see fit to respond to suggestions arising out of consultation that they should be included.

3 The exercise which now confronts those parties who have an interest in the law of immigration and asylum is one of digesting, understanding and critically commenting on a draft Bill of massive proportions, part consolidation of existing statutes but in substantial measure a major rewriting of the law. On the government side the "Simplification Team" as it has been called, presumably consists of a number of civil servants, government lawyers and others who have been engaged full time in this exercise for a considerable period and will continue to be similarly engaged for as long as it takes until the draft is either finally presented to parliament as a Bill to go through the normal legislative process or is abandoned. Those of us who are endeavouring to respond to the invitation to consult on draft B may be forgiven for thinking that the forces are unequal; immigration lawyers, bodies such as Migration Watch and others have limited time and resources and have to take on the burden of studying draft B and commenting on it as a spare time onerous occupation.

4 The impact assessment published on the same date as Draft B states that just two options have been considered, doing nothing or undertaking consolidation and simplification and the second option has been adopted. This is a seriously inadequate analysis. There is a third option, that of undertaking a straightforward consolidation of the existing 11 Acts of Parliament and thereafter moving on in stages to considering simplification. Statute law on the subject has become increasingly complex year by year. The impact assessment states on page 8: "Consolidation and simplification of legislation will require private, public and voluntary sector staff to familiarise themselves with the new legislation.... [There will also be] set up costs [which] will be greater for staff and relevant stakeholders in areas of legislation where there are significant changes associated with simplification." Coping with a new Act of Parliament which purports to assimilate the content of 11 previous Acts passed over a period of 28 years and which during that time have been much litigated in the High Court as well as in specialised tribunals will inevitably prove to be a much more demanding and costly business than these anodyne words suggest.

5 A plain consolidation would still present lawyers and other users with the need to familiarise themselves with a new layout of the legislation, new section numbers etc., but the substance and the actual words used in the consolidation Act would be unchanged and hence familiar. We remain strongly of the view that this is the course of action which the government ought to be taking. Consolidation could be followed by reform of the substantive law at a rather more leisurely pace than the present exercise contemplates. The omission of the option of simple consolidation shows a determination to push ahead with the government's preferred course of action of preparing a "simplification" Bill which as it grows ever more voluminous and complex is clearly anything but simple. The clear statement in the impact assessment that the only alternative to the "simplification" Bill is to do nothing is, with the greatest respect, an act of intellectual dishonesty.

6 When Draft A was published the government's declared intention was to have the Bill ready for presenting to Parliament in the autumn of 2009. That was obviously an unrealistic hope and has had to be abandoned. All that the government can do is invite consultation and promise scrutiny by Parliament in some unspecified manner. The Bill was not included in the Queen's Speech on 18 November 2009 and there is obviously no possibility of its being considered during the present session of Parliament. We have the prospect of a General Election in the first half of 2010 and

there is no way of knowing whether the government taking office after the Election, regardless of its political complexion, will have any interest in adopting the Bill as part of its legislative programme.

7 Apart from the greater ease of access to the material contained in it, because of the familiarity of its provisions, a consolidation Bill has an important procedural advantage in the way it is dealt with in Parliament.. So long as it can be shown that its clauses simply re-enact and repeal previous statutory provisions and do not introduce anything new, no debate on the substance of the Bill is allowed and the procedure is uncontentious and quick. A Bill in the form of Draft B is likely to be highly contentious, will take many months of consideration in Committees of both Houses and is likely to emerge from that process in very different form from the form with which it started life. The “simplification” Bill is already far from simple and could end up after being mauled through many months of the legislative process in Parliament in a state of much greater and even nightmarish complexity.

COMMENTS ON THE DRAFT BILL OF 2009

8 We are in favour of a tidying up of statute law on immigration and asylum, but we have made clear in the preceding paragraphs our preference for a progressive process beginning with a straightforward consolidation as a means of achieving this end. Having made clear our overall objections to the form of the draft, we now proceed to comment on it as a serious set of proposals for law reform.

9 We compliment the draftsmen on producing a user-friendly document, particularly Schedule 7, which gives a comprehensive list in alphabetical order of all the many expressions defined in the draft Bill, showing where their definitions are to be found. However, an important tool which does not appear is one which would be normal in a consolidation Bill, namely a schedule of derivations and destinations showing (1) where provisions from repealed are re-enacted in the Bill and (2) against each Clause in the draft Bill, the provisions in the Acts to be repealed to which its contents correspond. There are at least some parts of Draft B which are straightforward consolidation provisions and it would be helpful if they could be identified in this way. As an alternative, if the government does not consider it appropriate to include such a schedule in the draft Bill, could the schedule which we have requested be published as part of the explanatory notes on the draft Bill?

10 Migration Watch has been critical of the failure of the Points Based System to place any limit on the number of immigrants granted visas for the purpose of employment. Our proposal, therefore, is that the necessary powers to impose limits on the numbers of those granted particular types of visa should be conferred on the Secretary of State after consultation with concerned parties and should be exercisable by statutory instrument, subject to parliamentary approval, in accordance with Clause 335 of Draft B. This is in accordance with the proposals of the Cross Party Parliamentary Group on Balanced Migration. We draw particular attention to it as a proposal for a major change in policy.

11 We have some concerns about 9 of Draft B, which provides that the Secretary of State “may by order grant immigration permission to such categories of persons as are specified in the order”. Clause 9(2) gives examples of such categories, e.g. crews of ships, trains or aircraft, members of diplomatic missions etc., but the list is not exhaustive and it is not apparent that the definition of categories of persons to which immigration permission may be granted under this Clause must be construed *eiusdem* generis in accordance with the examples. The explanatory note on Clause 9

states that it “replaces the current provision for exemption from immigration control under the IA 1971”. We take this as a reference to Sections 3A and 3B of the Immigration Act 1971, which were inserted by the Immigration and Asylum Act 1999. These two sections set out between them the powers of the Secretary of State to make further provision by statutory instrument with respect to the grant of leave to enter and leave to remain, both now subsumed under the expression “immigration permission” in Draft B. But the content of Clause 9 is very different from that of these two sections in the 1971 Act. The latter contain powers to make statutory instruments of general application as already explained, whereas Clause 9 creates a new power to grant by order immigration permission to persons falling within one or other of the categories named in the order. The Clause goes well beyond the replacement of current provision for exemption for e.g. diplomatic staff. There appears to be no limit to the numbers and categories of persons to whom immigration permissions can be granted under this Clause. The Immigration Rules have always made and continue to make provision for all categories of visitor, e.g. students, working holidaymakers, highly skilled migrants and many others. There appears to be a strong possibility of confusion being created if some of the categories of visitor and the conditions governing their visits are created by the Immigration Rules while others are created by statutory instrument under Clause 9. This possibility surely militates against the professed objective behind the draft Bill of simplifying the law.

12 A procedural point appears also to arise as a result of the possible confusion between categories of visitor created by the Immigration Rules and those created by statutory instrument under Clause 9. By Clause 335 of Draft B statutory instruments are in general subject to annulment by a resolution of either House of Parliament, but orders made under Clause 9 fall within the exceptions set out in subsection (4) of Clause 335, which requires that such orders be approved by a resolution of each House of Parliament – in shorthand, they are subject to positive rather than negative resolution. This is a safeguard which creates at least the possibility of some degree of parliamentary scrutiny, but still falls some way short of the degree of scrutiny which can be expected to occur if the provisions creating the categories are to be incorporated into the Immigration Rules. The procedure for amending the rules is set out in Clause 336, which requires any changes to the Rules to be laid before both Houses. If either House disapproves of a statement of changes within 40 days of its being laid, the Secretary of State is required to make changes and lay the statement afresh within a further period of 40 days. In this way the importance of the Rules is recognised; we suggest that the power sought to be created by Clause 9 should not be sought and Clause 9 should be omitted.

13 In our comments on Draft A we expressed our concern about confusion between the concepts of asylum seeker and refugee. The wording of Clause 318 of Draft B in the relevant subsections is identical with the wording which gave rise to that concern in Clause 193 of Draft A. In both Clauses “refugee” is defined as having the same meaning as in the Refugee Convention. I quote from our comments on Draft A:

“The problem with the Convention is that it uses the word “refugee” as meaning in modern parlance either an asylum seeker or a person who has been recognised as a refugee within the meaning of the Convention after his application for asylum or appeal against refusal of asylum has been successful. From a practical point of view it is important to differentiate between the two. In much of the literature on the subject of asylum the two expressions are frequently confused with the result that asylum seekers are assumed to be persons genuinely fleeing persecution in their countries of origin, whereas the truth is that less than 20%

of asylum seekers are granted asylum while a further 10% are found not to be fleeing persecution but nevertheless to be in need of humanitarian protection.”

14 Clause 318 provides a defence for an asylum seeker charged with one or other of the offences listed in clause 319 of Draft B, being offences which may be committed as part of the process of illegal entry into the UK, to show that he applied for asylum as soon as possible after arrival. By subsection (3) of Clause 318, if the Secretary of State has refused to grant refugee permission – i.e. to grant asylum – then the person who by subsection (1) is taken to be a refugee “is to be taken not to be a refugee”. The use of the same word in both subsections creates confusion which could be avoided if the expression “asylum seeker” were to be used instead of “refugee” in subsection (1). In our comments on Draft A we drew attention to confusion between the concepts of asylum seeker and refugee which occurred in the definition of “protection application” in Clause 205 of that draft. We are pleased to note that confusion in the corresponding Clause 21(1) of Draft B has been removed. We urge that a similar degree of clarity be sought by redrafting of Clause 318.

15 Subsection (3) of Clause 318 gives rise to a further problem. It states that if the Secretary of State has refused to grant asylum permission the permission seeking to rely on the defence provided by subsection (1) will not be able to do so ***“unless sufficient evidence is adduced to raise the issue as to whether [that person] is a refugee and the contrary is not proved beyond reasonable doubt”***. ([Emphasis supplied.] The effect of this is to empower Circuit Judges and District Judges hearing such cases to allow what will amount to in effect appeals against refusal of refugee permission by the Secretary of State. Judges hearing such cases and members of juries in the Crown Court do not have the expertise or training required to second guess the conclusions of trained caseworkers in the UK Border Agency as to the eligibility of applicants for asylum. If there is any question about the correctness of the Secretary of State’s refusal, that should go to the Asylum and Immigration Tribunal or its imminent successor, the first tier tribunal, in the usual way. The subsection does not extend to the possibility of reopening the dismissal of an appeal against the Secretary of State’s refusal, nor should it. We suggest strongly that subsection (3) should be deleted and replaced by a subsection stating unequivocally that:

- 1 – if there has been no appeal against the Secretary of State’s refusal, that refusal should be treated as conclusive, and
- 2 – if there has been an appeal and the appeal has been dismissed, the decision of the Tribunal shall be treated as conclusive.

16 Clause 318 deals also with humanitarian protection in the same terms mutatis mutandis as those in which it deals with asylum. We suggest that similar amendments should be made to subsections (4) to (6) as we have suggested above in relation to subsections (1) to (3). In Subsection (4) the expression “a person entitled to humanitarian protection” should be replaced by the expression “a person applying for humanitarian protection”. Subsection (6) should be amended in the same way as is suggested for subsection (3) above.

17 Credibility is a major problem in dealing with asylum and human rights applications and appeals. In recognition of the problem and of the need for comprehensive guidance to decision takers, section 8 of the Asylum and Immigration (Treatment of claims, etc.) Act 2004 sets out a code whose provisions decision takers must take into account in assessing the credibility of claimants’ evidence. In general, any behaviour by the applicant/appellant which is designed to conceal information, to mislead or to obstruct or delay the handling or disposal of a claim or appeal is to be treated as damaging the

applicant's/appellant's credibility. We note with concern that none of the Clauses in Draft B re-enacts section 8. We expressed our concerns in identical terms in relation to Draft A. We regard it as most important that Clause 8 should be re-enacted.

Appeals

18 We believe strongly that the procedure in hearing asylum and immigration appeals should in future be inquisitorial rather than adversarial and that this should be clarified by an explicit provision in the draft Bill. Up to now the view taken by the higher courts has always been that immigration judges should act in similar fashion to judges in civil litigation and simply hold the ring between the parties. They should refrain from asking questions themselves other than to the extent necessary for clarifying the evidence. They should not on any account "descend into the arena" and start cross examining appellants or other witnesses. There have often been times when the Home Office has been short of Presenting Officers and has not been represented at appeal hearings. The result is that on such occasions there is no one to cross examine the witnesses and in view of the readiness of so many appellants to resort to untruthful evidence, this is a serious deficiency.

19 The object of asylum and immigration appeals is very different from that of civil litigation. In the latter the judge should properly remain aloof and simply pass judgment on the basis of evidence and legal submissions. But these appeals are concerned with the rights and duties of individuals as against the state and the obligations of the United Kingdom towards foreign nationals who wish to visit, settle, claim asylum or whatever and in large measure to enjoy the same state benefits as its citizens. The immigration judge should be concerned to elicit the truth in proceedings before him, having regard to the public interest in every appeal. Migration Watch made a similar statement in proceedings before the House of Commons Constitutional Affairs Committee in 2003 and 2004. (See Second Report of the Session 2003-04, Volume II, page 60.) We made identical comments on Draft A. In our view this Bill is an opportunity to make this significant improvement to the system.

28 November, 2009

Annex A

In legal [Briefing Paper 8.28](#) (deleted) I commented on the Draft (Partial) Immigration and Citizenship Bill 2008 which was presented to Parliament as a Command Paper in July 2008 and appended to the briefing paper the comments on the draft Bill which we had sent to the Home Affairs Committee of the House of Commons. The object of the draft was a complete rewriting and simplification of all the main immigration and asylum provisions presently contained in 11 Acts of Parliament passed between 1971 and 2009. Work appears to be continuing apace on this ambitious project and a new draft was published on 12 November along with a separate Command Paper entitled "Simplifying Immigration Law" and a consultation document on simplifying Immigration Rules. Immigration Rules are delegated legislation made by the Home Secretary and contain detailed provisions and instructions to immigration officers relating to leave to enter and remain for the various categories of persons as well as provisions on asylum. They are frequently amended and presently run to almost 300 pages.

The Press release issued along with these documents states: “The draft Bill introduces new and far-reaching concepts for the future immigration system that will strengthen our borders, simplify immigration procedures and increase our effectiveness at removing those who do not have permission to be in the United Kingdom.”

This Briefing Paper is the first set of our comments, on the draft Bill itself. We will keep you informed of any further comments through our website.

The sheer size and complexity of this exercise and the lengthy consultation period inevitably mean that there is no practical possibility of the Bill being introduced in Parliament before the impending General Election. The official Press Release says that the draft Bill will be scrutinised by Parliament in the new year, but without specifying what form scrutiny will take. It seems likely that this will be a task for the Home Affairs Committee of the House of Commons, and on that assumption we have sent off our comments to that Committee.

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