

## APPG on the Rule of Law

### Meeting Report: Immigration Bill 2015 and the Rule of Law

#### Joint Meeting of the APPG on the Rule of Law and APPG on Migration

20 October 2015, 17:15 – 18:45

Committee Room 19, House of Commons

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## Format

|               |  |
|---------------|--|
| 17:15 – 17:20 | Mr Paul Blomfield MP Introduction  |
| 17:20 – 17:25 | The Rt Hon Dominic Grieve QC MP (Chair)<br>Introduction  |
| 17:25 – 17:45 | Expert speakers<br>Dr Hugo Storey<br>Ms Alison Harvey<br>Ms Caroline Robinson<br>Professor Elspeth Guild |
| 17:45 – 18:10 | Questions and comment – MPs and Peers  |
| 18:10 – 18:30 | Questions and comment – open to the floor  |

## Attendance

Host and Chair: The Rt Hon Dominic Grieve QC MP

Chair of the APPG on Migration: Mr Paul Blomfield MP

MPs and Peers: Ms Joanna Cherry QC MP; The Baroness Hamwee; Mr Andy Slaughter MP; Mr Gavin Newlands MP; Mr Stuart McDonald MP; Mr Fabian Hamilton MP; The Lord Avebury; The Lord Ramsbotham GCB CBE; Mr Richard Arkless MP; The Baroness Sheehan; The Lord Ahmed; Rt Hon Fiona Mactaggart MP.

Others in attendance included: Anita Lowenstein Dent (SOAS); Zoe McCalum (Odysseus Trust); Dr Jenny Lloyd (Focus on Labour Exploitation); Jean-Benoit Louveaux (JUSTICE); Charlotte Peel (Joint Council for the Welfare of Immigrants); Conor O'Neill; Marianne Lagrue (Coram CLC); Samina Khan; Anna Marslen-Wilson (Independent Chief Inspector of Borders and Immigration); Garry Cullen (Independent Chief Inspector of Borders and Immigration); Richard Price (National Landlords Association); Margaret Burton (EY); Don Flynn (Migrant Rights Network); Justine Stefanelli (Bingham Centre); Swee Leng Harris (Bingham Centre); Dr Lawrence McNamara (Bingham Centre); Christina Dykes (Dominic Grieve QC MP's office); Amy Williams (Paul Blomfield MP's office).

## Meeting Aim

To provide MPs and Peers with an opportunity to discuss the rule of law issues that arise in relation to the government's Immigration Bill 2015, after hearing a range of expert views on the subject.

## Background

The stated purpose of the Immigration Bill 'is to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom'. The Bill raises a number of rule of law questions.

This background section **first** outlines the measures in the Bill that will be the focus for discussion at the meeting, **secondly** sets out other measures in the Bill that are relevant by way of context, **thirdly** identifies rule of law questions

that arise, and **fourthly** describes the Bill's progress through the legislative process.

Measures in the Bill that were proposed to be focussed on in the meeting are:

- Deport/remove first, appeal later powers that apply to all immigration applications: where a person has had an immigration application refused, this provision will allow the Home Office to require them to pursue their appeal from overseas. They would be permitted to return only if the appeal succeeded. The Home Secretary must still consider whether the removal would breach a person's human rights, in which case removal is not permitted. This power previously applied only to "foreign criminals" as defined.
- Landlords' duty to carry out immigration checks: in parallel with the Bill, the duty on landlords to check tenants' immigration status ('right to rent') is to be expanded from a pilot test area in the West Midlands to the whole of England. The Bill establishes new offences for landlords and agents who do not undertake 'right to rent' checks, or do not evict tenants with no right to rent.
- Landlords' new power to evict tenants: grants a new power to landlords to evict tenants with no right to rent, with twenty-eight days' notice, after the landlords receive a notice from the Home Office stating that the tenants have no right to rent. This new power is enforceable as if it was an order of the High Court. Also grants a new power to landlords to terminate tenancy agreements if the property has an occupier who has no right to rent. No provisions are made for repayment of rents paid in advance, or any other compensation.
- Creation of a Director of Labour Market Enforcement: who will set out and oversee a strategy for dealing with non-compliance in the labour market, including serious exploitation of workers.
- Criminalisation of illegal work: a new criminal offence for workers that could lead to a twelve-month prison sentence and seizure of earnings. This is supported by provisions granting immigration officials powers to enter and search properties, seize and retain property, and close down businesses found to be employing illegal workers.

Other proposals under the Immigration Bill include:

- Bank accounts: a new duty is imposed on banks to conduct regular checks on the immigration status of account holders, and close accounts as soon as possible if their status is no longer valid. The Home Office is granted a power to apply to the courts to freeze all accounts until the account holder leaves the UK, although this may include an exception for the account holder to meet reasonable living expenses and legal expenses.
- Ban on driving while illegally present in the UK, as well as power to stop and search persons, seize and retain their driving licences, and detain and confiscate vehicles.
- Language requirements for public sector workers: which will require public authorities to ensure that all frontline public sector workers can speak fluent English.

- Immigration bail: replaces the existing framework of temporary admission, temporary release and immigration bail for people liable to be detained or are seeking release from detention with a new framework of immigration bail. The Home Office is granted wide-ranging powers to override the tribunal including in respect of imposing electronic monitoring requirements.
- Power to cancel leave extended under section 3C of the Immigration Act 1971: where a person with leave to remain fails to comply with conditions attached to the leave, or has used or uses 'deception' in seeking leave to remain.

**To ensure the meeting addresses these issues in a rule of law framework,** speakers will discuss rule of law questions that arise, such as:

- Access to justice, what effect might the 'deport first, appeal later' provisions have on access to justice? Will access to justice be preserved with regard to the landlords' duty to carry out immigration checks and power to evict tenants?
- Clarity and predictability of the law, will the labour market and illegal working provisions be consistent with related legislation?
- Law, rather than discretion, are the discretionary powers given to the Home Office so broad that decisions on legal rights may be determined by exercise of discretion rather than application of the law?
- Equal protection under the law, might the Bill's provisions for landlords and tenants be inconsistent with the principle of equal protection under the law? There is some evidence of discriminatory effects in the pilot area for right to rent checks (West Midlands<sup>1</sup>). Stop and search provisions have historically had a discriminatory effect<sup>2</sup> as well, with police more likely to stop and search people who do not appear to be of British origins.
- Protection of fundamental human rights, is the Bill consistent with the protection of fundamental human rights, such as the right to non-discrimination? Are the provisions and penalties proportionate to the aims sought to be achieved, and can less restrictive measures be considered?
- Respect for international law, is the Bill consistent with the UK's international law obligations, including under European Union law (such as Art 18, EU Asylum Procedures Directive 2005), the European Convention on Human Rights, and other international conventions that the UK has ratified?

**The Public Bill Committee of the House of Commons on the Immigration Bill started meeting on 20 October (the day of the meeting),** presenting an opportunity for MPs to comment on and propose amendments to the Bill. The Public Bill Committee will take evidence on the Bill as well as go through line-by-line scrutiny of the Bill and consider amendments to it, and has been given a deadline to conclude proceedings by 17 November 2015. The Bill

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<sup>1</sup> Joint Council for the Welfare of Immigrants, No Passport Equals No Home: An independent evaluation of the "right to rent" scheme (JCWI, 3 September 2015)

<sup>2</sup> Equality and Human Rights Commission, Stop and Think: A critical review of the use of stop and search powers in England and Wales (EHRC, 2010)

was introduced on 17 September 2015 and had Second Reading on 13 October 2015.

### **The Bingham Rule of Law Principles**

The rule of law concerns identified above are based on the eight rule of law principles that were identified by Lord Bingham, which can be summarised as:

1. The law must be accessible and so far as possible, intelligible, clear and predictable;
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion;
3. The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
5. The law must afford adequate protection of fundamental human rights;
6. Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
7. Adjudicative procedures provided by the state should be fair; and
8. The rule of law requires compliance by the state with its obligations in international law as in national law.

### **Speakers' Summaries**

*These summaries were provided in writing by the speakers.*

(1) **Dr Hugo Storey<sup>3</sup>**  
**Judge of the Upper Tribunal; and President, International Association of Refugee Law Judges-Europe**

From a purely rule of law perspective my talk will address: (1) the new provisions dealing with immigration bail; and (2) the provisions expanding the ambit of s.94B so as to create a general policy of non-suspensive appeals in respect of Article 8.

#### **Immigration bail**

In relation to (1), there are presently provisions in the Bill which permit an executive override of judicial supervision by the First Tier Tribunal of detention and its conditions; provisions which mandate regard to a number of non-exhaustive factors to be taken into account, none of which address the possible factors in favour of bail or specify any statutory limit on the time a person can be detained. Despite making conditions relating to electronic tagging a priority, the Bill is not complemented by any transparent mechanism for applications to be made to government officers to vary conditions of bail. Nor does the Bill address what will happen to individuals

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<sup>3</sup> The views expressed here are my own and do not necessarily reflect those of the UK Upper Tribunal or the IARLJ.

who are only able presently to fulfil the bail residence condition because they can provide a s.4(1) bail address (s.4(1) of the 1999 Act being set for repeal). Come what may, judges will be obliged to give full effect to Art 5 ECHR in every case and to make decisions against the background of the constitutional importance attaching to the liberty of the person.

### **Policy of non-suspensive appeal**

As regards (2), the Court of Appeal (CA) has now handed down judgment in Kiarie and Byndloss. Whilst finding the existing policy instructions not to reflect the provisions in the statute and decision made under them procedurally unfair, it held that there is nothing unlawful in limiting people to an out of country appeal. Submissions that such a process is unlawful or unfair because it was harder to present a case and get legal help were rejected. It must also be observed that insofar as it makes clear that decision-makers have to apply a proportionality test to any certification, that is seen to be confined to removal during the time period of the pending appeal and hence to be about (what was assumed to be) only “short-term” disruption to private and family life.

Thus the case does demonstrate that s.94B cannot be reduced to a simple test of real risk of irreversible harm; its exercise also requires decision-makers to be satisfied there is no breach of s.6 HRA 98. It must also be borne in mind that the CA was not dealing with the new appeal regime created by the 2014 Act in which the 19 previous grounds have been reduced to 4 and the backdrop that for there to be any appeal, all claims now have to be funnelled into a human rights (or protection) claim. Nor does it address an extension of the ambit of s.94B.

In the context of the proposed extension of s.94B, there are at least 3 potential areas of difficulty:

- (i) The problem of defective primary decision-making (prompting the question of whether implementation should be linked to parliamentary guarantees about sufficient quality of primary decision making);
- (ii) The very wide scope of the amended s.94B both in terms of personal scope (all persons who make a human rights claim) and material scope (human rights claims simpliciter). In terms of personal scope (which is entirely new), there is thus some tension between the wording of the Bill and the much narrower target identified in the Prime Minister’s Queens Speech statement (illegal migrants stalling deportations). In terms of material scope, the Secretary of State has already stated in her Human Rights Memorandum that there is no intention to apply this power to cases relying on Articles 2 and 3 rights (which confirms the same position taken under the current s.94B); but the effect is to achieve circumscription (to Article 8) by policy, not law; and this approach may be storing up problems for the courts and Upper Tribunal in considering the legality, rationality and procedural fairness of the policy;
- (iii) Kiarie and Byndloss is premised on there being a speedy disposal of out of country appeals so that disruption is “short-term”, but present figures indicate that there may be delays from 6 months to over a year in a significant number of cases. The timeless axiom “Justice delayed is justice denied” would appear to require

careful parliamentary attention in relation to any extension of the policy of non-suspensive appeals and raises, *inter alia*, the question of whether, if such extension becomes law, the Bill should not also ensure a guarantee of speedy disposal (by an adequately resourced judiciary) of out of country appeals.

Generally, any human rights incompatibility questions will be for the High Court, not the Upper Tribunal. As ever, respecting the separation of powers, the function of judges will be to interpret and apply the new law, simultaneously giving effect to s.2, 3, 4 and 6 HRA 1998.

**(2) Ms Alison Harvey**  
**Legal Director, Immigration Law Practitioners' Association**

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

ILPA has worked closely since its inception with parliamentarians of all parties on immigration legislation: giving written and oral evidence; attending meetings; drafting amendments; preparing briefings and advising from the opposition advisor's box during debates in the House of Lords. Given the complexity of immigration it sees one of its main functions when an immigration bill is before parliament as explaining what the Bill does and putting the provisions in context.

ILPA's briefings and proposed amendments are circulated to all members of the Immigration Bill Committee and can be found on its website at <http://www.ilpa.org.uk/pages/immigration-bill-2015.html>

This Bill makes demands that the Home Office is not equipped or able to meet and gives it powers that it cannot be relied upon to exercise properly. The Bill is predicated upon the false assumption that the Home Office gets it right, not most of the time, but all of the time. The Bill will mean that where the Home Office exceeds or abuses its powers, or simply fails to do the job, British citizens are denied their entitlements as citizens; persons whose presence in the UK is authorized, and indeed welcomed, are not able to live and work in accordance with the conditions of their authorization, and the rights of all: citizens, persons under immigration control and those with no leave, are put at risk.

The Immigration Law Practitioners' Association is particularly concerned at proposals to extend powers so that all persons appealing immigration (not asylum) cases, for the most part cases on family relationships under the Immigration Rules and relying on Article 8 of the European Convention on Human Rights, the right to private and family life, could be removed before the appeal was decided if to do so would not breach human rights and rights under EU law. The power of one party to a case to send the other party from the jurisdiction so that they cannot appear before the court or tribunal and may struggle to present their case at all is inimical to the notion of equality

of arms. If the proposed residence test for legal aid, currently under challenge in the courts, is brought into effect it will mean that being outside the jurisdiction automatically disqualifies a person from legal aid. Those paying privately, and the Legal Aid Agency while legal aid is still available, will be forced to expend considerable sums instructing lawyers and marshalling evidence from overseas. Appeals will not be pursued or will be pursued inadequately.

**(3) Ms Caroline Robinson  
Policy Director, Focus on Labour Exploitation (FLEX)**

FLEX works to end human trafficking for labour exploitation by: preventing labour abuses; protecting the rights of trafficked persons; and promoting best practice responses to human trafficking for labour exploitation. FLEX was heavily involved in advocacy during the passage of the Modern Slavery Act 2015 into law, particularly on the role of labour inspection to prevent modern slavery. FLEX believes that labour inspection and enforcement is key to prevention of trafficking for labour exploitation and called for increased resources and remit for the Gangmasters Licensing Authority (GLA) to this end. FLEX's briefings and policy documents related to the Immigration Bill as well as previous briefings on the Modern Slavery Act can be found here: <http://www.labourexploitation.org>

FLEX is deeply concerned that the Immigration Bill could jeopardise the aims of the Modern Slavery Act 2015, to tackle modern slavery in all its forms. FLEX believes that the conflation of immigration control and labour inspection will prevent the UK from identifying cases of modern slavery. FLEX supports the general aims behind the creation of a Director of Labour Market Enforcement in Clause 1 to act as a central hub of intelligence and to enforce workers' rights. However, whilst the GLA operates to protect vulnerable and exploited workers, it is not at all clear from this Bill that this would be the role of the Director of Labour Market Enforcement. FLEX believes that the Bill requires more detail on the work of the Director of Labour Market Enforcement, in particular to: enforce the rights of workers and protect people from exploitation; promote pro-active inspection and intelligence gathering; promote worker engagement; and to ensure access to remedies.

FLEX is completely opposed to Clause 8 'Offence of illegal working' which would mean: a) that many victims of modern slavery in the UK would not risk referral to the UK national referral mechanism if a negative conclusive grounds decision could mean imprisonment; b) that traffickers would use this new offence as a threat through which to coerce victims in to exploitation; and c) that trafficked persons could be criminalised for initially abusive undocumented working that then deteriorated into a trafficking situation. Clause 8 disempowers vulnerable workers and empowers would-be exploiters. FLEX is deeply concerned that the deterrence effect of the offence of illegal working on victim identification along with the threat to labour inspection identification capacity proposed in Clause 2 could lead to breaches of Article 4 of the European Convention of Human Rights due to a failure to prevent, identify and protect victims and potential victims of modern slavery.



**(4) Professor Elspeth Guild**  
**Jean Monnet Professor *ad personam* at Queen Mary, University of London**

Baron Bingham of Cornwall, one of the most prominent and influential judges of our times, published his authoritative account of the Rule of Law in 2010. It won the Orwell Prize for Best Political Book in 2011. In his analysis of Rule of Law, Lord Bingham set out eight indispensable characteristics of Rule of Law, a fundamental prerequisite for liberal democracies around the world. I will set out these principles here and inquire whether the Bill before you is compliant or may put at risk the UK's reputation as a country which holds dear and respects the rule of law.

- **Accessibility of law:** this means that law must be accessible and so far as possible intelligible, clear and predictable. Does the current Bill fulfil Lord Bingham's criteria regarding accessibility? Even the most cursory examination of the Bill reveals a virtually impenetrable forest of jargon, references to previous laws and provisions which appear almost designed to hide their objective and possible impact.
- **Law not discretion:** questions of legal right and liability should be resolved by the application of the law not the exercise of discretion. Does the current Bill fulfil Lord Bingham's criteria regarding law v discretion? As my fellow discussants have indicated in detail, chapter and verse, this Bill appears to seek to 'legalise' discretion for instance in the area of immigration detention providing a legislative veil which is designed to permit very extensive discretion to be exercised by the servants of the Secretary of State according to guidelines which they themselves construct and change without reference to Parliament. The extent of the discretion which this Bill proposes to confer on the Secretary of State raises questions about whether it fulfils the basic requirement of law *per se* as set out by the European Court of Human Rights (Quinton and Gillan 2010) for foreseeability.
- **Equality before the Law:** law should apply equally to all save to the extent that objective differences justify differentiation. Lord Bingham himself recognized the legitimacy of differences between the rights of citizens and those of foreigners. However, every difference in treatment must be justified as an exception to the principle of equality. The radical nature of this Bill which places the foreigner in a position of such profound vulnerability not only before the authorities but also before private actors such as landlords, employers etc. is not obviously consistent with the fundamental rule of equality. Parliament must consider whether the justifications are adequate to support such an important challenge to the rule of law.
- **Exercise of Power:** Lord Bingham stated that Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which they were conferred, without exceeding the limits of such powers and not unreasonably. The breadth of the discretion built into this Bill will make it almost impossible for this characteristic of rule of law to be satisfied. There are insufficient control mechanisms to ensure that actions of public officers are consistent with the duties of good faith, fairness, and purpose. The problem of the extent of discretion makes the issue of exceeding the limits of the powers even more problematic.

- Human Rights: all law must afford adequate protection of human rights. My fellow speakers have already expressed their concerns that, in particular, the human right to family life is insufficiently protected in this Bill. The presumption in favour of respect for human rights can only be maintained if family life is respected until such time as any claim by public officials that an exception to the right is justified. An exception has to not only be justified with reasons but also be subject to judicial scrutiny.
- Dispute resolution: According to Lord Bingham for the basic requirements of rule of law to be satisfied, means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* disputes which the parties are unable to resolve. The new obligations proposed in the Bill which also confer new powers on private actors such as employers and others distort the capacity of foreigners to access dispute resolution in order to resolve disputes.
- Fair Trial: adjudicative procedures provided by the state should be fair. Lord Bingham was particularly concerned that fair trial be protected as a central element of rule of law. This Bill must be interrogated from the perspective of the fairness of the adjudicative procedures. Can it really be claimed that an appeal right regarding the human right to respect for family life is fair where from the decision of the public authority that is in issue, the appellant may be expelled from the territory, denied access to his or her family unless they are able to travel to visit him or her in the country of origin, and unable to be present at his or her appeal? Such a claim must be questioned.
- Compliance with international obligations: Lord Bingham insisted that rule of law requires the UK (and every other state claiming to be a liberal democracy) to comply in good faith with its obligations in international law as in national law. Does this Bill actually comply with EU and international human rights law on free movement of persons which the provisions on non-suspensive appeal rights will also apply to them? Does it comply with the EU Charter of Fundamental Rights and European Convention on Human Rights on the right to respect for family life? Parliamentarians may wish to reflect and solicit further expert advice on the compliance with international obligations before approving a Bill which may place at risk the UK's claim to be a liberal democracy which respects the rule of law.

### Key Points from the Discussion

*The following points were raised in discussion amongst parliamentarians and the expert speakers at the meeting. The outline below paraphrases and summarises points made, and should not be considered verbatim quotes.*

#### **Consequences of outsourcing immigration control for the rule of law**

The first question concerned whether there would be any problems arising from the outsourcing of immigration control from the Home Office to individuals who are not government officials, such as landlords and employers, and the consequences of this for the rule of law.

Alison Harvey gave the view that there would be a fundamental problem caused by the resultant increase in discrimination. While civil servants had a duty under their code of conduct to make decisions lawfully and in a non-discriminatory manner, the outsourcing of immigration control to non-civil servants presents them with conflicting interests. If landlords were told by the law not to discriminate, and also not to rent to undocumented people, the greater driver of their behaviour would be avoiding the risk of a £3000 fine and possible jail sentence for renting to illegal migrants. Faced with two potential tenants and no objective difference but their race or names, the landlords would be inclined to rent to the tenant who is white and has what they consider to be a British sounding name, or who has a British passport, as they present a lesser chance of running afoul of the law. Similarly, employers would not want to take on the risk of the penalties for employing illegal workers, and so would be more likely to discriminate against people who do not look like what they consider to be British or have what they consider to be a British-sounding name or passport. Some of the people most at risk of such discrimination would be the third-country (i.e. non-British or European) partners of European nationals, because they will not necessarily have documentation to prove their right of residence in the UK.

### **Consequences of the application of rule of law principles to third parties**

Concerns were also raised that third parties might be affected by the proposed legislation, such as employers who run businesses staffed with ethnic minorities.

Alison Harvey cited the evidence Sir David Metcalfe gave to the Public Bill Committee highlighting the problem of ethnic minority on ethnic minority exploitation. For example, he said that in Chinatown hours were not being recorded properly and the minimum wage not paid. However it was observed that exploitation is generally found in areas where investigation is concentrated. ILPA has expressed concern that the proposed widening of the criminal offence of employing illegal workers from only covering those who knowingly employ illegal workers to also include those who negligently do so, is casting far too wide a net.

Caroline Robinson cited COMPAS (the Centre on Migration, Policy and Society at the University of Oxford) research on the effects of intensified immigration control in the USA. This showed that intensified immigration control did not have an impact on people's choice to migrate, but rather on how they migrated and the work they sought. Trafficked persons tend to seek solidarity amongst/help from people who share similar ethnic or country backgrounds as a result of fear of government officials. However, this solidarity can be abused and result in exploitation. The solution was to have more effective labour market enforcement that protects labour rights.

Dr Elspeth Guild highlighted that the rule of law demands equality before the law. If small and medium sized enterprises in a particular sector were targeted and subject to a practice of heavy inspection for undocumented workers, there is a risk of indirect discrimination and the recent Court of Justice decision CHEZ (Case C 83/14) could potentially apply, which found indirect discrimination contrary to EU law in a similar situation.

### **The Rule of Law and Immigration**

There was some discussion of the Joint Inquiry into the Use of Immigration Detention in the United Kingdom by the APPG on Refugees & APPG on Migration. The inquiry revealed concerns about the quality of Home Office immigration casework, and the need for the whole system to be reviewed. In

light of the experience of that inquiry, some at the meeting welcomed the rule of law as a different paradigm through which the immigration casework system could be reviewed, and by which the Immigration Bill should be considered.

The meeting also noted the Bingham Centre's report on the rule of law and immigration detention, (available at [http://www.biicl.org/files/6559\\_immigration\\_detention\\_and\\_the\\_rol\\_-\\_web\\_version.pdf](http://www.biicl.org/files/6559_immigration_detention_and_the_rol_-_web_version.pdf))

### **Constructive suggestions for Government**

It was observed that the policy background behind the Immigration Bill is the sense of frustration in Government arising from the difficulty faced in ensuring the deportation of illegal immigrants, and the length of time and process in achieving this. Many of the measures set out in the Bill are explicitly designed to ease this process. Therefore there was a question as to constructive suggestions for the Government on how to achieve its policy objectives without offending the rule of law.

Alison Harvey suggested that if the decision-making system was quicker and fairer, cases would be more likely to be resolved with finality, and to be resolved before the applicants had spent a large portion of their lives in the UK. Conversely, if decisions are poorly made or unfairly, whether because of the decision-maker failing to decide correctly or because of the fundamental unfairness of the underlying law, the appeal raises twice as many issues as the original applications, because parties then have to address the unfairness and its consequences, as well as the original case.

In Ms Harvey's view, the Home Office should not detain persons seeking asylum and should not rely on the detained fast-track as a plank of its asylum policy. It does not lead to fair decisions and in addition the Home Office has been found to be in breach of its Article 3 obligations (the prohibition on torture and inhumane or degrading treatment) in six cases involving mentally ill in immigration detention.

Paul Blomfield MP agreed that previous governments had struggled with this issue, and the question was being grappled with by the Public Bill Committee, in terms of what needs to be done. He questioned whether we need new laws, or better enforcement of existing laws.

### **Adjustments to out-of-country appeal arrangements**

There was some discussion about the necessity of adjustments to out-of-country appeal arrangements to make them effective. The Court of Appeal dismissed arguments on access to justice in *Kiarie and Byndloss* ([2015] EWCA Civ 1020) on the basis that tribunals would make sufficient adjustments to make out-of-country appeals effective. There was thus concern about whether tribunals could/would make the requisite adjustments to allow access to justice in out-of-country appeals, such as by allowing people to submit evidence through means other than in person, and facilitating access to lawyers.

It was noted that a number of Upper Tribunal decisions have found that out-of-country appeals are a method that can be used by the Government in certain contexts. The proposed extension of this raised an interesting contrast with the EU law position. While Regulation 24AA makes similar provision for imposing out-of-country appeals on EU nationals, in the EU law context there is a right to come back to be present at the hearing, even if the EU national was removed prior to the hearing.

## **Congruence with the Modern Slavery Act**

The discussion turned finally to the Modern Slavery Act, which the Government had reassured Members of Parliament at Second Reading contains defences to protect victims from unfair prosecutions. Caroline Robinson noted that the defence under the Modern Slavery Act is narrow, and leaves questions open about whether it applies to undocumented work prior to exploitation, or only applies to work done in the course of or after exploitation.

## **Speakers' Biographies**

**(1) Dr Hugo Storey**  
**Judge of the Upper Tribunal; and President, International Association of Refugee Law Judges-Europe**

Dr Storey is a Judge of the Upper Tribunal (Immigration and Asylum Chamber) (formerly Senior Immigration Judge of the Asylum and Immigration Tribunal) in the United Kingdom. He has sat on a number of the Tribunal's main cases (including country guidance cases on Iraq and Somalia and cases on Article 8 –e.g. MF (Nigeria)). In an academic capacity he has published widely on human rights, refugee, international law and European law issues. He is one of the International Association of Refugee Law Judges' (IARLJ's) founding members is the current President of the IARLJ's European Chapter. He was one of the experts utilised by the European Commission when drafting the Refugee Qualification Directive (/2004/83/EC) and, more recently, its "recast". He has been active for many years in the training of judges doing asylum and immigration work inside and outside the UK.

**(2) Ms Alison Harvey**  
**Legal Director, Immigration Law Practitioners' Association**

Ms Harvey has specialised in immigration, asylum and nationality work since the mid-1990s, representing individuals and working on policy and legislation, in the UK and abroad. She is a member of the editorial board of the Journal of Immigration, Asylum and Nationality Law, has contributed to numerous publications, and is a non-practising barrister. Ms Harvey has headed ILPA, a group of more than 1000 immigration practitioners, for the past 2 years, and is the organisation's main public advocate.

**(3) Ms Caroline Robinson**  
**Policy Director, Focus on Labour Exploitation (FLEX)**

Ms Robinson is Director of Policy at Focus on Labour Exploitation (FLEX). FLEX works to end human trafficking for labour exploitation by: preventing labour abuses; protecting the rights of trafficked persons; and promoting best practice responses to human trafficking for labour exploitation. She has ten years' experience in the field of human trafficking at the UK national and international level. She has also worked as senior political adviser in the UK parliament and for the United Nations in Afghanistan. Caroline is a founder of the Anti-Trafficking Review journal.

(4) **Professor Elspeth Guild**  
**Jean Monnet Professor *ad personam* at Queen Mary, University of London**

Professor Guild is Jean Monnet Professor *ad personam* at Queen Mary, University of London as well as at the Radboud University Nijmegen, Netherlands. She is also a partner at the London law firm, Kingsley Napley and an associate senior research fellow at the Centre for European Policy Studies, Brussels. She is also a visiting Professor at the College of Europe, Bruges. She was special advisor to the House of Lords European Union Committee's Inquiry into Economic Migration in 2005.

### Further Resources

We are aware of the existence of the following Parliamentary briefing papers/material on the Bill, which we set out below by way of further information only.

1. House of Commons Briefing Paper CBP-7304 on the Immigration Bill 2015-16 (6 October 2015), available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7304>
2. Home Office's Explanatory Notes on the Immigration Bill, available at: <http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0074/en/74en01.htm>
3. Equality and Human Rights Commission, Briefing on Immigration Bill (12 October 2015), available at: <http://www.equalityhumanrights.com/legal-and-policy/our-legal-work/parliamentary-briefings/immigration-bill-house-commons-second-reading-13-october-2015>
4. Immigration Law Practitioners' Association Briefing for Second Reading (5 October 2015), available at: <http://www.ilpa.org.uk/resources.php/31432/immigration-bill-2015-ilpa-briefing-for-second-reading-13-october>
5. JUSTICE briefing for Second Reading of Immigration Bill (October 2015), available at: <http://justice.org.uk/justice-briefing-for-second-reading-of-immigration-bill/>
6. FLEX Briefing: Immigration Bill, House of Commons 2nd Reading, October 2015, available at: <http://www.labourexploitation.org/publications>
7. Residential Landlords Association, *Immigration Bill and Right to Rent proposals* (14 October 2015) available at: <http://news.rla.org.uk/immigration-bill-right-to-rent-proposals-rla-in-the-news/>
8. House of Commons Briefing paper SN07025 on Private Landlords: Duty to Carry out Immigration Checks (21 September 2015), available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07025>
9. Joint Council for the Welfare of Immigrants report on "No Passport Equals No Home": *An independent evaluation of the 'Right to Rent' scheme*, (3 September 2015), available at:

[http://www.icwi.org.uk/sites/default/files/document/No%20Passport%20Equals%20No%20Home%20Right%20to%20Rent%20Independent%20Evaluation\\_0.pdf](http://www.icwi.org.uk/sites/default/files/document/No%20Passport%20Equals%20No%20Home%20Right%20to%20Rent%20Independent%20Evaluation_0.pdf)

10. House of Commons Briefing paper CBP-7294 on Immigration detention in the UK (7 September 2015), available at:  
<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7294>
11. Coram Children's Legal Centre briefing on Immigration Bill for Second Reading (October 2015), available at:  
[http://www.childrenslegalcentre.com/userfiles/file/ImmigrationBill\\_CCLC\\_HoC2ndreading.pdf](http://www.childrenslegalcentre.com/userfiles/file/ImmigrationBill_CCLC_HoC2ndreading.pdf)