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GENERAL COMMITTEES

Public Bill Committee

IMMIGRATION BILL

Eleventh Sitting

Thursday 5 November 2015

(Morning)

CONTENTS

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STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: Mr Peter Bone, † Albert Owen

† Blomfield, Paul *(Sheffield Central)* (Lab)
† Brokenshire, James *(Minister for Immigration)*
† Buckland, Robert *(Solicitor General)*
† Champion, Sarah *(Rotherham)* (Lab)
Davies, Byron *(Gower)* (Con)
† Davies, Mims *(Eastleigh)* (Con)
† Elphicke, Charlie *(Lord Commissioner of Her Majesty's Treasury)*
† Harris, Rebecca *(Castle Point)* (Con)
† Hayman, Sue *(Workington)* (Lab)
† Hoare, Simon *(North Dorset)* (Con)
Hollern, Kate *(Blackburn)* (Lab)
† Lewell-Buck, Mrs Emma *(South Shields)* (Lab)
† McLaughlin, Anne *(Glasgow North East)* (SNP)
† Newlands, Gavin *(Paisley and Renfrewshire North)* (SNP)
† Smith, Chloe *(Norwich North)* (Con)
† Starmer, Keir *(Holborn and St Pancras)* (Lab)
† Tolhurst, Kelly *(Rochester and Strood)* (Con)
† Whittaker, Craig *(Calder Valley)* (Con)

Marek Kubala, Joanna Welham, *Committee Clerks*

† attended the Committee

Public Bill Committee

Thursday 5 November 2015

(Morning)

[Albert Owen *in the Chair*]

Immigration Bill

Clause 31

Appeals within the United Kingdom: certification of human rights claims

11.30 am

Question proposed, That the clause stand part of the Bill.

The Solicitor General (Robert Buckland): Clause 31 deals with the important issue of rights of appeal relating to persons who claim to have a right to remain in the United Kingdom on asylum or human rights grounds, but whose claim has been refused. It has long been established that, in some cases, a person can be removed and deported before an appeal is brought or heard. Indeed, the previous Labour Government introduced powers in 2002 to certify claims that were defined as "clearly unfounded" such that persons bringing unfounded claims could be removed before bringing their appeal. That was extended to deportation in 2007. Then, in 2014, it was extended further so that arguable claims from foreign national offenders could also be certified when deportation pending appeal would not be in breach of that person's rights under the European convention on human rights or the rights of any other person affected by the decision.

The context is important in this debate, because the proposed change builds on the success of previous alterations, which have represented an incremental approach. The 2014 framework was recently confirmed in the Court of Appeal—we will no doubt explore some of the issues relating to that judgment in due course. The changes have had a positive operational impact, with the accelerated deportation of hundreds of foreign criminals, which is why one of this Government's manifesto commitments was to remove the limitation that the power can be used only for those subject to deportation—mainly criminals—so that all individuals who have sought but been refused a right to remain in the UK on human rights grounds can be removed more swiftly. Clause 31 delivers on that commitment. It is our policy to ensure more effective removals and to prevent people whose applications have been refused from remaining in the UK and potentially accruing article 8 rights after it has been decided that they have no right to be here.

The power to certify that an appeal must be brought from overseas when that would not breach human rights was introduced in the Immigration Act 2014 for persons liable to deportation—largely foreign national offenders, as I suggested a moment ago. Subsections (2), (3) and (6) of clause 31 extend the scope of the existing power to all human rights claims. Importantly, the power will not apply to asylum claims, meaning that all asylum appeals, except those that are clearly unfounded, will continue to be heard in the UK. The certification power cannot be used in cases when removal pending appeal would create a real risk of serious, irreversible harm or other breach of human rights, such as when there is a claim under article 2, the right to life, or article 3, freedom from torture and inhuman or degrading treatment. We are largely dealing here with cases that relate to article 8 and to a person's family or private life. I emphasise that each case will of course be assessed on an individual basis, taking into account the impact of certification on family members, including children.

The power will not normally apply to unaccompanied children. Many unaccompanied children make asylum claims anyway, so this power is irrelevant to them. When an asylum claim is refused, a child will be granted leave until they are 18 years of age, unless adequate reception arrangements are in place for their return to their home country. When a child has been in the UK for seven or more years, they can be granted leave to remain on the basis of their private life rights when it would not be reasonable to expect them to leave the UK.

Paul Blomfield (Sheffield Central) (Lab): The Solicitor General is at pains to point out that the power would not normally be used on children, so I guess that he has taken account of the evidence that we received from the Children's Society and others expressing such concerns. Why have the power at all if it is not intended to be used?

The Solicitor General: It is envisaged that the power could be used on certain occasions in the case of a much older child or young person. Particular circumstances could allow, on a case-by-case basis, a particular resolution, but it is envisaged that in the vast majority of cases that would not apply and it would be exceptional if it did.

Paul Blomfield: Will the Solicitor General clarify that point? We are straying into the territory of our previous debate, on how to define age. He said "much older". What does he consider to be much older? Where does that threshold kick in?

The Solicitor General: We are talking about the 18-month period between 16 and a half to 18 years of age. That is the period we are dealing with. I have already made the point about age in previous debates, but I will develop the point I was making just now. For example, if a 17-year-old who lives in the UK with members of their wider family has made a human rights claim to stay that has then been refused, and if they have parents or family in another country to whom they can return and successfully establish their life there, these provisions might apply. To develop the general point about the interests of children, the welfare of children will continue to be a primary consideration in decisions by virtue of statute under section 55 of the Borders, Citizenship and Immigration Act 2009, so each case will be assessed depending on individual circumstances.

Keir Starmer (Holborn and St Pancras) (Lab): The Solicitor General is dealing with a very important point and reassuring us that an assessment will be made, particularly when it involves children, but how precise

will that assessment exercise be? How will the detailed circumstances be ascertained and what is the remedy if it is thought that a wrongful decision has been made?

The Solicitor General: The hon. and learned Gentleman has hit upon the more general point about successful appeals. It is wrong to assume that the reason for the number of successful challenges to Home Office decisions lies fairly and squarely at the door of the Home Office and any failures that it might exercise in using its discretion. We have due process, and he will of course be aware that when an applicant makes an application, they should do everything they can to provide the fullest evidence and information about their situation at the earliest opportunity. I would think that evidence about the welfare needs of children would be at the forefront of any applicant's mind, or the minds of those who are instructed to represent them. It is therefore vital—this is a good opportunity for me to put this on the record—that everybody involved in such proceedings understands that early reliance on comprehensive evidence is essential if we are to avoid the issues that the hon. and learned Gentleman rightly raises.

On the handling of children's cases, revised guidance has now been published following the recent Court of Appeal judgment, which we are well aware of, and is now available on the gov.uk website.

Keir Starmer: It may be my fault for not expressing myself clearly enough, but in relation to the assessment of the impact on a child who is required to appeal from abroad—which is a different assessment from the ordinary assessment of an impact on a child—how is that to be conducted? What is the guidance? For example, does the guidance say more than six months for a child under 10? Is separation from a parent acceptable or unacceptable? What is the guidance for the decision maker if they are presented with two children under 10 and a possible separation of six to 12 months? Are they told that that is okay or not okay?

The Solicitor General: The hon. and learned Gentleman has asked a specific question about the wording of the guidance. I am at a slight disadvantage because I do not have it to hand. It might be that I can get a response to him about that. However, guidance that goes into huge prescriptive detail on time limits or time indications is not really guidance. Guidance must give decision makers discretion and allow them to look individually on a case-by-case basis.

Keir Starmer *rose—*

The Solicitor General: I will finish this point, then the hon. and learned Gentleman can by all means intervene again.

I want to give the Committee an example about individual circumstances. An example of where the welfare of a child might make a case unsuitable for certification by the Secretary of State is if the individual whose article 8 claim has been refused is acting as the primary carer for a child, even temporarily—for example, if the child's parents had separated and the parent who is normally the primary carer is unavailable to take care of the child temporarily and the other parent is caring for the child while their appeal is being determined. In that example, welfare issues clearly come into play.

In each case, individuals will be asked to provide any reasons why the power should not be applied in their circumstances, which will be fully considered. Of course, they will be able to challenge the decision to certify; we must not overlook that important point. The decision to certify is an administrative decision that can be challenged by judicial review.

Keir Starmer: I want to probe the question of guidance. The Solicitor General's example is of a primary carer. Unsurprisingly, it is not thought a good idea to certify in those circumstances—that case makes itself. The Children's Commissioner published a report about a month ago about the impact of different rules, including the rules about the income requirement that must be met before a spouse can join a family, which focused on the impact on the child of not having access to one parent for months, and sometimes years. Has the Solicitor General or the Department taken those findings into account? They seem to be pertinent here, given the impact on a child of not having contact with one parent for a prolonged period.

The Solicitor General: The hon. and learned Gentleman makes a powerful point, but those sorts of considerations can be taken into account by the decision maker.

I now have to hand the guidance on the Nationality, Immigration and Asylum Act 2002 issued by the Home Office. The latest version is dated 30 October, so it is fresh off the printing press. The section 55 duty is described in paragraphs 3.6 to 3.8 inclusive, which I will read for the record:

"When considering whether to certify a human rights claim pursuant to section 94B, the best interests of any child under the age of 18 whom the available information suggests may be affected by the deportation decision must be a primary consideration."

That is a very helpful start.

"Case owners must carefully consider all available information and evidence to determine whether or not it is in the child's best interests for the person liable to deportation to be able to appeal from the UK. This is particularly relevant in considering whether deportation pending appeal would cause serious irreversible harm to the child. The case owner must also consider whether those interests are outweighed by the reasons in favour of certification in the individual case, including the public interest in effecting deportation quickly and efficiently."

That is the balancing exercise in a nutshell.

Paragraph 3.7 might help the hon. and learned Gentleman:

"Case owners must carefully assess the quality of any evidence provided in relation to a child's best interests. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests or copies of documents."

Paragraph 3.8 states:

"For further guidance in relation to the section 55 duty, see…Section 55".

It also contains links to an introduction to children and family cases and to criminality guidance for article 8 ECHR cases. I think that is a helpful encapsulation of the balancing exercise that decision makers have to carry out.

Keir Starmer: I want to explore that guidance. For clarity, if the assessment states that there will be serious harm to the child, but it would not be irreversible, that

[Keir Starmer]

suggests that the decision maker would go ahead with the decision and certify. Is it right that the harm has to be serious and irreversible?

The Solicitor General: The hon. and learned Gentleman is right to read the words in that way. We do not have the words "and" or "or"—we are back to "and" or "or". He and I like these arguments because they are important; we do not indulge in them for the sake of semantics. However, what I am referring to is guidance, so it takes a different form from primary legislation or secondary legislation. It allows decision makers to get clear in their minds what the balance should be. There is a public interest in swift and efficient deportation. The party that the hon. and learned Gentleman represents had no issue with the principle when it introduced this power or when it was extended in the 2014 Act, so that principle is something on which he and I can agree.

11.45 am

The next item is what is to be weighed in the balance. I am satisfied, on the basis of section 55 of the 2002 Act and the guidance, that it is made clear to decision makers that the child's best interests and whether the harm is serious, whether it is irreversible, would be key factors in making the decision. Let us say that a child is in a position in which there is a risk of very serious abuse, but the risk is only temporary because the information is that the individuals in question will not necessarily be in the child's life for a long period. That could be an example of where a decision maker would weigh in the balance the various factors. I think there is enough leeway in those helpful paragraphs in the guidance to deal with the hon. and learned Gentleman's concern about an overly mechanistic approach to decision making.

I am grateful to—I was about to say "those who instruct me". Gosh, I am going right back to court. I am grateful to the team who assist me. The point about the test develops upon the point about the guidance. Let us go back to the overarching test in law. The test is whether removal will breach the human rights, including those of any child affected. Therefore, serious irreversible harm is not the test itself; it is an indicative example of a consideration that a decision maker can bear in mind heavily. Within that overarching test—the hon. and learned Gentleman is very familiar with this, but it is important that we put it on the record—there will be many different factual matrices and considerations that will add up to proper discretion in this case.

Subsections (4) and (5) of clause 31 amend the existing power to ensure that it applies in all circumstances where a human rights decision is made and not just where a person is to be removed from the UK. Individuals will continue to have a right of appeal against refusal of human rights claims. The effect of the clause is that where a human rights claim is refused and certified, the appeal right must be exercised from outside the United Kingdom. In addition, existing certification powers will continue to apply—for example, where the claim is certified as clearly unfounded or where the individual was given reasonable opportunity to raise a ground for seeking to remain here but did not do so.

That is an important point. This matter was examined carefully by the Court of Appeal in the case authority that I think we are all familiar with, but which I will cite. It is the case of the applications of Kiarie and Byndloss *v.* the Secretary of State—from the transcript that I have, the citation is 2015 EWCA Civ 1020. The judgment was handed down on 13 October. In that judgment, there was a helpful look back at a case with which many of us will be familiar, BA (Nigeria) *v.* the Home Secretary, and the observations of Lord Justice Sedley, as he then was. The observations of that court were built upon, importantly, in the judgment of Lord Justice Richards. In particular, internal Home Office statistics for the last five years, to July 2015, were examined. They related to entry clearance appeals, and I think that there is a read-over, because in many of those appeals, human rights issues will be raised, so I think this is a useful comparator, and certainly the Court of Appeal found it useful.

Those statistics showed that 38% of entry clearance appeals succeed, with 42% of appeals succeeding in 2015 in the comparable in-country category of managed migration appeals. To be clear, entry clearance appeals obviously take place out of country. That important and encouraging statistic goes a long way to dispel the understandable concerns that hon. Members may have about the potential disadvantage to appellants who are not permitted to make in-country appeals.

Importantly, with regard to compliance with article 8, the Court of Appeal held that the requirement in an article 8 appeal was not for the "most advantageous procedure available", but for

"a procedure that meets the essential requirements of effectiveness and fairness."

As someone who believes very much in talking about the concept of fundamental human rights, I was encouraged to see the Court take that approach, which confirmed that the Secretary of State is generally entitled to rely on the independent specialist judiciary of the immigration tribunal to ensure that an appeal from overseas is fair and that the process is in line with our legal obligations under the European convention on human rights.

The clause is a balanced and measured development on a line of statute that has found the approval of the House and been supported by both the main parties. It strikes a balance between ensuring that our deportation system has the British people's confidence and maintaining the essential aspect of fairness that guarantees that due process takes place in a way that is appropriate and consistent with our convention duties for out-of-country appeals. w

Sarah Champion (Rotherham) (Lab): Thank you, Mr Owen. I appreciate being given the opportunity to speak.

I think it has become abundantly clear in the Committee that I am not a lawyer. What I am is someone who wants justice and the law to be robust. To that point, I will describe a real case that will be directly affected by the clause. The legal difficulties caused by denying in-country right of appeal of Home Office decisions were outlined both in submissions to the Committee and in the evidence sessions. I want to give a real, human, ongoing example.

I represent an urban constituency, and a significant amount of my casework is immigration based. When I read the clause, one case in particular was immediately brought to my mind. During a surgery, I met a constituent

who was in the midst of an asylum claim. He had been a very senior lawyer in Brazil. He represented a client in a case involving corruption in the local police force, as a result of which a police officer was arrested. Following the arrest, my constituent began to receive death threats and his client was later murdered. My constituent was forced to enter the state witness protection programme, but it soon became clear that he remained easily locatable, whereupon he fled to Britain and claimed asylum, together with his wife and two young children, to escape the ongoing threats.

Previous comments have carried the implication that some people come here for lifestyle choices and that they are irresponsible parents for doing that—how could they bring their children into this situation? For my client—*[Interruption.]* Sorry, my constituent—I watch "The Good Wife" too much; it is starting to seep into my vocabulary. For my constituent, this was not a lifestyle choice. He was not coming for a better life. He had a fantastic life. He came here to save the lives of his wife and his children.

The facts of my constituent's case were not in any doubt. He was able to provide information from Government agencies that verified his story and that the Brazilian authorities were unable to protect him. However, his claim was rejected, and because Brazil is on the Government's white list of countries deemed to be safe, he was prevented from pursuing an appeal from within the UK. I had every reason to believe that to remove my constituent's family from the UK would place them at serious risk, yet he was unable to challenge the Home Office's decision. I have no doubt that, on his return, he will be murdered, as will his wife and children.

My constituent's case illustrates the dangers of presumption of safety. The principle that a country should be deemed safe regardless of whether or not it is represents a grievous risk to extremely vulnerable people. The Bill seems to drafted on the presumption that a majority of appeals are without merit and that those forced to leave the UK who would later successfully appeal their refusal would be relatively few in number. On the contrary, however, the reality is that the proportion of successful appeals is extremely high. Statistics for April to June 2015 show that some 39% of appeals were allowed by the first-tier tribunal, and that is before even considering appeals that are denied at first tier but later allowed by the upper tribunal. Of course, concerns have been raised for many years about the quality of Home Office decisions. In light of these reservations, it is difficult to conclude that the Home Office certifications would be robust and accurate. Given the serious consequences of inaccurate certification and the practical obstacles to mounting a challenge, it is deeply wrong to continue to extend such provisions.

Furthermore, by denying an in-country right of appeal, the Bill fails to take account of the realities of the appeal process. As my hon. and learned Friend the Member for Holborn and St Pancras has said, most appeals take between six and 12 months to receive a hearing. That means that those people who are pursuing an application on the basis of article 8 are likely to be separated from their families for many months, or even years. A report commissioned by the Office of the Children's Commissioner makes abundantly clear the serious, long-term impact on a child of separation from a parent, which will result from these changes. Separation has been shown to undermine the developmental, behavioural and emotional wellbeing of children, and even in some cases their physical health; some of those effects will probably never be reversed.

The withdrawal of in-country appeals also raises serious questions about access to justice. Removing an individual from the UK before they have the chance for a fair hearing in front of a judge is likely, in practice, to bar many people from exercising their rights and pursuing an appeal. Poor electronic communication, a lack of contacts in the UK to undertake work on an appeal and a lack of legal representation mean that, in practice, exercising appeal rights will be simply impossible. Effectively barring many people from pursuing their legal rights undermines the integrity of our immigration system.

The extension of the principle of limited in-country appeals must be seen as an attack on the legal rights of migrants. It represents a serious risk to vulnerable individuals, will divide families, potentially harms children and imposes serious barriers to justice. This process should be stopped and these provisions should be removed from the Bill.

Gavin Newlands (Paisley and Renfrewshire North) (SNP): It is alarming that we are, yet again, debating provisions that make it harder to access the appeals process when the ink is barely dry on the last Immigration Act. As in previous debates, I must raise the concern that we are now in the position of accelerating through further changes to the appeal process without properly evaluating the impact that the last set of changes have had on the individuals affected by them. In my view, that just serves to highlight that we are developing policy without the appropriate and sufficient evidence base.

Before I discuss clause 31, it is only right that I speak to the changes that were made to the appeal process under the previous Act, as that will provide some insight into what the impact of the clause, if it is accepted, will be. The previous Act drastically reduced the number of appeals available, but this Bill removes them entirely for some people. Following a question that I submitted to the Minister on 9 October, I received a very helpful answer, indicating that from July 2014 to August 2015, 1,700 individuals had been removed under the deport first, appeal later power. In my speech on Second Reading of this Bill, I made the point that we should remember that appeal routes exist for a reason—to correct a wrongful decision—and it would be reasonable to suggest that the Home Office does not currently have a good record in decision making.

In addition, appeal routes can also help to improve governance, as they highlight areas of the Executive that are not operating as effectively as we might hope. However, the deport first, appeal later policy, introduced in the last Immigration Act and accelerated in this Bill, effectively removes—for the majority of applicants—the ability to appeal a decision that has been made on their application to continue to live and work here. Indeed, the answer that I received from the Minister points to the fact that only 23% of those forcibly removed from the UK later appealed that decision. I accept that there might be a number of reasons why someone might not appeal, but we cannot ignore the salient point that it is harder—in some cases, almost impossible—for someone to appeal the decision that led to their removal from the UK.

[Gavin Newlands]

Were we to investigate further, I would expect us to find that the most vulnerable people who have been deported have less chance or opportunity than other people to appeal the decision that has gone against them. Justice quite helpfully expands on this point and suggests that the policy removes people from appropriate justice. Justice expands on some of the factors that may prevent or discourage people from appealing after being removed from the UK. They include: the difficulty of obtaining, translating and submitting evidence, including submitting medical evidence to the courts, particularly in countries without the same quality of infrastructure or services as we have in the UK; difficulties in arranging to give evidence; and the demoralising effect of being removed from the UK. In turn, all these factors make it unpleasant, harder and, in some cases, impossible for someone to access the justice to which they should be entitled. Those are serious points.

It is only right that we should try to gain a greater understanding of the policy before we accept the clause. Yesterday, I submitted a series of questions on the policy's impact, ranging from appeals to cost and so on. Those questions are a good start to reviewing the policy. I request that the impact of deport first, appeal later be researched before going ahead with implementation.

12 noon

The clause will extend the worst aspects of the policy to unparalleled levels. I accept that the Solicitor General sought to reassure the Committee on the treatment of children, but I would like to see that securely on the face of the Bill. Liberty and a range of children's charities highlighted the real prospect that the measure could tear families apart for months while appeal hearings are allocated and decisions are determined. That fear was perfectly articulated by Ilona Pinter from the Children's Society:

"We think the risks for children from this provision are very serious indeed. Essentially, it would see families becoming destitute—they would no longer have accommodation and financial support under asylum support. That obviously brings with it a whole range of risks, from families being street homeless to families having to move around, potentially for short periods of time, to stay in potentially unsafe accommodation. The research broadly, including the Children's Society's research, shows that children who are currently destitute are at a heightened risk of being exploited, as well as at risk of remaining in circumstances where they are facing domestic violence. Obviously, some of the evidence that currently exists from serious case reviews highlights the real child protection risks for children of having no support."—*[Official Report, Immigration Public Bill Committee,* 20 October 2015; c. 72, Q165.]

The clause will also have significant consequences for ensuring the protection of an individual's human rights. It grants the Secretary of State a power to allow the temporary removal of a person refused entry to the UK or required to leave the UK, even if that person has an outstanding appeal based on human rights. The clause therefore potentially engages articles 6, 8 and 13 of the European convention on human rights. I am sure the Solicitor General and Government Members will disagree, but surely the fact that that argument can be made suggests that the Government have got this badly wrong and should pull back. At the very least, they should review the effects of the previous deport first policy before implementing a much wider provision.

Keir Starmer: I am grateful to the Solicitor General for setting out the provisions of clause 31 in detail. The clause is a wide extension of the powers that I accept already exist in relation to a limited class of individuals and will now cover very many people who are appealing their cases. I urge the Government to consider the impact, particularly on children, of separation in these and similar circumstances.

I have already mentioned the report by the Children's Commissioner. I appreciate that the context is slightly different in that usually in those cases the spouse is already abroad, but the report gives powerful testimony about the impact on children of being unable to have any meaningful contact with one of their parents for a prolonged period. I do not think that has been assessed and taken into account in the guidance that has just been mentioned, because the timing probably would not have allowed that, but such separation should be considered and taken into account, and there should be a proper impact assessment of the existing remove first, appeal afterwards provisions.

We can dance around article 8, and we can argue as lawyers about whether or not that article has been breached, but among the most powerful points in the Children's Commissioner's report of a month ago were the human stories of the impact of suddenly depriving a child of one of their parents for a prolonged period. The report contained stories of children who were highly distressed because their father or mother was no longer available to them for contact for a prolonged period. Some of those families came to the launch and gave their evidence.

Sometimes we need to step out of these Committees and step out of our lawyerly, political selves. I am the father of a four-year-old and a seven-year-old. I heard those families describing what it was like trying to get their children to bed—the crying and distress during month after month of separation. In some cases it may well be that article 8 is breached and in some it may not be, but that is highly distressing for the children, and as a father I found it highly distressing to hear their testimony. I thought about what I would feel if I were separated from my children, whom happily I see nearly every day, for just a week or two. We should not lose sight of the idea of being separated for six months or a year because it does not tick the box of crossing a threshold into article 8, or any other legal provision. This measure will have a profound impact on human lives, and we need to approach this debate with that in mind.

The Solicitor General kindly gave us the statistic of a 42% success rate for appeals, which he puts forward as evidence that there is no obvious detriment in appeal after removal, but let us start by focusing on that figure: 42% of those removed won their appeal. So 42% of the families—if a family is involved—who suffered the human distress that I have described, whether or not there was a breach of the law, succeeded on appeal. That is an alarmingly high success rate in those circumstances.

The Solicitor General: The hon. and learned Gentleman is making a proper point about that, but we must be careful not to fall into the trap of assuming that that success rate is always due to failure by the Home Office. It is not. Very often it is due to the applicant's failure to provide evidence that clearly would have helped in a timely way. It is not fair to keep beating the Home Office over the head for the failures of others.

Keir Starmer: I accept that, and I would accept the wider proposition that some cases will succeed on appeal without that necessarily meaning that the decision can be retaken with the same result, but it is still a high success rate compared with other areas of the law. It may well be that information has not been provided in the way that it should have been; equally, it may be bad decision making by the Home Office. I am trying not to overuse the 42% figure, but it is high.

Simon Hoare (North Dorset) (Con): I have an ongoing case involving constituents of mine in which the quality of their immigration solicitor's advice was, frankly, shocking. The hon. Member for Rotherham and I have had a conversation outside this place about this case. It amplifies the point made by my hon. and learned Friend the Solicitor General that a lot of legal advisers see this process as a gravy train: if they can provide slightly dodgy advice that does not get the person through the first time, hey presto, here is another piece of advice, another bill and another instruction to act on. Surely to goodness either the Bar Council or the Law Society should provide better and tighter guidance on quality for those people who are often advising under-resourced and vulnerable people.

Keir Starmer: I recognise some of what the hon. Gentleman has said. As he indicated, where that is a problem, it is for the professional bodies to regulate better or follow up in individual cases, and nothing that I say should stand in the way of that, but I do not want to step outside the human aspect. Ultimately, in cases where that is an issue, it is the individual who is removed who suffers as a result; if children are involved, it is the children who suffer. If an appeal is successful because bad advice was given months or years earlier and something relevant was not put before the decision maker or court, but it has come to light and been put before an appeal court, the impact on the individual who is not at fault should not be lost.

That is one difficulty with the proposed scheme for removing individuals. However, I recognise some of the picture that the hon. Gentleman has painted, and I agree that where professional follow-up can take place, it should as it would help in such cases. It is, however, also a fact that many appeals take a long time. If decision making were of a higher quality and decisions were quicker, a lot of the concern would evaporate, and we would not be debating the need for deport first, appeal later provisions.

I come to the practicability of appealing from abroad. We are familiar with the notion of a hearing in this jurisdiction. In some ways, a hearing is not dissimilar to the exchanges we have across this Committee Room, where physical human beings make submissions and listen to what is said against those submissions. Here, we have you, Mr Owen; in court, we would have a judge. That judge listens to the exchanges, takes into account the evidence and comes to a decision. Anybody who has ever been in any court of any form will know that many cases are determined through those exchanges, with the decision maker making their mind up as the process unfolds. Attention can be drawn to a particular piece of evidence, a point can be rebutted and additional evidence can swiftly be put before the court or the tribunal, if it is necessary to do so. If a judge has questions, they can be dealt with there and then by the parties.

That is how we have been doing things for 200 years —certainly in the criminal context—and it is a highly effective way of resolving differences between the parties. It is a very different experience if someone is appealing from abroad. In the first place, their submissions will probably be made in electronic or hard, written form way before the hearing. There is no prospect of the sorts of exchanges that get to the truth or resolve the critical issues between the parties. Until recently, it has been possible for some individuals to have representation in the proceedings, notwithstanding the fact that they are abroad. I have a question for the Solicitor General: if the proposed residence test for legal aid comes into force, will that effectively mean that, for this large, extended category of individuals, the prospect of any representation is gone once they are removed, unless they have private money? That is a serious consideration. That proposal would fundamentally change how the scheme operates, when taken with the proposed change before us.

The Solicitor General: I can assist the hon. and learned Gentleman there. The position on legal aid is not altered by an individual having to appeal from overseas. Legal aid is not available for article 8 appeals before the tribunal, regardless of whether the appeal is lodged from overseas or within the UK. I hear the point he makes, but the issue he raises is immaterial to the question of legal aid. He also asked about residence, and I will see whether I can get a specific response on that.

Keir Starmer: I am grateful. I realise that may not be easy, so if the Solicitor General writes to me or the Committee, I will be grateful. The question was: what impact, if any, will the proposed resident test for legal aid have on those exercising their right to appeal from abroad? I would be happy to receive the answer by way of a letter.

There is, however, a more fundamental point here. There is a very real difference between a hearing at which the individuals are present and able to deliberate and to make submissions in the way I indicated, and one where the individuals are abroad. So my next question is: what practical steps will be taken to ensure that the procedure is as effective as it can be? To break that down: what steps are being taken to ensure that evidence can be made available by way of video, using the technologies available? As I understand it—the Solicitor General will correct me if I am wrong—an individual's ability to use technical means to appear virtually, as it were, in the courtroom depends on the courtroom being set up to receive such evidence, and not many are. It is for the individual to finance that from wherever they have been removed to and I do not think that the procedural rules for such proceedings have been amended sufficiently to allow that to happen with any great ease or regularity.

Accepting those very real differences between a live appeal and an appeal from abroad, what steps are being taken to ensure the best possible access and ability to participate by those who have been removed? That would include steps to ensure that there is an exchange of submissions, rather than just a set of submissions that are put in in the first place. In other words, how does the appellant abroad deal with the points that the tribunal wants to make as the tribunal begins to make up its mind?

12.15 pm

Paul Blomfield: The debate focuses on an important principle, which we need to consider fully. The main drift of the Bill is aimed at illegal migrants, but legal migrants will be the group mainly affected by the removal of appeal rights. We received a lot of evidence on the issue. The Law Society said that it felt that it would be

"an unjustifiable incursion into Article 8 rights."

Although the Immigration Act 2014 introduced the principle of deport now, appeal later, that was on deportation cases where people had appealed serious crimes. The Court of Appeal has determined that that regime was lawful. There are some caveats in the case of Kiarie, cited by the Solicitor General, including the caveat on the principle of real risk of serious irreversible harm. The Court of Appeal said

"the real risk of serious irreversible harm is not the overarching test".

Nevertheless, that regime was determined as lawful under the 2014 Act, but this provision extends that regime to all migrants making human rights appeals, regardless of any illegality or criminality and whether it has been established or even suspected. That is a fairly fundamental step for this Parliament to take. The Law Society made the point, very strongly, in its evidence:

"Restrictions on Article 8 rights which may be deemed justifiable in one context (for example, national security) cannot be extended to other contexts without further justification."

We have not really received that justification. The Government have not made the case for the additional rights.

Using the test of serious irreversible harm or a breach of human rights as the only exception to an out-of-country appeal sets an extraordinarily high bar for vulnerable appellants seeking to contest removal from the UK. I come back to the point about the 42% success rate, which we discussed. We can debate where the responsibility lies. My hon. and learned Friend the Member for Holborn and St Pancras made it clear that we are not suggesting that this is all the fault of the Home Office. It may be the result of incomplete documentation or down to lawyers, as the Solicitor General suggested. Nevertheless, a substantial number of people are successful. The effect of this provision is that people who have committed no offence, who would in fact be granted the right to stay in the UK, will be forced to leave for an indeterminate period. In some cases, that would expose them to significant risks and would mean separation from their families. We are not talking about short periods. I represent the multicultural heart of Sheffield, where we have people who owe their origins to 120 countries and speak 160 different languages, so I have a fair amount of casework in this area.

We know that immigration appeals are currently taking about six months; a year or more is not unusual. There is no significant indication that that will improve. With such delays, out-of-country appeals would cause real disruption to family life, with potential longer-term consequences, for people who will, in significant numbers, ultimately be given the right to remain. Apart from anything else, as the Law Society pointed out, if the current appeal success rate is maintained, this could be a very expensive measure for the Government, and the taxpayer, because successful appellants could seek compensation over the enforced separation from their families.

In addition, the provisions could have a perverse impact on UK nationals. The Law Society again pointed out that, ironically, the spouse of a national of an EEA member, except the UK, would retain a full in-country right of appeal, whereas the spouse of a UK national would have to leave the country. The *Daily Mail* has clearly not picked up on that one. There are some perverse impacts, which I am sure the Solicitor General will want to comment on.

I also want to touch on the specific area of trafficking in relation to labour exploitation, which we debated earlier. We received powerful evidence from the charity, the Anti-trafficking and Labour Exploitation Unit. It made the point of how difficult it would be for many of the clients it supports to challenge a negative human rights decision if the client was overseas. It said in written evidence:

"Our client group would be unlikely to have the resources or familiarity with modern technology to allow us to take instructions by skype or keep in regular contact with them. As many clients who fall into exploitation have little or no education they could not be expected to maintain any written communication with us or to draft any documents needed for an appeal themselves. Victims of trafficking are often submissive, frightened of authority figures and find it hard to establish relationships of trust."

It goes on to say:

"Face to face relationships are essential when working with individuals who have been subject to abuse and exploitation."

Across the House, Members are concerned about those individuals. That was the background to the Modern Slavery Act 2015 in which Members of the House across party were involved. That is a serious consideration we should take into account.

I draw attention to the point made by my hon. and learned Friend the Member for Holborn and St Pancras about the position of children. We again received powerful evidence from the Children's Society, which made the point that even for those who are able to bring an appeal from abroad, notwithstanding all the difficulties and challenges, children will be subject to damaging and unnecessary disruption in their lives during the process. I am sure the Solicitor General will come back on how this will work in practice.

The Children's Society expressed real concern that the Government have not protected unaccompanied children in this provision. In relation to unaccompanied children, we talked earlier about the age range. The Children's Society made the point that

"This provision could see more cases involving unaccompanied children or young people over 18 who claimed asylum alone as children, being certified for an out-of-country appeal."

Its next point relates to the age twilight zone that the Solicitor General referred to:

"According to Home Office statistics, of the young people who applied for asylum as unaccompanied asylum-seeking children and received an initial decision in 2014, 85 young people were refused and their claim was certified. 67 of those were over 18 at the time of the decision while 18 were minors at the time of the decision."

Sarah Champion: We know from the extensive debate about age that we had in the Modern Slavery Bill Committee that some of those young people do not know how old they are, so there are all manner of loopholes that they can fall through.

Paul Blomfield: My hon. Friend makes an important point. We are talking about young people who have been through, in many cases, deeply disturbing experiences, and it is not surprising that they might not know their age. They have come from countries such as Sudan, which was one of the countries mentioned in the Home Office statistics that I referred to a moment ago. The Children's Society states that the provisions in the Bill

"would mean that more children and young people would not be able to appeal their claim in the UK".

It makes the point:

"Without a multi-agency best interests determination process currently in place to assess the full impact on welfare, children could be returned to countries and circumstances where they may be at risk of serious harm including sexual abuse, neglect, homelessness, violence, forced marriage"

or

"forced recruitment as child soldiers".

We are talking about very serious circumstances, and I urge the Government to give those points the attention that they deserve.

The Solicitor General: I am extremely grateful to all hon. Members for having made the debate a considered and wide-ranging one, which is what the topic deserves. First, I say to all hon. Members who—I make no criticism—pray in aid the human element that of course they are right. We all stand here as human beings and some of us, including me, as parents. It would take a heart of stone not to recognise that, in the myriad different cases, we are dealing with people and their lives.

That is why the role of decision makers, and the discretion that they have, is so important in assessing the evidence and coming to a reasonable conclusion. We call that due process. It is something that we treasure as part of our rule of law, and it is something of which we are rightly proud. I do not believe that our proposal does anything to undermine those important principles, and I will explain why. I will not repeat everything that has been said, but I will encapsulate it in the following way. The Court of Appeal has looked at the concept of out-of-country appeals and reminded us of our duties under the European convention, and I am satisfied that the procedures that will be used will guarantee the basic and fundamental rights of fairness and due process that we are so proud of.

The hon. Member for Rotherham said that she was not a lawyer. I think we are all lawyers in this place. This is the High Court of Parliament, and we are the law makers, so she is a lawyer and I am glad to welcome her into the fold. As somebody with whom I have worked well in the past on other Bills, I know that she comes to this with an entirely appropriate frame of mind and a genuine passion for doing the right thing not only by her constituents, but by people who are either affected directly by the legislation or part of our wider community, who want to see our enforcement system working well. There is a huge public interest, which we must not forget when we deal with these matters.

12.30 pm

The hon. Lady made a powerful case by referring to a constituent of hers, and I listened with great care to what she said. I must gently tell her that the particular case that she cites actually relates to a provision that the Labour Government passed in 2003. Said provision relates to when a case has been determined to be clearly unfounded, thus allowing for deportation. The certification that was made in her case study related to a power that has been in existence for the best part of 15 years. All decisions to certify a claim so that an appeal is out of country can of course be challenged by way of judicial review. I have already said that it is important that we remember that there is that administrative check on the process, during which judges can look not at the merits of the decision, but at whether it was conducted according to the standards with which many of us will be familiar.

I will now move on to those standards and the issues raised by the hon. Member for Paisley and Renfrewshire North, who expressed concerns about the quality of the decision-making process in the Home Office.

Mrs Emma Lewell-Buck (South Shields) (Lab): Sorry for backtracking, but I am a little confused by the Minister's reference to judicial review. Many families will not have the money to pay for such reviews, so who would fund them?

The Solicitor General: I am grateful to the hon. Lady. I will get full clarification about the funding of applications in a moment and will come back to her.

If I may develop my point about the quality of decision making, several improvements have been made since 2010 in order to simplify policy and guidance. The introduction of a number of quality audit processes allows for the ongoing refinement of operating processes, which strengthens and enhances decision-making quality. The accumulation of those measures means that we now have tools and processes that help caseworkers to make more efficient, effective and fairer decisions in line with the relevant immigration rules and Home Office policy and guidance. I accept that there is still a way to go, but progress is being made.

Since 2010, UK Visas and Immigration has put in place measures to ensure the continuous review of its operations, so that proper feedback mechanisms can further improve quality and we ensure we make the right decision first time as often as possible. For example, UKVI has placed a focus on decision quality at the centre of caseworking objectives, introducing a quality objective in all caseworker objectives within performance appraisals. When it comes to ranking performance, the marking of quality assessment is an essential part of that process. Such measures are being put front and centre, which helps to answer the genuine queries and concerns of constituents, including mine.

The hon. Member for Paisley and Renfrewshire North alluded to that. I am grateful to him for asking a number of parliamentary questions—in recent hours—about statistics that he regards as important indicators of the success or otherwise of measures that have been introduced in recent years. I note that some of the questions refer both to the power relating to EEA nationals and to section 94B. I am not making a criticism, but he asks a comprehensive range of questions, and we are today purely dealing with section 94B and not EEA nationals. Replies will be provided as soon as possible, but we must take care in reading across data from foreign national offender cases to all human rights

[The Solicitor General]

cases. I think he would accept that. The case law clearly states that public interest is stronger when it comes to criminal cases, although there is of course a clear and strong public interest in the removal of any individual who has no right to be in the UK. I promise him that he will get answers to his questions.

The hon. Gentleman made the point about the best interests of children, which he wants in the Bill. May I give him some comfort? We already have primary legislation—section 55 of the Borders, Citizenship and Immigration Act 2009—that puts children's best interests into print and are the guiding principles for decision makers when it comes to cases involving children. That is a sufficient safeguard, together with the guidance that we have debated and discussed, which will address the legitimate issues that he raises.

The hon. Gentleman asked about the difficulty of appealing from abroad. I accept, as did the Court of Appeal, that an out-of-country appeal will be, in many cases, less advantageous to an appellant than an in-country appeal. As I have said before, article 8 does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous one. It requires access to a procedure that meets the essential requirements of effectiveness and fairness. I pray in aid the statistics that the Court used and that I mentioned this morning to give Members reassurance that we are in a situation in which there is not an obvious and clear detriment to appellants, bearing in mind the entry clearance statistics, which always involve out-of-UK appeals.

Paul Blomfield: I want to seek to confirm what seemed to be an extraordinary acknowledgment from the Solicitor General that out-of-country appeals would be prejudicial to the opportunity for an appellant to make as good a case as if it were in this country. That is a fairly significant step to take, as we said in relation to people who are likely in the long term to be successful, who have committed no crime and have proper rights. So is he acknowledging that this is prejudicial to their interests?

The Solicitor General: The words I used are the words of the Court of Appeal—not as advantageous—but that does not mean prejudicial. The points that the hon. Gentleman raises are a summary of the points raised by the hon. and learned Member for Holborn and St Pancras about the process itself, which I will try to help with in due course, but there is a difference. If the Court had come to the conclusion that there was a clear gap—an injustice gap—for individuals, I am sure the decision of the Court of Appeal would not have supported the submissions made by Lord Keen, the Advocate General.

On the point raised by the hon. Member for South Shields, I will write to her and set out the position in full. The point made by the hon. Member for Paisley and Renfrewshire North about going further and using the statute to exclude children from the scope of the power is, with respect, an unnecessary step to take for the reasons that I hope I have clearly outlined about the necessary protection that children enjoy under section 55 and the guidance. I do not think that going a stage further would serve any particular purpose, however well intentioned.

The hon. and learned Member for Holborn and St Pancras raised important points. I want to try to do justice to them in turn. First, I will deal with the issue he raised about the important report by the Children's Commissioner. I remind the Committee that the power does not represent a blanket approach. It allows caseworkers to individually consider the impact on individual children—that human element that he prayed in aid so powerfully—and the range of possible effects that a decision to certify might have.

Keir Starmer: I wonder whether that is right. As I understand it, decision makers take into account whether there is serious and irreversible harm, not the distress and anxiety that I was talking about. The Children's Commissioner's report gives examples of children wetting the bed, being highly distressed for weeks on end, and so on, which may not reach the test of serious and irreversible harm—I do not know. People will argue differently about that, but it is highly distressing, and it is highly distressing to hear about it. Distress will probably be taken into account, but it certainly will not enable the decision makers lawfully to determine against certification.

The Solicitor General: I caution the hon. and learned Gentleman against using the term "test" about serious, irreversible harm. We must not forget that the overall test is the article 8 test. We are talking about the guidance. Of course, there will be input from the family, and there might be input from the school and social workers. Those people are best placed to provide evidence about what the impact will be.

It is a reality in our society that many parents and children have to live separately temporarily. Many parents work away—many in this room are in that position—and many are on active service and have to spend long periods of six months or more away from their children. I do not minimise—I really do not, from my own experience—how that affects the family dynamic and the effect that that has on children, but we have to be careful not to single out that category of individuals and say their experiences are sui generis, unique or wholly different from those of other families in those circumstances.

Family separation is sometimes in the best interests of the children. I can think of examples—although not involving examinations, because they take place when children are older—involving children who need a stable term in school, perhaps because they have particular special needs. We should be proud that our country leads the world in special needs provision. I can think of examples involving children who can be supported more effectively in special needs education in the UK. I hope that gives at least some insight into the Government's thinking on the nuances that will appear in the cases.

The hon. and learned Gentleman made a point about the process itself. He said he is concerned about the fact that the process and procedure of out-of-country appeals are different from that of the hearings that he and I are familiar with. Technology is increasingly used in our courtrooms and, as he knows, the use of virtual technology is often in the best interests of children and vulnerable witnesses, in particular. We are exhorted, and indeed mandated, through statute and practice direction to use such mechanisms increasingly to move away from the

effects that what I would call traditional court proceedings can have on individuals. His point is important, but I want to put it in context.

Keir Starmer: I do not want to be misunderstood. I championed the use of digital working in our courts. There was a very good pilot in a Birmingham court for criminal cases. However, it took a lot of resource and very good modern technology to make virtual hearings as close as humanly possible to actual hearings. Is the Solicitor General able to say whether steps will be taken for similar arrangements in these cases?

The Solicitor General: I am able to give the hon. and learned Gentleman this assurance. If a person appealing from overseas submits that oral evidence is needed, an application can be made to the tribunal for evidence to be given via video link, Skype or telephone. Of course, we have specialist immigration judges who are best placed to make an informed decision about whether the quality of the evidence will be enhanced if it is given in that way. That is similar to the tests that are applied up and down the country every day, increasingly as a matter of course, when it comes to the use of TV links, for example.

12.45 pm

On the hon. and learned Gentleman's points about the proceedings themselves, evidence about the foreign prisoner appeals is still developing. I am not sure whether we should draw too many read-overs from it because at the moment the control sample is quite small. I do not think that so far there is any evidence in any of the determinations relating to the 2014 provisions to suggest that appellants who wished to give oral evidence were prevented from so doing or, more importantly, that the parties, their representatives or indeed the court concerned raised any issues as to the fairness of the hearing, or the issue he raised about the potential disadvantage of the individual being present. I accept that these are important points to raise, but I do not want the Committee to end up placing undue weight on them.

The hon. and learned Gentleman asked specifically about the residence test. I have given a general answer about article 8 legal aid, which is not dependent on in-country or out-of-country appeals. In any event, there is the exceptional funding category. That is available when failure to provide legal aid would breach the applicant's rights under the ECHR or EU law, or, in the light of the risk of a breach, it would be appropriate to provide legal aid. That would apply wherever the individual happened to be sited. The issue he raised is a proper one. It is not quite a red herring, but different issues apply anyway to that category. I have made it clear that exceptional funding arrangements apply to applications overseas.

The hon. Member for Sheffield Central, in his inimitable and informed way, raised concerns about the process and I am grateful to him for his input as chair of the all-party group on migration. On his important point about the potential effect on people who have been here lawfully, there is a due process, which will determine whether that person, who until that point had been here lawfully, no longer had that status. We are dealing with people who, after due process, are now determined to be here unlawfully. The point may sound facile, but it is important and I ask him to bear it in mind when thinking about a potential blurring of the lines. I do not think there is a blurring of the lines. Whether someone is here lawfully or unlawfully will be clear after that due process.

Parliament has made clear the weight that should be afforded to the public interest in article 8 decisions. It is part of a proportionality analysis that decision makers must apply when assessing human rights claims. When deciding whether to certify, all the facts and circumstances will be weighed carefully. There is a public interest in maintaining immigration controls, which forms part of that analysis.

The public interest in making sure we have a system in which everyone can enjoy confidence and due process is at the heart of considerations means that these proposals represent a proper step forward and a guarantee of those fundamental human rights that we all cherish so much.

Question put, That the clause stand part of the Bill.

The Committee divided: Ayes 9, Noes 7.

Division No. 23]

AYES

Brokenshire, rh James	Hoare, Simon
Buckland, Robert	Smith, Chloe
Davies, Mims	Tolhurst, Kelly
Elphicke, Charlie	Whittaker, Craig
Harris, Rebecca	

NOES

Blomfield, Paul	McLaughlin, Anne
Champion, Sarah	Newlands, Gavin
Hayman, Sue	Starmer, Keir
Lewell-Buck, Mrs Emma	

Question accordingly agreed to.

Clause 31 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned. —*(Charlie Elphicke.)*

12.50 pm

Adjourned till this day at Two o'clock.