PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

IMMIGRATION BILL

Sixth Sitting

Tuesday 5 November 2013

(Afternoon)

CONTENTS

Clauses 3 to 8 agreed to.
Schedule 2 agreed to.
Clauses 9 to 14 agreed to, one with amendments.
Adjourned till Thursday 7 November at half-past Eleven o'clock.
Written evidence reported to the House.

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Saturday 9 November 2013

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: †Sir Roger Gale, Katy Clark

Bain, Mr William *(Glasgow North East)* (Lab)
Baker, Norman *(Minister for Crime Prevention)*
Dowd, Jim *(Lewisham West and Penge)* (Lab)
† Doyle-Price, Jackie *(Thurrock)* (Con)
† Hanson, Mr David *(Delyn)* (Lab)
† Harper, Mr Mark *(Minister for Immigration)*
† Hillier, Meg *(Hackney South and Shoreditch)* (Lab/Co-op)
† Huppert, Dr Julian *(Cambridge)* (LD)
† Jones, Helen *(Warrington North)* (Lab)
† Kirby, Simon *(Brighton, Kemptown)* (Con)
† McFadden, Mr Pat *(Wolverhampton South East)* (Lab)
† Mills, Nigel *(Amber Valley)* (Con)
† Milton, Anne *(Lord Commissioner of Her Majesty's Treasury)*
† Opperman, Guy *(Hexham)* (Con)
Paisley, Ian *(North Antrim)* (DUP)
† Patel, Priti *(Witham)* (Con)
† Robertson, John *(Glasgow North West)* (Lab)
† Smith, Henry *(Crawley)* (Con)
† Soames, Nicholas *(Mid Sussex)* (Con)
Syms, Mr Robert *(Poole)* (Con)
† Wilson, Phil *(Sedgefield)* (Lab)

John-Paul Flaherty, Matthew Hamlyn, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 5 November 2013

(Afternoon)

[Sir Roger Gale *in the Chair*]

Immigration Bill

Clause 3

Immigration bail: repeat applications and effect of removal directions

Amendment proposed (this day): 32, in clause 3, page 3, leave out paragraph (3).—*(Dr Huppert.)*

2 pm

Question again proposed, That the amendment be made.

The Chair: I remind the Committee that with this we are discussing amendment 33, in clause 3, page 3, leave out paragraph (6).

The Minister for Immigration (Mr Mark Harper): I should say—at least for the benefit of the Committee, if no one else—that my hon. Friend the Minister for Crime Prevention, who was just about to leap to his feet to reply to the debate on the amendment when you were forced, Sir Roger, to call order by the programme motion, is attending a very important constituency engagement in Lewes this afternoon. It is something to do with bonfires and the burning of various dignitaries from the past, which I understand is effectively a three-line Whip for Members of Parliament for Lewes, so I will continue his response. I thought the Committee might like to know why there has been a last-minute substitution.

I anticipated that I would have had to answer the debate, so I listened carefully to what the hon. Member for Warrington North said. The amendment, which she moved, seeks to remove entirely the further provision—*[Interruption.]*

The Chair: Order. Just to set the record straight, it was the hon. Member for Cambridge who moved the amendment.

Mr Harper: Thank you, Sir Roger; you are absolutely right. I hope the hon. Member for Warrington North will forgive me. I had not realised that ascribing to her an amendment tabled by my hon. Friend the Member for Cambridge would be so difficult to cope with.

Amendments 32 and 33 seek to remove entirely the further provision that where a person had made an unsuccessful bail application and another application was made within 28 days, the tribunal must dismiss it without a further hearing. We touched on the matter in the debate on an earlier amendment, so I will not go into it at length. At the moment, as my hon. Friend the Member for Lewes said, there is no limit on the number of times that a person may apply to the first-tier tribunal for bail. He provided some examples, which I will not repeat, of abusive repeat applications. Nothing prevents a detainee who has been refused bail from reapplying the following day on exactly the same grounds, and at the moment the tribunal is required to decide every such application at an oral hearing. The Government believe that to be inefficient and costly. A safeguard already exists, however, because the requirement to decide a repeat bail application on the papers will apply only when there has been no material change of circumstances. If the tribunal concludes that there have been material changes, it can proceed to a hearing.

The tribunal procedure committee has consulted on placing a time limit on repeat bail applications. It is seeking to allow a repeat bail application to be decided on the papers if it is made within 28 days and there is no change in circumstances. The committee's consultation has now closed and we are awaiting its decision. It is clear that the issue raised by the Bill is also of concern to those who have to deal with the matter. My hon. Friend the Member for Cambridge might ask rhetorically, "Well in that case, why don't we just let the tribunal procedure committee get on with it?" The fact is that it may decide to make the change—although it has not set that out—but it would be open for it to change it back in future. The Government think the change is wise and therefore want it in primary legislation.

One or two of the concerns came up that I do not think my hon. Friend the Member for Lewes was able to cover in the debate on the previous amendment. Just to be clear, if there were procedural flaws in a previous bail hearing and evidence of that came to light—as mentioned by my hon. Friend the Member for Cambridge—it would be open to the tribunal to conclude that that was a material change in circumstances and therefore to allow a full hearing on that application. In the type of case that my hon. Friend suggested, it would be open to the detainee to bring forward evidence that there had been a procedural problem and to present it to the tribunal. The tribunal would obviously assess that on the facts, but it would be open to the tribunal to conclude that there had been a flaw that amounted to a change in circumstances and to allow a full hearing, rather than making a decision on the papers.

I will now answer fully the points made by the hon. Member for Warrington North in the debate on the previous amendment. Information pertaining to the fact that someone was pregnant or information about a change in their health circumstances would indeed be a material change of circumstances that they could draw to the attention of the tribunal. Although the hon. Lady said there would be difficulties in producing such information in terms of papers, I do not see an enormous barrier to the person producing a letter or some form of evidence from a medical professional.

Of course, people held in immigration detention have full access to medical professionals, in a way that is broadly analogous to the medical support they get in the community, so it would be open to them to produce that information for a tribunal. They would have to produce only enough evidence to persuade a tribunal that there had been a material change in circumstances for the tribunal to conclude that they would get a full hearing.

I have addressed the issues raised by my hon. Friend the Member for Cambridge and the hon. Member for Warrington North. I therefore urge my hon. Friend to withdraw his amendment.

Dr Julian Huppert (Cambridge) (LD): I thank the Minster for his comments and for clarifying that any procedural error would count as a material change in circumstance. That is not how I would have interpreted the legislation; I would have assumed that the circumstances were the same. However, if that is the intention—

Mr Harper: Just to be clear, that could count, but it would be up to the tribunal to make a judgment. It might judge that the procedural flaw made no difference to the decision and was very minor, but it would be open to it to make a judgment, although not necessarily in every case.

Dr Huppert: I thank the Minister for that clarification; I was not intending to put words into his mouth. The fact that a procedural error could count as a material change does change the tenor of this debate and resolves the concerns I had, so I am happy to beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 3 ordered to stand part of the Bill.

Clause 4 ordered to stand part of the Bill.

Clause 5

IDENTIFYING PERSONS LIABLE TO DETENTION

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

Helen Jones (Warrington North) (Lab): Let me say at the start of this debate that we are not opposed to the use of biometric information or its provision by various people. Indeed, many of the issues that the Government say they wish to tackle in the Bill—such as the use of the NHS by those not entitled to free treatment or the need for measures to identify people who should not be in this country—could have been much more easily dealt with if they had not cancelled our proposals for ID cards.

However, I have some questions about how the clause will work. If the Committee will bear with me, those questions go back to the much amended Immigration Act 1971. Paragraph 16 of schedule 2 to the 1971 Act provides for a person to be

"detained under the authority of an immigration officer"

if they are

"required to submit to examination under paragraph 2"—

that is the paragraph that deals with people arriving in the country. Paragraph 16 also provides for the detention of people who are required to submit to a further examination, and where

"there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14".

Those paragraphs—this is the edited version, Sir Roger, so you can see why immigration lawyers make a very good living—cover people who have been refused leave to enter and cases where directions for a removal under paragraphs 8 and 9 might be given, but have not been.

Those paragraphs provide for the Home Secretary to give directions for owners or agents of ships and aircraft to remove that person, and to place a person with directions for removal in a place under the authority of an immigration officer, and so on. I recommend this schedule to anyone who finds it difficult to sleep at night. Paragraph 18 of schedule 2 to the 1971 Act gives the right to detain anyone subject to the provisions if they are not on a ship or an aircraft in such places as the Secretary of State may direct, and gives immigration officers, constables and prison officers the power to take the necessary steps for identifying him or her.

If the Committee is with me so far, the question is: if the existing provisions already cover such a wide range of people in different circumstances and if they can already be detained by an immigration officer under those provisions, who are the people whom the Government think—by adding the words "or liable to be detained"—are not covered? The provision in current law seem to covers that, in cases where there are reasonable grounds for believing a person is liable to be removed or has been refused leave to enter, and so on.

If I have read the clause correctly—perhaps the Minister will tell me that I have not—the Government seem to be introducing an unnecessary provision to enact something that already exists in law. Will the Minister clarify the circumstances the clause is expected to cover that are not already covered by legislation? In other words, will he specify who will be caught by the new provision who cannot be dealt with effectively under the law as it stands? The Opposition are concerned about dealing with people with no right to enter or to be in the UK, but we also want to ensure that innocent people are not picked up as "liable to be detained", before we then find that we have the wrong person. I do not think that is the Minister's intention, but I would be grateful if he clarified that point.

If someone is detained and there is a need to verify their identity, that is perfectly reasonable. The law as it stands allows for people to be detained and to submit to an examination when there are reasonable grounds for believing that they are someone in respect of whom directions may be given under certain paragraphs in the 1971 Act. Interestingly—perhaps not "interestingly" really, but there it is—the word used in that Act is "may," not "have," so there is already room for the detention of people suspected of being in the country illegally.

I hope the Minister can allay the fear that suspicion might fall on people who are perfectly innocent, and that he can tell me exactly whom the provision is intended to cover who is not covered by the law as it stands.

John Robertson (Glasgow North West) (Lab): May I ask the Minister for some clarification on a couple of issues? A constituent has written to me on several occasions because he feels he has been badly treated by being stopped going through customs and immigration. Will the Minister give some detail on why somebody would be stopped under such circumstances and therefore detained, even for a short space of time, as was the case for my constituent? My other observation is that the provision is so complicated that it strikes me that it could be there to be abused and therefore used for some form of victimisation. I would be interested to hear the Minister's response.

Mr Harper: The hon. Member for Warrington North betrayed her fascination with this subject when she said that studying the rules would send someone to sleep and then admitted to having found the whole thing very interesting—we will keep that to ourselves, Sir Roger, and not share it more widely.

Helen Jones: The Minister should remember that I have recently been dealing with local government finance, after which most things sound interesting.

Mr Harper: Now that the hon. Lady has made that clear, I can see why she finds this a much more fascinating subject. If she has studied local government finance—she must be one of only three individuals on the planet who clearly understand it—all becomes clear.

The hon. Lady asked about the gap we think we have identified and that we want to plug by making the change in the clause. She is absolutely right: where immigration officers have information that leads them to suspect that someone they have encountered might be an illegal immigrant, but where they also have doubts about that person's identity, they can currently check the person's fingerprints—we are talking only about checking their fingerprints. However, immigration officers can do so only with that person's consent or following their arrest.

The hon. Lady is quite right that if an immigration officer arrests somebody, they are entitled to take and check their fingerprints. At the moment, the problem for an immigration officer is that, faced with someone they do not want to arrest but whose information they want to check—either to ascertain that they are that person or to check the information suggesting that they might be an illegal immigrant—that officer would have to either let the person go if they did not consent, or arrest them. We want to ensure that the immigration officer would be able to check the information and the fingerprints to ascertain whether or not the person was who they were looking to take. That is the gap. It is admittedly quite a narrow gap—the powers are already quite broad—but it is one we are trying to plug.

2.15 pm

Perhaps I can suggest to the hon. Member for Glasgow North West that if his constituent is frequently stopped at the border, he should write to me with the details and I will make some inquiries. I have had cases raised with me before where we have discovered on investigation that some erroneous information is held about the constituent or that they share some information—for example, name or date of birth—with someone who is of interest to the authorities. If the hon. Gentleman's constituent is frequently being bothered and is not someone who should be, we might be able to take steps to sort that out. If he writes to me with the details, I will make some inquiries. I hope that will be of benefit.

I hope I have explained the reason for the change from "detained" to "liable to be detained". It does not force the immigration officer to make the arrest and detain someone to make the check. It is not a massive change, but it is a helpful step to plug a gap. That is the reason for the clause. I hope that my explanation satisfies the hon. Member for Warrington North.

Question put and agreed to.

Clause 5 accordingly ordered to stand part of the Bill.

Clause 6

PROVISION OF BIOMETRIC INFORMATION WITH CITIZENSHIP APPLICATIONS

Dr Huppert: I beg to move amendment 34, in clause 6, page 4, line 36, at end insert—

'(1ZA) Subsection 1(bza) does not apply to persons who were—

(a) born before 1 January 1983 outside the United Kingdom to a British mother; or

(b) born before 1 July 2006 outside the United Kingdom to a British father who was not married to their mother.'.

We are into the realm of details, albeit details that matter profoundly to a number of people. The amendment deals with applications for citizenship by two groups of people who have been discriminated against for some considerable time. The first set consists of those who were born outside the United Kingdom to a British mother before 1 January 1983, when the 1981 immigration changes came into force. These people are not automatically entitled to British citizenship. There is a process whereby they could register when they were under 18, but there were some complexities around that and a number of them found that deeply frustrating.

The second set consists of those who were born before 1 July 2006 outside the United Kingdom to a British father who was not married to their mother. The issue comes down to the fact that the British Nationality Act 1981 dealt only with "legitimate children"—something that now sounds very archaic indeed. The position of the mother and child is clear, but the 1981 Act used to read:

"For the purposes of this Act…the relationship of father and child shall be taken to exist only between a man and any legitimate child born to him".

That was the wording of the legislation passed only 30 years ago, and it has caused a number of problems to unmarried British fathers, in that their British citizenship was not passed on to their child.

That was corrected by the Nationality, Immigration and Asylum Act 2002—one of the things that the previous Government did with which I totally agree. *[Interruption.]* That may come as a shock to the hon. Member for Hackney South and Shoreditch, but there are a number of such things. The previous Government changed the language to include

"the husband at the time of the child's birth of the woman who gives birth to the child",

those affected by virtue of certain provisions in the Human Fertilisation and Embryology Act 1990, and

"any person who satisfies prescribed requirements as to proof of paternity."

That is a sensible way to deal with the issue. If there is no marriage, there would be a need to prove who the father is. I have no problem with that. That Act was passed in 2002. It took four years before the regulations came out in 2006, but they did come out, which has meant that since 2006 we have had a much fairer system. However, that does not solve the problem for people born before 1 July 2006 to a British father who was not married to their mother.

I am sure we would all want to see that sort of discrimination ended. I and others have been concerned about this issue for some time; we now have an opportunity

to resolve it by changing the sort of information people would have to provide. It would be cleaner and neater to allow them to have British citizenship if they apply, subject to suitable constraints. Unfortunately that does not quite fall within the scope of this Bill, so we will look at the biometric requirements they have to have. In the case of people born before 1983 to a British mother overseas, although there are some routes, they cause problems. People have to go through a registration process, and citizenship is not necessarily granted. Let me quote one person who has been involved in this:

"I have lived in the UK for 20 years on a right of abode through my British born mother. I resent the fact that I have to pay £874 (which I can't afford) for citizenship when my cousins can just go down to the British high commission in Toronto and apply for a British passport through their father (my uncle). This law is just downright sexist especially in this day and age!"

That is right: we should remedy this historic issue. There is a concern about retrospectively imposing citizenship on people who do not have it. I do not suggest that we should force people to acquire it, but we should allow them to do so.

The issue of those born before 1 July 2006 has been raised on a number of occasions. I raised it a couple of years ago with the Minister's predecessor, the right hon. Member for Ashford (Damian Green), who has now changed his ministerial role. He described it as an

"odd hangover from previous legislation",

which is a very good description. He accepted that changes could be made, but said that these

"would have to be made through primary legislation and there is no appropriate vehicle before the House at the moment".—[*Official Report*, 9 May 2011; Vol. 527, c. 898-99.]

I have raised this issue on a number of other occasions and the Minister has been helpful in some regards. I have a helpful letter, which he sent me last month, in which he says:

"I agree that the position of children born before 2006 to British fathers who were not married to their mothers is an anomaly that deserves to be addressed".

I thank him very much for comment, which will make a large difference to the people who are caught up in this issue. The Minister says that

"this is a discrete issue affecting a clearly defined group and it therefore seems to me suitable for a Private Member's Bill".

I hope the Minister can confirm that such a Bill, if an hon. Member were to bring it forward, would have the full support of the Government to make sure it could pass—this was an argument made by the right hon. Member for Ashford in 2009, when the issue was debated in relation to another piece of legislation. I hope the Government will correct both anomalies. However, if they cannot, they should at least correct the more recent anomaly, because we should not have a system that requires people to go through hoops merely because we used to have poorly dated legislation that made assumptions about the structures of people's families.

The Minister has been very helpful on this issue. I hope he can go that final stage and resolve the problem, which would hold out a lot of hope for many people who have been caught up in it and feel deeply discriminated against, with very good reason. The Minister might also be able to look at the issue of people who end up being stateless because the relevant provisions do not apply to them, because of a mismatch between our rules and those of other countries. I thank the Minister for what he has done so far on this issue; if he could just take those last few steps, I and many other people would be deeply grateful.

Meg Hillier (Hackney South and Shoreditch) (Lab/Co-op): In the spirit of cross-party co-operation, I support the hon. Gentleman's amendment because I, too, have constituents who are caught in this trap. They have no idea, until they suddenly have to apply for a passport, that they cannot just get one as of right. There are old-fashioned anomalies in the law and if there is an opportunity in the Bill to redress the balance and even solve the problem in some cases, then I urge the Minister to do all he can to do that. He would certainly have my support—I cannot speak for those on my Front Bench, but I hope that they, too, would be sympathetic.

John Robertson: Clause 6(3) proposes that photographs should be kept. There are a number of people in this country who do not have passports, and the clause proposes that a person's photograph should be kept until they have a UK passport and they are a British citizen. How do the Government propose to do this? Are they going to start having a catalogue of photographs covering everybody who enters or does not enter the country, or who is in the country at the time? Can the Minister do that? I wonder, at a time when the Home Office is kind of stretched, how they will find the time to do all this work, with all the photographs that they might have to get.

The Chair: Order. I shall not be hugely distressed if the Minister wants to respond to the hon. Gentleman, but his question is covered in the next amendment, I think.

Mr Harper: I am grateful, Sir Roger, for that guidance. If the hon. Member for Glasgow North West will forgive me, as his question is covered in the next amendment, if he holds that thought I will respond to him when I respond to either the hon. Member for Warrington North or the right hon. Member for Delyn when they move amendment 20.

My hon. Friend the Member for Cambridge has raised with me before the issue that his amendment deals with, as he says, and he has thought of a very creative way of raising it in the Bill, given that to solve the problem substantively, as both he and the hon. Member for Hackney South and Shoreditch suggest, would actually be outside the scope of the Bill. I am sure that he tested that with the Clerks and came up with a very creative way of raising it. He is right that it is an anomaly that some people do not qualify as British citizens by birth, either because they were born at a time when they could not inherit a mother's British nationality, or because their parents were unmarried and they could not therefore inherit their father's nationality. That does not apply to children born today, but he is right that the previous law change was not retrospective. The Government do not believe in retrospectively imposing British citizenship on people, because that could cause difficulty for adults who have established their identity as nationals of another state.

There is provision for children of British mothers born before 1983 to register as British citizens by means of registration. They do have to pay the citizenship

[Mr Harper]

ceremony fee, which is £80, but they do not have to pay the naturalisation fee. As my predecessor, my right hon. Friend the Member for Ashford (Damian Green) said, and as I said in my letter, we support the change that my hon. Friend the Member for Cambridge proposes, but that is not within the scope of the Bill.

I am happy to do two things. First, I can give my hon. Friend an example of where we have been prepared to deal with such issues. He may be aware that the Government support the Bill introduced by my hon. Friend the Member for Woking (Jonathan Lord), who is resolving a discrete nationality issue that applies to some members of the armed forces. In those circumstances, the Government are happy to offer support.

In my letter, I said that if a private Member were successful in the next ballot and thought that this was an area worthy of support, the Government would be happy to work with that private Member and, as long as the Bill was properly drafted, would look to provide support to deal with these anomalies. Certainly, if my hon. Friend the Member for Cambridge or the hon. Member for Hackney South and Shoreditch are successful in that ballot, or if they can persuade others to table such a Bill, the Government will look favourably on that, but we cannot resolve the matter in this Bill because it is outside its scope. I urge my hon. Friend to withdraw his amendment.

Dr Huppert: I thank the Minister and the hon. Member for Hackney South and Shoreditch for their support. We have cross-party agreement that we should try to rectify some of the issues of the past. I accept, as the Minister said, that the best way of dealing with this is not specifically to deal with the biometric information. While I thank him for holding out hope of some change through a private Member's Bill, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Helen Jones: I beg to move amendment 20, in clause 6, page 5, line 10, after 'citizen', insert 'or after three years'.

We can deal with this matter briefly. The amendment was tabled to find out the Government's intention on the retaining of photographs until a person applies for a passport. What happens if, as my hon. Friend the Member for Glasgow North West asked earlier, they do not apply for a passport?

Section 8 of the UK Borders Act 2007 contains regulations on use of biometric information. Section 41 (1)(b) of the British Nationality Act 1981, which is to be amended, gives the Secretary of State the power to prescribe the manner in which applications for registration or naturalisation should be made—I mention that to show the Minister that I have read some of the other immigration legislation, because I lead a dull life. However, proposed section 41(1ZD) provides that, despite the regulations in the 2007 Act on the destruction of biometric information, photographs of someone who is registered or naturalised as a British citizen may be kept until the person is issued with a British passport.

The Home Office considers that change necessary to prevent imposters from wrongly acquiring passports. I agree with it on that; that is something that we can all support. On the face of it, that seems reasonable. I want to test the Minister, however, on what happens if someone does not apply for a passport. I accept that most people do, but that is by no means automatic. Let us say, for example, that an elderly person, who may not want to travel abroad again, gains citizenship. How long is it reasonable to keep photographs and, frankly, for how long would they be of any use?

Retention of photographs will be even more problematic when a young person who gains citizenship does not initially apply for a passport. If someone applies for a passport much later in life, do the Government intend to use digital technology to check whether that is the same person as in the photograph? People's appearances can change radically. My right hon. Friend the Member for Delyn was once a young and eager county council candidate with a full head of hair, so I do not think that photographs taken of him at that time would be of much use now.

2.30 pm

I want to hear the Minister's response. While no one wants a person to get a false passport and the Government are quite right that we need to guard against this, at the moment information has to be destroyed as soon as is reasonably practical. I see from the statement of intent produced for the Committee that 90% of new citizens apply for a British passport within a year. Can the Minister tell us how many take longer, or do not apply at all? I realise that only a small number do not apply, but can he tell us how long their photographs would be stored and what use would be made of them? If he can clarify that issue for us, we will be happy to support this clause.

Mr Harper: We will come onto some of the points raised by the hon. Lady when we get to clause 10, which deals with the use and retention of biometric information. On this specific point, we have been very clear that once someone becomes a citizen we will destroy their fingerprint information. We are talking about retaining their photograph only until they make their first passport application, to ensure that the passport application is being made by the person who has indeed become a naturalised citizen, as the hon. Lady correctly said.

The statement of intent sets out that 90% of new British citizens make a passport application within one year. The rather trite answer to her question about how many do not is therefore 10%. I think that she was after more granular information on the 10%, the age profile of the distribution and how long they wait. I will see if I have that available and can help her with that in a few moments. I may not, in which case I will write to members of the Committee so that we have that information ahead of Report.

Let me give the hon. Lady an example of why the three years that she is testing in her amendment—she accepted that she is testing it—may need to be longer. We would make a judgment on whether it was necessary, but again the question would be why it might be necessary to keep information for longer. We have had fraudulent applications, and I have a specific example of a passport application that was made by a new British citizen five years after being granted citizenship. The application was supported with a different photograph than the one

used for naturalisation. Even after five years, we have had specific cases in which it was necessary to keep information.

In the circumstances set out by the hon. Lady, clearly there is a time period after which a photograph may cease to be useful, although there have been examples of people making quite extraordinary applications. For example, the ethnicity of the person may not be the same in the photograph as in the application. Therefore, even if I accept that someone's likeness may have changed, information might be gleaned from the photograph. Some of the important factors are physical features rather than just appearance, so the photograph may have a more lasting use. Clearly, a judgment will need to be made about whether the photograph continues to be useful, but we want the ability to keep it if it would be useful. This is also a protection for the individual, because it stops someone fraudulently applying for a passport or travel document. In fact, the risk of that happening is higher when we have someone such as the person mentioned by the hon. Lady.

Meg Hillier *rose—*

Mr Harper: I will give way to the hon. Lady after this sentence. Such a person may not use a travel document themselves and may therefore not be aware that someone has fraudulently applied for one. I wonder whether the hon. Member for Hackney South and Shoreditch, who I see has transmitted her enthusiasm to the hon. Member for Warrington North, will use this as another opportunity to tell me yet again why we should not have abolished ID cards. I give way to her.

Meg Hillier: I will not go that far on this point, but the Minister has raised an important point about protection for the individual applying for a passport. If a genuine passport is wrongly issued or a passport is fraudulently issued, that can cause real difficulty for the actual person in whose name the passport is, as well as for the passport service and others. Given those concerns, why are the Government proposing to destroy the other biometric they have already taken, namely fingerprints? That would give an extra guarantee that the applicant was who they said they were. The Government do not seem to be in favour of fingerprinting in general except for foreign nationals, but why do they not keep that biometric until after the passport has been issued and destroy it at that point? Indeed, the Government could keep the information and start up the ID card system all over again—but perhaps we should confine ourselves to the first part of my point.

Mr Harper: I think the second part of her point perhaps answers the first. Although it is important to have biometric checks and biometric information, it is necessary to treat that information and those data in a proportionate way. My preference is that once somebody has become a citizen we should to all reasonable extents treat them in the same way as we treat a citizen who was a citizen in the first place, and we do not routinely collect the fingerprints of UK citizens. The proposal is therefore that we destroy the fingerprints of somebody who has become a UK citizen, so that we are treating them in the same way as other UK citizens. However, in one specific area—applying for travel documents—we propose to use the biometric data before their first application as a way of avoiding possible abuses and preventing people taking advantage. We think that is proportionate. That is a judgment we have made, and it could be argued, as the hon. Lady perhaps did—I do not want to put words in her mouth, as she could simply have been posing a question—that we should hang on to the fingerprints as well.

The Government's judgment is that it is proportionate to keep the facial image, as that provides the appropriate level of security to make sure that the passport application is valid while not holding unnecessary information about someone who has by now become a British citizen. I do not want to rehearse old information, but the Government's view was that we did not want to have a national identity register or identity card, so for someone who has become a British citizen we want to limit the information we hold to what we feel is necessary and proportionate. That is why we have reached the judgment that we should destroy the fingerprints but keep the facial image.

I perhaps have not satisfied the hon. Lady, but I hope I have at least answered her question and dealt with the issue raised by the hon. Member for Warrington North.

Helen Jones: Having listened to the Minister's answer, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 6 ordered to stand part of the Bill.

Clauses 7 and 8 ordered to stand part of the Bill.

Schedule 2 agreed to.

Clause 9 ordered to stand part of the Bill.

Clause 10

Use and retention of biometric information

The Chair: I understand that amendment 21 will not be moved.

Helen Jones: I beg to move amendment 22, in clause 10, page 7, leave out lines 1 to 3.

Again, this is a probing amendment to test the Government's intentions. With your indulgence, Sir Roger, I hope to comment on some of the other aspects of the clause. We want to test how the Government propose to use the wide order-making powers under the clause, simply because when such wide powers are included in a Bill, it is the Opposition's duty to try to ascertain the Government's intentions.

Much of the clause restates provisions in the UK Borders Act 2007 on the use and retention of biometric information. Interestingly, section 8 of that Act includes a power for the Secretary of State to make provision about the use of biometric information

"in connection with control of the United Kingdom's borders".

It will be interesting to find out from the Minister why that provision is strangely absent from the revised version, although the clause replicates provisions on

"the exercise of a function by virtue of the Immigration Acts"

and "in relation to nationality". Has it been missed out inadvertently, or was it deliberate? If so, why?

The clause's provisions on

"the prevention, investigation or prosecution of an offence"

and national security mirror the provisions in the 2007 Act, and we have no problems with them. However, I want to ask about the use of information for the purpose of

"identifying persons who have died, or are suffering from illness or injury".

[Helen Jones]

I would have no problem if the clause referred to "persons suffering from a serious illness or injury", as that would be sensible and would allow biometric information to be used if there was no one to identify a person who was very ill. However, the Bill does not quite say that. Will the Minister tell us whether the omission of the word "serious" is deliberate or accidental? If it is deliberate, why?

My worry about the provision is that anyone suffering from a minor illness, or who goes to hospital, could be subject to biometric identity checks. I accept that that is not the Minister's intention—at least I hope it is not—but that is what the Bill says. That is rather odd, especially when the provision is read in conjunction with other parts of the clause. If a person provides biometric information, has their application accepted and is living in the country legally, will they be subject to biometric tests if they are ill? It would be much easier if we had ID cards, but the Minister must clarify his intentions.

Proposed new section 8(3)(d) will allow information to be used to ascertain

"whether a person has acted unlawfully, or has obtained or sought anything to which the person is not legally entitled".

The things that immediately spring to mind are claims to benefits and access to the health service. I am all for ensuring that people who are not entitled to benefits do not get them, because I regard that as stealing from the poorest people in society. People who are not entitled to free health care in this country should not be getting it, but how will the provision work? Benefits officers cannot give biometric tests to applicants and compare the results with the database, and GPs and hospitals will not be testing everyone who walks in because they are far too busy dealing with sick people, so who will check the information and when? It clearly cannot be done before a person gets a benefit or is treated, and doing it after someone has been caught claiming a benefit to which they are not entitled is like shutting the stable door after the horse has bolted. It would be much easier if people proved their identity when they made a claim. As we all know, getting money back afterwards or recouping costs of treatment are long and difficult jobs. It seems that the Government are trying to sound tough, but without any idea of how their proposal will work.

Amendment 22, which would remove proposed new section 8(3)(e), is designed to test the Government's intentions on their wide-ranging provision. Given the other measures in the clause, I do not know why that power has to be so wide. Paragraph (e) says:

"for such other purposes (whether in accordance with functions under an enactment or other wise) as the regulations may specify."

That gives the Government wide powers to use biometric information for almost anything. Considering their dyed-in-the-wool opposition to ID cards, it seems a strange provision to include in the Bill. Of course, we have not yet seen the regulations, although that would have been helpful. The Government's statement of intent tells us that they are tightening statutory safeguards, however.

2.45 pm

Mr Pat McFadden (Wolverhampton South East) (Lab): Does my hon. Friend think it would be fair to sum up the Government's position as being against the cards, but not the data?

Helen Jones: My right hon. Friend has it exactly right. This seems a complicated way to go about something that could have been done simply, which is why the approach is less effective. It sounds great as something that Conservative Members can take back to their associations, but my worry is whether the proposal will work in practice—I am not convinced that much of it will work in practice.

Perhaps the Minister will tell us why the Government are taking such wide reserve powers. Is it because they do not think their proposals are going to work in the first place, or is there another reason?

Mr Harper: I am grateful for what the hon. Lady describes as a probing amendment, which gives us the chance to go through how the proposal works. The clause provides a single regulation-making power to ensure consistency in how biometric information is used and retained by the Secretary of State. That is helpful because it means we can have a consistent policy across all the relevant nationality and immigration Acts, with one set of rules.

It is also worth saying that the order-making power—this is in distinction to our earlier debate about order-making powers—is potentially very wide, but that is why it is an order-making power. Any regulations would require the approval of both Houses of Parliament through the affirmative procedure before they could come into force.

The clause refines section 8 of the UK Borders Act 2007, which was brought in by the previous Government. I know that the amendment is probing, but it would remove the Secretary of State's existing flexibility to provide in regulations new circumstances in which biometric information could be used. That is not a new power; it replicates a provision already in section 8 of the 2007 Act. That power has proved useful, such as by allowing the Secretary of State to make regulations to allow the use of biometric information she holds in connection with identifying victims of an event or situation that has caused loss of human life—I will come on to the hon. Lady's point about illness in a moment—and for the purpose of ascertaining whether any person failed to comply with the law, or gained a benefit or service to which they were not entitled.

The hon. Lady asked two specific questions. One was whether there had been a deliberate omission of the word "serious" in connection with identifying persons suffering from illness or injury. It was deliberate in one sense, in that we are replicating the provisions of the 2007 Act and regulations made under it, particularly regulation 9(f) of the Immigration (Biometric Registration) Regulations 2008, which were subject to the affirmative procedure and do not refer to "serious" injury or illness.

I understand that the approach is to protect people who need medical attention when it is not clear who they are—in other words, when there is an unidentified person who needs medical attention. The purpose of using the biometric information is to identify them, not to deny them medical attention. It is to ascertain who they are and to try to establish facts about their medical records. That is the existing use of the provisions that we have tried to replicate in the Bill.

The hon. Lady also asked why there was no reference to border security. In immigration legislation, we consider that the reference to the border is nugatory, because it is covered by immigration and nationality purposes. The 2007 Act specifically related to biometric residence permits

being used to support applications for British passports for non-citizens. We consider that the reference to immigration and nationality purposes is wide enough to cover in-country examples and those at the border. Arguably, we could have included such a reference, but we did not think it was necessary. I do not think that our approach materially changes what is already in place.

The hon. Lady was right that we published a statement of intent regarding the clause. It sets out the Government's intentions for the retention of information, which we discussed briefly in the previous debate, and I hope that it is useful.

Helen Jones: Will the Minister answer my point about proposed new section 8(3)(d), on the use of biometric information

"for the purpose of ascertaining whether a person has acted unlawfully, or has obtained or sought anything to which the person is not legally entitled"?

Would that provision be used only after someone had been arrested? It is not clear, but it seems to kick in only after someone has done something wrong, rather than preventing them from doing something wrong in the first place.

Mr Harper: The use of the phrase "acted unlawfully" and the word "obtained" suggests that the measure is looking backward—for checking whether someone had behaved unlawfully—but the phrase

"sought anything to which the person is not legally entitled"

obviously suggests a forward-looking provision, in the sense that if someone applied for something to which they were not entitled, action could be taken to stop them, working backwards from evidence that they were not entitled. Part of the reason for not going into enormous detail is that that would be set out in the regulations, on which debates would be held in both Houses of Parliament in which we would have to set out our exact intentions and the hon. Lady and others could ask questions.

Helen Jones: How does the Minister propose to use biometric information when someone is seeking something to which they are not entitled—in other words, to stop someone getting something to which they are not entitled? Every applicant cannot be tested.

Mr Harper: A simple way would be to use the method used in right-to-work legislation, for example. We already insist that people present a biometric residence permit, which contains a facial image and enables somebody to check whether the person in front of them is the rightful owner of that permit and allowed to work in the United Kingdom. As we will debate later, that could also determine whether they had the right to rent accommodation.

Helen Jones: I am grateful to the Minister, but what is being proposed is unclear to me and several other Committee members. Is he proposing that anyone who applies for benefits or tries to access the NHS could be asked for a biometric residence permit? If so, how will he prevent British citizens of black or ethnic minority origin from being asked for that information when they may have been born and bred in this country or lawfully resident here for many years?

Mr Harper: If we were bringing forward proposals to do that, we would have to table regulations for debate in the House, where we would set out their provisions. Let me give the hon. Lady an example. During the evidence session, the hon. Member for Hackney South and Shoreditch expressed concern, given the diversity of her constituency, about how we would ensure that landlords did not discriminate against either lawful migrants or British citizens from black and minority ethnic communities as a result of the residential tenancies proposals. As I said then, we will publish a code of conduct that explains what reasonable inquiries should be made and how landlords should go about making such inquiries in a way that is compliant with the Equality Act 2010 so as not to discriminate. If we tabled regulations to identify whether people were, for example, entitled to benefits, we would set out how we thought that was going to work.

On the question of benefit for foreign nationals, the Department for Work and Pensions already goes through with somebody whether they are entitled to benefits. If they are a non-European economic area national, it ascertains their status in the United Kingdom. Even for EEA nationals it establishes whether they have the right to reside here and asks a significant number of questions about whether they are habitually resident in the United Kingdom. Indeed, the DWP is strengthening those tests this autumn and extending the set of questions that it asks, so that it can be more thorough and robust in that testing process.

That type of checking already goes on, and if we were to bring forward significant provisions, they would have to be brought introduced under the affirmative procedure. That would give Members the ability to ask questions and probe the Government on what they were doing.

Meg Hillier: The Minister describes an administrative process which, from the distance of Whitehall to the Jobcentre in Hackney, sounds fine. However, a constituent of mine might still have a strong African accent despite holding a British passport or having lawful residence in the UK. Many people in that situation do not have a passport. In fact, I have the case of a group of men in their 50s who do not even have any photographic ID or a bill in their name. How will they be dealt with? They will often be asked for information as though they were foreign nationals and they will not have it. Many of them will not have the sort of ID that a British citizen or lawful resident will usually have. There are people in my constituency and up and down the country caught in that gap. Whatever the Minister's reassurances, the safeguards do not capture that group.

Mr Harper: Again, without leaping forward to future debates, let me give an example. As I have said, if we were to bring forward specific proposals using proposed section 8(3)(d), we would be able to set out the way those should be adopted and the documents that people would need to deal with the issues that the hon. Lady raised. Let me use a specific example that we are going to deal with in the Bill, which we discussed at the evidence stage—the proposals for residential tenancies. As with the right-to-work measures that the previous Government brought in, we have accepted that the question has to be asked of everybody, in order not to be discriminatory. We will set out the documents that

[Mr Harper]

somebody will have to provide. We have accepted that not everyone has a passport or a driving licence, for example, and we will set out the combination of documents that will be accepted.

We listened to organisations, one of which gave evidence—Shelter, I think. It talked about individuals who lead lifestyles that perhaps are a little chaotic, or who do not have a set of documents. We have said that we will accept, for example, benefit documentation, which Shelter said those people frequently have. So in specific cases, we will look at the practicalities and the difficult cases that the hon. Lady sets out, and we will look pragmatically at the range of documents that somebody could provide to evidence the fact that they were entitled to a service.

I accept that the hon. Lady's much slicker process of having a national identity register and a card could have been used for these purposes, but this Government resolutely did not want to do that. That was the right decision, but I give her full marks for her tenacity in trying to prove that her decision to bring in identity cards was the right one, which I am sure she will hang on to for many years to come.

Helen Jones: I am grateful to the Minister for his reply and his generosity in giving way. Having listened to his reply, I still think that some of the provisions of the clause have not been thought through and that the Government are very unclear about how they work—particularly proposed section 8(3)(d). We may wish to return to the matter at a later stage, but for now I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 10 ordered to stand part of the Bill.

Clause 11

Right of appeal to First-tier Tribunal

Mr Hanson: I beg to move amendment 24, in clause 11, page 10, line 1, at end insert—

'(6) This section shall not come into force until a draft statutory instrument is laid before, and approved by resolution of, each House of Parliament.

(7) An order under subsection (6) may not be made until—

(a) a report by the Independent Chief Inspector of Borders and Immigration on entry clearance decision-making in the UK Border Agency for entry clearance and managed migration; and

(b) the Secretary of State is satisfied that decision-making for entry clearance and managed migration is—

(i) efficient;

(ii) effective; and

(iii) fair.'.

Clause 11 caused some debate at Second Reading and at the evidence sessions. In discussions with people outside this Committee, it has caused concern. I wish to examine and address that concern. Given your earlier advice and guidance, Sir Roger, I expect that that will form part of a wider stand part debate on clause 11, which I am happy to merge into one general discussion on some of our other concerns, although focusing on the amendment.

3 pm

The Chair: Order. Just to clarify the position, amendment 23 was ruled out of order because accepting it would have meant the Committee would have had to vote against clause stand part. As before, the right hon. Gentleman can have the stand part debate either now or after the debate on the amendment.

Mr Hanson: I am grateful, Sir Roger. My intention was to try to wrap the whole thing up into one.

Amendment 24 would place an obligation on the Secretary of State to introduce a draft statutory instrument for both Houses of Parliament to approve. The draft order would not be forwarded for both Houses to consider until a report by

"the Independent Chief Inspector of Borders and Immigration on entry clearance decision-making in the UK Border Agency for entry clearance and managed migration"

had been made, and an order would not be made until the Secretary of State—whoever it was at the time—

"is satisfied that decision-making for entry clearance and managed migration is"

efficient, effective and fair. I accept that those words are subjective and open to interpretation, but I hope that the Committee will bear with me while I consider certain points related to them.

The amendment ensures that we can have a proper debate now about the decision-making process for entry clearance and for managed migration. We can look at it in the light of the proposals in the clause, which effectively remove the first-tier tribunal appeal mechanism for those areas of migration management. Our amendment would ensure that appeal rights, which are important and to which I will return in a moment, could not be abolished until the quality of Home Office decision making for managed migration—understood to encompass casework other than asylum—was deemed by the chief inspector and the Secretary of State to be, in the words of the amendment, efficient, effective and fair, although I accept that those words are open to interpretation.

The amendment is vital to ensure that the clause works. There are still too many mistakes made in the initial decision making by the Home Office. Nobody has ever said that the decision-making processes are easy. There were difficulties when my colleagues ran the Department—I was in the Home Office at the time, but responsible for policing. There have been difficulties for a long period, and nobody is saying that it is easy. Let me put that straight. The previous Government had difficulties with managed migration and with first-tier appeals, and the current Government have as well.

On any subjective assessment, on this glorious day, 5 November 2013, the Home Office is still challenged by policy. The removal of the first-tier tribunal will lead the Home Office to make decisions that are unfair and not based on fact, and, as I will attempt to show, that will lead to decisions that would have been overturned had the appeal mechanism been in place. Again, no one says that it is easy, and the Department faces a well documented set of challenges. There is a huge backlog of casework, and the Department is having to hire staff to try to deal with that; there is widespread use of overtime; and there are particular pressures on border staff in relation to checks and secondary checks.

Like many other Departments, the Home Office has faced financial challenges. A lot of money has been taken out of the Home Office, affecting its ability to respond to challenges. The Department has stated that it wants to reduce the administration budget by 50% from the 2010 figure. In my view, it is clear that the backdrop to the clause is that the Department is already struggling to deliver effective decision making and is making mistakes on managed migration. Those mistakes, irrespective of the fact that an administrative review is currently in place, are being overturned on appeal.

Do not listen to me, Sir Roger—

Mr Harper: Okay!

Mr Hanson: I always say this. Do not listen to me, Sir Roger, because you would expect me to have some criticisms of where we are. I have tried to be open and honest and to admit that things were not hunky-dory and rosy in the garden when my colleagues were in government. That is clear. It is a difficult challenge that demands a certain set of skills to meet it. Again, do not listen to me, Sir Roger. The Home Secretary, the right hon. Member for—*[Interruption.]* Maidenhead. I was going to say Maidstone. *[Interruption.]* I apologise. Constituencies change quite a lot and Maidenhead and Maidstone—perhaps not quite that much.

The Chair: Order. My colleague on the left says, "Stop digging." I think that is good advice.

Mr Hanson: Which colleague, Sir Roger? They do not exist.

In March 2013 the Home Secretary gave a damning and accurate verdict on the UK Border Agency before taking it back into the Home Office. She told the House that it had been struggling with the volume of its casework and had been a troubled organisation since it was formed in 2008. She continued:

"UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry instead of automated data collection, and they often involve paper files… The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies… All those things mean that it will take many years to clear the backlogs and fix the system".—[*Official Report*, 26 March 2013; Vol. 560, c. 1501.]

The Home Affairs Committee recently undertook an assessment of the UKBA failings and the problems with the future of immigration control back within the Home Office. In its report from 2012 on the work of UKBA it listed a catalogue of challenges which still exist today. Again, I am being fair: those challenges have developed and grown over time. Any Government would need to reflect on them, but the way the Minister is going about it in clause 11 will not help.

The Permanent Secretary to the Home Office, Mark Sedwill, is quoted as saying:

"Most of us will still be doing the same job in the same place with the same colleagues for the same boss".

In an evidence session held by the Home Affairs Committee in June the interim director general of UK Visas and Immigration, Sarah Rapson, said that no new people had been employed since the decision to absorb UKBA into the Home Office, apart from those in her private office. When asked whether she thought the immigration service would ever be fixed she replied candidly, openly: "I don't think so."

Meg Hillier: Perhaps the figures I obtained from the Library this morning will help my hon. Friend. They show the scale of the problem that remains. In quarter 1 of 2013-14, 61% of new asylum applications were concluded within one year. That is over half, and I suppose we should be grateful for small mercies, but it shows that there is still a long way to go. For the full year of 2013-14, the percentage of visas issued in time was only 39% for family visits, 55% for visitors and only 69% for employment, which this Government are keen to see more of.

Mr Hanson: I am grateful to my hon. Friend for those figures, which came from the Library today. I shall quote the figures from the Home Affairs Committee report from last year. I do so not to suggest that responsibility is not shared for some of these problems—it is; the system is partly a shambles and it has been chaotic for many years—but because they will lead me on to my main contention regarding amendment 24, which is that we must assess the decision-making process before we remove the right of appeal.

The agency's performance in the final quarter of 2012, according to the Home Affairs Committee, is challenging to say the least. There were 4,102 foreign national ex-offenders living in the community while awaiting deportation, and of those cases 65% were more than two years old; the number of foreign national ex-offenders living in the community rose by 122 in that period. Linking back to what my hon. Friend just said, there were 12,816 asylum cases awaiting an initial decision—a 17% increase on the previous quarter. Evidence placed before the Home Affairs Committee revealed a previously undisclosed new backlog in permanent and temporary migration decisions of—wait for it—190,000. The total immigration backlog stood at 502,467 at the end of 2012.

Mr Harper: Regarding an allegedly undisclosed backlog, the hon. Gentleman should be aware that I have written to the Home Affairs Committee to draw its attention to the fact that the information to which it referred—cases that had not yet concluded—was information that we had been disclosing to the that Committee over a period of time. For the Select Committee to turn around and say that it was a surprise and that it was new information of which it was not aware was not accurate. I have written to that Committee to put that straight. If it is helpful, Sir Roger, I can furnish this Committee with a copy of the letter that I sent to the Chair of the Select Committee.

Mr Hanson: The Minister has fairly put his point on the record. He is challenging the fact that the information was not disclosed, rather than the figure I mentioned, with which I do not think he is disagreeing.

Mr McFadden: Does my right hon. Friend agree that the point is not really whether or not the backlog was secret? The point is the picture it paints of a system that has struggled for years to cope with the case load that it has to deal with.

Mr Hanson: I am grateful for my right hon. Friend's support. I am a Labour party politician, but I am trying to be fair in my approach in this Committee. The difficulties and challenges are not new. They are not the fault of this Government and, dare I say it, they are not even necessarily the fault of the previous Government.

[Mr Hanson]

They are inherent in a system that to date has not been able to manage the volume, type and complexity of cases before it.

The Home Affairs Committee also said that only 75% of case bundles were delivered to court on time by the agency, which means that 25% were not. The Select Committee's overall conclusions bear out what my right hon. Friend the Member for Wolverhampton South East said:

"Establishing the UK Border Agency as an executive agency did not resolve the problems experienced by the old Home Office Immigration and Nationality Directorate and there is no reason to suppose that re-integrating those functions back into the Home Office will do so either. Further, significant change, to management structures, information sharing, processes and IT systems will be required if the Home Office is to succeed in raising the standard of its borders and immigration work."

That is the challenge that the Minister faces and I wish him well with it. On our part, I hope we will continue to work on the shared objective of meeting some of those difficult challenges.

The reason I draw the Committee's attention to those challenges is because, on top of them, there is significant evidence that there is poor-quality decision making within the Department in the areas affected by clause 11. That is why I tabled the amendment. The latest statistics reveal that 32% of deportation decisions and 49% of entry clearance applications were successfully appealed last year.

3.15 pm

The appeal statistics for the areas affected by the clause are quite stark and worthy of the Committee's attention. They show that the immigration system would be far from fair if the right of appeal were taken away in the areas where the clause would remove it. Success rates have increased over the years, as decision making has got worse. On average 40% of appeals succeed; in managed migration cases, where appeals are being removed by the clause, almost 50% of all appeals succeed. I shall give some detailed figures about the appeals that the clause is removing. In 2007-08, 34% of both first-tier appeals and managed migration appeals were successful. In the past seven to eight years that figure has risen, so that in 2013-14 45% of first-tier appeals and 52% of managed migration appeals have been upheld by the tribunal that the clause seeks to abolish.

A long time ago now, in 1967, when I was, dare I say it, still at primary school, long before human rights were justiciable in UK courts and long before this issue was as dominant as it is today, the Wilson committee said

"it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future"—

that was the phraseology of the time—

"should be vested in officers of the executive, from whose findings there is no appeal".

That is a fair assessment. The Home Office currently has administrative review: it will look at the appeal mechanism internally, and if that mechanism is not satisfactory for the appellant, the appellant has the right—unless clause 11 is passed—to go to a first-tier tribunal to have the decision independently examined by the judicial system. That is fair because it means that the Home Office is not the sole body reviewing its own decision-making process.

In our evidence sessions, we heard from Adrian Berry, the chair of the Immigration Law Practitioners Association. I will say at the outset, as I am sure the Minister will say it, that Mr Berry probably has a vested interest in appeals being brought forward; that is the nature of the business. I asked Mr Berry:

"Will you give your assessment of the current standard of the decision-making process in the Home Office for immigration issues covered by the Bill, which will remove the first-tier tribunal?"

He replied:

"The Home Office decision making in this area is extremely poor, as the appeals impact assessment notes."

That is the Government's own appeals impact assessment. Confirming the figures I have already given, he went on to say:

"Some 50% of managed migration appeals are allowed on points of administrative law, and do not engage human rights or the refugee convention."

I went on to ask whether he could give an example of something that could be overturned on appeal. I will quote just one of the examples he gave that I think is worthy of the Committee's consideration. He said that

"a tier 1 investor—someone who invests £1 million in this country—can apply for further leave to remain in order to achieve indefinite leave to remain. If their application for further leave is refused, they currently have a right of appeal to the tribunal on a point of law".

That example may not be commonplace, but as Mr Berry said:

"If the measure goes through, they will have no appeal right. The likely consequence of that is that they will withdraw their investment and take it somewhere else."

According to a lawyer who deals with these cases every day of the week, the Government could be turning away, not on the grounds of human rights or asylum but on a point of administrative law, an investor worth £1 million, who will walk away and invest that money in France, Holland or somewhere else. Mr Berry also stated:

"The same would be true for people who have limited leave to remain for the purposes of study and who apply for further leave. The same would be true for people who apply to enter the UK for the purposes of UK ancestry and, perhaps most surprisingly of all, there is an abolition of certificates of entitlement to the right of abode. That is the document that British citizens use to vindicate the fact that they are British citizens when they seek to rely on their British citizenship when overseas. It has nothing to do with foreign nationals."—[*Official Report, Immigration Public Bill Committee,* 29 October 2013; c. 73, Q154-156.]

Mr Berry may have an interest; I accept that, but let us hear the Minister's response to those points.

I quote Angela Patrick of the organisation Justice, in answer to a similar question from me on 31 October 2013. My question was:

"Can you give an indication of your assessment of the current quality of Home Office appeals?"

She replied:

"The statistics say it all… In some cases, almost 50% of decisions are overturned on appeal. That simply says that this is a Department that is exercising its discretion badly."—[*Official Report, Immigration Public Bill Committee,* 31 October 2013; c. 87, Q187.]

My amendment 24 does not imply that we oppose in principle removing the clause at the moment; we will consider that shortly and may decide to vote for it, depending on what the Minister says. I genuinely want the Minister to explain how he justifies abolishing a first-tier tribunal appeal mechanism when his own impact assessment, immigration lawyers, Justice and many other organisations I could have quoted are saying that the level of decision making is so poor that 50% of decisions are overturned on appeal. How can he justify it? If this proposal goes ahead, what mechanism is he undertaking to ensure that that level of appeal decision making and first principle decision making is being approved?

If the first-tier tribunal is abolished, as clause 11 proposes, and if amendment 24 is not accepted and there is no draft statutory instrument and no report from the chief inspector of borders and immigration or the Home Secretary that decision making has improved to the extent that it is efficient, effective and fair—those three subjective words that I have included in the amendment—will the Minister give us his estimate of the number of people who do not have their appeals upheld who will not be able to bring their investment to the country, continue their studies or join their families, and who would have, through administration, been able to do so had that first-tier tribunal not been abolished?

It seems to be contrary to a basic tenet of justice that because the Government cannot get it right in 50% of cases, instead of trying to get it right in 100% of cases they abolish the appeal so that nobody notices that those 50% of cases are upheld. Those 50% of people will be, under clause 1 or other clauses of the Bill, lifted, deported or not let into the country because of the changes that are being made. That seems an unfairness that should at least be explained by the Minister.

The decision making of the Home Office, in this view, is really no better than flipping a coin, because 50% of appeals are upheld, and that is not acceptable. These are not short-lived, short-term rights that people have got; these are long-entrenched rights that people have had for many years. The Immigration Act 1971 gave a right of appeal against a range of immigration decisions, following the recommendations of a report by a committee on immigration appeals. That committee which established the 1971 Act, which has survived for 42 years, said:

"However well administered the present control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future"—

again, the language of the time—

"should be vested in officers of the executive, from whose findings there is no appeal".

I do not think that anything has changed in the 42 years since that principle was established.

More recently, in the case of Asifa Saleem *v.* Secretary of State for the Home Department in 2001, Lady Justice Hale, as she was then, said of the right of appeal to the immigration tribunal:

"In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts."

Lord Justice Roach said of the right of appeal under the Immigration Act 1971 that it was

"a basic or fundamental right, akin to the right of access to courts of law".

I could be chilled and relaxed about those matters if no appeals were being upheld by the tribunal, which would show that, as my right hon. Friend the Member for Wolverhampton South East is concerned about, people are dragging out the system. When 50% of appeals are upheld, however, there is scope for debate about where the dividing line should fall.

I give the Minister credit where it is due. We have had ongoing discussions outside the Committee, and he has been very welcoming during my few weeks as Labour immigration spokesman. He has, as he promised to do when we discussed the matter privately, produced an "Administrative review in lieu of appeals" statement of intent, and he has circulated it to the Committee. He has set out how the administrative review will work. Is any of that different from how administrative review works at the moment? There are 16 bullet points on this statement of intent. Which of those do not currently apply in the Home Office? It is all very well saying, "Here is the way in which we are going to deal with administrative review," but if the new process is fundamentally not very different from the current one, I contend that the 50% of appeals that are currently upheld will simply glide through the new system as they have glided through the current one.

What is new about this immigration statement of intent? I do not normally ask questions that I do not know the answer to, but I do not know the answer to that one and I would genuinely welcome some indication. The current administrative review process in the Home Office has not prevented 50% of appeals from being upheld, so unless the Minister can point out what is new, I do not see how that can change. I am not the only one to be concerned about that. I refer to Second Reading on 22 October 2013, when the hon. Member for Cambridge, who popped in briefly to the Committee—I do not know whether he plans to return—said:

"I continue to be very concerned, like other hon. Members, about the end of appeals. That could be dangerous when we are not making the right decisions. When we are getting the decisions right, we can look at how we can stop people prolonging the process, but when so many appeals are successful, it shows that there are problems. If we remove people before they have made their appeal, how can we be sure that we will hear the appeal properly? If somebody has been wronged, will there be a chance for them to present their case within a reasonable period of time?"—[*Official Report*, 22 October 2013; Vol. 569, c. 247.]

I wish he were here to intervene on me. He did not use the words "concerning" or "troubling"; he said that it could be "dangerous" if we do not make the right decisions, and I would like him to expand on whether he remains of that view. When I started the speech, he was here, but he has now managed to find alternative work elsewhere.

Mr Harper: Let me reassure the right hon. Gentleman that it was not the quality of his oratory that drove my hon. Friend the Member for Cambridge from the room. My hon. Friend is in a difficult situation: in the spirit of coalition support, he is serving on the Home Affairs Committee, which is sitting now, and on this Public Bill Committee. The Home Affairs Committee is taking evidence from the police officers involved in the gate-gate-gate scandal. One of them is alleged to have misled the Committee in answer to a question from my hon. Friend, which is why he is popping in and out. I thought it was helpful to make that clear to the Committee.

3.30 pm

Mr Hanson: As you know, Sir Roger, I try to be fair on these matters and to give credence where it is due, and I accept that the hon. Member for Cambridge, given what the Minister has said, has to be there and here. I also accept that his vote will be here, if he wishes it to be, when the time comes—if I decide to move the amendment to a vote.

Mr Harper: He will be here if there is a vote.

Mr Hanson: If there is a vote, he will be. If there is a vote, I presume he will strongly consider supporting the Opposition on amendment 24, because it was not me, but him, who said:

"I continue to be very concerned, like other hon. Members, about the end of appeals. That could be dangerous when we are not making the right decisions."—[*Official Report*, 22 October 2013; Vol. 569, c. 246.]

However, I will not dwell too long on the hon. Member for Cambridge. He is a member of the Committee, and he is working hard elsewhere. He might be back to vote one way or the other, and I am sure he will have listened to the debate through whatever mechanism he can find.

Let me turn now to the right hon. Member for Bermondsey and Old Southwark (Simon Hughes). We know how important he is in the Liberal Democrats. As I recall, he is the deputy leader—

Meg Hillier: President.

Mr Hanson: The president or the deputy leader—one of the two. He is something high up in the Liberal Democrats; he is certainly higher up than I am in the Labour party. *[Interruption.]* Well, there is time yet—I am a stripling. Speaking of immigration and asylum casework on Second Reading, he said:

"The overwhelming experience of that casework, which is frequently acute, is that far too often the wrong decision is made at the beginning."—[*Official Report*, 22 October 2013; Vol. 569, c. 217.]

Unbeknown to the Committee, he is supporting the potential for the amendment, because he is saying that the quality of decision making is not good, and I agree with him on this occasion.

On Second Reading, my hon. Friend the Member for Slough (Fiona Mactaggart) referred to the Wilson committee report, which I mentioned earlier. She supported its contention that it is

"fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal."

She went on to say:

"Yet that is in effect what the Government are proposing to do in this Bill, 42 years after the Commonwealth Immigrants Act 1968."—[*Official Report*, 22 October 2013; Vol. 569, c. 188.]

On Second Reading, my hon. Friend the Member for Brent North (Barry Gardiner)—this is now confirmed by the administrative notes the Minister has circulated with regard to appeals in clause 11—said:

"As the Bill stands, refused applicants will be required to apply for administrative review within 10 days of receiving the decision. All of us who have extensive correspondence with the Home Office know that most of the decisions come back to lawyers. So lawyers will be required to make that administrative review application within 10 days, but the Home Office must know full well that that simply will not happen. It is not happening at the moment."—[*Official Report*, 22 October 2013; Vol. 569, c. 198.]

My hon. Friend's concern is that the time scales for administrative reviews will mean that most do not happen. Again, that could cause some concern. My contention is that removing the first-tier tribunal will still mean that 50% of cases that are currently upheld are no longer upheld.

Let me turn now to the Minister's impact assessment on the Bill. In part 2, which deals with appeals, he has helpfully included table 2, which is entitled "Appeals—Summary of costs and benefits". He has given a 10-year impact assessment of the costs and benefits of this proposal. Included in that is a cost for reduced appeal income to Her Majesty's Courts and Tribunals Service of £42 million, so we are saving that sum by not having those tribunals take place. The cost is £42 million over 10 years or £4.2 million a year saved by not having that tribunal, which is currently upholding 50% of the appeals which go to it. It is a relatively small cost per annum for that.

The assessment also says—this is the interesting point—that administrative review costs are "unknown". The Minister does not know, in his own impact assessment, what he believes that the administrative review costs will be. It might well be that that they will increase—or decrease, I do not know—because of the pressures of now not having an appeal mechanism. Some cases are going through administrative review at the moment. They should go through that administrative review, and they go to the tribunal. I do not know whether there will be an even greater impact of people requiring and asking for an administrative review because they know that there will not be an appeal mechanism downstream. There might be much more of that. I would genuinely welcome whatever assessment the Minister has made of the cost of administrative review, based on the provisions of clause 11 if it is passed.

The Minister has also not given any estimate at all of any costs that might be incurred by the Home Office in the event of people applying for asylum or applying for judicial review following the enactment of this provision. I would welcome the Minister's assessment of this, but I think that there is the potential for a number of individuals who are now being turned down to go to judicial review. This would increase the cost to both the Home Office and, if they can afford it, to the individuals themselves. This would also mean that only the richest people, or those with independent means, could go to judicial review. Therefore of the 50% of cases that are currently being upheld, the poorest people in that 50%—who will now not have their appeal heard—will be the ones to miss out. The richest people in that 50% will be able to undertake judicial review, which will also impact on the Home Office's costs.

Amendment 24 simply says that we should have some better assessment of the decision making process because—although I would say this—quite frankly I think that that would be right, fair and accurate. The decision making process is not working. If the decision making process was working, 50% of appeals would not be upheld. The Minister is removing that first-tier tribunal and removing the right of that 50% to have their appeal upheld, so therefore before we can agree to clause 11 he

must give this Committee some indication of how he will improve decision making. We need to know how he will make it more efficient, how the administrative review will work, and how it will reduce that 50% of upheld appeals, before we agree to clause 11.

Meg Hillier: I fully endorse the comments of my right hon. Friend the Member for Delyn, but I think that there is an additional issue to consider. A number of my constituents have come to my surgeries with basic letters containing material mistakes. I have already privately shared with the Minister some of the challenges we have both faced with that when in position. Likewise, I will give him every support to try to make the system better, but the fact is that as my right hon. Friend has said, the system is as it is now. This primary legislation will affect the fundamental right of appeal for people while the system is not working.

The other point I would like the Minister to respond to is the quality of legal advice that many of my constituents and others are getting at the beginning. Some of these problems, and one of the reasons why some original decisions are overturned on appeal, are also to do with the quality of legal advice that people get at the beginning. The actual application that as MPs we sometimes all see going in does not include some material information which might have resulted in a better administrative decision, because the decision maker would have had in the first place the relevant information which then appears at a later stage. It is a fault of both the Home Office system and the poor quality of some of that decision making, but it is also an issue about the cuts made, often by other Departments, to the legal advice that is available.

For many years now, parts of the UK have been good immigration legal advice deserts, with only a limited number of people to see and, for a poor migrant, the cost of travel is enormous. Improper lawyers out there—some of them are not even lawyers, but advisers—charge a lot of money for low-quality advice and we are aware of the huge changes under way to legal aid. While we have seen a little withdrawal on that, that has not been sufficient to ensure that appropriate legal advice is in place. The Minister needs to be alert to the fact that the Ministry of Justice is effectively cost-shunting many of the services on which it wants to save money to the Home Office and, in turn, the Home Office is shutting off an avenue of appeal to many of my constituents and others who want a fair decision.

All we want is something that is fair and clear and timely. At the moment, the system does not deliver that. I ask the Minister particularly to address legal advice, as without that, the system will never work.

Mr Harper: I will try to address the points made by the right hon. Member for somewhere in Wales—it is, of course, Delyn. Let me deal first with his amendment and then as we have dealt with the breadth of the clause, I will deal with points on that in context. His amendment would impose three conditions that must be met before the appeals provisions can come into force. I argue that that is unnecessary and counter-productive.

The clause changes the decisions that give rise to an appeal and the grounds on which that appeal can be brought. That does not affect cases in which fundamental rights are engaged, so asylum and human rights cases, for example, will still have an appeal mechanism. That is worth saying because on Second Reading I think some Members seemed to think—perhaps they no longer have the same view—that the clause also encompassed asylum and humanitarian protection cases where we are talking about not just someone's economic interests, but their freedom and life.

The right hon. Gentleman spoke about—he repeated this frequently—the quality of decision making. I will not labour this point because he was good enough to acknowledge that we did not inherit a sleek, Rolls-Royce-like decision-making machine, but I will slip in that we inherited, for example, 450,000 undecided asylum applications, and I could give many other examples. We have now largely dealt with those cases and the remainder will be dealt with by the end of this Parliament.

The way in which the right hon. Gentleman quoted the statistics gave a misleading impression. On the quality of decision making, he obviously referred only to those decisions against which an appeal was brought, but of the 295,428 managed migration decisions we took in 2012, only 11% were refused, so 89% of the people who applied to the Home Office for a managed migration decision received one with which presumably they were content. He was referring only to that relatively small percentage that was refused, and we did not receive an appeal for all of those. In the latest set of statistics, admittedly we won only just over half of those cases, but that means that 5% of the decisions that we make are potentially found by a tribunal not to have been accurate. I accept that that is not fabulous and that we should try to improve on that, but his constant repetition that half the decisions that we make are not good gives a misleading impression. His figures were correct—I checked them as he cited them—in that of those cases brought to appeal, we win just over half. We should do better and I will set out how we propose to do that, but it is not the case that half the decisions we make are wrong.

3.45 pm

The right hon. Gentleman is also right to say that there were some significant problems. The Home Secretary's decision to split up the UK Border Agency has two significant benefits. There has been a real benefit for the bit of what was UKBA that is relevant to this debate—the UK Visas and Immigration part of the operation. He is right that most of the people working in that organisation also worked in UKBA, but they now have a very clear job. They are supposed to be delivering a good service to the people who are making applications, which did not always happen in the past. They have a clear job and the new interim director general, Sarah Rapson, who has been quoted once or twice already, has made real strides to improve things, although the process is not going to happen overnight, as the Home Secretary was frank about in her oral statement to the House earlier this year. We have made considerable progress on in-country casework, of which we had a backlog in 2012-13, and there is ongoing work to improve decision quality.

Meg Hillier: The Minister is citing a lot about numbers and he mentioned the backlog his Government inherited. Perhaps he can confirm that the asylum controlled archive of 70,225 cases at September 2012, and the migration controlled archive of 18,791—that is about

[Meg Hillier]

90,000 cases altogether—were closed, even though the Home Office had not concluded the cases, because it could not find people. That meant that, by December of that year, those figures were zero. The cases were not all dealt with; they were just written off by the Home Office. I think it fair to put on record that the Home Office wrote off some of those cases because it was no longer in contact with the individuals concerned. That is one way to solve a problem, but perhaps not the best solution for every case.

Mr Harper: I will put that straight, though I will not labour the point, Sir Roger, because we will drift off topic. We set out clearly and in writing that we did not just write off those cases. There were more cases than people, as some people had more than one case, as the hon. Lady will know. Many of the cases were very old. We went through an exhaustive process of checking whether those people were still in the UK, and we put all that on record. When we had established that they clearly were not in the country, we closed the cases. It is also worth saying that we did not just write the cases off, as all the information remains on the system.

When people suggested that we had given an amnesty, we made it clear that if we encountered any of those people, their cases would be reactivated and we would take steps to remove them. We went through exhaustive checks to determine whether there was any evidence that they were still in the UK. All the information was made available to the Home Affairs Committee. We published it and, I think, placed it in the Library. I do not think the hon. Lady is right that we just said that we did not want to deal with the cases and would just pretend that they did not exist. That is not an accurate reflection of what happened.

The right hon. Member for Delyn was right that quality of decisions is a focus for the Department. It is partly about the close supervision of new staff and the work we do when we take on new staff—looking at how they make decisions and feeding that back. The chief inspector's November 2012 report on tier 4 student decisions acknowledged that positive steps had been taken to improve the process by which decision makers learn from appeals, which had not been consistently happening.

The right hon. Gentleman made it sound like there was a process whereby if someone made an application and got a decision, there would be an administrative review process and, if they did not like that, they could appeal. There is not an administrative review process for in-country decisions. The process that we are proposing is analogous to that which already exists for most of the decisions made out of country. I will, however, set out a little more detail as I think that will give the Committee confidence that this is not a novel process. The process already exists for many of the entry clearance applications, with which, on current performance, we deal swiftly and successfully.

Administrative review will be a central part of improving decision quality, dealing with case working errors and feeding back review outcomes much better to decision makers. The right hon. Gentleman rightly asked how we are making the process better. With the overseas administrative review process, we are much better at having a closed loop that feeds back the outcomes of the administrative review process to decision makers and thus improves decision quality. The chief inspector acknowledged in his September 2013 report on tier 1 visas that that was the right approach. Our in-country administrative review process is modelled closely on the approach overseas. Implementing administrative review will help us to make better decisions, which is why the right hon. Gentleman's suggestion of effectively putting in place a delay to that process would be unhelpful.

For many of the people who get an initial decision that they do not welcome that relates to a caseworking error, an administrative review process will be no more costly that the existing approach, but will be quicker at resolving their problem. It can take many weeks for the independent tribunal service to deal with cases, but the overseas administrative review process is much quicker, so it is in people's interests that we put such an administrative review process in place.

To be clear, while there is no in-country administrative review process, there is an out-of-country one, under which more than 90% of those administrative reviews are completed within the 28-day target—that is the figure for the quarter ending June 2013. That is much faster than the time it takes someone to go through the appeal process that has been available for some time. There was some scepticism on Second Reading and in last week's evidence sessions that, given that part of the Home Office makes the decision, the process is just a charade and nothing changes. I made the point then that the initial decision in entry clearance cases overseas is overturned in 21% of cases by the administrative review process, so significant numbers of initial decisions are changed following the administrative review process. I have also set out those details in the statement of intent.

Mr Hanson: A response to a freedom of information request published by the Department states that, between July 2012 and June 2013, 6,096 administrative reviews were resolved and that, of those cases, 1,077 decisions were overturned at the first-tier tribunal, which is 18%. What happens to that 18%, or whatever the figure may be in future?

Mr Harper: If I understand the right hon. Gentleman correctly, he is saying that under the administrative review process that already exists for overseas decision making, 18% of decisions are overturned.

Mr Hanson: No. I am saying that, between July 2012 and June 2013, 1,077 of the administrative review decisions were overturned by the first-tier tribunal, which is a proportion of 18%. My question is: whatever that percentage is, what happens to the people whose appeals are upheld currently, but who will not have that right of appeal in future?

Mr Harper: Without having the document in front of me, I am not sure what the right hon. Gentleman means by "administrative review". We do not have a review process for in-country decisions, although administrative reviews exist for overseas decision making. I am not sure that I will be able to answer his specific question at this point, although I will take a look at the document and come back to him.

Meg Hillier: I have a concern beyond that of getting rid of appeals, which my right hon. Friend the Member for Delyn has talked about in great detail. We as MPs can take up cases with the parliamentary ombudsman when we feel there has been a problem. We are the gatekeeper for that process. Has the Minister or the Department made any assessment of the cost to the public purse due to people coming to see MPs, or going through other routes, to get a maladministration decision or a decision from the ombudsman about how their case has been handled? I have dealt with such cases involving people who have had positive outcomes, but been through a bad process. I cannot see that problem diminishing under the proposals; I can see it increasing. Will he outline what costings have been examined?

Mr Harper: The good point that the hon. Lady raises was made during the passage of the Crime and Courts Act 2013, which removed the right of appeal on family visitor visas. I sat down with several hon. Members who had a significant number of constituents with family members overseas who were concerned both for themselves and their staff if there should be a significant influx of extra work. We went through a process to ensure that proper decisions would be made and that there was a proper way of allowing people to supply any extra information required.

I am clear that we are not just trying to move the problem to Members of Parliament, for example. I agree with the right hon. Member for Delyn that this is about making better decisions. One of the roots of our approach is that we are not very good at having a closed-loop process whereby we use appeal decisions to inform the caseworker who made the first decision why their decision was overturned. We are much better at doing that through the administrative review process that we implemented for those decisions from overseas. I am keen to ensure that we have a better process and improve initial decision making. The hon. Member for Hackney South and Shoreditch is right that the better solution—for applicants, and for Members of Parliament—is to make better decisions in the first place for those 5% of applicants who have their case upheld by a tribunal.

To be clear, however, nothing in what we are doing will prevent somebody who has run out of process with us from raising the issue directly with their MP as a backstop, but I assure the hon. Lady, based on my experience so far, that if anything happened in that regard, I would undoubtedly be made aware of it quickly—I am frequently made aware of individual cases—and I would deal with it. I have no intention of using MPs as a way to deal with issues that are not addressed by the tribunal because I know that that would come back quickly to bite me.

Meg Hillier: My concern is not so much about my office and my staff—it is our job to ensure that we represent people and take them through the available processes, and rightly so—as about the potential cost. This is about shunting costs from the Department to the ombudsman. Has the Minister made an assessment of the possible costs? Perhaps he could cite the real-life examples of any increases since the withdrawal of the family visitor visa appeal process, although obviously it is fairly early days on that. If he cannot answer that now, perhaps he will write to the Committee.

Mr Harper: I will certainly have a look to see what work we have done in that area. I reassure the hon. Lady that there is no intention that the Home Office will take a narrow view and just try to move the issue around Government or the public sector. This is about genuinely trying to make better decisions.

I am not at all surprised that people are sceptical, given the history under Governments of both parties. What I think will give people confidence is the administrative review process in the managed migration cases that I set out in the statement of intent, which I have circulated to Members. It is broadly analogous to an existing process that we already implement with our overseas entry clearance applications. That process is working successfully in both making a significant difference to decision making and enabling decisions to be made more quickly. People who apply for an administrative review overseas get a much faster review and determination than somebody going through an appeal process.

Forcing people to use an appeal mechanism when there is a caseworking error—I will go through the types of decision in a minute—is not very sensible. I will say, as the right hon. Member for Delyn thought I would, that I can absolutely see why immigration lawyers and advisers want to retain a process that makes people feel that they need advisers, although in my experience it is not always the case that such advisers provide good advice. The hon. Member for Hackney South and Shoreditch is right that some provide good advice and others do not. There are proposals in the Bill, which we will get to later, that will strengthen the ability of the office of the commissioner to further improve the quality of the advice that is provided by immigration advisers. I think the Committee will support those proposals.

4 pm

I will talk briefly about the cases in which a tribunal makes a different judgment from us. We have looked at a sampling of the cases that the Home Office loses, and about 60% are cases in which we have made a caseworking error. We set out in the statement of intent examples of what we mean by that. In some examples it is alleged that we made an error in calculating the correct period of leave, or that we granted the wrong type of leave, or that we did not consider all the evidence, or the documents were not adequate. For example, there are cases in which we did not correctly apply the evidential flexibility policy, by which we ask the applicant to correct minor omissions in their application before it is decided. Such things account for about 60% of the appeals that we lose. An administrative review process is a sensible means of resolving that type of errors. It would not be sensible to force somebody to go through a legal process in a tribunal, which would impose an inappropriate cost and delay on them and the public sector.

Mr Hanson: My point, which I hope the Minister will address, is that we are not forcing people to go through a judicial procedure. If the administrative review still does not uphold their concern, they have the option of a one-off attempt in a first-tier tribunal to have the matter reviewed externally to the Home Office. The Minister's proposal removes that external "judge over your shoulder".

Mr Harper: I may not be being clear. The right hon. Gentleman is talking as though the process for in-country decisions—the managed migration process—were that

[Mr Harper]

we make a decision and then there is an administrative review process for people who do not find their decision favourable, and if they do not like the outcome they can bring an appeal in the first-tier tribunal. That is not the way it works. There is no administrative review process for in-country decisions. People get a decision, and if they do not like it they can appeal against it, which is what they do. We propose that for dealing with those cases it is more satisfactory for people to have an administrative review process.

I do not blame people for being sceptical. However, they can be confident because we already have an analogous process for overseas decisions, for which there is no right to appeal, and it works pretty well. It reviews cases on a timely basis, and in over 90% of cases it gives people a swift outcome. Some people have said, "Oh, of course, it's just the same people"—it is not the same individuals, but it is the same organisation. I could understand that view if in 99.9% of cases the administrative review concluded that we had made the right decision. But the fact that in 21% of cases it comes to a different decision suggests that it is a robust process that looks seriously at cases and caseworking evidence processes and seriously deals with caseworking errors.

For appeals that are not against caseworking errors—the percentages will not add up to 100%, because there can be more than one ground for appeal—we think that about 30% of points-based system appeals succeed on article 8 grounds. If someone believes they should be allowed to stay in the United Kingdom on human rights grounds, they should make an application on human rights grounds rather than raising it in their appeal against a managed migration application. The Secretary of State can then make a decision on those grounds, which gives them a right to appeal. At the moment the issue of human rights is raised for the first time in the appeal process. It is not right that those decisions are considered by an immigration judge first. They should be considered by the primary decision maker, the Secretary of State. There is then an appeal mechanism, because a fundamental right has been raised. That also answers the question about whether many people will then make human rights or asylum applications. In 30% of managed migration cases in which people have effectively received a no, they already raise such grounds. However, they do so for the first time in the appeal mechanism, which is not the right place; they should make an application on such a basis.

A significant number of appeals are allowed for a technical reason related to a flaw in the Secretary of State's power to serve removal decisions. That flaw has been resolved by the Crime and Courts Act 2013, so although some remaining decisions will work their way through the system, that power has been corrected, which deals with that point.

Finally—I am sure to the relief of Committee members—about 9% of allowed appeals are allowed on the basis that the judge came to a different conclusion from the decision makers, which is quite a small number. Where there is disagreement about the interpretation of rules or of the law, judicial review is the appropriate remedy.

Having set all that out and put it in context, we have shown that, compared with the total number of decisions and applications, only a relatively small number are successfully appealed. For those that are successfully appealed, we will put in place not an existing mechanism but a new mechanism analogous to one that already exists, that works well and that has been reviewed by the chief inspector—his report has provided evidence that it works well. That is the one that we are asking the Committee to support. We are not asking the Committee to take it on trust, but we are asking it to look at an analogous process that works and is better at improving the quality of decision making. That is the ultimate goal that we are all trying to reach and on which there is some unity. On that note, I ask the right hon. Gentleman to withdraw his amendment.

Mr Hanson: In his usual courteous manner, the Minister has tried hard to address my concerns, but I remain unconvinced.

Mr Harper: Extraordinary.

Mr Hanson: Much as I try to reach out the hand of friendship to Ministers on occasion, we sometimes have to agree to differ. My central difference with the Minister in this case is that, despite all he has said, some people whose cases would currently be upheld by a tribunal will not have their case upheld under his proposals. In my view, they would be unfairly—internally, within an admin review—denied the opportunity to have the fairer outcome to the application process that they would have if the tribunal still existed.

Although the Minister has tried hard, I wish to test the will of the Committee on amendment 24. I do not intend to vote against clause stand part this time, because I want to reflect on what the Minister has said and return on Report with a specific amendment. I want the Committee to vote on the amendment, but we will reserve our judgment on clause 24 until another day.

Question put, That the amendment be made.

The Committee divided: Ayes 6, Noes 9.

Division No. 1]

AYES

Hanson, rh Mr David	McFadden, rh Mr Pat
Hillier, Meg	Robertson, John
Jones, Helen	Wilson, Phil

NOES

Doyle-Price, Jackie	Opperman, Guy
Harper, Mr Mark	Patel, Priti
Kirby, Simon	Smith, Henry
Mills, Nigel	Soames, rh Nicholas
Milton, Anne	

Question accordingly negatived.

Clause 11 ordered to stand part of the Bill.

Clause 12

PLACE FROM WHICH APPEAL MAY BE BROUGHT OR CONTINUED

Mr Harper: I beg to move amendment 1, in clause 12, page 10, line 27, leave out 'foreign criminals' and insert 'persons liable to deportation'.

The Chair: With this it will be convenient to discuss Government amendments 2 to 9.

Mr Harper: The amendments relate to clause 12(2) and (3) and would slightly broaden the power under the Bill to make foreign criminals depart from the UK first, and appeal afterwards. The new power is to help to speed up the deportation of harmful individuals, including foreign criminals. At present, all appeals where there is a human rights claim suspend deportation unless the claim can be certified as clearly unfounded. As the Home Secretary has made clear, where there is no risk of serious irreversible harm we should deport foreign criminals first and hear the appeal later, from overseas.

The provision would mean that those facing deportation could be deported, and their appeal could be heard later, while they were out of the country, if the Secretary of State certified that that would not breach the UK's obligations under the European convention on human rights. In particular, the certification would have to include their not facing a real risk of serious irreversible harm if they were removed before the appeal was heard. That builds on the Crime and Courts Act 2013, in which similar provisions were made for out-of-country appeals in national security deportation cases.

The serious irreversible harm test is used by the European Court of Human Rights when it decides whether an individual's deportation must be suspended pending conclusion of litigation, and in its rulings on what types of claim must be granted an in-country appeal. In the de Souza judgment of 2012 the Grand Chamber confirmed that there must be a suspensive appeal in cases where there was arguably a threat to life or a risk of torture. We propose to keep to that. In cases that raise issues about family or private life, the Court made it clear that a suspensive appeal would not normally be required, as long as removal would not cause serious irreversible harm.

I assure the Committee that an arguable asylum claim would never qualify for certification under the power. However, a criminal might suffer no serious irreversible harm in being away from his or her family temporarily during the appeal, even if it is claimed that permanent deportation would be contrary to the right to a family or private life. In the majority of criminal cases there would already have been a substantial interruption to family or private life during the period of imprisonment. Every case will be considered on its facts, and a decision will be made on whether the test for certification has been met.

The clause as originally drafted would apply only to foreign criminals, and so would be focused on those convicted of a serious offence. On reflection, we realised that that definition would leave out a cohort of harmful individuals who should not have a suspensive right of appeal; that is what the amendments are about. That group would include individuals who were being deported from the UK on the ground that their presence would not be conducive to the public good. That is a slightly broader judgment than automatic deportation on the ground of a single serious offence.

The relevant cohort would include, for example, gang members where witness intimidation had prevented a successful prosecution, but where there was sufficient compelling evidence about conduct to be used in an immigration decision. I emphasise that everyone certified under the power will still have an appeal if they have a human rights-based claim; and if their appeal is successful they will be able to return to the UK. We think, however, that where there is no risk of serious irreversible harm we should be able first to deport foreign criminals and those considered not conducive to the public good. They would then have to pursue their right of appeal from overseas.

The reason for that approach came up in the evidence-taking sittings, and it is that many people use the appeal mechanism not because they have a case but to delay their removal from the United Kingdom. In some cases, they attempt to build up a human rights-based claim under article 8, which they subsequently use, sometimes successfully, to prevent their departure. We want to put a stop to that sort of behaviour by people who are criminals or people whose existence in the United Kingdom is not conducive to the public good. I hope the Committee will support the Government amendments.

Dr Huppert: I apologise for missing the beginning of the Minister's comments. It is slightly frustrating to have a Select Committee meeting at exactly the same time as this sitting. I apologise if he has already covered the issue that I am about to raise. What sort of methods do people have to challenge the labelling of being someone who is "not conducive to the public good"? How will the Minister ensure that their appeal is held in prompt time and under reasonable circumstances so that they are not just left waiting for many years?

4.15 pm

Mr Harper: My hon. Friend can be reassured that, in the spirit of coalition bonhomie, I did actually explain his absence. When he reads the record, he will notice that the right hon. Member for Delyn was lamenting his absence during the debate on the appeals right. I stepped in to explain to the Committee that he was double-hatted today and serving on the Home Affairs Committee. I also explained that he had to be absent because of the nature of the debate and his involvement. I put all that on the record, and I hope he welcomes that.

On the Home Secretary's power to deport someone on the ground that their presence is not conducive to the public good, her decision making is partly governed by the legislative framework for those decisions and also by the general view that she must take those decisions in a proportionate and lawful way. If someone disagrees with the original decision to deport someone on the ground that their presence is not conducive to the public good, they can challenge the Home Secretary. Before even getting to the discussion about whether they should be able to appeal against their removal, it should be said that there is a legal basis to the argument in the first place.

On the speed of the appeal mechanism, my hon. Friend is right to say that it should not be artificially prolonged. The Home Office does not run the appeals and tribunal service. I have not seen any evidence that an appeal in such a case would be unduly prolonged. He may have some specific cases in mind, but it is certainly not the intention to deport somebody—a foreign criminal—and then so arrange the administrative process in the tribunal service that they never get to one.

It is difficult to avoid the conclusion that many people who use an appeal—I know this from having looked at long immigration histories and I am sure that the hon.

[Mr Harper]

Member for Hackney South and Shoreditch, who has served in the Home Office, will know this as well—are doing so as a mechanism for delaying their removal, especially when their removal is inevitable. They do it to try to build up some of their rights under article 8 to try to subvert their removal. I do not think that people who are serious criminals or whose presence is not conducive to the public good should be allowed to get away with misuse of the system. Again, we cannot do it, and we should not do it, in cases where they might suffer serious irreversible harm. The Secretary of State has to certify that that is not the case before the power can be used. I hope that that provides my hon. Friend the Member for Cambridge with the assurance that he requires.

Mr Hanson: The Opposition do not oppose clause 12 and will not divide the Committee on it. None the less, I must test the Minister slightly more on his amendments. He obviously tabled them very late in the day. He knows that the Bill has not had pre-legislative scrutiny and that it effectively received an unopposed Second Reading. There were people who voted against the Bill, but the official Opposition did not, yet he is tabling major amendments that change quite significantly the nature of the provisions in clause 12. The Minister cited gang members as the one example of people who are "not conducive to the public good". Members will be aware of the case of Pepper *v.* Hart, which effectively said that the courts can interpret legislation by what is said in Committees, such as the one we are in today. Giving one example provides only a narrow definition of "deportation conducive to public good".

The clause, as amended, gives great discretion to a future Home Secretary, who will be responsible for the legislation, to determine who is deported under that definition. The Minister related the definition to gang members, but I would like him to state why this late amendment was tabled. He said that the matter has been considered, but we have not yet had sufficient explanation of what it will mean in practice. I am saying that to save him difficulties downstream should the legislation be passed, because I can envisage many circumstances in which the Minister could determine that deportation would be conducive to the public good, and he could face challenges on what that actually means. At the moment, the definition refers to gang members only. I would appreciate some clarification either now when we agree to the amendment, to which we will give a fair wind, or later. It is in the Minister's interest to put more flesh on those bones either now or through advice circulated via the Chair and the Clerk to members of the Committee, pending the confirmation on Report about whether that definition can be widened or clarified.

My second question is whether the Minister has any indication of the numbers of people that would be involved after the widening of the current definition. He can presumably tell the Committee how many people he anticipates would fall under the existing definition in clause 12, because "foreign criminals" is clearly defined in proposed new section 117D of the Nationality, Immigration and Asylum Act 2002. I am sure that the Minister can tell us how many fell under that definition last year or the year before, and how many he would expect this year, next year or in any future year. I am not sure, however, whether he can tell us how many of those deportations would be "conducive to the public good". That is important because we have heard today about the challenges that the agency in the Home Office faces on these matters. It would be helpful if the Minister explained what the work load, the potential for challenge and the additional responsibilities might be.

There are two other important aspects. What will happen if the Secretary of State certifies a person's appeal, but that person is not removed from the United Kingdom? If a person wins an appeal, how quickly can they come back from wherever they happen to be, which could be, although the Minister has provided some important caveats, a challenging area in the world?

The Minister needs to provide a little more information, if only to guard a future Minister's back, on the implications of the proposals.

Mr Harper: On the Home Secretary's power to deport people on the ground that their presence in the UK in not conducive to the public good, I cannot give the right hon. Gentleman an exhaustive list of examples, because the whole point about that power is that the Home Secretary must exercise some judgment. However, that judgment will be based on established legal principles for whether it is proportionate and takes proper evidence into account. The Home Secretary cannot just make a judgment about someone on a whim. Any judgment can also be subject to legal challenge. I will give the right hon. Gentleman another example, but it is not possible and would not be right to provide an exhaustive list. It is unhelpful to have undue specificity, because the danger there is the implication that cases that do not fall within those defined are therefore not covered.

The Home Secretary's power is deliberately flexible, but not wide, in the sense that she has to have proper evidence. I know from the decisions that she takes on these matters that she makes them very carefully, with comprehensive advice, and it is well acknowledged in the Department that they are subject to legal challenge. It would be fair to say that, on a whole range of the Home Secretary's decisions, it is not unknown for there to be legal challenge. So the Department is well aware that decisions have to stand up to that.

Another example, so that we do not get segmented in gang members, is that we may have intelligence that shows that an individual is a member of a serious organised crime syndicate. The nature of the intelligence means that we could not prosecute the individual. That criminal could have valid leave in the UK as an investor and he could use that leave to travel to and from the UK freely and to conduct the illegal activities of his crime syndicate. The Home Secretary could consider the intelligence against the criminal and decide to deport him, because his presence in the UK is not conducive to the public good. The decision would be certified to be considered by SIAC, on the basis that it has been taken considering secret intelligence.

The criminal then puts in an application on the basis that it will breach his article 8 rights, as he can no longer associate with his business partners in the UK. Under the original definition of the clause, that case would not fall to have a non-suspensive appeal and, having put in for article 8 rights, he would have had the right to delay

being removed. Under our amended proposals, he would be removed from the United Kingdom and have to file his appeal from overseas. We think that would be right, but I will not give the right hon. Member for Delyn an exhaustive description, because it is not that kind of power. It is not one where you can put down every kind of scenario. The Home Secretary has to have the power to look at the facts of the case and the point is that she has to exercise those powers in an established way—case law sets out how she has to exercise them—and they are sufficiently ring-fenced.

I do not have the figures to hand, but since the right hon. Gentleman has said that he will not divide the Committee now, but reserves the right to come back on Report, it might be helpful to indicate to the Committee the historical cases which would be subject to the original definition in the Bill. I cannot, of course, give him future cases, because I do not know how many foreign national offenders there will be.

Again, I cannot give the right hon. Gentleman future numbers, but I can give him some statistics about the number of people for whom the Home Secretary uses her power to deport on non-conducive grounds. It is a very small number, so we do not anticipate this being used in a large number of cases, but those for which it is appropriate will, by definition, be quite serious. Given that we have primary legislation, we felt that this was a gap that we did not want to leave and that we had not considered when we were first drafting the Bill.

I hope that that is helpful. The right hon. Gentleman has indicated that he will not press the matter now, but I accept that he has some remaining questions which I will seek to answer while the Committee sits and before we reach Report.

Mr Hanson: My question is meant to be helpful, to clarify and not to cause the Minister any difficulty. It is about family members. At the moment, it is clear that a family member of an individual who has been convicted as a foreign national criminal has a relationship with somebody who has been convicted. Yet somebody removed because it is deemed to be conducive to the public good may have no convictions, but the decision is related to a range of material that the Minister has outlined in part—I understand his wish not to specify every circumstance. Again, it would be helpful either now or in writing before Report if he reflects on what that means for a family member of such a person. The proposal means that the Secretary of State can determine that an individual can be removed because of the conducive to public good element. As I understand it—and unless the Minister tells me otherwise—that could also apply to a family member who may have committed no crime, may not be involved in any crime whatever, and may individually have the right, or be applying for the right, to remain in the United Kingdom.

4.30 pm

Mr Harper: I think I can partly answer that final point and, if there is anything further, I may then write to the right hon. Gentleman and other members of the Committee. I think we covered the general point when we talked about removals some time ago. Clearly, if the family member is a British citizen, an EEA national or has the right to be in the UK in their own right, the fact that a family member is being removed will not have an impact. It is clearly more complex if their right to be in the UK is related to the primary person, and if they are in the process of making an application. Those are the factors that have to be taken into account.

On that latter point, where the situation is more complex, I undertake to write to the Committee in good time before Report. I want to be clear rather than effectively winging it. I hope that will satisfy the right hon. Gentleman. If we finish Committee stage and the right hon. Gentleman is not satisfied before we get to Report, given that he is broadly content with what we are doing in this area, I am happy to have discussions with him.

Mr Hanson: The purpose of my questioning is not to be difficult for the Minister. It is simply to pose the type of question that will be posed by individuals who will be subject to the legislation downstream, if it is passed. The definition of family member and the relationship of family member are important, particularly in the circumstances where somebody might be resident in the UK because of a relationship to someone deemed not to be conducive to the public good, or is an individual who might be in the process of applying. They may not know that the other family member is deemed not to be conducive to the public good. There are occasions when people do not know the other lives that people lead.

I think it needs testing so that an individual subject to the legislation will have clarity from the Minister on its impact. I welcome the Minister's offer to write to you, Sir Roger, and your co-chair with a copy to me. That will assist us in considering the clause.

Amendment 1 agreed to.

Amendments made: 2, in clause 12, page 11, line 13, leave out 'foreign criminals' and insert 'persons liable to deportation'.

Amendment 3, in clause 12, page 11, line 14, leave out from 'where' to end of line 15 and insert

'a human rights claim has been made by a person ("P") who is liable to deportation under—

(a) section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good), or

(b) section 3(6) of that Act (court recommending deportation following conviction).'.

Amendment 4, in clause 12, page 11, line 18, leave out 'C' and insert 'P'.

Amendment 5, in clause 12, page 11, line 19, leave out 'C' and insert 'P'.

Amendment 6, in clause 12, page 11, line 20, leave out 'C's' and insert 'P's'.

Amendment 7, in clause 12, page 11, line 24, leave out 'C' and insert 'P'.

Amendment 8, in clause 12, page 11, line 26, leave out 'C' and insert 'P'.

Amendment 9, in clause 12, page 11, line 28, leave out subsection (4).—*(Mr Harper.)*

Clause 12, as amended, ordered to stand part of the Bill.

Clause 13 ordered to stand part of the Bill.

Clause 14

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

Dr Huppert: I beg to move amendment 35, in clause 14, page 14, line 3, at end insert 'or

(c) was born in the United Kingdom and has always lived in the United Kingdom;'.

The focus of the amendment is partly to understand the definition of qualifying children, but also to explore the consequences in relation to the rights of the child. I will start with that broader issue, and will be grateful if the Minister could clarify how this part of the Bill fits with the United Nations convention on the rights of the child. I am sure that the Minister does have an answer. Article 3(1) says,

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

That underpinning rule has fed into a lot of court judgments, which I will not read to the Committee at this stage. I am sure the Minister has looked at the UN convention on the rights of the child. It would be helpful to understand how he has assured himself that there is no contradiction. We would all want to see that level of support.

The specific point of the amendment is to understand what is meant by qualifying child. The interpretation talks on a number of occasions of who is a qualifying child. It talks of a person under the age of 18. There are two categories. One is if that child is a British citizen, and that is relatively clear. The next is that they have lived in the UK for a continuous period of seven years or more. I am interested to know where that period of seven years came from, as opposed to any other number. That leaves out children who have been here a considerable part of their lives but not yet for seven years. This is a probing amendment to understand these issues. Would we want the definition of a qualifying child to include a six-year-old who was born here and has never left? It seems to me that they are very much a British person. We would expect them to count as a qualifying child. If they came here at the age of three months they would have been here for six years. It seems odd that we would not count them as a qualifying child.

As ever, the issue is not the precise wording of the amendment. I am simply keen to understand how the Minister has ensured that the measures are compatible with the UN convention on the rights of the child. What definition has he used for who a qualifying child is? Can he expand on how that works? Could he show any flexibility in that? It is a critical part of this whole chain which is writing existing interpretation into the law. I understand that, although I do not entirely agree with the interpretation. I accept that that is different discussion, but I should be grateful if he could clarify the question of children here.

Priti Patel (Witham) (Con): I want to follow on from the points made by the hon. Member for Cambridge about children. I also seek some clarity here. To what extent will the measures in clause 14 clamp down on many of the associated abuses that we have seen with article 8? Judicial activism, which has rightly been referred to in our wider debates, has prolonged the presence in this country of people who clearly have no right to remain here and that undermines public confidence in the immigration system.

Guy Opperman (Hexham) (Con): I rise to address the amendment proposed by the hon. Member for Cambridge, which goes to the heart of article 8 of the ECHR. It concerns the length of time that an individual has been in the United Kingdom and what constitutes a qualifying partner. Relevant to that, as I am sure he will be aware, is the long history of how the coalition Government and previous Governments have addressed what constitutes the human right, what constitutes an article 8 right and what constitutes a qualifying partner within the confines of the balance between immigration rules, whether it is under the very old system, the 2007 Act or the present rules, and how an immigration judge assesses a problem.

The deportation of a foreign national has been the subject of much political and public debate. Traditionally it was a matter of case law. The case law can be traced back fundamentally to the Immigration Act 1971. I am sure others could go back beyond that Act but I was in short trousers then. Section 3(5) states:

"A person who is not a British citizen is liable to deportation from the United Kingdom if… the Secretary of State deems his deportation to be conducive to the public good".

The previous Government quite rightly attempted to make the process more robust. I was not in this House but in 2007 the UK Borders Act was passed. I attempted to find out who introduced that Act, but as we all know, there were three Home Secretaries—none of whom represented Maidstone or Maidenhead at the time, I hasten to add—between 1 May 2006 and June 2007. All of them, interestingly, have departed this House.

Whether it was Charles Clarke, Dr John Reid or Jacqui Smith who proposed and ultimately introduced the 2007 Act, I know not. What is absolutely clear is that under sections 32(4) and 32(5) of that Act, the Secretary of State must make a deportation order in respect of a foreign criminal. Clearly, Parliament at that time, under the previous Government, was attempting to make the existing situation prior to the 2007 Act more robust. A foreign criminal was then defined as a person who was not a British citizen but who was convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least 12 months. The reality was that the traditional law on the matter came from a variety of ECHR sources and was then interpreted by the House of Lords in its decision on Huang *v.* the Secretary of State for the Home Department in 2007, paragraph 11. Lord Bingham's decision sets out the procedures by which the UK courts should assess such a case.

The coalition Government was elected in May 2010, and the Home Secretary decided to introduce the immigration rules, which were a clear attempt to make the 2007 Act more robust. One can see the gradual progression of Home Secretaries of different hues creating a more difficult situation for the foreign criminal. The Home Secretary certainly expected that the immigration rules would weaken article 8 rights for foreign criminals. That was the clear intention, but in the Court of Appeal case of MF (Nigeria) *v.* the Secretary of State for the Home Department, reference number C5/2013/0398, in a unanimous decision by the Master of the Rolls and two others, Lord Dyson set out an assessment of the immigration rules.

This is particularly relevant to the hon. Member for Cambridge, as the case of MF is very relevant to his proposed amendment. I will deal briefly with the facts of the case, but I refer anybody interested in that particular point to the extensive judgment of Lord Dyson. I suggest that it also dovetails with the point, of which hon. Members will be aware, about the delays in the system.

MF was a citizen of Nigeria who entered the United Kingdom illegally in March 1998. In September 2006, some eight years later, he claimed asylum. In November 2009, he was convicted of handling stolen goods and use of a false instrument, for which he was sentenced to 18 months' imprisonment. He was, therefore, a foreign criminal as defined in the 2007 Act. Accordingly, under section 32(5) of the Act, the Secretary of State was required, subject to section 33, to make a deportation order. However, on 28 March 2009, MF had the good fortune to marry one of his co-appellants, SB, at a time when it was known by all concerned that his immigration status was, to quote the Court of Appeal with its famous undertones, "precarious". He had probably already been charged with offences.

SB had a daughter, F, by another person. Therefore, F was MF's stepdaughter. In that context, the case was heard first by the first-tier tribunal; MF obviously sought leave to stay. The case was subsequently heard by the upper tribunal. I am paraphrasing a long case, but eventually his case was heard by the Court of Appeal, which found very much in favour of MF.

4.45 pm

MF was therefore in a position where, if one understands the case, the clear effect was that the existing immigration rules were not sufficient—notwithstanding the facts that I have set out, nor the fact that the appeal was in relation to a stepdaughter—to secure his deportation. Although many deprecatory things were said about the conduct of the individual, the gentleman was allowed to stay here. I want to set that in the context of the comments of the lady from Justice who gave evidence to us several days ago. If you will give me one more minute, Sir Roger, I will finish on this point.

Simon Kirby (Brighton, Kemptown) (Con): Hear, hear!

Guy Opperman: I am most grateful for my hon. Friend's assistance. The context is that Angela Patrick from Justice made it clear that the process by which clause 14 was being introduced would make the immigration rules more robust. Having studied the case of MF, I am not persuaded by the amendment tabled by the hon. Member for Cambridge. With your indulgence, Sir Roger, I shall stop there.

Mr Harper: I should make it clear that I do not think the amendment is a good one, but—I suspect this might be why my hon. Friend the Member for Cambridge tabled it—it does provide a good opportunity to set out how the Government think the article 8 provisions in the Bill dovetail with our legal responsibilities to consider the best interests of the child.

My hon. Friend mentioned the other legal provisions that govern our obligations towards children: the United Nations convention on the rights of the child and section 55 of the Borders, Citizenship and Immigration Act 2009, usually referred to as the children duty. Having mentioned that and previous immigration Acts, I should say in passing that I was quite worried, although perhaps I should not have been, when listening to my hon. Friend the Member for Hexham describe the UK Borders Act 2007. That Act seemed to get through quite a number of Ministers as it progressed. I hope that I can steer the Bill on to the statute book and come through the process unscathed. My hon. Friend's explanation of the passage of the 2007 Act made me slightly nervous.

Returning to the specific point about children, the two provisions mentioned by my hon. Friend the Member for Cambridge—the UN convention on the rights of the child and section 55 of the 2009 Act—have in common the fact that, as interpreted in particular by the Supreme Court in ZH (Tanzania), they establish the fact that the best interests of the child are a primary consideration. That means that, in discharging the children duty, the Secretary of State must have regard to the best interests of the child as a primary consideration and ask herself whether any other considerations outweigh it. That does not mean that it is the only thing that must be considered, but it is a very important thing to consider.

I am mindful of what the hon. Member for Hackney South and Shoreditch said in her well argued remarks earlier. She made the point that it cannot be the case that the existence of a child trumps everything else because, apart from the fact that there might be other factors, of which criminality might be one, that would mean that children would become tools of people who are up to no good. The provisions in the Bill protect children by not allowing them to be a mechanism for getting around the provisions that are in place.

This is a difficult issue. Cases involving children and families are particularly difficult, as we saw in our earlier debate, because although the adults concerned may well be immigration offenders or may have committed serious wrongdoing, and at the very least are in breach of the law and have taken decisions in full knowledge of what they have done, those factors do not apply to their children. Judgments in those cases are difficult, but that does not obviate the need to make them.

In the case of AJ (India), the Court of Appeal analysed ZH (Tanzania) further, and made some very important comments at paragraph 43 of the judgment:

> "As Baroness Hale stated...in ZH, consideration of the welfare of the children is an integral part of the Article 8 assessment. It is not something apart from it...The absence of a reference to section 55(1) is not fatal to a decision. What matters is the substance of the attention given to the 'overall wellbeing'...of the child...The welfare of children was a factor in Article 8 decisions prior to the enactment of section 55...The primacy of the interests of the child falls to be considered in the context of the particular family circumstances, as well as the need to maintain immigration control."

I have quoted all that because some people have said that the best interests of the child are the primary consideration and outweigh all other factors. That is not correct. Some people have also said that the best interests of the child must be considered first, before all other factors. That is also not correct. Technical legal arguments about whether the best interest of the child is "a" or "the" primary consideration, or the order of consideration, are a distraction. What matters is that we comply with the obligation to treat the best interests of the child as a primary consideration, and the clause is entirely consistent with that.

When we introduced the immigration rules in June 2012 —my hon. Friend the Member for Hexham referred to the Government's previous attempt to lay out a clear view, and both Houses of Parliament agreed the immigration rules unanimously—we said that we wanted to ensure clarity and consistency in decision making

[Mr Harper]

while having regard to our obligations under article 8 and the children duty. A rules-based approach means that everyone is clear about the consequences of overstaying or committing criminal offences and that Parliament decides where to draw the line.

Some lawyers have argued, as did some of the people who gave evidence to us last week, that each case must be looked at on its own facts, that effectively there can be no rules at all and that it is not for Parliament to make judgments about the public interest. That approach provides plenty of work for lawyers, who can then argue that their client's case is different from every other case—or, if it suits them better, that it is just like another case—but it leaves decisions in the hands of lawyers and the courts. It does not allow this Parliament to set out its view, nor does it allow the Secretary of State to make decisions. She is of course the person to whom Parliament has entrusted that decision making. It is right to set out some rules, as we did with the immigration rules and as we are also doing in the clause.

The children duty requires us to have regard to the best interests of the child when making immigration decisions, and the Bill does not change that. I labour that point because, although my hon. Friend the Member for Cambridge did not say this, we heard evidence from a number of organisations—some of them very reputable, on whose judgment I would normally place a great deal of weight—that said that the clause somehow puts aside the need to have regard to the best interests of the child. That is simply not the case.

I will set out a few details for clarity. The clause applies when a court or tribunal is considering article 8 in an immigration case, and sets out what the public interest requires. Those public interest tests or arguments are countervailing factors that must be balanced against the best interests of the child.

Proposed new section 117B of the Nationality, Immigration and Asylum Act 2002 relates to non-criminal cases. It refers to the need to enforce immigration controls and to protect the economic well-being of the UK, both legitimate aims under article 8(2) of the convention. But we have had regard to the children duty and subsection (6) sets out that the public interest does not require the removal of a person who has a qualifying child where it would not be reasonable to expect the child to leave the United Kingdom.

Proposed new section 117C of the 2002 Act applies additional public interest factors to foreign criminals. Again, we have had regard to the children duty, and subsection (5) provides that, where the foreign criminal has been sentenced to less than four years' imprisonment, the public interest does not require deportation where there is a qualifying child and the effect of the criminal's deportation on the child would be unduly harsh. The test is higher for criminals than it is for non-criminals, because of the greater public interest in their deportation. That distinction was accepted by Baroness Hale in ZH (Tanzania). She said:

"If the prevention of disorder or crime is seen as protecting the rights of other individuals, as it appears that the CRC would do, it is not easy to see why the protection of the economic well-being of the country is not also protecting the rights of other individuals. In reality, however, an argument that the continued presence of a particular individual in the country poses a specific risk to others may more easily outweigh the best interests of that or any other child than an argument that his or her continued presence poses a more general threat to the economic well-being of the country."

So, both the economic interests of the UK and the prevention of disorder and crime are legitimate factors to weigh in the balance when considering the children duty, but, unsurprisingly, criminality is a more weighty factor. That is not to say that an article 8 claim on the basis of family life with a child born in the UK with less than seven years' residence could never succeed in outweighing the case for deportation. Such a claim could of course be argued, but would need to demonstrate very compelling circumstances over and above the family life exception, taking into account the public interest in deporting foreign criminals and the seriousness of the offending.

Rather than ignore or overlook the best interests of the child, clause 14 provides very specific protection to a qualifying child, similar to that contained in the current immigration rules. The Bill defines a qualifying child as a child who is a British citizen or has lived in the UK for a continuous period of at least seven years. My hon. Friend's amendment is intended to extend that definition of a qualifying child to include a child who was born in the UK and has never lived anywhere else. I think that attempting to change the definition shows a misunderstanding of the effect of the clause. The best interests of the child have to be considered in every case. The reason for setting out the specific test in clause 14 for when the public interest does not require deportation is to ensure that, as reflected in case law and the current rules, we have clarity and consistency.

In cases that do not fall within the scope of clause 14, consideration will need to be given to the individual facts of the case, having regard to article 8 and section 55. The Bill does not cover every possible situation in which an article 8 or section 55 issue may arise and it would be too complex and unwieldy to attempt to do so. When considering the best interests of the child, the fact of citizenship is important, but so is the fact that a child has spent a large part of their childhood in the UK.

My hon. Friend asked where the period of seven years came from. It is not a number that we simply invented for the Bill. It is based on a previous seven-year concession for children, known as DP5/96, which was a concession against deportation where children had accumulated seven years of continuous residence. It was withdrawn in December 2008 in favour of a case-by-case approach applying article 8. However, as we made clear in the debate on the rules, that left it to the courts to develop the policy on what article 8 required and led to uncertainty and inconsistency. We want to redress the balance, and our starting point is that where a child has been in the UK for seven years, that has significant weight when considering article 8.

In EA (Nigeria) in 2011, the court said that, in the case of very young children—from birth to age 4—the child is primarily focused on themselves and their parents or carers. It said that very young children do not typically form any deep or strong friendships outside the family, such as will happen as the child grows up and begins to develop more independence. We have acknowledged that, if a child has reached the age of seven, it will have moved beyond simply having his or her needs met by the parents. The child will be part of the education system and will be developing social networks and

connections beyond the parents and the home. However, a child who has not spent seven years in the UK, either will be relatively young and able to adapt, or, if they are older, will be likely to have spent their earlier years in their country of origin or another country.

A child who is born in the UK and has never lived anywhere else is not analogous with a British child or a child who has lived in the UK for seven years. The child may be a week old, a year old, or five years old. In every case, the best interests of the child will need to be considered, but where the parent has no right to be in the UK, or is being deported, we would expect, if there are no special circumstances, the child to accompany their parents. We do not want to create a position in which the moment a person has a child in the UK the article 8 balance shifts in their favour, which I think is what I said earlier. That recognises the point raised by the hon. Member for Hackney South and Shoreditch.

If the amendment tabled by my hon. Friend the Member for Cambridge were accepted, it would effectively mean that, as soon as a child came into existence, someone would have a much stronger article 8 case. Creating that automatic presumption would not be helpful.

In a globalised world, many people reasonably and legitimately take their children temporarily to another country before the family return to their country of origin. Sometimes a child is born abroad, and I hope no one is suggesting that by moving to another country and returning home the parents are breaching their child's human rights. In many cases, the parents' aim is to enhance the life and experience of their children by exposing them to different cultures and countries. It is wrong to suggest that removing a family from the UK who have entered temporarily or illegally and have no lawful basis to stay is a breach of article 8, or of the children duty, if they have had a child here. That puts a huge premium on having a child in the UK and would send a bad message about the value of a child as a means of circumventing immigration control. I hope that my hon. Friend will reflect on that and feel able to withdraw his amendment.

Dr Huppert: I will be extremely brief, because I know that hon. Members are keen to finish. The Minister's comments have been helpful, and I will carefully go through and reflect on what he said. Unlike some hon. Members and Members of the other place, I am not a lawyer. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 14 ordered to stand part of the Bill.

Ordered, That further consideration be now adjourned.—*(Anne Milton.)*

5.1 pm

Adjourned till Thursday 7 November at half-past Eleven o'clock.

Written evidence reported to the House

IB 07 Parental Passport Campaign

IB 08 Residential Landlords Association—supplementary

IB 09 NAT (National AIDS Trust) and the Entitlement Working Group

IB 10 Refugee Council

IB 11 Rights of Women

IB 12 Immigration Law Practitioners' Association

IB 13 South Yorkshire Migration and Asylum Action Group (SYMAAG)

IB 14 Detention Action

IB 15 Bail for Immigration Detainees (BID)

IB 16 Dr Zeinab Abdi, Dr Sonia Abid, Dr Kate Aldridge, Dr Rob Aldridge, Dr Jackie Applebee, Dr Peter Baker, Dr David Barr, Dr Miriam Beeks, Dr Rachel Bingham, Dr Colin Brown, Dr Francis Collin, Dr Tim Crocker-Buque, Dr Jienchi Dorward, Dr Joseph Fitchett, Dr Patrick French, Dr Nicholas Hopkinson, Dr Danni Kirwan, Dr Gareth Lewis, Dr Benjamin Patterson, Dr Hugh Grant, Dr Robert Hughes, Dr Anna Livingstone, Dr Michael Marks, Dr Fred Martineau, Dr Angharad Piette, Dr Carl J Reynolds, Dr Jennifer Roe, Dr Clare Shortall, Dr Emily Spry, Dr Taavi Tillmann, Dr Stephanie Wilmore, Dr Wai Keong Wong and Dr Maryam Zaky

IB 17 Christopher Millbank

IB 18 Shout Out UK

IB 19 Undine Schmidt