House of Lords
House of Commons

Joint Committee on Human Rights

Scrutiny of Bills: Progress Report

Third Report of Session 2003–04

Drawing special attention to:

Asylum and Immigration (Treatment of Claimants, etc.) Bill
Domestic Violence, Crime and Victims Bill

HL Paper23
HC 252

House of Lords
House of Commons

Joint Committee on Human Rights

Scrutiny of Bills: Progress Report

Third Report of Session 2003–04

Report, together with formal minutes and appendices

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JOINT COMMITTEE ON HUMAN RIGHTS

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current Membership

HOUSE OF LORDS	HOUSE OF COMMONS
Lord Bowness	Mr David Chidgey MP (Liberal Democrat, *Eastleigh*)
Lord Campbell of Alloway	Jean Corston MP (Labour, *Bristol East)* (*Chairman*)
Lord Judd	Mr Kevin McNamara MP (Labour, *Kingston upon Hull*)
Lord Lester of Herne Hill	Mr Richard Shepherd MP
Lord Plant of Highfield	(Conservative, *Aldridge-Brownhills*)
Baroness Prashar	Mr Paul Stinchcombe (Labour, *Wellingborough)*
	Mr Shaun Woodward MP (Labour, *St Helens South*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm. A list of Reports of the Committee in the present Parliament is at the back of this volume.

Current Staff

The current staff of the Committee are: Paul Evans (Commons Clerk), Ian Mackley (Lords Clerk), Professor David Feldman (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

Contacts

All correspondence should be addressed to The Clerk of the Joint Committee on Human Rights, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2467; the Committee's e-mail address is jchr@parliament.uk.

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Summary

The Joint Committee on Human Rights examines every Bill presented to Parliament. With Government Bills its starting point is the statement made by the Minister under section 19 of the Human Rights Act 1998 in respect of its compliance with Convention rights as defined in that Act. However, it also has regard to the provisions of other international human rights instruments which bind the UK.

The Committee does not in general publish separate reports on each Bill which raises human rights questions, but publishes regular progress reports on its scrutiny of Bills, setting out any initial concerns it has about Bills it has examined and, subsequently, the Government's responses to these concerns and any further observations it may have on these responses. The aim is to complete the cycle of consideration of a Bill before its second reading in the second House.

This report is the first scrutiny of Bills progress report from the Committee of the 2003–04 Session. It draws the special attention of each House to two Government Bills, the Asylum and Immigration (Treatment of Claimants, etc.) Bill and the Domestic Violence, Crime and Victims Bill (sections 1 and 2). It also lists a number of public and private Bills which, in the Committee's view, do not need to be drawn to the attention of either House on human rights grounds at this time (sections 3 to 5).

In respect of the Asylum and Immigration (Treatment of Claimants, etc.) Bill

The Committee draws attention to:

— the attempt in clause 10 of the Bill to restrict the remedies for violations of Convention rights which would normally be available under section 7 of the Human Rights Act 1998 (paragraphs1.23 to 1.28);

— the questionable nature of the presumption in clauses 11 and 12 of the Bill that certain countries can always be regarded as "safe countries" in relation to the Refugee Convention or rights under the ECHR, either generally or for particular purposes (paragraphs 1.29 to 1.33);

— a number of other human rights issues relating to clauses 2, 6, 7, 8, 10, 13, 14, 15, 16 and 20 of the Bill (paragraphs 1.5 to 1.21).

A copy of the letter from the Chair of the Committee to the Home Secretary setting out the questions the Committee has raised with the Government is appended to the Report.

In respect of the Domestic Violence, Crime and Victims Bill

The Committee draws attention to:

— the effect of clause 5(1) and (2) of the Bill, relating to inferences of guilt from a defendant's failure to give evidence, on the right to a fair hearing under ECHR Article 6 (paragraph 2.8);

— the effect on the right to liberty under ECHR Article 5 of clause 7 of the Bill, extending powers of arrest without warrant to the offence of common assault (paragraph 2.11);

— the importance of ensuring that any code of practice on victims and witnesses, proposed by clauses 13 to 15 of the Bill, would not interfere with the right to a fair hearing under ECHR Article 6 (paragraphs 2.13 and 2.14);

— the effect of clause 23 of the Bill, allowing information to be disclosed for certain purposes without it being a breach of any restriction on disclosure other than one imposed by the Data Protection Act 1998, on the obligation of public authorities under section 6(1) of the Human Rights Act 1998 to respect private and family life and correspondence under ECHR Article 8 (paragraphs 2.15 to 2.19).

Government Bills drawn to the special attention of each House

1 The Asylum and Immigration (Treatment of Claimants, etc.) Bill

Date introduced to the House of Commons	27 November 2003
Date introduced to the House of Lords	
Current Bill Number	House of Commons 5
Previous Reports	none

Background

1.1 The Asylum and Immigration (Treatment of Claimants, etc.) Bill is a Government Bill, introduced to the House of Commons on 27 November 2003. The Home Secretary has made a statement under section 19(1)(a) of the Human Rights Act 1998 that in his opinion the Bill is compatible with Convention rights. Explanatory Notes to the Bill have been published[1] (hereafter "EN"). They deal with the Government's view as to the effect of the Bill on Convention rights.[2]

1.2 We have received numerous representations about the effects of the Bill, and the House of Commons Home Affairs Select Committee has also reported on the Bill.[3]

1.3 This Report offers our preliminary reflections on the human rights implications of the Bill. We have put a number of questions to the Government arising from this preliminary consideration.[4] When we have received the Government's responses, we expect to report our conclusions.

The scheme of the Bill

1.4 The Bill deals with a number of different matters, and its overall scheme is as follows.

New or extended criminal offences

1.5 Clauses 1 to 5 would create four new criminal offences.

a) Assisting unlawful immigration (clause 1): this would amend section 25 of the Immigration Act 1971 to allow the Secretary of State to extend by order the list of States, to be known as the "Schengen Acquis States", to assist unlawful immigration into which it will be a criminal offence in the United Kingdom. The Secretary of State's power would be exercisable only when the Secretary of State thinks it necessary for the

1 Bill 5—EN

2 paras 135–143

3 Home Affairs Committee, First Report of 2003–04, Asylum and Immigration (Treatment of Claimants, etc.) Bill, HC 109.

4 See letter from the Chair to the Home Secretary printed as Appendix 1 to this Report.

purpose of complying with the United Kingdom's obligations under the European Community Treaties. We do not consider that this provision raises a human rights issue requiring to be drawn to the attention of either House at this time.

b) Entering the United Kingdom without an immigration document which is in force and satisfactorily establishes the identity and nationality or citizenship of the person and any dependent child would for the first time become a criminal offence (clause 2). The crucial time would be the first occasion on which the person is interviewed by an immigration officer. There would be a power to arrest without warrant on reasonable suspicion that a person is committing this offence, and other investigatory powers would be applicable. There would be various defences. **This provision in our opinion raises issues relating to discrimination and the Refugee Convention.** This issue has been raised with the Government,[5] and we expect to report further on this matter.

c) Forging immigration documents (other than passports) would be made an offence contrary to the Forgery Act 1981, section 5 (clause 3). This provision seems to us to give rise to no human rights issue requiring to be drawn to the attention of either House at this time.

d) Clauses 4 and 5 would create a new offence of arranging or facilitating the arrival in the United Kingdom of a passenger whom the person intends to exploit through slavery or forced labour within the meaning of Article 4 of the ECHR, sale or coerced donation of organs for transplant, or the use of force, threats or deception to induce the passenger to provide any services or benefits for another person or to enable another person to acquire any benefit. The person assisting entry would be liable if any of the conduct to which the clauses relate is done inside the United Kingdom, or is done outside the United Kingdom by a British citizen, a British overseas territories citizen, a British National (Overseas), a British Overseas Citizen, or a British subject or British protected person under the British Nationality Act 1981. In our view, this gives rise to no human rights issue requiring to be drawn to the attention of either House at this time.

Assessing the credibility of a claimant for asylum or for admittance on human rights grounds

1.6 Clause 6 attempts to provide a framework of relevant considerations to be taken into account when a decision-maker in the immigration process is deciding whether or not to believe any statement made by or on behalf of a person who makes an asylum claim or a human rights claim. **This provision in our opinion raises human rights issues.** We have raised these questions with the Government,[6] and we expect to report further on this matter in the near future.

Withdrawal of support from claimants whose asylum claim has failed

1.7 Clause 7 would amend Schedule 3 to the Nationality, Immigration and Asylum Act 2002 by inserting a new paragraph 7A extending the power of the Secretary of State to

5 See Appendix 1, pp 23–24.

6 See Appendix 1, pp 24–25.

deprive an unsuccessful asylum-seeker of support from public funds. **This raises issues relating to ECHR Articles 3 and 8.** We have raised these questions with the Government,[7] and we expect to report further on this matter in the near future.

Additional investigatory powers for immigration officers

1.8 Clause 8 would extend the powers of immigration officers, allowing them to arrest people on reasonable suspicion that they have committed a wide range of offences, including bigamy and crimes under the Theft Act 1968 and similar legislation, and to conduct searches. **These powers in our opinion raise issues relating to ECHR Articles 5 and 8.** We have raised these questions with the Government,[8] and we expect to report further on these matters in the near future.

Fingerprints

1.9 Clause 9 would increase the scope of powers to fingerprint people in the immigration process. Instead of waiting until a direction for removal has been given, it would be possible to take fingerprints of a person as soon as a decision has been taken to reject a claim for leave to remain. It would thus be available from the beginning of the process of enforcing removal. **This engages the right to respect for private life under ECHR Article 8.1, but in our view it is likely to be justifiable under Article 8.2 as a proportionate response to a pressing social need to prevent crime by making it more difficult for people whose applications have been rejected to remain unlawfully in the United Kingdom.**

New system for handling appeals

1.10 Clause 10 of, and Schedules 1 and 2 to, the Bill would replace immigration adjudicators and the Immigration Appeal Tribunal with a single-tier Asylum and Immigration Tribunal, and would seek to cut off all appeals to and judicial review by the ordinary courts in immigration matters (although the Special Immigration Appeal Commission would be unaffected). **These provisions cause us serious concern in relation to the attempt in the Bill to limit the remedies for violations of Convention rights provided by section 7 of the Human Rights Act 1998.** We consider this further below, at paragraphs 23 to 28. **These provisions also raise issues relating to the right to an effective remedy for a violation of Convention rights under ECHR Article 13, as well as serious issues relating to the maintenance of the rule of law.** We have raised these issues with the Government,[9] and expect to report further on them in the near future.

States which are "safe" for restricted descriptions of people

1.11 Section 94 of the Nationality, Asylum and Immigration Act 2002 sets out a list of States which are presumed to be safe places for asylum and human rights purposes, and allows the Secretary of State to amend the list. Once a State is on the list, a person claiming

7 See Appendix 1, pp 25–26.

8 See Appendix 1, pp 26–27.

9 See Appendix 1, pp 27–29.

to be the victim there of persecution falling within the Refugee Convention, or of a violation of human rights, can be presumed to be making an unfounded claim. He or she can be returned to that State, and has no right to appeal from inside the United Kingdom against the decision that his or her claim is unfounded. There are some States which are known to be unsafe for people of a particular gender, language, race, religion, nationality, membership of social or other group, political opinion or other attribute, but are safe for others. Clause 11 of the Bill would allow the Secretary of State to specify that asylum and human rights claims by people from such a State are unfounded (because the State is "safe" for those people) only if the claimants fall within (or outside) categories defined by reference to those criteria. **Clause 11 of the Bill seems to us to be likely to make the operation of the "safe country" system more responsive to local conditions and less likely to lead to a violation of human rights, but in our view the idea of a "safe country" is still questionable.** We develop our reasons for this view further, in combination with discussion of clause 12, below**.**

Removal and detention pending removal

1.12 Clause 12 of the Bill, and Schedule 3 to it, would replace existing provisions for removing asylum seekers to "safe" countries with a list of countries which are presumed to be safe for everyone for the purposes of both the Refugee Convention and the Convention rights under the ECHR. There are 26 countries on the list. The Secretary of State would then be empowered to create a second list, by order, of countries which are presumed to be safe for the purposes of the Refugee Convention, but not the ECHR rights. In addition, the Secretary of State would be empowered to certify that a particular country which is not on the lists would be safe for a specified person, so that that person could be removed there. **The provisions of clause 12 in our view raise significant human rights issues.** These are explained below at paragraphs 29 to 33.

Removal of power to grant bail

1.13 Clause 13 of the Bill would amend paragraph 2 of Schedule 3 to the Immigration Act 1971 to allow a person whose deportation has been recommended by a court to be detained without allowing the court to free the person on bail. **In our view the provisions of Clause 13 engage the right to liberty under ECHR Articles 5, 8 and 13.** We have raised these questions with the Government,[10] and expect to report further on this matter in the near future.

Deportation or removal: co-operation

1.14 Clause 14 would allow the Secretary of State to require a person to take specified action, including providing information, documents, identification data and co-operation, in order to facilitate that person's deportation or removal by enabling a travel document to be obtained for the person. Failure to co-operate would be an offence. **In our view Clause 14 raises issues about the right to respect for private life under ECHR Article 8.** These

10 See Appendix 1, p 30.

questions have been raised with the Government,[11] and we expect to report further on them in the near future.

Electronic monitoring

1.15 Clause 15 would allow electronic monitoring to be imposed on an applicant for immigration to complement a residence restriction or as a condition for immigration bail, or as an alternative to a reporting restriction. **The imposition of electronic monitoring engages the right to respect for private life under ECHR Article 8.1. In our view it may be justifiable under Article 8.2 as being in accordance with the law and being necessary in a democratic society for the prevention of crime (in this case illegal immigration). However, there would be no power to challenge the decision to impose a monitoring requirement, because of the restriction on remedies contained in clause 10. There is in our view therefore a risk that this would violate the right to an effective remedy under ECHR Article 13.** We have raised this matter with the Government,[12] and expect to report on it further in the near future.

Controls over immigration advisers

1.16 Clauses 16 to 19 would impose a number of controls over people offering advice and assistance to immigrants.

1.17 Clause 16 would allow a JP to issue a warrant permitting the Immigration Services Commissioner to enter and search premises for material of substantial value to the investigation of an offence against section 91 of the Immigration and Asylum Act 1999 (provision of immigration advice or assistance by an unregistered person) in certain circumstances, even if the material consists of items subject to legal professional privilege or the categories of confidential or journalistic material known as excluded material and special procedure material under the Police and Criminal Evidence Act 1984. **The provisions of Clause 16 in our opinion engage the right to respect for private life and correspondence under ECHR Article 8.** We have raised this matter with the Government,[13] and expect to report further on it in the near future.

1.18 Clause 17 would insert a new section 92B in the Immigration and Asylum Act 1999 to create a new offence where a person offers to provide immigration advice or services (which include advertising such services) in circumstances where doing so would constitute an offence contrary to section 91. This does not seem to us to engage Convention rights.

1.19 Clause 18 would remove the right to appeal to the Immigration Services Tribunal against a decision to defer a decision in relation to the recognition of a provider of immigration advice or services, amending section 87(3) of the Immigration and Asylum Act 1999. In our view, this would not engage Convention rights.

11 See Appendix 1, p 30.

12 See Appendix 1, pp 30–31.

13 See Appendix 1, pp 31–32.

1.20 Clause 19 would amend section 86 of the Immigration and Asylum Act 1999 to allow the Secretary of State to remove a professional body from the list of designated bodies whose members may provide immigration advice and services. It would also compel a designated body to comply with any request of the Commissioner of Immigration Services for the provision of information, either in general or in relation to a particular matter. The Secretary of State would be able to remove the body by order, if it has failed to provide effective regulation of its members' provision of such advice or services, or if it has failed to provide information in response to a request from the Commissioner of Immigration Services. In our view, this does not engage any Convention right.

Fees

1.21 Clauses 20 and 21 would allow the Secretary of State to charge a fee for applications for nationality, leave to remain, work permits, etc., in excess of the administrative cost of processing the application and reflecting the benefits which the Secretary of State thinks are likely to accrue if the application is successful. **In our view there is a risk that the provisions of Clauses 20 and 21 could result in the immigration system operating in a discriminatory way, discriminating against people on the basis of their wealth, in contravention of ICCPR Article 26. This binds the UK in international law, although it does not form part of national law.** This matter has been raised with the Government,[14] and we expect to report further on it in the near future.

General matters

1.22 Clauses 22 to 28 and Schedule 4 deal with matters of interpretation, money, repeals, commencement, extent and short title, and do not seem to us to require to be drawn to the attention of either House on human rights grounds.

Remedies for violations of Convention rights: the relationship between clause 10 of the Bill and section 7 of the Human Rights Act 1998

1.23 **Our gravest concern about the provisions of the Bill relate to the apparent restriction it would impose on the remedies available under the Human Rights Act 1998**. Clause 10(7) of the Bill would introduce a new section 108A into the Nationality, Immigration and Asylum Act 2002 which would cut off all appeals to and judicial review by the ordinary courts in immigration matters.[15] It would also exclude habeas corpus applications in immigration cases. The only remedy for a person wishing to challenge a decision of the proposed new single-tier Tribunal would be to ask the Tribunal to review its own decision[16] unless the person is challenging a certificate allowing the removal of the person to a safe country and treating the person's claim in this country as unfounded, or is alleging that a member of the Tribunal has acted in bad faith, in which case the High Court would be able to entertain an application for judicial review.[17] The President of the

14 See Appendix 1, p 32.

15 The Special Immigration Appeal Commission would be unaffected.

16 Clause 10(6), introducing a new section 105A to the 2002 Act.

17 Proposed new section 108A(1)–(3).

Tribunal would be allowed to refer a point of law for the opinion of an appellate court, but would be under no obligation to do so, and the opinion of the court would not bind the Tribunal when it comes to make its decision.[18]

1.24 These provisions raise a large number of issues on which we expect to report in due course. At present, we are particularly concerned by the proposed new section 108A(4) of the Nationality, Asylum and Immigration Act 2002, which provides that—

> Section 7(1) of the Human Rights Act 1998 (c. 42) (claim that public authority has infringed Convention right) is subject to subsections (1) to (3) above.

Subsections (1) to (3) would seek to exclude the jurisdiction of the High Court to review decisions of the proposed new Tribunal.

1.25 Section 7(1) of the Human Rights Act 1998 is fundamentally important to the scheme of that Act and to the system of protection for Convention rights in the United Kingdom. It provides that a person claiming to be the victim of a violation by a public authority of a Convention right may bring proceedings against the public authority in "the appropriate court or tribunal", or rely on the Convention right in any legal proceedings. The effect of proposed new section 108A(4) of the 2002 Act would be that there would be no such "appropriate court or tribunal" when it is alleged that the proposed new Tribunal has itself acted incompatibly with a Convention right, save for a request to the Tribunal itself to review its decision under proposed new section 105A.

1.26 The Government says that the Lord Chancellor would be able to make rules providing for such a challenge to go to a court or tribunal specified in the rules,[19] but does not explain the source of the power. It probably refers to the power in section 7(2) and (9)–(13) of the Human Rights Act 1998 to make rules identifying particular courts or tribunals as the appropriate court or tribunal to hear claims under section 7(1) of the 1998 Act. However, we consider it very likely that any such rule purporting to allow a challenge to a court in an asylum or immigration matter would, if the Bill is enacted, be invalid and void. As subordinate legislation, it would not be valid if it is inconsistent with the primary legislation contained in proposed new section 108A(1) to (3) of the Nationality, Immigration and Asylum Act 2002. In any case, it would appear inherently unlikely that any such power would be used, if the provisions of clause 10 as a whole accurately reflect current Government policy.

1.27 **We are deeply concerned about any provision in a Bill which seeks to make an important provision of the Human Rights Act 1998 subject to other legislation, particularly when the later legislation attempts to restrict remedies for violations of Convention rights by excluding the jurisdiction of the ordinary courts**. The power and duty of ordinary courts to provide remedies for Convention rights is fundamental to the ECHR. As the European Court of Human Rights observed in *Golder v. United Kingdom*,[20] "One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was

18 Proposed new s. 108B of the Nationality, Immigration and Asylum Act 2002, to be inserted by cl 10(7).

19 Explanatory Notes, para. 139.

20 (1975) 1 EHRR 524 at § 34 of the judgment.

their profound belief in the rule of law. … And in civil matters one can scarcely conceive of the rule of law without there being a possibility of access to the courts." It was also at the centre of the Government's scheme for "bringing rights home" to the United Kingdom. Limiting the scope of the Act's scheme of remedies in particular areas of administration and decision-making would set a dangerous precedent.

1.28 We regard the proposal to restrict the remedial framework of section 7(1) of the 1998 Act through the proposed new section 108A(4) of the 2002 Act as being inherently objectionable as an attack on an important element of the scheme for protecting Convention rights in the United Kingdom. We draw this matter to the attention of each House. We will report further when the Government has responded to our questions.

Rights to appeal and "safe countries"

1.29 Clause 11 of the Bill would extend the power of the Secretary of State under section 94 of the Nationality, Immigration and Asylum Act 2002 to certify a human rights or asylum claim as clearly unfounded, allowing the claimant to be removed without consideration of the claim on its merits where the Secretary of State is satisfied that the claimant is entitled to reside in a "safe country" which appears in a list made by the Secretary of State by order. The clause would allow the Secretary of State to make an order specifying a state or part of a state as "safe" for this purpose for people falling within a defined description, although not as generally being safe.

1.30 Clause 12 of the Bill, and Schedule 3 to it, would replace existing provisions for removing asylum seekers to "safe" countries. The idea behind prescribing certain countries as "safe" is to allow the Home Secretary to reject a person's claim as manifestly ill-founded, without looking at the merits, if it amounts to an allegation that the person has suffered persecution within the meaning of the Refugee Convention (an "asylum claim"), or would be in danger of suffering a violation of his or her Convention rights so that removal to that country would be unlawful by virtue of section 6 of the Human Rights Act 1998 (a "human rights claim"), in one of the prescribed countries. In addition, existing legislation prevents people from appealing against the rejection of the claim or consequential decisions until he or she has left the United Kingdom.

1.31 Schedule 3 to the Bill would create a list of countries which are presumed to be safe for everyone for the purposes of both the Refugee Convention and the Convention rights under the ECHR. There are 26 countries on the proposed list. The Secretary of State would then be empowered to create a second list, by order, of countries which are presumed to be safe for the purposes of the Refugee Convention, but not the ECHR rights. That is to say, people in those countries can be assumed not to have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, but cannot be assumed to be adequately protected against violation of their rights under the ECHR. In addition, the Secretary of State would be empowered to certify that a particular country which is not on the lists would be safe for a specified person, so that that person could be removed there.

1.32 The Committee has previously reported on earlier proposals[21] for lists of countries which should conclusively be presumed to be safe. It drew the attention of each House to its view that "the presumption that a country is safe is of questionable validity",[22] and that the restriction of any right of appeal against a decision that a human rights or asylum claim is clearly unfounded until the claimant has left the country could undesirably weaken legal protection for the rights of asylum-seekers and human rights claimants.[23] At that time, there was no proposal to exclude access to judicial review in immigration and asylum cases. It seems to us that the threat to the structure of remedies is now even more acute, because of the proposals in clause 10 of the current Bill.

1.33 We remain of the view, which we expressed in 2002, that the presumption that a particular country is always safe for everyone is of questionable validity. We are even more concerned about the restriction of appeal rights than we were in 2002, because of the proposals in clause 10 to restrict legal remedies for unlawful or erroneous decisions. We draw this to the attention of each House, and expect to report further when we have received the Government's responses to our questions.

21 In the Nationality, Immigration and Asylum Bill of 2002.

22 Twenty-third Report of Session 2001-02, Nationality, Immigration and Asylum Bill: Further Report, HL Paper 176, HC 1255, paras. 35–37.

23 ibid., paras. 30–34, 38–39; Seventeenth Report of Session 2001–02, Nationality, Immigration and Asylum Bill, HL Paper 132, HC 961, paras. 93–108.

2 The Domestic Violence, Crime and Victims Bill

Date introduced to the House of Commons	1 December 2003
Date introduced to the House of Lords	
Current Bill Number	House of Commons 6
Previous Reports	None

Background

2.1 The Domestic Violence, Crime and Victims Bill is a Government Bill, introduced to the House of Lords on 1 December 2003. The Minister of State at the Home Office, Baroness Scotland of Asthal, has made a statement under section 19(1)(a) of the Human Rights Act 1998 that the Bill is in her opinion compatible with Convention rights. Explanatory Notes to the Bill have been published.[24] They deal with the Government's view as to the effect of the Bill on Convention rights at paragraph 100, merely noting that the Minister had made a section 19(1)(a) statement. The proposals contained in the Bill follow a number of reports (including two by the Law Commission), consultation papers and White Papers.

2.2 Here, we draw attention to a number of human rights implications of the Bill which we have raised with the Government in a letter from our Chair to the Home Secretary. A copy of the letter is appended to the Report. We expect to report further in due course on the matters which we have raised.

The scheme of the Bill

2.3 The Bill is divided into four Parts, dealing respectively with domestic violence (including offences and evidence relating to non-accidental death within families), criminal procedure (including trial on indictment without juries), treatment of victims of crime, and the usual supplementary matters of amendments, repeals, commencement, extent, short title, etc. We concentrate on the substantive provisions in Parts 1 to 3.

2.4 The main provisions are as follows.

Non-molestation orders

2.5 Clause 1 would insert a new section 42A in the Family Law Act 1996 making it an offence to breach a non-molestation order made under section 45 of that Act.[25] Clause 2 would amend section 62(1)(a) of the 1996 Act to include same-sex couples within the category of "cohabitants" who are entitled to the protection, and subject to the obligations, of that part of the Act. Clause 3 would amend section 62(3) of the 1996 Act to include people who have or have had an intimate relationship with each other of significant duration among the "associated persons" who may be entitled to the protection, and subject to the obligations, of that part of the Act. In our view, these provisions are entirely consistent with Convention rights, and would help to ensure that the protection of the

24 HL Bill 6—EN

25 See the White Paper, Justice for All Cm 5563 (2002), and the Government's consultation paper, Safety and Justice: the Government's Proposals on Domestic Violence Cm 5847, 2003.

1996 Act extends to all those who have a family relationship within the meaning of ECHR Article 8 in a manner compatible with the right under ECHR Article 14 to be free of discrimination in the enjoyment of Convention rights.[26]

Harassment: restraining orders

2.6 Clause 8 would amend section 5 of the Protection from Harassment Act 1997 to allow a court to make a restraining order (preventing a person from doing anything described in the order) where a defendant is convicted of any offence, and to entitle anyone named in the order (including anyone intended to be protected by it) to be heard on an application to vary or discharge the order. It would also insert a new section 5A in the 1997 Act to allow a court to make a restraining order when a defendant is acquitted of any offence, if the court considers it necessary to do so to protect a person from harassment by the defendant.[27] These provisions engage the right of the defendant to respect for private life under ECHR Article 8.1, but also serve to protect the Article 8.1 rights of potential victims of harassment. The court would be bound by its obligation under section 6(1) of the Human Right Act 1998 to act in a manner compatible with Convention rights, including Article 8 and the right to a fair hearing under Article 6, when deciding whether to make, vary or discharge an order. In our view, the provisions of clause 8 are likely to be justifiable under ECHR Article 8.2 as being in accordance with the law and necessary in a democratic society for the protection of the rights of others, and the procedure is unlikely to violate Article 6 standards.

Causing or allowing the death of a child or vulnerable adult

2.7 Clause 4 of the Bill would create a new offence of being a person who causes the death of a child or vulnerable adult in the same household or failing to take reasonable steps to protect the victim from a significant risk of serious physical harm resulting from the unlawful act of another member of the household.[28] Clause 6 would allow the Secretary of State to institute a "domestic homicide review" in relation to a death of the kind contemplated in clause 4. In our view, clauses 4 and 6 do not give rise to a significant threat of a violation of any Convention right, and may help to protect the right to life under ECHR Article 2 and interpreted by the European Court of Human Rights and English courts.

2.8 Clause 5 would allow a court or jury, trying someone for murder or manslaughter alongside an offence under clause 4, to draw inferences against the defendant in relation to the charge of murder or manslaughter from his or her failure or refusal to answer a

26 We note that in Lomas v. Parle, The Times, 13 January 2004, CA, the Court of Appeal drew attention to the deficiencies of a divided court system in which the legal treatment of domestic violence is divided between different courts. The Court called for a unified court, with expertise in both civil and family law, to deal with such cases, and suggested that the Domestic Violence, Crime and Victims Bill might be a suitable vehicle for the creation of such a court. In the meantime, the Court laid down mandatory guidelines for court procedures in domestic violence cases involving criminal law, family law and civil law. In particular, the Court gave guidance on the relationship between orders under the Family Law Act 1996 and the Protection from Harassment Act 1997, and between sentences in criminal cases and penalties for breaching orders made under those Acts.

27 See Safety and Justice, n. 25 above.

28 See Law Commission No. 279, Children: Their Non-accidental Death or Serious Injury (Criminal Trials) (2003), Law Commission No. 282, Children: Their Non-accidental Death or Serious Injury (Criminal Trials) (2003), and NSPCC, Which of you did it? (2003).

question, even if there is no other evidence against the accused which would amount to a case to answer. In our view, the provisions of clause 5 may give rise to a risk of incompatibility with the right to a fair hearing under ECHR Article 6. We have raised this matter with the Government,[29] and we expect to report further on it in due course.

2.9 Clause 5(4) would provide that the offence of failing to protect a child or vulnerable adult against a threat of unlawful action which causes death would be an offence of homicide for the purposes of deciding the mode of trial and sentence of a child or young person for indictable offences.[30] The result would be that a child or young person charged with, or to be sentenced for, an offence contrary to clause 4 would always be tried and sentenced in the Crown Court rather than a youth court. This would not in itself violate the right to a fair hearing under ECHR Article 6[31] or the right "to be treated in a manner consistent with the promotion of the child's sense of dignity and worth" under Article 40.1 of the Convention on the Rights of the Child, as appropriate measures would be in place to ensure that the defendant receives proper protection in view of the special vulnerability of children in the criminal process.

Arrest for assault

2.10 Clause 7 would make common assault[32] an offence for which a person could be arrested on reasonable suspicion without a warrant in England and Wales and Northern Ireland. It would become an arrestable offence within the meaning of the Police and Criminal Evidence Act 1984 and the Police and Criminal Evidence (Northern Ireland) Order 1989. This engages the right to liberty under ECHR Article 5, but in our view does not give rise to a significant risk of violating the Article as long as the person making the arrest acts in accordance with obligations under the Human Rights Act 1998.

2.11 However, we note that a person may be arrested for an arrestable offence within the meaning of the 1984 Act and the 1989 Order by someone who is not a police officer, and who might therefore not be subject to the obligation under section 6(1) of the Human Rights Act 1998 to act in a manner compatible with Convention rights. This could have the effect of limiting the extent to which a person has an effective remedy for a violation of the right to liberty under ECHR Article 5, although the torts of battery and false imprisonment will usually provide an adequate remedy. We draw this to the attention of each House.

Limiting trial by jury

2.12 Clauses 9 to 12 of the Bill deal with the case of a defendant who faces a large number of counts in an indictment.[33] If it is likely to be impracticable to have all the counts tried by a jury, and it is possible to identify sample counts, and it is in the interests of justice to do

29 See Appendix 2.

30 Magistrates' Courts Act 1980, ss. 24 and 25; Crime and Disorder Act 1998, s. 51A; Powers of Criminal Courts (Sentencing) Act 2000, s. 8.

31 See T. and V. v. United Kingdom Apps Nos 24724/94 and 24888/94, judgment of 16 Dec. 1999, Eur. Ct. HR.

32 That is words or acts putting a reasonable person in fear of suffering immediate and unlawful physical touching, and physical touching of a person without his or her consent, without any bodily harm.

33 See Law Commission, Law Com No. 277, The Effective Prosecution of Multiple Offending (2002).

so, a Crown Court judge would be allowed to order that only the sample counts would be tried by jury, while the other counts would be tried by judge alone. Clause 11(4) and (5) contains protections for the rights of the defence. In our view, these provisions do not engage any Convention right.

Victims

2.13 Part 3 of the Bill would further regulate the treatment of victims in the criminal justice process.[34] The Secretary of State would be required to issue a code of practice as to the services to be offered to victims (clauses 13 to 15). The Parliamentary Commissioner for Administration would be empowered to investigate complaints, made in writing to a Member of Parliament and referred to the Commissioner, that a person has failed to perform a relevant duty under the code of practice (clause 16 and Schedule 1, amending the Parliamentary Commissioner Act 1967). A new office, that of the Commissioner for Victims and Witnesses, would be established to promote the interests of victims and witnesses, to encourage good practice in their treatment, and to keep the code of practice under review, but without power to intervene in individual cases (clauses 17 to 22 and Schedule 2). There would be a Victim's Advisory Panel, to be consulted by the Secretary of State on appropriate matters (clause 24). The Secretary of State would be empowered to make grants to support measures to assist victims, witnesses and other people affected by offences (clause 15).

2.14 In our view, the provisions of Part 3 of the Bill do not in themselves engage Convention rights. However, we draw the attention of each House to the possibility that the terms of the code of practice, when implemented, may have an effect on the ability of a court to ensure that a defendant has a fair hearing in the determination of a criminal charge, as required by ECHR Article 6. We recommend that any such code should be carefully scrutinized to ensure that their implementation would not interfere with the right to a fair hearing under ECHR Article 6.

Disclosure of information

2.15 Clause 23 would allow a person to disclose private information to anyone bound by the proposed code of practice on victims and witnesses, or to a local probation board, or to the Commissioner for Victims and Witnesses, or to an authority within the remit of the Commissioner, for the purpose of—

a) complying with the code of practice; or

b) complying with the duties of local probation boards in relation to victims of certain offences; or

c) helping the Commissioner to carry out his or her functions.

34 See the Government's 2001 consultation paper on the review of the Victim's Charter; Justice for All (n. 25 above), pp. 48–49; the Government's policy leaflet A Better Deal for Victims and Witnesses presented to the Library of each House in November 2002, and the national strategy for victims and witnesses published on 22 July 2003.

2.16 Clause 23(7) provides that a person who makes the disclosure would not be taken to breach any restriction on the disclosure of information, however imposed. Clause 23(8) then says: "But nothing in this section authorises the making of a disclosure which contravenes the Data Protection Act 1998 (c. 29)".

2.17 In our view, this form of drafting could make it possible for a person to make a disclosure which violates the right to respect for private and family life, the home and correspondence under ECHR Article 8. By allowing any disclosure despite any restriction (however imposed), subject only to the express exception of disclosures which would contravene the Data Protection Act 1998, the combined effect of clause 23(7) and (8) seems to us to be that the Bill limits the duty of public authorities under section 6(1) of the Human Rights Act 1998 to act in a manner compatible with Convention rights.

2.18 We are very concerned about this provision of Clause 23. In the past, the Government has declined to include in Bills provisions expressly making powers of public authorities subject to the duty to act in a manner compatible with Convention rights under section 6 of the Human Rights Act 1998. The Government has in these cases argued that identifying that duty expressly would tend to imply that the duty is not to apply when it is not expressly mentioned. Here, we have the reverse effect: by expressly preserving duties under the Data Protection Act 1998 while excluding all other duties of non-disclosure, clause 23(7) and (8) of the Bill seem to exclude the applicability of duties of non-disclosure arising under the Human Rights Act 1998. We have already expressed our concern in the case of clause 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Bill.[35] **We draw to the attention of each House our deep concern about the provisions of clause 23 of the Domestic Violence, Crime and Victims Bill which could restrict the operation of the Human Rights Act 1998 and set a dangerous precedent.**

2.19 On the other hand, with regard to the substantive effect of clause 23 on human rights, we consider that the Data Protection Act 1998 is likely to be able to provide any necessary protection for the right to respect for private life, etc., under ECHR Article 8.1, because—

a) all recorded personal information is subject to the regime of the Data Protection Act 1998;

b) unlike the Human Right Act 1998, the Data Protection Act 1998 applies directly to bodies which are not public authorities as well as those which are; and

c) the exemptions in the Data Protection Act 1998 from compliance with the data protection principles in relation to criminal investigations and prosecutions would probably not apply to the disclosure of information for the incidental purposes covered by clause 23.

35 Paragraphs 27–28.

Bills not drawn to the attention of either House

3 Government Bills

3.1 In respect of each of these Bills, the responsible Minister has made a statement of compatibility with Convention rights in accordance with section 19(1)(a) of the Human Rights Act 1998. In our view, the following Bills do not have human rights implications making it necessary to draw them to the special attention of either House at this time.

a) Armed Forces (Pensions and Compensation) Bill,[36]

b) Child Trust Funds Bill,[37]

c) Consolidated Fund Bill,[38]

d) Health Protection Agency Bill [HL],[39]

e) Higher Education Bill,[40]

f) Horserace Betting and Olympic Lottery Bill,[41]

g) Planning and Compulsory Purchase Bill,[42]

h) Public Audit (Wales) Bill [HL],[43]

i) Statute Law (Repeals) Bill [HL].[44]

36 House of Commons Bill 10.
37 House of Commons Bill 1.
38 House of Commons Bill 12.
39 House of Lords Bill 3.
40 House of Commons Bill 35.
41 House of Commons Bill 8.
42 House of Commons Bill 6.
43 House of Lords Bill 1.
44 House of Lords Bill 13.

4 Private Members' Bills

4.1 The following Bills, being Private Members' Bills, do not carry a statement of compatibility with Convention rights, but do not seem to us to engage Convention or other human rights in ways which require to be drawn to the attention of either House at this time.

a) Air Traffic Emissions Reduction Bill [HL],[45]

b) Executive Powers and Civil Service Bill [HL],[46]

c) Harbours Bill [HL],[47]

d) Wild Mammals (Protection) (Amendment) Bill [HL].[48]

45 House of Lords Bill 11 (Lord Beaumont of Whitley).

46 House of Lords Bill 15 (Lord Lester of Herne Hill).

47 House of Lords Bill 7 (Lord Berkeley).

48 House of Lords Bill 16 (Lord Donoughue).

5 Private Bills

5.1 The following private Bills carry a statement of compatibility made by the sponsors of the Bills, in accordance with Standing Orders.[49] They do not appear to us to raise any questions of compatibility with Convention rights or other human rights which require to be drawn to the attention of either House at this time.

a) University of Manchester Bill,

b) University of Wales, Cardiff Bill.

49 The Standing Orders of each House relating to Private Bills were amended with effect from 27 November 2001 so that Standing Orders 38(3) of the Commons and Lords now require the memorandum attached to each Bill by the promoter to include a statement of opinion as to compatibility with Convention rights. Standing Order 169A of the Commons and 98A of the Lords require a Minister to report on each such statement (by depositing a statement in the Private Bill Office) immediately after First Reading.

Formal Minutes

Monday 19 January 2004

Members Present:

Jean Corston MP, in the Chair

Lord Bowness	Mr Paul Stinchcombe MP
Lord Campbell of Alloway	Mr Shaun Woodward MP
Lord Lester of Herne Hill	
Lord Plant of Highfield	

The Committee deliberated.

Draft Report [Scrutiny of Bills: Progress Report], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 5.1 read and agreed to.

Resolved, That the Report be the Third Report of the Committee to each House.

Ordered, That certain papers be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and that Lord Bowness do make the Report to the House of Lords.

[Adjourned till Monday 26 January at a quarter past Four o'clock.

Appendices

Appendix 1: The Asylum and Immigration (Treatment of Claimants, etc.) Bill

Letter from the Chair to Rt Hon David Blunkett, Secretary of State for the Home Department

The Committee is considering how to report to each House on the above Bill. It has carried out an initial examination of this Bill and would be grateful for your comments on the following points raised by our Legal Adviser. Our starting-point is of course the statement made under s.19(1)(a) of the Human Rights Act 1998; but I should make it clear that the Committee's remit extends to human rights in a broad sense, not just the Convention rights under the Act.

Clause 2: Offence of entering the UK without a valid immigration document

Two issues arise: first, compatibility with Article 31.1 of the UN Convention Relating to the Status of Refugees (Geneva, 1951) (hereafter "the Refugee Convention"); secondly, compatibility with Article 6 of the ECHR.

1. *The Refugee Convention*

Article 31.1 of the Refugee Convention (which, as you know, binds the United Kingdom in international law and gives rise to a legitimate expectation under English administrative law that claimants to refugee status will be treated in accordance with its provisions[50]) provides that States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Clause 2 of the Bill would, as you know, make it an offence punishable after trial on indictment by imprisonment for up to two years or an unlimited fine or both for a person, when first interviewed by an immigration officer after arrival in the United Kingdom, not to have with him an immigration document which is in force and satisfactorily establishes his or her identity and nationality or citizenship and those of any dependent child accompanying him or her.[51] Although there would be a defence available to a person who can prove that he or she and any dependant child is an EEA national or has a reasonable excuse for not being in possession of an appropriate immigration document, deliberate destruction of the document would not be a reasonable excuse unless the person could prove that the destruction was for a reasonable cause or outside the control of the person charged, and does not include a situation where the person intends the destruction to delay the making or resolution of a claim to asylum, or to increase the chance of success, or to comply with the instructions or advice of a person who advises on or facilitates immigration to the United Kingdom.[52]

50 R. v. Uxbridge Magistrates' Court, ex parte Adimi and others [2001] QB 667, [2000[3 WLR 434, [1999] 4 All ER 520, DC.

51 Cl 2(1), (2), 7(a).A lesser penalty would available following summary conviction: cl 2(7)(b).

52 Cl 2(3)–(5).

Article 31.1 allows states to impose criminal liability on people seeking refugee status who enter without authorization:

a. who do not come directly from the place where they allege they have suffered persecution;

b. who fail to present themselves to the authorities without delay; or

c. who fail to show good cause for their unauthorized entry or presence in the country.

However, even allowing for the defences, clause 2 would impose liability on some people who fall outside those three categories. The way in which the Bill is framed is likely to make it difficult for asylum-seekers to discharge the burden of proving such an excuse. They would carry the burden of proving what happened in a country where he or she was allegedly suffering persecution or in transit. There may be little or no evidence of these matters apart from the asylum-seeker's word. Clause 2 is likely to affect a very large number of asylum-seekers, and there seems to be a real risk that the defence will fail to protect a significant proportion of them, giving rise to a real risk that the United Kingdom will fail to discharge its obligations under Article 31.1 of the Refugee Convention. The Home Affairs Committee has drawn attention to the importance of making it clear on the face of the Bill that there would be a 'reasonable excuse' where the person had no practical way of obtaining valid documents, and to the risk that the Bill could criminalize genuine refugees fleeing persecution who are compelled to travel on false or invalid documents.[53]

Question 1. In the light of these considerations, why does the Government consider that the provisions of clause 2 are likely to allow asylum claimants to be dealt with in accordance with Article 31.1 of the Refugee Convention?

2. *ECHR Article 6*

Placing on the accused the burden of establishing a defence to a charge, instead of requiring the prosecution to prove all elements necessary to guilt, is capable of engaging the right to a fair hearing in the determination of a criminal charge under ECHR Article 6.1, read together with the right to be presumed innocent until proved guilty under Article 6.2. The Government accepts this, but argues that it is justifiable to impose this burden on the accused because 'it is a justified and a proportionate response to the legitimate aim of the statute in accordance with Strasbourg and domestic case law'.[54]

The case law establishes that it may be justifiable to reverse the burden of proof in some circumstances, even if the result is that the defendant has to disprove what would normally be regarded as a central element in the offence, such as intent. Whether it is permissible will depend on the circumstances of each case. If the provision gives rise to a presumption which is effectively irrebuttable by the defendant, there will be a violation of Article 6.1 and 6.2 because the accused will have been denied the opportunity for a fair hearing. On the other hand, a presumption against the accused can be justified if it is kept 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[55]

53 ibid., paras. 20 and 22.

54 EN para 136.

55 Salabiaku v. France (1988) 13 EHRR 379, Eur. Ct. HR, at para. 28 of the judgment.

Question 2. Why does the Government consider that reversing the burden of proof would be a proportionate response to the legitimate aim, particularly having regard to clause 2(5) (which limits the circumstances in which a defendant would be able to claim to have had reasonable cause for destroying documents)?

Clause 6: assessing the credibility of a claimant

Under clause 6 of the Bill, a "deciding authority", when determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, would have to "take account of" any behaviour of the claimant which the deciding authority thinks is designed or likely to conceal information, mislead, or obstruct or delay, or which otherwise damages the claimant's credibility.[56] Behaviour likely to conceal information, etc., is to include failure without a reasonable explanation to produce a passport, or production of an invalid passport, or destruction, alteration or disposal of a passport, ticket or other travel document, and failure without reasonable explanation to answer a question.[57] Furthermore, under clause 6(3) a failure to make an asylum or human rights claim while in a "safe country" would automatically be treated as damaging the claimant's credibility, regardless of the circumstances.[58]

Clause 6(3) seems to require an authority to make an unreasonable assumption about credibility. There is no reason to suppose that a person is not worthy of belief on any matter merely because he or she preferred to make a human rights claim in the United Kingdom rather than in another country. The failure to take make the claim in another country might cast doubt on certain statements, but cannot rationally be said to damage the claimant's credibility in relation to all statements. Clause 6(3) thus imposes an inference of damaged credibility regardless of the circumstances and the nature of the statement in relation to which credibility falls to be assessed. Requiring a deciding authority to make an irrational inference might appear to compromise the fairness of the decision-making process. So far as human rights claims are concerned, the failure to provide a fair hearing would engage ECHR Article 13 (right to an effective remedy before a national authority for alleged violations of Convention rights).

Question 3. Why does the Government consider that clause 6(3) would be compatible with ECHR Article 13 in so far as the clause would require a deciding authority to infer that a person making a human rights claim, who has not taken advantage of a reasonable opportunity to make the human rights claim in a safe country, has thereby damaged his or her credibility?

Clause 7: failed asylum-seekers: withdrawal of support

Clause 7 of the Bill would allow the Secretary of State to deprive an asylum seeker who has a dependent child as a member of his or her household of the right to claim support after the asylum claim has been rejected and before he or she has been removed from the country.[59] In effect, the failed asylum-seeker and his or her dependant children could be left without any source of support.

Any dependent child of the asylum-seeker would be liable to be taken into the care of the local social services authority, which would continue to have responsibility for providing accommodation for the child under section 20 of the Children Act 1989 if the adult claimant were to be unable to provide it. This would engage the right to respect for family

56 Cl 6(1).

57 Cl 6(2).

58 Cl 6(3).

59 Immigration and Asylum Act 1999, s. 94(3A); Nationality, Immigration and Asylum Act 2002, s. 18(2).

life under ECHR Article 8.1. It has been held that the Secretary of State, when withdrawing support from a claimant, may have to justify the action in terms of ECHR Article 8.2.[60]

The most problematic question seems to be whether clause 7 represents a proportionate response to the need to ensure that failed asylum seekers leave the country. The following factors seem to be relevant.

First, as the Home Affairs Committee noted (and considered to be unsatisfactory), the Government is unable to estimate the number of families who might be affected.[61]

Secondly, the clause does not lay down any procedure to be followed before deciding to remove support.

Thirdly, there is an alternative to the withdrawal of support under clause 7: the families could be removed compulsorily before plunging adults into destitution and children into care. It does not seem unreasonable to expect the Government to identify those families who are likely to become destitute if support is withdrawn as people who should be compulsorily removed as a matter of urgency without the need for support to be withdrawn and the family split up.

Fourthly, the Home Affairs Committee has concluded that the measures in clause 7 are likely to be counter-productive.[62]

Question 4. In the light of these considerations, why does the Government consider that the interference with the right to respect for private and family life, which would be a likely consequence of withdrawing support under clause 7, would be proportionate to the legitimate aim of removing people who are unlawfully within the United Kingdom?

Question 5. Does the Government consider that the proposals in clause 7 comply with the United Kingdom's obligation under CRC Article 3.1 to make the best interests of children a primary consideration in all decision-making which affects them, and if so, why?

Clause 8: additional investigatory powers for immigration officers

Clause 8(1) and (3) would allow immigration officers to exercise powers of arrest without warrant, and of entry, search and seizure after arrest, in respect of certain offences unrelated to immigration matters if they come across evidence of the offences in the course of an immigration investigation. The offences would be:

a. conspiracy to defraud;

b. bigamy;

c. making a false statement, or aiding or abetting such an offence, contrary to the Perjury Act 1861;

d. in Scotland, knowingly giving false information to a district registrar of births, marriages and deaths;

e. theft;

60 R. (Q.) v. Secretary of State for the Home Department [2003] EWCA Civ 364, [2003] 3 WLR 365, CA, at para. [64].

61 Home Affairs Committee, First Report of 2003-04, Asylum and Immigration (Treatment of Claimants, etc.) Bill, HC 109, para. 64.

62 ibid., para. 66.

f. obtaining property by deception;

g. obtaining a pecuniary advantage by deception;

h. false accounting;

i. handling stolen goods;

j. obtaining services or evading liability by deception;

k. in Scotland, fraud, uttering and fraud, and reset;

l. forgery;

m. using, copying or using a copy of a false instrument; and

n. making false documents.[63]

The proposed extensions to these powers engage the right to liberty (ECHR Article 5), the right to respect for private and family life, home and correspondence (ECHR Article 8), and (in relation to search of the person) the right to be free of degrading treatment (ECHR Article 3). It is not clear why the powers are to be extended to these offences, or why they are not to be exercisable in relation to other offences. It is not clear how far immigration officers would be subject to safeguards which apply to the police when investigating such crimes, including: training in the use of the powers in the context of Code B of the Codes of Practice made under the Police and Criminal Evidence Act 1984; the statutory disciplinary code which applies to the police; arrangements for independent investigation of complaints against police officers arising from the use of the powers; and the supervision of complaints by the Police Complaints Authority. Although the Immigration Service would be bound by the obligations arising under the Human Right Act 1998, victims of an alleged abuse of power might not be able to challenge abuses of the powers in court or obtain compensation, because of the restrictions on remedies proposed in clause 10 of the Bill.

This seems to give rise to a significant risk of violations of Convention rights, including those under ECHR Articles 5 and 8, while the absence of remedies may give rise to a violation of ECHR Article 13 where the alleged wrong amounts to a violation of a Convention right and of ECHR Article 6.1 when it consists of a violation of a civil right or obligation.

Question 6. In the light of this, why does the Government consider that there would be sufficient safeguards against abuse of the powers proposed in clause 8 (including expertise among immigration investigators in investigating the kinds of offences listed, training in the use of the powers and the application of the relevant Codes of Practice, independent investigation of complaints, supervision by the Police Complaints Authority, and availability of judicial remedies) to meet the requirements of ECHR Articles 5.1,5.5, 6.1, 8, and 13?

Clause 10: changes to the appeal system

Clause 10 of the Bill would replace the present, multi-tiered system for making and reviewing or appealing against immigration decisions with a single-tier Asylum and Immigration Tribunal. In addition, clause 10(7) would introduce a new section 108A into

63 Cl 8(2).

the Nationality, Immigration and Asylum Act 2002 which would cut off all appeals to and judicial review by the ordinary courts in immigration matters (although the Special Immigration Appeal Commission would be unaffected). It would also exclude habeas corpus applications in immigration cases. The only exceptions would be cases where a person is challenging a certificate allowing his or her removal to a safe country and treating the person's claim in this country as unfounded, or is alleging that a member of the Tribunal has acted in bad faith, in which case the High Court would be able to entertain an application for judicial review (proposed new section 108A(1)–(3)). It follows that there would generally be no right to challenge a decision of the single-tier Tribunal on the ground that it has acted incompatibly with a person's Convention rights.

At this initial stage in its consideration of the Bill, the Committee is particularly concerned about proposed new section 108A(4). This would provide that section 7(1) of the Human Rights Act 1998, allowing a claim to be brought in a court on the ground that a public authority has acted in a manner incompatible with the Convention rights, would have effect subject to the provisions of proposed new section 108A(1)–(3). Section 7(1) of the 1998 Act is fundamentally important to the scheme of the Act and the system of protection for Convention rights. It provides that a person claiming to be the victim of a violation by a public authority of a Convention right may bring proceedings against the public authority in "the appropriate court or tribunal", or rely on the Convention right in any legal proceedings. The effect of proposed new section 108A(4) of the 2002 Act would be that there would be no "appropriate court or tribunal" where it is alleged that the proposed new Tribunal has itself acted incompatibly with a Convention right, save for a request to the Tribunal itself to review its decision under proposed new section 105A.

The Government says that the Lord Chancellor would be able (if he wishes) to make rules providing for such a challenge to go to a court or tribunal specified in the rules,[64] but does not explain the source of the power. It probably refers to the power in section 7(2) and (9)–(13) of the Human Rights Act 1998 to make rules identifying particular courts or tribunals as the appropriate court or tribunal to hear claims under section 7(1) of the 1998 Act. However, any rule purporting to allow a challenge to a court would, if the Bill is enacted, be invalid and void, because it would be subordinate legislation which would be incompatible with the primary legislation contained in proposed new section 108A(1) to (3) of the Nationality, Immigration and Asylum Act 2002.

A provision restricting a key element in the system of remedies for violations of Convention rights set out in the Human Rights Act 1998 gives rise to deep concern. It would allow the immigration and asylum process to operate outside normal arrangements for protecting Convention rights. Any step which immunizes an area of public administration in this way sets a dangerous precedent.

The Government argues that the proposals are compatible with the Convention rights: "… article 13 does not require the provision of multiple tiers of appeal. What it requires is access to an independent national authority with powers to provide effective redress. The single tier Tribunal will meet this test. It is wholly independent of the initial decision-making body. The single tier tribunal will provide an effective remedy as article 13 requires and will safeguard appellants' Convention rights including those referred to in articles 3 and 8."

In order to allow the Committee to assess the Government's assertion that the Tribunal would provide an effective remedy for people alleging violation of Convention rights, the

64 EN para. 139.

Committee needs certain information about the resources which would be made available to the Tribunal.

Question 7. What are the Government's estimates of:

(a) the number of full-time and full-time-equivalent members who would be appointed to the proposed Asylum and Immigration Tribunal;

(b) a statement of the current number of full-time and full-time-equivalent adjudicators and members of the Immigration Appeal Tribunal;

(c) the current number of staff of the Immigration Appeal Tribunal and the adjudicators;

(d) the current member and staff costs of the adjudicator and Immigration Appeal Tribunal system; and

(e) the estimate of member and staff costs for the first year of operation of the proposed new Tribunal?

One effect of making the Tribunal the final arbiter of a claim that it has acted incompatibly with a Convention right would be to deprive the victim of a remedy from an independent tribunal. To be effective for the purposes of ECHR Article 13 a remedy must be available from a national authority which is independent. The Tribunal would not appear to be independent when deciding whether its own decision or conduct had violated a Convention right.

Question 8. Why does the Government consider that it would be compatible with ECHR Article 13 to restrict review by and appeal to the courts so as to make the proposed Tribunal the final arbiter of a claim that it has itself violated a Convention right?

It is not clear from the Bill what remedies the new Tribunal would be able to award if it finds that a person's Convention rights have been violated. If the Tribunal would not have power to issue injunctions or award damages or order the payment of compensation in civil proceedings, preventing recourse to the ordinary courts in human rights cases would give rise to a significant risk of violating ECHR Article 13.

Question 9. Why does the Government consider that the restriction of recourse to the courts, coupled with the absence of a power for the Tribunal to give a full range of remedies (including injunctions and damages) for violations of human rights, would be compatible with the right to an effective remedy for alleged violations of Convention rights as required by ECHR Article 13?

Clauses 11 and 12: restricting rights to appeal, and "safe countries" for removing asylum seekers

The Committee has previously reported on earlier proposals (in the Nationality, Immigration and Asylum Bill of 2002) for lists of countries which should conclusively be presumed to be safe. It drew the attention of each House to its view that 'the presumption that a country is safe is of questionable validity',[65] and that the restriction of any right of appeal against a decision that a human rights or asylum claim is clearly unfounded until the claimant has left the country would undesirably weaken legal protection for the rights

65 Joint Committee on Human Rights, Twenty-third Report of 2001–02, Nationality, Immigration and Asylum Bill: Further Report, HL Paper 176, HC 1255, paras. 35–37.

of asylum-seekers and human rights claimants.[66] At that time, there was no proposal to exclude access to judicial review in immigration and asylum cases. Now the threat posed by restricting rights of appeal is even more acute, because of the proposals in clause 10 of the current Bill to restrict access to the courts. I draw this matter to your attention.

Clause 13: removal of power to grant bail

Clause 13 would remove the power of a court under paragraph 2(1) (2) of Schedule 3 to the Immigration Act 1971 to grant bail to a person who has been recommended for deportation following conviction of an offence, and to a person who is detained having been notified that the Secretary of State intends to make a deportation order against him.

Question 10. Why does the Government consider that a system which denies detainees the right to apply to a court for bail, or to obtain judicial remedies (including compensation) for a violation of a Convention right by the proposed new Tribunal, would be compatible with the right to compensation for a violation of ECHR Article 5 (see Article 5.5) and the right to an effective remedy by an independent authority guaranteed by Article 13?

Clause 14: Power to require cooperation of deportees

Clause 14 would allow the Secretary of State to require a person to take specified action, including providing information, documents, identification data and cooperation, in order to facilitate that person's deportation or removal by enabling a travel document to be obtained for the person. Failure to cooperate would be an offence. The clause as drafted would enable the administration to abuse the power by demanding information and cooperation which can then be used to facilitate the person's deportation later, and to allow the Secretary of State to require any person to cooperate even if that person is in no danger of deportation or removal, with refusal to cooperate being an offence. This seems to be capable of engaging the right to respect for private and family life, home and correspondence under ECHR Article 8.1.

The powers of the Secretary of State and the definition of the offence could be drawn more tightly in order to target the particular mischief at which the clause is directed, namely the difficulty of arranging necessary travel documents to allow people to be removed or deported without the assistance of the person in providing information needed to obtain a travel document on their behalf from the person's Embassy or High Commission.[67] As it stands, it is not clear how one can be confident that such a widely drawn provision would operate in a way that would be proportionate to a pressing social need so as to be "necessary in a democratic society" for a legitimate aim under ECHR Article 8.2.

Question 11. Why does the Government consider that clause 14 as currently drafted is sufficiently focused on the mischief to make it a proportionate interference with the right to respect for private life under ECHR Article 8?

Clause 15: electronic monitoring

Clause 15 would allow electronic monitoring to be imposed on an applicant for immigration to complement a residence restriction or as a condition for immigration bail, or as an alternative to a reporting restriction. This engages the right to respect for private life under ECHR Article 8.1. Although the step may be justifiable under Article 8.2 as being

66 ibid., paras. 30–34, 38–39; Joint Committee on Human Rights, Seventeenth Report of 2001–02, Nationality, Immigration and Asylum Bill, HL Paper 132, HC 961, paras. 93–108.

67 EN para. 84.

in accordance with the law and being necessary in a democratic society for the prevention of crime (illegal immigration), there would be no power to challenge the decision to impose a monitoring requirement, because of the restriction on remedies contained in clause 10.

Question 12. Why does the Government consider that the remedies for abuse of the power to impose a requirement of electronic tagging under clause 15 would be sufficiently comprehensive to meet the requirement for an effective remedy before a national authority under ECHR Article 13 where the tagging infringes the right to respect for private life under ECHR Article 13, and the right to have access to a court under ECHR Article 6.1 when the tagging infringes a civil right (such as the right to be free of assault)?

Clause 16: Search warrants for the Immigration Services Commissioner

Clause 16 would amend the Immigration and Asylum Act 1999, introducing a new section 92A allowing a JP to issue a search warrant allowing the Immigration Services Commissioner to enter and search premises where there are reasonable grounds for believing that an offence under section 91 of the Act (provision of immigration advice or services by an unregistered person) has been committed, that there is likely to be evidence on the premises of substantial value to the investigation of the offence, and that one of a number of conditions is met. Proposed new section 92A(7)(c) would make the power applicable to material even if it consists of items subject to legal professional privilege or the categories of confidential or journalistic material known as excluded material and special procedure material under the Police and Criminal Evidence Act 1984.

The provisions of proposed new section 92A engage ECHR Articles 6 (right to a fair hearing), 8.1 (right to respect for private life, home and correspondence) and 10.1 (right to freedom of expression). Confidential material is protected under ECHR Article 8.1, and lawyer-client communications attract particularly strong protection: any interference must be justified by reference to specially compelling considerations if it is not to violate Article 8.[68] The European Court of Human Rights recognizes that the ability to communicate freely and privately with one's legal adviser an essential element in a fair trial, so interfering with lawyer-client communications may violate ECHR Article 6.1.[69] The right to legal professional privilege is similarly protected as a fundamental right under English common law.[70] Where the material sought or seized is journalistic material, even if it is not confidential it is protected by ECHR Article 10, which protects journalists' working materials and sources of information as part of the protection for a free press which is regarded as essential to maintaining freedom of expression in a democratic society.[71]

To justify an interference under ECHR Articles 8.2 and 10.2, the interference must be shown to be 'necessary in a democratic society', ie a proportionate response to a pressing social need. Where a power to interfere with rights under ECHR Articles 8 and 10 is conferred, "the implementation of the measures must be accompanied by effective safeguards which ensure minimum impairment of the right to respect for his correspondence. This is particularly so where … correspondence with the [complainant's] legal advisers may be intercepted."[72]

68 See e.g.Campbell v. United Kingdom (1992) 15 EHRR 137, Eur. Ct. HR; Niemietz v. Germany (1992) 16 EHRR 97, Eur. Ct. HR; Foxley v. United Kingdom (2000) 31 EHRR 637, Eur. Ct. HR.

69 Niemietz v. Germany, above, at § 37 of the judgment.

70 B (A Minor) v. Director of Public Prosecutions [2000] 2 AC 428, HL; R. (Morgan Grenfell & Co. Ltd.) v. Special Commissioner of Income Tax [2002] UKHL 21, [2002] 2 WLR 1299, HL.

71 Goodwin v. United Kingdom (1996) 22 EHRR 123, Eur. Ct. HR.

72 Foxley v. United Kingdom, above, at § 43 of the judgment. See also Campbell v. United Kingdom, above, at §§ 46 and 48 of the judgment.

Question 13. In view of the level of seriousness of the offence of offering immigration advice and assistance, and any safeguards against improper use of the power by the Commissioner, why does the Government consider that proposed new section 92A of the Immigration and Asylum Act 1999, which would be inserted by clause 16 of the Bill, and particularly 92A(7)(c) making possible search for and seizure of lawyer-client communications, other confidential material of a personal nature, and journalistic material, would be a justifiable interference with ECHR Articles 6.1, 8 and 10?

Clause 20: fees for immigration applications

Clause 20 proposes a power for the Secretary of State to set fees for applications and certain other processes which exceed the cost of determining the application or undertaking the process. In particular, the Secretary of State would be allowed to calculate the level of the fee by reference to the potential benefits which the Secretary of State thinks are likely to accrue to the applicant if the application is successful or the process is completed.[73] This could allow the Secretary of State to impose very high fees, on the footing that the right to British nationality, leave to remain in the United Kingdom, or (perhaps most of all) a work permit are economically valuable, even if the application is not being made for economic reasons.

Question 14. Does the Government consider that fees calculated on the basis set out in clause 20(1) and (3) would not impact on poor people in such a way as to be incompatible with the right to be free of discrimination on the ground of property under Article 26 of the International Covenant on Civil and Political Rights, and if so, why?

In view of the progress of the Bill the Committee wishes to report your responses to the above questions, and its conclusions on them, at as early a date as possible. The Committee would therefore be grateful for a reply by 22 January at the latest.

6 January 2004

Appendix 2: The Domestic Violence, Crime and Victims Bill

Letter from Chair to Rt Hon David Blunkett, Secretary of State for the Home Department

The Committee is considering the above Bill, and would be grateful for your comments on the following point raised by its Legal Adviser. Our starting-point is of course the statement made under s.19(1)(a) of the Human Rights Act 1998; but I should make it clear that the Committee's remit extends to human rights in a broad sense, not just the Convention rights under the Act.

Clause 5 of the Bill would allow an adverse inference of guilt to be drawn from the failure of a defendant charged with murder or manslaughter to give evidence if:

1. the defendant is also charged with an offence contrary to clause 4 of the Bill (failure to protect child or vulnerable adult against a threat of unlawful violence which leads to death) in respect of the same death; and

2. it would be proper to draw an adverse inference of guilt in relation to that offence by reason of section 35 of the Criminal Justice and Public Order Act 1994.

73 Cl 20(1), and also cl 20(3) in relation to consular fees.

The use of adverse inferences from silence engages the right to a fair hearing in the determination of criminal charge (ECHR Article 6.1) and the right to be presumed innocent until proven guilty according to law (ECHR Article 6.2). This has been interpreted by the European Court of Human Rights as preventing a court from convicting a defendant where the inference from silence is the only or main evidence of the defendant's guilt: see for example *Murray v. United Kingdom* (1996) 22 EHRR 29, *Condron v. United Kingdom* (2001) 31 EHRR 1 and *Beckles v. United Kingdom* (2003) 36 EHRR 13.

The Explanatory Notes to the Bill, paragraph 38, suggest that the effect of clause 5 is that 'a defendant may not be convicted solely or mainly on the basis of an inference from silence'. However, the words in parentheses at the end of clause 5(1), '(even if there would otherwise be no case for him to answer on that charge)' indicate that, in cases falling within clause 5, a judge, when deciding under clause 5 whether to leave a case to the jury, would be able to take account of an inference from silence alongside the prosecution's evidence. The same would apply to a court or jury when assessing the defendant's guilt or innocence.

It follows that there will always be some significant evidence which tends to fix the defendant with responsibility for the death before an inference can be drawn, but a conviction could be based on the inference taken together with less evidence than would suffice to allow the inference to be drawn at all, or to allow a case to be left to a jury, in an 'ordinary' case under section 35 of the 1994 Act.

In the light of this, why does the Government considers that clause 5 would not allow a conviction to be based mainly (but not wholly) on an inference from a defendant's failure to give evidence, and why accordingly there is no probability of a violation of ECHR Article 6?

The Committee would also be grateful for an indication of what representations you have received in connection with this Bill in relation to human rights issues, and to what specific points those representations were directed**.**

In view of the progress of the Bill the Committee wishes to report your response to the above question, and its conclusions on them, at as early a date as possible. The Committee would therefore be grateful for a reply by 22 January at the latest.

6 January 2004

Public Bills Reported on by the Committee (Session 2003–04)

* indicates a Government Bill
Bills which engage human rights and on which the Committee has commented substantively are in bold

BILL TITLE	*REPORT NO*
Air Traffic Emissions Reduction [Lords]	3rd
Armed Forces (Pensions and Compensation)*	3rd
Asylum and Immigration (Treatment of Claimants, etc)*	**3rd**
Child Trust Funds*	3rd
Consolidated Fund*	3rd
Domestic Violence, Crime and Victims [Lords]*	**3rd**
Executive Powers and Civil Service [Lords]	3rd
Harbours [Lords]	3rd
Health Protection Agency [Lords]*	3rd
Higher Education*	3rd
Horserace Betting and Olympic Lottery*	3rd
Planning and Compulsory Purchase*	3rd
Public Audit (Wales) [Lords]*	3rd
Statute Law (Repeals) [Lords]*	3rd
Wild Mammals (Protection)(Amendment) [Lords]	3rd