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Select Committee on the Constitution

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Immigration Bill

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Immigration Bill

1. The Immigration Bill was introduced in the House of Commons on 17 September 2015. It received its first reading in the House of Lords on 2 December 2015. Second reading took place on 22 December 2015. Committee stage is expected to start on 18 January 2016.

2. The Bill implements several policies set out in the Conservative Party's 2015 election manifesto, the overarching purpose of the Bill being, as the Explanatory Notes to the Bill put it, "to tackle illegal immigration by making it harder to live and work illegally in the UK".[1]

3. We draw a number of matters to the attention of the House.

'Genuine obstacle to leaving the UK'

4. The Bill limits the circumstances in which failed asylum-seekers can obtain support (such as financial support and accommodation). It does so by inserting a new section 95A into the Immigration and Asylum Act 1999. Section 95 of that Act presently permits the Secretary of State to provide support for asylum-seekers and failed asylum-seekers who appear to her to be 'destitute or to be likely to become destitute within such period as may be prescribed'. The Bill will make the section 95 support regime inapplicable to failed asylum-seekers, to whom new section 95A will apply instead.

5. Under new section 95A, the Secretary of State will be permitted to provide failed asylum-seekers with support only if—in addition to meeting the (impending) destitution criterion—they "face a genuine obstacle to leaving the United Kingdom". The Government's position is that this would be compatible with the UK's obligations under the European Convention on Human Rights (ECHR). It bases this view on a judgment of the Court of Appeal[2] holding that, in the words of the Government's ECHR memorandum on the Bill, the ECHR does not impose "a duty on the State to provide a person with support when they are free to … leave the UK in order to avoid the consequences of withdrawal of support".[3]

6. The question of whether a failed asylum-seeker is "free to leave the UK" is therefore pivotal. If he or she is not free to do so, then support obligations arise in the event of (impending) destitution. In contrast, if a failed asylum-seeker person is free to leave the UK, then support can be denied even if he or she is destitute or likely to become so—the ECHR, in the Government's view, imposing no obligation to provide support in such circumstances.

7. Yet the meaning of the term "genuine obstacle" is not given on the face of the Bill. Rather, it is to be determined by regulations: new section 95A(3) provides that regulations "may make provision for determining what is, or is not, to be regarded as a genuine obstacle to leaving the United Kingdom for

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1 Explanatory Notes to the Immigration Bill, [Bill 79 (2015–16)-EN] para 2

2 In *R (Kimani) v London Borough of Lambeth* (2003) EWCA Civ 1150: http://www.bailii.org/ew/cases/EWCA/Civ/2003/1150.html [accessed 22 December 2015]

3 Home Office, *Immigration Bill: ECHR Memorandum* (17 September 2015) para 105: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [accessed 22 December 2015]

the purposes of this section". Those Regulations would be subject to the negative resolution procedure.

8. In its Delegated Powers Memorandum, the Government justifies this position by saying that "the definition of what amounts to a 'genuine obstacle to leaving the UK' should necessarily be flexible rather than contained in primary legislation, as it may depend on a variety of changing factors".[4] What those factors might be is not, however, stated in the Delegated Powers Memorandum.

9. **In the absence of any definition of the term "genuine obstacle", the House is being asked to legislate without a clear understanding of how this legislation might affect individuals in potentially desperate circumstances—with significant consequences for those individuals should the term be ascribed a relatively narrow meaning. The House may wish to consider whether it would be more appropriate for the meaning of the term "genuine obstacle" to be defined in greater detail on the face of the Bill.**

Henry VIII powers and the Sewel Convention

10. The Delegated Powers and Regulatory Reform Committee will no doubt report to the House on the proposals for delegated powers contained in the Bill. There are provisions for a number of Henry VIII powers in the Bill, all of which are subject to the affirmative procedure. Some of those powers are relatively limited.[5] Others are much broader in scope. We do not intend to comment on the detail of those powers, although we urge the House, as always, to ensure that the need for such powers is justified and that their scope is limited to the minimum necessary to achieve their objectives.

11. We wish to draw the attention of the House to a wider point in relation to those powers. Clauses 10, 11, 15 and 39–42, which relate to illegal working in respect of licensed premises and private-hire vehicles; orders for possession of properties; and the transfer between local authorities of responsibility for relevant children, only have effect (in some cases because the legislation to which they make amendments only has effect) in relation to England or England and Wales.

12. However, clauses 10, 11, 16 and 43 provide regulation-making powers so that the provisions made or given effect by clauses 10, 11, 15 and 39–42 can in substance be extended to Northern Ireland and Scotland (and, where relevant, Wales). The formula used in clauses 10, 11, 16 and 43 is that the Secretary of State "may by regulations make provision" in respect of Northern Ireland and Scotland (and, where relevant, Wales) which "has a similar effect to" the English provisions. Clauses 11, 16 and 43 are Henry VIII powers: regulations made under them can "amend, repeal or revoke any enactment".[6]

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4 Home Office, *Immigration Bill: Delegated Powers Memorandum* (1 December 2015) para 87: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482043/2015-12-01_Immigration_Bill_Delegated_powers_memo_-_Lords.pdf [accessed 22 December 2015]

5 See clause 13 and schedule 3, para 1; clause 29

6 Clause 10 permits the amendment, repeal and revocation of enactments of the Scottish Parliament and the National Assembly for Wales, but not acts of the UK Parliament.

13. The UK Government's view is that clauses 10, 11, 16 and 43 do not engage the Sewel Convention, so Legislative Consent Motions (LCMs) are not required.[7] We note that this view has been disputed by some interested parties. For example, the Law Society of Scotland has stated that regulations authorised by clause 10 "would alter … licensing law, which is a devolved matter", and that "the effects of the proposals are not incidental to devolved matters" so that "consultation with a view to seeking the legislative consent of the Scottish Parliament should be initiated".[8]

14. **The House may wish to ask the Government to justify its view that Legislative Consent Motions are not required for clauses 10, 11, 16 and 43.**

15. The power to make regulations that have "a similar effect to" provisions contained in the Immigration Bill is vague. In its Delegated Powers Memorandum, the Government seeks to make the case for the use of secondary legislation in this context in the following way:

> "In order to make the provisions relating to private hire etc. licensing effective in Scotland and Northern Ireland it will be necessary to make some detailed modifications of Scottish and Northern Ireland legislation. Also there are specific provisions in both Scotland and Northern Ireland which may require consequential amendments to make the scheme effective. This will require detailed input from the devolved administrations, which might itself be consequential on Parliament's views on the amendments relating to England and Wales. It is considered appropriate for the changes for Scotland and Northern Ireland to be made in secondary legislation, therefore, once Parliament has approved the main concept of the scheme with reference to the existing amendments suggested to private hire etc. licensing legislation."[9]

16. It is not clear why, given that primary legislation has been deemed to be appropriate in England or England and Wales, secondary legislation is considered to be appropriate in Northern Ireland and Scotland (and, where relevant, Wales). Although regulations made under clauses 10, 11, 16 and 43 must be made under the affirmative procedure, the degree of parliamentary scrutiny that they will receive is less than that which primary legislation attracts. If, as the Government acknowledges, the Bill's provisions will need to be adapted to the legislative and policy environments in the devolved nations, legitimate concerns arise in relation both to the degree of scrutiny that the subsequent regulations will attract and the discrepancy between the levels of scrutiny to which those provisions relating to England (set out in primary legislation) and those relating to other areas of the UK (to be detailed in secondary legislation) will be subjected.

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7 Explanatory Notes to the Immigration Bill, Annex B.

8 Written evidence to Public Bill Committee on the Immigration Bill: http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/memo/ib22.htm

9 Home Office, *Immigration Bill: Delegated Powers Memorandum* (1 December 2015) para 23. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482043/2015-12-01_Immigration_Bill_Delegated_powers_memo_-_Lords.pdf [accessed 22 December 2015].This passage concerns clause 11. A similar case is made elsewhere in the Delegated Powers Memorandum in respect of clauses 10, 16 and 43.

17. **The House may wish to consider whether the differential legislative approaches adopted in respect of England and other parts of the UK, and the difference in the degree of scrutiny that this implies, are appropriate.**

Rule of law

Complexity of the law

18. That the law be clear, certain and predictable are central requirements of the rule of law. It would be difficult, however, to argue convincingly that these requirements are satisfied by UK immigration law which stands out as a particularly Byzantine field. The Immigration Bill is a case in point. It is lengthy and complicated—running to 168 pages in total, it consists of 65 clauses and 12 schedules—while its complexity is exacerbated by the fact that much of the Bill will take effect by means of amending or inserting new provisions into several existing, and already highly complex, pieces of immigration legislation. This issue of complexity is compounded by the frequency with which the law changes in this area. The Bill will be enacted in the wake of, and will make changes to, the Immigration Act 2014, which was itself a very substantial and complicated piece of legislation.

19. The disparate and complex nature of the legislation in this area is of real concern from a rule of law perspective. Whilst we recognise that this issue goes far beyond the provisions of this particular Bill, we wish to draw to the attention of the House this general concern, and our view that further thought must be given to this matter so as to make immigration law accessible and fit for purpose.

Override of judicial decisions by the First-tier Tribunal

20. Schedule 7 of the Bill creates two concurrent legal bases upon which immigration bail (that is, bail granted to immigration detainees) may be granted. First, it authorises the Secretary of State to grant bail.[10] Second, it authorises the First-tier Tribunal to grant bail if an application is made to the Tribunal for a grant of bail.[11] The power to grant bail includes a power (and an obligation) to set bail conditions. In its ECHR Memorandum, the Government acknowledges that such conditions may restrict a person's liberty by, for example, requiring them to reside at a particular address or not to leave a defined geographical area.[12]

21. Where bail has been granted and bail conditions set by the Tribunal, schedule 7 provides for decisions of the Tribunal concerning bail conditions to be, in effect, overridden by the Secretary of State, who can:

- impose a condition pertaining to residence in a case in which the Tribunal chose to impose no such condition;

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10 Immigration Bill, schedule 7, paragraphs 1–2

11 Immigration Bill, schedule 7, paragraph 3

12 Home Office, *Immigration Bill: ECHR Memorandum* (17 September 2015) para 87: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462206/Immigration_Bill_ECHR_Memo.pdf [accessed 22 December 2015]

- substitute a residence condition that is different from any such condition imposed by the Tribunal;

- impose an electronic-monitoring condition in a case in which the Tribunal decided to grant bail free from any such condition.

22. The Government's Explanatory Notes to the Bill cast some light on the policy background to this aspect of the Bill—and, in particular, the proposal to allow the Secretary of State to override a Tribunal decision not to impose an electronic monitoring condition:

> "The Conservative Party Manifesto commits the government to satellite tracking for every foreign national offender subject to an outstanding deportation order or deportation proceedings … Over 80% of foreign national offenders living in the community have been released on bail by the First-tier Tribunal … and while the Tribunal has the power to apply an electronic monitoring condition, the Secretary of State cannot require it as a condition of bail. The Bill gives the Secretary of State the ability to impose an electronic monitoring condition when the Tribunal grants bail but does not impose such a condition."[13]

23. From this, it seems that the Government is not satisfied by the Tribunal's propensity to impose electronic-monitoring conditions, and therefore wishes to be in a position to impose such conditions even in cases in which the Tribunal does not see fit to do so.

24. A decision of the Secretary of State to override the Tribunal in this way would be subject to judicial review. However, the constitutional question arises whether it is compatible with the rule of law for a member of the executive to be given the authority to override the decision of an independent judicial body. The Supreme Court had cause to consider this question recently in the case *Evans v Attorney-General*,[14] which concerned the exercise of the ministerial veto power in the Freedom of Information Act 2000. Giving one of the majority judgments in the Evans case, Lord Neuberger said that:

> "A statutory provision which entitles a member of the executive … to overrule a decision of the judiciary merely because he does not agree with it would not merely be unique in the laws of the United Kingdom. It would cut across two constitutional principles which are also fundamental components of the rule of law … subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive."[15]

25. In that case, some reliance was judicially placed upon the fact that the veto power in the Freedom of Information Act facilitated override of a decision of the Upper Tribunal, which is statutorily designated a "superior court of record". Lord Neuberger took this to mean that it has "the same status as the

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13 Explanatory Notes to the Immigration Bill, para 23

14 *R (Evans) v Attorney-General* (2015) UKSC 21

15 *R (Evans) v Attorney-General* (2015) UKSC 21, para 51

High Court".[16] In contrast, the First-tier Tribunal is not a superior court of record. It is, however, an independent judicial body, meaning that the prospect of ministerial interference with its decisions raises concern about the threat to the rule of law.

26. We recognise that the position in relation to schedule 7 of the Bill is complicated by the existence of concurrent bail-granting and condition-setting powers. This means that if, for instance, the Secretary of State were to impose an electronic-monitoring condition (the Tribunal first having granted bail free from any such condition), the Secretary of State would be doing something that it would, in the first place, have been for her to do had the question of bail been dealt with by her instead of upon an application to the Tribunal. Ultimately, however, this does not detract from the fact that once the Tribunal has ruled on bail conditions, schedule 7 permits the executive to unpick or override certain aspects of a judicial decision.

27. It is also worth noting that, unlike the matter at stake in the *Evans* case, electronic-monitoring and residence conditions engage considerations of individual liberty—something that arguably renders the prospect of executive intervention more constitutionally dubious.

28. **We are concerned that schedule 7, which would allow a Minister to override or alter independent judicial decisions about immigration bail conditions, is in tension with the principles of the rule of law. The usual process, should a Minister have concerns about a judicial decision, would be to appeal against it. The House may wish to ask the Government to clarify how their proposals comply with the rule of law. The House may also wish to ask the Government why, if the intention is to ensure the use of certain bail conditions for particular offenders (such as satellite monitoring for foreign nationals), they do not simply propose new criteria for the First-tier Tribunal to take into account when setting bail conditions.**

Retrospective legislation

29. Schedule 7 also gives rise to another matter relating to the rule of law: retrospective legislation. It replaces certain existing legislative provisions relating to immigration bail, including paragraphs 22 and 29 of schedule 2 to the Immigration Act 1971, which are concerned with the release on bail of an individual who "is detained" or is "being detained" under certain other provisions of the 1971 Act.

30. It is accepted that the power to impose bail conditions also extends to someone who could be detained even if they are not actually detained immediately prior to the grant of bail. However, the Court of Appeal recently held that the powers conferred by paragraphs 22 and 29 to impose bail conditions should extend only to individuals who are or could be lawfully subjected to immigration detention pending deportation.[17] The Court further held that where, as in the case it was considering, there was no realistic prospect of the person's deportation taking place, subjecting them to immigration detention pending deportation would not be lawful. Once the

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16 *R (Evans) v Attorney-General* (2015) UKSC 21, para 2

17 *R (B) v Secretary of State for the Home Department (No 2)* (2015) EWCA Civ 445. In November 2015, the Supreme Court gave permission to appeal in this case.

legal basis for detention falls away, so does the legal basis for imposing bail conditions, the power to impose such conditions being dependent upon the possibility of lawful detention. The effect of the Court of Appeal's judgment is therefore to make the imposition of bail conditions unlawful in circumstances in which the person concerned could not lawfully be subject to immigration detention.

31. The Immigration Bill addresses this matter by providing that bail conditions can be set in relation to individuals who are either "detained" or "liable to detention" under relevant immigration powers. A person is liable to detention if he could be detained were it not for the fact that a legal issue or practical difficulty presently precludes or impedes his removal from the UK.[18] Once the Bill comes into force, it will therefore be possible to impose bail conditions upon people who cannot actually be detained because of impediments to their deportation.

32. However, before those provisions of the Bill come into force, immigration bail will continue to be granted under (among other powers) the powers granted by paragraphs 22 and 29 of schedule 2 to the Immigration Act 1971. Clause 32(3) of the Bill—which, unlike most of the Bill, enters into force immediately upon enactment[19]—therefore provides that the 1971 Act powers can be used "even if the person can no longer be detained" provided that he is "liable to detention". Clause 32(3), on its own, will only permit those liable to detention to be subjected to immigration bail once the Bill has been enacted. The Government, however, is concerned about the position in respect of those liable to detention upon whom immigration-bail conditions were imposed prior to the Bill's enactment. Clause 32(5) therefore provides that: "The amendment made by subsection (3) is to be treated as always having had effect." This is intended to be a transitional arrangement: when the new immigration-bail regime contained in the Immigration Bill comes into force and repeals the 1971 Act immigration-bail powers, clauses 32(3)–(5) of the Immigration Bill will themselves automatically be repealed.[20] Nevertheless, for as long as clauses 32(3)–(5) are in force, they will have retrospective effect.

33. The Government acknowledges this in its Explanatory Notes to the Bill:

> "This clause is retrospective in its effect because it is intended to clarify the law following a recent Court of Appeal judgment … on when immigration bail conditions can be imposed. The Court of Appeal judgment disturbed previously settled case law in this area. If the Court of Appeal's judgment stands (it is under appeal) then it will have a significantly limiting impact on judges' and the Home Office's ability to impose bail conditions and manage individuals, including those who pose a risk to the public where deportation is being pursued."[21]

34. The statement that these provisions "clarify" the law is questionable. The Court of Appeal has determined what the relevant provisions of the

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18 Immigration Act 2002, section 67

19 Most provisions of the Bill enter into force on 'on such day as the Secretary of State appoints by regulations': Immigration Bill, clause 63(1).

20 Immigration Bill, clause 32(6)

21 Explanatory Notes to the Immigration Bill, para 168

Immigration Act 1971 mean—and what, in law, they have always meant. The Government now wishes to revise what those provisions mean. The effect of clause 32(5) will therefore be to change the law and to do so retrospectively. The extent to which retrospective legislation is constitutionally concerning varies, retrospective criminal legislation being particularly egregious. Clause 32(5) of the Immigration Bill does not fall into that category. However, the rule of law requires government to act according to law, and from that perspective the retrospective provision of a legal basis for executive action is constitutionally suspect and calls for a clear justification. To the extent that such a justification is provided by the Government, it appears to turn upon considerations of administrative convenience and to rely upon the fact that the Court of Appeal's judgment disturbed what the Government considered to be a settled understanding of the legal position. **We recognise that the Government was acting in accordance with its understanding of the law, but once that action has been judged to be unlawful we would expect a greater justification for changing the law with retrospective effect than simple administrative convenience.**

35. **As we have previously stated, there needs "to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable."[22] The House may wish to assure itself that sufficient justification has been advanced for the use of retrospective legislation in this instance.**

36. There is one further provision in the Bill that might, perhaps, be considered to have retrospective effect. Clause 13 inserts new provisions into the Immigration Act 2014 creating a number of criminal offences relating to the leasing of premises. New section 33A(1) provides that a landlord under a residential tenancy agreement[23] commits an offence if two conditions are satisfied. The conditions are that (a) the premises are occupied by a person who, because of their immigration status, is disqualified from occupying premises under a residential tenancy agreement, and (b) the landlord knows or has reasonable cause to believe that the person concerned is so disqualified. The Bill inserts new provisions into section 35 of the 2014 Act, the effect of which is to cause section 33A to apply to residential tenancy agreements made prior to the entry into force of clause 13 of the Immigration Bill.

37. This does not mean that clause 13 will have retrospective effect in the sense of imposing criminal liability in relation to things that happened before it entered into force. If a disqualified person occupied a landlord's premises until the day before clause 13 entered into force, the landlord would not become guilty of a criminal offence upon the subsequent entry into force of clause 13. If, however, a disqualified person remained in occupation after clause 13 entered into force, the landlord would commit a criminal offence even though the occupation was under a residential tenancy agreement that was made prior to the coming into force of clause 13. In this sense, clause 13 might be considered to have retrospective effect, in that it can cause criminal liability to accrue on the basis of an arrangement that was entered into prior to the entry into force of the provision; albeit that liability would only arise if

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[22] Constitution Committee, *Banking Bill* (3rd Report, Session 2008–09, HL Paper 19), para 7

[23] As defined by the Immigration Act 2014, section 20

occupation pursuant to that arrangement persisted following the coming into force of clause 13.

38. Overall, however, we recognise that the effect of clause 13 is to impose criminal liability only in respect of landlords' conduct following the entry into force of the provision, and do not consider this provision raises rule of law concerns.

Human rights

39. Several aspects of the Immigration Bill raise human-rights considerations. For instance, the Government acknowledges in its ECHR memoranda that the following aspects of the Bill engage Convention rights:

- Clause 14—which, in certain circumstances, permits landlords to obtain possession of properties without a court process—engages a number of Convention rights, including Article 3 (inhuman and degrading treatment), Article 8 (private and family life and the home) and Article 1, Protocol 1 (property).

- Clause 19 and schedule 4—which provide for freezing orders to be obtained in respect of illegal migrants' bank accounts—engages Article 6 (due process). This is so because it will be possible to obtain freezing orders on an *ex parte* basis, that is, in court proceedings to which the account-holder is not a party. (There is, however, a right of appeal.)

- Clause 32 and schedule 7—which provide for the new immigration-bail regime—engage a number of Convention rights, including, as noted above, Article 5 (liberty) and Article 8 (private and family life and the home).

- Clauses 37–38 and schedules 8–9—which limit the support that can be provided to certain categories of migrants—engage several Convention rights, including, as noted above, Article 3 (inhuman and degrading treatment).

40. **The House will no doubt wish to give these issues close consideration during the course of the Bill. We do not intend to comment on these matters in more detail since the Joint Committee on Human Rights (JCHR) will undoubtedly be covering these issues as part of its scrutiny of the Bill.**

Certification of human rights claims

41. There is, however, one human rights matter that we draw to the attention of the House. This relates to the provision made by clause 34 in relation to the "certification" of human rights claims. For present purposes, a "human rights claim" means a claim that removal from the UK or refusal of entry into the UK would be unlawful under the Human Rights Act 1998.[24] In cases in which the Secretary of State rejects a human rights claim, there is a right of appeal to the First-tier Tribunal against the Secretary of State's decision. However, when a human rights claim is made by a person liable to deportation under section 3(5)–(6) of the Immigration Act 1971, the

[24] Nationality, Immigration and Asylum Act 2002, section 113(1)

Secretary of State can "certify" the claim if she considers that removal to the country in question pending the completion of any appeal process would not itself be unlawful under the HRA.[25] Once a human rights claim has been so certified, any appeal against the Secretary of State's initial rejection of the claim (as distinct from any challenge to the decision to certify the claim)[26] must be brought or continued from outside the UK.[27]

42. This regime leverages the distinction drawn in ECHR jurisprudence between circumstances in which a suspensive appeal process is required and those in which a non-suspensive process suffices. The Government acknowledges in its ECHR Memorandum that human rights claims made on the basis of Article 2 (right to life) or Article 3 (torture and inhuman or degrading treatment) require an appeal process that is suspensive of any proposed removal. In other words, such appeals must be heard in-country. In contrast, a non-suspensive appeal—that is, an appeal that does not disrupt removal and is brought on an out-of-country basis—is compatible with ECHR case law when neither Articles 2 nor 3 are engaged.

43. The arrangements described above were put in place by the Immigration Act 2014. The Immigration Bill expands those arrangements. Whereas, at present, human rights claims can be certified only when made by persons liable to deportation, the Bill will permit certification of all human rights claims made by those who are subject to immigration control. As the Explanatory Notes put it: "The effect is to extend the certification power beyond appeals related to removals, such that it also includes circumstances where the individual is refused entry or required to leave the UK."[28]

44. The effect of certifying a human rights claim is very significant: it means that the person concerned can be removed from or denied entry to the UK and required, should they wish to pursue the matter, to appeal on an out-of-country basis against the Secretary of State's decision to reject their human rights claim. The Solicitor-General has acknowledged that an out-of-country appeal is "less advantageous" than an in-country appeal.[29] It is a general requirement of the rule of law that the lawfulness of executive decisions should be capable of being tested either by way of an effective right of appeal or by way of judicial review. That requirement assumes particular importance when the decision in question has the sort of profound effects upon the individual that a certification decision is liable to have.

45. Since there is no right of appeal against the Secretary of State's decision to certify a human rights claim, the only possible means of challenge is judicial review. Noting this, the JCHR, when it considered the original certification power conferred by what is now the Immigration Act 2014, expressed concern about the adequacy of judicial review in this context. On this matter, it concluded:

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25 Nationality, Immigration and Asylum Act 2002, section 94B

26 There is no right of appeal against certification. However, as noted below, certification can be challenged by way of judicial review.

27 Nationality, Immigration and Asylum Act 2002, section 92(3)

28 Explanatory Notes to the Immigration Bill, para 176

29 Public Bill Committee on the Immigration Bill, 5 November 2015

> "We are not satisfied with the Government's reliance on the continued availability of judicial review to challenge the Secretary of State's certification that a human rights appeal can be heard out of country, having regard to the unavailability of civil legal aid to bring such a claim and the proposed reforms of judicial review."[30]

46. The proposed reforms to judicial review mentioned by the JCHR concerned, in particular, plans to change the law of standing so as to prevent (for example) NGOs from bringing judicial-review challenges. That change to the law did not, in the end, occur.

47. The JCHR's concern regarding legal aid for the purpose of judicially reviewing a certification decision is, however, a distinct matter. This issue was raised with the Solicitor-General by the Public Bill Committee on the Immigration Bill. He subsequently wrote to the Chairs of the Committee indicating that legal aid is in principle available in respect of judicial-review challenges to certification decisions, provided that the case has "sufficient merit" and provided that the individual financial-means test is satisfied. The Solicitor-General also stated in his letter that "the judicial review must be of specific benefit to the individual and cannot be on a repeat immigration matter that was previously determined within one year".[31]

48. However, the in-principle availability of legal aid in this area notwithstanding, the practical extent to which it is likely to be available in respect of judicial-review challenges to certification decisions is far from clear. This is particularly so in the light of restrictions on the availability of legal aid in circumstances in which a case does not proceed beyond the permission stage, i.e. the first stage of a judicial-review claim. Restrictions imposed in 2013[32] were quashed as unlawful by the High Court in 2015,[33] the struck-down provisions being subsequently replaced by somewhat less restrictive ones.[34]

49. The upshot is that, through a combination of (a) certification of substantive human-rights claims and (b) the fact that opportunities for seeking judicial review of certification decisions may in practice be constrained by the limited availability of legal aid, individuals' scope for mounting effective human rights challenges in respect of immigration decisions may be significantly attenuated.

50. **We note the JCHR's previous conclusion regarding the practicality of challenging certifications by the Secretary of State. The House may wish to bear these concerns in mind when considering the provisions of the Bill that extend the certification power so that it can be applied to a wider range of human-rights claims.**

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30 Joint Committee on Human Rights, *Immigration Bill* (Twelfth Report, Session 2013–14, HC 935, HL Paper 102), para 53

31 Solicitor-General's letter to Public Bill Committee on the Immigration Bill, 10 November 2015.

32 Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014

33 *R (Ben Hoare Bell Solicitors) v Lord Chancellor* (2015) EWHC 523 (Admin)

34 Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898)