

SUPPLEMENTARY MEMORANDUM OF EVIDENCE TO THE JOINT COMMITTEE ON HUMAN RIGHTS AND THE UK BORDER AGENCY ON THE DRAFT IMMIGRATION BILL BY THE JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS

Joint Council for the Welfare of Immigrants (“JCWI”) is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to promote the welfare of migrants within a human rights framework.

Introduction

This short submission highlights JCWI’s key areas of concern about the Draft Immigration Bill (“DIB”). Those concerns are articulated by reference to the ECHR, ICCPR and EC obligations as they relate to asylum seekers and others. The paper follows the order of DIB itself but does not deal with Part 11 of DIB as JCWI previously submitted evidence to the JCHR in relation to this. Whilst we mainly focus on new proposals contained within the Bill, we also touch upon existing shortcomings that are replicated within it.

By way of general observation it would be fair to say that a key problem with DIB is that it replicates the shortcomings of most 21st century immigration legislation. It is vague enabling legislation that provides for subsequent, more precise provisions on matters of fundamental importance to be contained in guidance, rules, regulations and statutory instruments at some future point in time. This secondary legislation will by its nature receive inadequate parliamentary scrutiny, and does therefore in our view represent one of the chief threats to securing compliance with legal obligations and generally accepted human rights norms and principles.¹

¹ See JCWI’s response to *Simplifying Immigration Law* for a more detailed explanation as to why the existing structure for immigration law in the UK is a particular problem.

More specific concerns from the perspective of a human rights framework lie with:

- (i) DIB's disproportionate approach to expulsion;
- (ii) the reduction of of judicial oversight in relation to decisions on removal and expulsion it achieves;
- (iii) the introduction and maintenance of broad inadequately regulated powers of detention;
- (iv) powers that yet further export border control.

Part 1- Permission to enter the UK

i. JCHR previously expressed interest in the issue of the replacement of the 'right of abode' with permission to enter by order. Those concerns appear on their face to have been resolved.² There is however on-going concern as to whether the procedural protections for those entitled to/ claiming the right of abode comport with this. The present regime involves an ability to apply for and obtain a certificate of entitlement to the right of abode³ so that a person's rights may be ascertained and identified. If a certificate is refused the applicant enjoys a right of appeal against it. Possession of the certificate entitles the beneficiary to freely enter and remain in the UK. We note that part 9 of DIB removes the right of appeal against a certificate of the right of abode, but does not appear to replace this with an analogous equivalent.⁴

ii. By c (1) there appears to be a potentially significant change in relation to entitlements that British citizens enjoy given that free entry, arrival or stay is now by c 1(2) to be 'subject to any requirements or restrictions imposed 'by or by virtue of this Act or any other enactment.' This is wider than the equivalent IA 1971 provision.⁵ Given that 'this Act' deals

² See Draft Immigration Bill ("DIB), clause 9(4) and 9 (7).

³ See Nationality Immigration and Asylum Act 2002, s10.

⁴ See Nationality, Immigration and Asylum Act 2002, s 82(c).

⁵ Under the IA 1971, it is clear that the only immigration restrictions that can be imposed on British citizens are to ensure that they establish their entitlement to BC status. Under IA 1971 Act the residual ability to impose restrictions on BCs is framed in the terms "or as may be otherwise lawfully imposed on any person" (s1(1) 1971 Act) which appears to relate more generally to non-immigration matters such as powers of criminal/extradition law to prevent the free movement into/from the UK. There seems therefore to be an

with expulsion, detention⁶, and exercise of very broad immigration powers,⁷ and given that by c(1) (3) a person is only British for the purposes of the Act (and therefore for the purpose of exemption from some limited immigration powers) *if they* can prove it, this is of some concern. It potentially has particular implications for the use of those powers in relation to ethnic minorities, and may well raise concerns under Article 14 in conjunction with 8/5 ECHR. It could also be applied in way that is potentially inconsistent with standards enshrined in the ICCPR i.e. Article 12.⁸

Part 2- 3 - Powers to examine

i. The key concern here is the extension of the power to establish juxtaposed controls *outside of the EEA* to *any* state of departure pursuant to an international agreement. The lack of control and regulation of these powers is already considered a problem. Yet further extension of extra-territorial powers of this kind without appropriate safeguards in place is of concern. Its effect would be to increase opportunities for interdiction, and refoulement of asylum seekers in the midst of flight. Alternatively, it could leave to asylum seekers being prevented from leaving states in which they are subject to treatment that is contrary to international human rights norms. Both ECtHR and ICJ accept that the duty to respect ECHR/RC rights inheres wherever a state exercises effective or de facto extra territorial jurisdiction.⁹ Additionally whilst the UK has entered a reservation in relation to Article 12 ICCPR, the right to leave one country is an internationally recognised human right. The

extension here.

⁶ See for example DIB, c88, c84 powers of detention, c86, c140,c160-66

⁷ See for example DIB, clause 133.

⁸ The UK has entered an immigration reservation in relation to IPPR however Article 12(2) creates a right to leave any country and 12(4) enshrines the right not to be arbitrarily deprived of the right of entry to one's country.

⁹ *Bankovic v Belgium* (2001) 11 BHRC 435 at Para. 73. A state will be exercising jurisdiction where through consent, invitation or acquiescence a contracting state exercises some or all of the public powers normally exercised by that state. This will arguably be the case in some of the circumstances that could arise from the above.. See J Hathaway, *The Rights of Refugees under International Law*, (Cambridge, Cambridge University Press, 2005), p. 335-342, see also legal opinion by Sir Elihu Lauterpacht and Daniel Bethlehem QC in Feller, Turk, Nicholson (eds.) *Refugee Protection in International Law UNHCR's Global Consultations on International Protection* (Cambridge, Cambridge University Press, 2005)110-112.

absence of adequate checks and safeguards create a risk of arbitrary interference with this right.

ii. Additionally there is a general extension of powers of examination which is not matched by a corresponding and appropriate regulatory framework i.e. PACE codes of Practice.

Part 4 – Power to obtain biometric information

We have previously voiced our concerns about the existence of a compulsory biometric card system for non- nationals, the following new concerns arising from DIB are as follows:

i. C60 omits to include any temporal limitation on the retention of data be retained. As such the 10 year maximum¹⁰ does not appear, nor the requirement to destroy information in the event it is no longer considered useful.¹¹ Further part 4 does not specify the purpose for which data is to be retained. These changes could conflict with Article 3 of the *United Nations guidelines concerning computerized personal data files*,¹² The *ICAO guidelines on e-machine readable travel documents*,¹³ Article 5 of the Council of Europe *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*,¹⁴ and the Data Protection Act 1998. All these instruments require data to be obtained and stored for specified purposes.

ii. C58(3) significantly expands the class of individual from whom information may be taken without reference to the purpose of information gathering. Indiscriminate data collection of this kind may divorce intrusion into privacy for a legitimate aim and thus raise a compatibility issue with Article 8 ECHR.

¹⁰ S.143(15) Immigration and Asylum Act 1999.

¹¹ S.8(2) UKBA 2007.

¹² Adopted by the General Assembly on 14 December 1990. Available online at http://ec.europa.eu/justice_home/fsj/privacy/instruments/un_en.htm, accessed 16 January 2010.

¹³ International Civil Aviation Organisation, *Guidelines on E-MrtDs & Passenger Facilitation*, 2008, § 2.4.1, available at www.icao.int/icao/en/atb/sgm/mrtd/tag_mrtd17/TagMrtd17_WP017.pdf, accessed on 15 January 2010.

¹⁴ Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* ETS No. 108.

iii. Part 13 contemplates a duty to share data with public bodies for very wide purposes. Of course the UK already shares biometric information via Eurodac but the database contemplated here is much more indiscriminate. There is a real risk that a database of this kind would breach Article 8 ECHR if either the purposes for retaining the data are to remain unclear or if the data were retained to assist in the investigation of possible future crimes.¹⁵ As noted by JCHR there is also a risk that it would be incompatible with Article 14 in conjunction with 8 ECHR.¹⁶

iv. C59 does not reproduce the current safeguard for the under 16's which requires confirmation from a superior officer for prints to be taken thus raising concerns under Article 3 CRC 1989.¹⁷

Part 5 - Expulsion orders

Removal, and the imposition of bans on return will often engage Articles 8 and 3 ECHR and rights under EU law/Refugee Convention.

Part 5 is overall notable for its wholly disproportionate approach to removal. The elision of two current processes for removal (currently deportation for serious criminal offenders and removal for those breaching immigration laws) envisaged by DIB through the system of expulsion orders risks subjecting migrants to removal and indefinite expulsion in circumstances of minor immigration indiscretions e.g. where a student inadvertently works a few extra hours than their leave permits. This is greatly exacerbated by the lack of judicial scrutiny (see below). Specific concerns are:

¹⁵ in *S & Marper v United Kingdom* (App. Nos. 30562/04 and 30566/04); (2008) 25 BHRC 557.

¹⁶ See The Joint Committee's Thirteenth Report for the Session 2006-07 *Legislative Scrutiny: Sixth Progress Report*, 21 May 2007; HL 105/HC 538, § 1.24 the Committee expressed these concerns in relation to the introduction of biometric immigration documents.

¹⁷ See s141(12) IAA 99.

- i. C65(2)(a) and (b) fail to set out the criteria for regulation of discretionary expulsion orders in relation to family members and non-foreign criminal migrants and in so doing risks incompatibility with Article 8 ECHR (legality requirement);
- ii. By c72 and c65(2)(b) other family members also face expulsion alongside the principal family member. Given that this power is not limited to those who are treated as a 'dependant' for immigration purposes, it gives rise to a risk of arbitrary interference with 8 ECHR rights;
- iii. Powers under c 64(3) to make expulsion orders retrospectively against those who have left the country would subject the migrant to a decision whose consequences they were unable to predict at the time of departure, excluding them from meaningful determination of their future family life, and leaving them unable to challenge the decision meaningfully from abroad due to their remoteness from any suitably qualified legal advisor raise compatibility concerns with Article 8 ECHR;
- iv. C66(2) provides an exception relating to the making of expulsion orders in relation to children is limited to circumstances where SSHD 'thinks' that the child in question is truly a minor. This restricts the ability of a Court to make a decision itself on whether they are in truth a child: it is limited to reviewing the rationality of SSHD's opinion and is inconsistent with Article 3 CRC 1989;
- v. C76(2) (c) requires certain specified actions to facilitate removal, including co-operating with the authorities of states abroad is not subject to limitation. This creates a real risk that the information could jeopardise the safety of migrants and their dependants and in so doing breach EC/international obligations;¹⁸
- vi. The duty under c70(3) to cancel an expulsion order whilst its subject is outside the UK where continued prohibition of return would breach EC/ECHR creates ECHR risks given that it is limited to those cases where *SSHD* 'thinks' this may be the case rather than where this is, *as a matter of fact* actually the case.

¹⁸ EC Directive 2005/85 Article 22.

Part 6- Powers of detention and immigration bail

In general, this part creates new risks that undermine the rights of detainees/potential detainees under Article 5 ECHR whilst also replicating current serious shortcomings within the UK's scheme for immigration detention. Whilst new powers of detention are created, they do not appear to be matched by an appropriate regulatory framework. This of particular concern where non-state based entities are to be given powers to employ force/ detain migrants, and in relation to powers exercised in control zones. Specific concerns are as follows:

i. C83(3) provides captains of ships, aircraft or trains with a power to detain persons denied immigration permission. This is not subject to any time limit unlike other provisions.¹⁹ Additionally by c 89, there is no reference to any limitation upon the use of force by captains of ships, aircraft or trains to prevent migrants disembarking in the United Kingdom.

ii. C 84 allows 'authorised persons' to whom the power to search ships or vessels has been contracted out (under clause 47) to detain persons. DIB does not make clear who such persons are nor impose limits/any regulation of those powers.

iii. C85 provides a power to detain a person without time limit 'until the completion of [an] examination'. This is in contrast to and older immigration acts/other parts of DIB which are subject to a time limit;

iv. C98 does not grant bail powers to the sentencing court in cases of mandatory detention for 'foreign criminals' sentenced by a court but not thought deserving of imprisonment. Further, the anticipated 2 days detention in such cases is only triggered when SSHD 'is given notice' of the person's conviction, detention could extend for much longer due to bureaucratic delay in giving such notification. Additionally by c 88(3) the mandatory indefinite detention of 'foreign criminals' who have been made subject to expulsion orders continues to be limited only by reference to circumstances where SSHD 'thinks it inappropriate.' This is inconsistent with *A v Secretary of State for the Home Department*.²⁰

¹⁹ clauses 84, c 86 and c87.

²⁰ *A v Secretary of State for the Home Department*. [2004] UKHL 56 (which was confirmed by the Strasbourg

v. C88 authorises detention *in circumstances where there are 'reasonable grounds for suspecting' that a person may be the subject of an expulsion order*. This is a very low threshold. It could result in the indefinite detention of migrants/or nationals who may be subject to an expulsion order, but ultimately turn out not to be. It also fails to address long-standing concerns over the lack of any effective time-limits on detention in the UK together with the lack of statutory criteria for when detention is appropriate. This is of particular concern given that there is no mandatory judicial authorisation proposed in c.98. Detainees must apply for bail or seek judicial review/habeas corpus in order to test the appropriateness of detention with the effect that the UK would appear to be out of line with developing law in the European Union and Strasbourg case-law under Article 5 ECHR.²¹

vi. C99(2) omits to mention the extent to which there is a realistic prospect of removal in a reasonable period as being relevant to the grant of bail. This is a crucial consideration in detention cases as extended detention due to failure to secure readmission of migrants is a frequent occurrence.

vii. C 100 omits from the requirement to give notice for grant or refusal a requirement to give reasons.

viii.C103 makes it less likely that detained migrants will be able to secure sureties on account of the requirement to deposit monies with the SSHD, and the automatic forfeiting of sums in circumstances of non-compliance. Currently a surety need only establish that monies are available, and in cases of non-compliance, it is left to the Tribunal to decide whether monies should be forfeited, and what amounts.

ix. Part 5 replicates existing failings in the scheme for detention through:

- a. failing to make clear for 'immigration bail' there is a presumption in favour of liberty and bail should therefore be considered in all cases and that detainees have a right to apply for bail to SSHD;

Court in Appn. No.3455/05, *A and others v UK*, judgment of 16 February 2009.

²¹ See *Mikolenko* (Appn. No. 10664/05 *Mikolenko v Estonia* Judgment of 8 October 2009 at para.64, 67, 68). See also ECJ in *Kadzoev* (Case C-357/09 PPU, (OJ 2008 L 348, p.98).

- b. the absence of mandatory judicial authorisation for the purpose of bail grants from the First Tier Tribunal - detainees are therefore left to seek bail themselves. This is inconsistent with the Strasbourg approach.²² Detainees often cannot secure legal advice and therefore may be detained unlawfully or unnecessarily for long periods;
- c. not requiring the application of the PACE codes to immigration powers of detention and search by immigration officers and now others both in the UK and at other sites at which juxtaposed controls operate under part 2 of DIB;
- d. placing those who would have indefinite 'restricted immigration status' in a position where they have indefinite 'immigration bail' which is not subject to any oversight by the First Tier Tribunal under c98(8) and 107(3) Judicial review would appear to be the only remedy which is inaccessible;
- e. making the availability of electronic tagging subject to local availability.²³

Part 7- Detained persons and removal centres

Arbitrary detention, inhumane treatment and wrongful refoulement during the detention and removal process are well documented.²⁴ Our particular concerns about part 7 of DIB are:

- i. The removal of escort monitors' and contract monitors' current duty to investigate, and report to SSHD, allegations made against detainee custody officers arising whilst carrying out escort and custodial functions.²⁵
- ii. The absence of any statutory *duty* requiring the Independent Monitoring Board investigate individual complaints, and provide appropriate remedies²⁶ with the consequence that *nobody* has responsibility for this;

²² See *Shamsa v Poland* (Apps nos 45355/99 and 45357/99 judgement 27 November 2003).

²³ C104(4)(5).

²⁴ E.g. *Outsourcing abuse: The use and misuse of state-sanctioned force during the detention and removal of asylum seekers*, July 2008.

²⁵ Clauses 110 and 114.

iii. The new power for detention centre managers to authorise “workers” (who have no training in relation to the exercise of custodial functions and includes cleaners/kitchen staff) to exercise functions presently reserved for detainee custody officers, prison officers and prison custody officers if it is not a function “that can only appropriately be exercised by the detainee custody officer [etc].”²⁷

iv. The heavy reliance on secondary legislation;

v. The creation of criminal offence of refusing to undergo testing for drugs and alcohol without requirement for reasonable suspicion of use, absence of appropriate safeguards²⁸ and associated excessive custodial punishment: 6 months to 51 weeks imprisonment.²⁹

Part 8- Powers to stop, arrest, enter, search etc

i. Clauses 133-135 create an entirely new, far reaching power for the SSHD or a designated immigration officer to stop any person for questioning, and in so doing give rise to a real danger that people within an area will be stopped arbitrarily and on discriminatory grounds in a way that potentially breaches Article 8 ECHR alone and in conjunction with Article 14 ECHR. It is notable that in order for these powers to be exercisable: a. there is no requirement for the SSHD or a designated immigration officer to have *reasonable grounds* for believing that a person is an immigration offender, b. unlike s.44 of TA 2000, there is no geographical limitation in relation to the exercise of such powers, c. there is sparse detail in DIB about the application of the power, d. there is no duty to publish authorisations (specifying the grounds, area and duration for which it is made) and d. there is no limitation

²⁶ Note that HM Chief Inspector of Prisons will inspect a selection of detention centres but does not handle nor appropriate for handling individual complaints. In her report of 18.08.09 she noted that ‘there were considerable gaps and weaknesses in the systems for monitoring, investigating and complaining about incidents where force had been used or where abuse was alleged. See http://www.justice.gov.uk/inspectors/hmi-prisons/docs/Detainee_escorts_and_removals_2009_rps.pdf,

²⁷ Clause 121 and 124.

²⁸ Clause 123.

²⁹ Clause 125(2)(a).

on renewal of authorisation- this could potentially take place on a rolling basis which could last for years (as it did in *Gillan*).³⁰

ii. Clauses 136-179 continue the trend of extending broad powers of immigration officers and amalgamating them with those enjoyed by the police. Of particular concern are c 140 (4) (powers of arrest without a warrant) which permits detention for periods which exceed those permitted under the analogous criminal provisions,³¹ all premises warrants/multiple entry warrants³², and withdrawal of protection for legally privileged documents within the scheme.³³

Part 9 - Rights of Appeal

Decision making in the sphere of immigration/asylum often engages fundamental rights and determines individual destinies. It is therefore essential that such powers are subject to appropriate checks and restraint through judicial oversight. In general DIB achieves a significant reduction in judicial oversight of executive decision making, and increases the likelihood of ECHR/EC breaches. Of particular concern are the following:

i. By c180(2)(a) and (3) certain forms of expulsion order are insulated from in-country appeal, as where the expulsion order relates to a foreign criminal, or where the migrant failed to comply with a condition of temporary permission. Further by c180(3) family members are also excluded from the right of appeal against expulsion. This would prevent European Community law rights, refugee or human rights arguments being asserted in defence to a proposed removal; it would also prevent the detection of a decision that was otherwise unlawful. Appeals from outside the country in such circumstances are recognized as being useless as a claimant may suffer irreparable harm on return;³⁴

³⁰ *Gillan and Quinton v UK* (app. No. 4158/05).

³¹ S.7(4)(a) Bail Act 1976.

³² C.160-166.

³³ C. 147, 152, 168.

³⁴ ³⁴ See Blake J in the Administrative Court in *Etame* [2008] EWHC 1140.

ii. By c 190(2) there is a serious lack of judicial supervision regarding cases where a protection application is said to have been made late. In these cases, there will be no right of appeal, meaning that complex questions of credibility and country evidence will be capable of challenge only via the mechanism of judicial review;

iii. By c 173(2)(b) there is a right of appeal for persons refused protection under the Qualification Directive (2004/83/EC). That right of appeal is less extensive than required. Under Directive (Article 18) there is a right to protection where an individual faces a real risk of serious harm against which their home country will not offer them protection. However c 175 only permits a right of appeal *where no other immigration permission is afforded*. Those refused Humanitarian Protection should have access to an appeal in which they can contest their status regardless of whether they are facing removal;

iv. The Government continues to remove asylum seekers to "safe" third countries, and where these are European Union destinations. By c 195 the right of appeal that seeks to argue against the safety of such a removal is ousted. Litigation throughout 2007 has demonstrated grave defects in asylum processes in some countries. Such removals must be conditional on compatibility with European Union minimum standards: otherwise the objectives of those standards will be frustrated. Thus there should be a right of appeal against removal to a third country in all cases where the standards there are argued to fall short of the requirements set out in the Directives that comprise the Common European Asylum System;³⁵

Where the country is not a European Union destination, DIB does not permit the Home Office decision maker to consider whether *removal onwards* from that country risks subjecting the asylum seeker to serious harm: it merely authorizes consideration of whether serious harm would take place *in* that country (C196, especially (2)(b)). This is incompatible with the obligation to protect asylum seekers from exposure to serious harm, such as threats to their life or person arising from armed conflicts (Article 15(c) of Directive

³⁵ Directive 2003/9/EC; Directive 2005/85/EC; Directive 2004/83/EC.

2004/83/EC), by ensuring that third countries will not send persons onwards to face such harm;

v. By c 178 the cancellation of refugee status only attracts a right of appeal where the subject possesses immigration permission. This leaves a person whose status is wrongfully cancelled and who lacks immigration permission unable to challenge the decision: yet their situation is the more vulnerable of the two;

vi. By c 177(2) SSHD controls access to the Tribunal in certain non-protection cases, namely where he alleges that there has been deception in the case, in which case the migrant loses their right of appeal to the Tribunal. Whilst judicial review may still be available, this is unsuitable for the kind of fact finding investigation involved in making judgments on credibility. The right of appeal is ousted in applications under the immigration rules where it is said that there has been a failure to provide sponsorship information.³⁶ Where relevant, such information should be capable of being put forward on an appeal;

v. By c 177(3) (b) regulations are to be authorized which restrict the ability of migrants to challenge adverse decisions regarding bringing their family members to the UK, by restricting challenges to those cases where an individual is lawfully settled in the UK (as opposed to being lawfully present in the UK on a short term basis);

vi. By C177(2)(iii) an in-country right of appeal against a refusal to grant immigration permission in non-protection cases will be permitted only where the result of the decision is that the migrant lacks immigration permission This prevents a migrant from contesting the correctness of a decision which prevents them from obtaining a form of immigration permission which gives greater rights than that they presently possess;

vii. There *continues to remain* a serious restriction on the right of migrants to challenge decisions that are wrong under the Points-Based System. Evidence can generally be put forward only where it was submitted in support of the application that has failed.³⁷ This means that the ensuing appeal is not an independent review of the merits of the migrant's case, but merely a box-ticking exercise based on the original application. Simple errors

³⁶ DIB, c183(3)(f).

³⁷ DIB, C185(4)(a)).

caused by misunderstanding will not be capable of rectification without resubmitting applications and undergoing the associated cost, delay and difficulty (which may entail the loss of an offer of employment/opportunity to study).

Part 10- Special Immigration Appeals Commission (SIAC)

The JCHR has previously examined the operation of SIAC in detail, we do not therefore deal with existing shortcomings within the scheme in so far as they are replicated within DIB. Of particular concern to us are the following:

i. Presently an appeal to SIAC from an immigration decision lies on any grounds available under s82 NIAA.³⁸ . C 200(7) limits the grounds of an appeal under s200(3) to breach of the HRA only. Most importantly, this appears to deny a right of appeal under the Refugee Convention or Art 15(c) of the Qualification Directive. This may amount to a breach of Art 39 of Directive 2005/85 (Asylum Procedures Directive) which requires asylum applicants to have a right to an effective remedy. Because the UKBA considers applications under Art 15(c) of the Qualification Directive by the same procedure as asylum applications, Art 39 of the Asylum Procedures Directive applies to negative decisions under Art 15(c), see Art 3(3), Asylum Procedures Directive.

ii. In country/out of country appeals to are available on the same basis as c. 173 of this Bill *but for* a certificate under c 191, accordingly the concerns identified above in relation to Par 10 apply;

iii. See above section on bail and detention- these are applicable in SIAC cases under c 201.

³⁸ see s2(2)(e) Act SIACA.

Part 14- Carriers liability

Whilst this reflects s. 124 of NIAA 2002 (which has not been brought into force the inclusion of an ‘authority to carry scheme’ which extends carriers liability by permitting the Secretary of State to make regulations requiring carriers so seek authority in advance prior to bringing passengers to the UK under pain of penalty has quite obvious implications for asylum seekers, and is also inconsistent with standard set out Article 12(2) ICCPR.³⁹

Part 19- General Supplementary Provisions

We are concerned about the amount of secondary legislation that will be used to give meaning to the provisions in this Bill. Examples of this are contained in our briefing on part 11 of DIB. However we make one further observation based on JCHR’s previous recommendation in relation to c336. This permits SSHD to make Immigration Rules. JCHR, in the light of the *HSMP* case recommended that rules ought to be accompanied by a statement of compatibility with the ECHR. There is no provision for this. Given the intention to redraft the rules as part of the simplification process, and given that the highly inadequate negative resolution procedure continues to be used for the making of immigration rules we feel that this issue acquires some importance.⁴⁰

³⁹ The European Court of Human Rights has not yet ruled on the application of carrier sanctions in asylum cases) (Article 12(2) of the Civil and Political Covenant provides that ‘everyone shall be free to leave any country, including his own’. The only permissible limitations on the right are those necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and such limitations must also be consistent with the other rights recognised within the Convention. The UN Human Rights Committee has indicated that at least in some cases, the operation of carrier sanctions will put a state in breach of the duty to respect the right of persons to leave their own country, and more generally enjoy freedom of movement. We note also that the UK has entered an immigration reservation in relation to the ICCPR.

⁴⁰ We also believe that the affirmative resolution procedure ought to be employed for the Immigration Rules and that the negative resolution procedure is not suitable for this purpose. Our views on this and the problem with the structure of immigration law more generally are set out in our response to ‘Simplifying Immigration Law A New Framework for Immigration Rules’ available at <http://www.icwi.org.uk/Resources/JCWI/PDF%20Documents/Policy/Government%20Policy/IMMICONSUULTATIONFINAL.pdf>