ILPA

ILPA's Briefing for the House of Commons Committee Stage for the Nationality and Borders Bill – Part 5: Clauses 62 and 63

Background

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

Proposal

Clauses 62 and 63 should not stand part of the Bill.

Briefing

ILPA is concerned that immigration lawyers are being needlessly targeted by new costs orders and charge orders which are not necessary and do not apply in other areas of law. Immigration Tribunal judges already have all they need by way of (i) case management powers, (ii) costs powers, and (iii) referral powers. Making immigration lawyers' task harder prejudices access to justice and has not been shown to be necessary by evidence.

Introduction

Clauses 62 and 63 of the Nationality and Borders Bill will make it harder for lawyers acting for people with immigration cases to do their job in immigration tribunal hearings. Lawyers are not always well regarded; in some circles, immigration lawyers even less so. But immigration law practitioners *fulfil a key role in enabling access to the courts and therefore access to justice*, so that a person who is the subject of an immigration decision may make their case properly and seek vindication.

The proposals in Clauses 62 and 63 of the Nationality and Borders Bill are unnecessary. The immigration tribunals *already have all the case management, costs, and referral powers they need* to control their own procedure. Giving new powers to immigration tribunals without establishing a basis in evidence for them is not warranted. The proposals should be dropped from the Bill.

The context of immigration work

In acting for people subject to immigration control, among other things, immigration lawyers work with clients who may lack funds and legal aid entitlements; whose documents may be incomplete, missing, or badly translated; and whose statements as to their past experiences may be hard to secure on account of the ill-treatment they have suffered in their country of origin.

Moreover, much is at stake in immigration proceedings. A person subject to immigration control who loses their case may be subject to expulsion from the UK and face a risk of harm in their country of origin, they may be separated from their family, or they may lose the life they have built up in the UK over many years*. Difficult but arguable points may need to be taken on their behalf.* The proposals in the Nationality and Borders Bill will make that task harder. That is unnecessary.

Equal protection under law

Further, access to justice includes equal protection under the law. That principle admits of no distinction to be made as between British nationals and foreign nationals, see *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74, at paragraph 67.[1] Those who are subject to UK law are entitled to its protection. In the context of immigration tribunal hearings, where people subject to immigration control, non-citizens who cannot exercise democratic rights to shape the legislation to which they are subject, seek to vindicate their position against the state, that principle ought to warn against bearing down on them and their lawyers through an extra costs order and charging order regime inapplicable to British nationals in the wider courts and tribunals system.

Existing Powers – Case Management Powers, Wasted Costs, and the Power to Refer

The immigration tribunals *already have all the powers that they need to regulate their own procedure*. They have (i) case management powers, (ii) a costs jurisdiction, and (iii) referral powers.

[1] https://www.bailii.org/uk/cases/UKHL/1983/8.html

First, they have extensive case management powers, see for example rules 4-6 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

Second, the immigration tribunals already have a costs jurisdiction that enables them to make wasted costs orders against lawyers, see section 29 of the Tribunal, Courts and Enforcement Act 2007 ('the 2007 Act'). In any proceedings the tribunal may disallow or order the legal or other representative concerned to meet the whole of any wasted costs or such part of them as may be determined. Wasted costs are costs incurred by a party as a result of any *improper, unreasonable or negligent act or omission* on the part of any legal or other representative or any employee of such a representative, or which, in the light of any such act or omission occurring after they were incurred, the tribunal considers it is unreasonable to expect that party to pay.

This costs jurisdiction is given further effect by tribunal rules of procedure, see for example rule 9 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. An order for wasted costs may be made. A costs order may also be made where a person has acted unreasonably in bringing, defending or conducting proceedings. A tribunal may make an order on an application *or on its own initiative*.

Third, in practice, the tribunals have power to regulate their own procedure to avoid its abuse. In the context of applications for judicial review in the High Court it is recognised that the Court may refer a lawyer to their professional regulatory body (such as the Solicitors Regulation Authority) where their conduct warrants it (thus leading potentially to disciplinary proceedings), see *In the Matter of the Court's Exercise of the Hamid Jurisdiction: Re: An Application for Judicial Review* [2021] EWHC 1895 (Admin) at paragraph 6.[2] A legal representative may be asked to show cause why their conduct should not be considered for referral to the relevant regulatory body or why they should not be admonished. An immigration tribunal might consider making such a referral in an appropriate case. Alternatively, it might decide that the conduct might not be so serious after all and restrain itself.

New Powers – Wasted Resources Orders (Clause 62)

In the Nationality and Borders Bill, the Government seeks to give immigration tribunals new powers, so that additionally, they may *charge a participant* an amount of money if it is considered that the participant has acted *improperly, unreasonably or negligently*, and as a result, the tribunal's resources have been wasted. The charge (or fine, as the term is commonly understood) would be a separate matter from the costs incurred by a party and payable by the other party. The charge would be paid to the tribunal.

[2] https://www.bailii.org/ew/cases/EWHC/Admin/2021/1895.html

Immigration Law Practitioners' Association, registered charity no. 1155286. A company limited by guarantee no. 2350422.
Registered in England and Wales. Registered office Lindsey House, 40-42 Charterhouse Street, London EC1M 6JN.

In this context, a participant who may be ordered to pay a charge in respect of immigration tribunal proceedings means any person exercising a right of audience or right to conduct the proceedings on behalf of a party to proceedings; any employee of such a person; or the Secretary of State.

A person may be found to have acted improperly, unreasonably or negligently 'by reason of having failed to act *in a particular way*' (emphasis added), but we are not told in what particular way. Clause 62 provides that rules may be made and may include scales of the amounts to be charged. It is wrong that no framework is provided for the scale of the amounts to be charged.

As a rationale for this innovation, it is said that 'High levels of poor practice around compliance with tribunal directions, which disrupts or prevents the proper preparation of an appeal, can lead to cases being adjourned at a late stage' (Explanatory Notes to the Nationality and Borders Bill, paragraph 642). *No actual evidence is adduced to support that proposition* or to demonstrate that existing case management powers, wasted costs powers, and powers of referral are inadequate to deal with such matters.

New Powers – Unreasonable Costs Orders (Clause 63)

The Nationality and Borders Bill seeks to amend the costs provisions of the 2007 Act, so as to carve out and lay greater emphasis on making an order on grounds of *unreasonable* behaviour. A tribunal may, in particular, make an order in respect of costs in any proceedings if it considers that *a party* or *its legal or other representative* has acted *unreasonably* in bringing, defending or conducting the proceedings. This is a power to make a costs order against a party and/or their lawyer.

Further, unlike in considering wasted costs, the behaviour identified is solely that which is *unreasonable*; not behaviour that is *improper* or *negligent*. In carving out *unreasonable* behaviour in this way, there is a risk that the high threshold that applies in the wasted costs jurisdiction is lowered and that such orders are made where the ordinary difficulties of running an immigration case have impeded its progress.

One has to be careful in determining what might be said to be conduct that is unreasonable. In the consideration of the jurisdiction to order wasted costs in *Ridehalgh v Horsefield* [1994] Ch 205, the Court of Appeal held:

'"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the

resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.'[3]

Conduct that does not meet the test for being unreasonable so as to make a wasted costs order, ought not to sneak in via the back door of an unreasonable costs order.

New Powers – Tribunal Procedure Rules (Clause 63)

In addition, the Nationality and Borders Bill makes provision that tribunal procedure rules must prescribe *conduct* that, *in the absence of evidence to the contrary*, is to be treated as improper, unreasonable or negligent for the purposes of (i) a charge in respect of wasted resources; (ii) wasted costs, or (iii) unreasonable costs. Where the prescribed conduct occurs, the person in question will be treated as having acted improperly, unreasonably or negligently, unless they can show the contrary (i.e. there is a rebuttable presumption). Here too, there is a risk that conduct that does not meet the test for being unreasonable so as to make a wasted costs order sneaks back in.

Further, the rules are to make provision to the effect that the tribunal, if satisfied that conduct has taken place, must consider whether to impose a charge or make a costs order, though it is not compelled to do so.

The Home Office consider that there is '[a] range of conduct on the part of legal and other representatives in the [immigration tribunals] in the way proceedings are conducted or pursued, disrupting or preventing the proper preparation and progress of an appeal' (Explanatory Notes to the Nationality and Borders Bill, paragraph 650). Once again, no actual evidence is adduced to support that proposition or to demonstrate that existing case management powers, wasted costs powers, and the power to refer are inadequate to deal with such matters.

Conclusion

These proposals are unnecessary. The immigration tribunals already have all the case management, costs, and referral powers they need to control their own procedure. Adding new powers to immigration tribunals without establishing a basis in evidence for them is not warranted. The proposals should be dropped from the Bill.

[3] https://www.bailii.org/ew/cases/EWCA/Civ/1994/40.html