ILPA's Briefing for the House of Commons Report Stage for the Nationality and Borders Bill – Part 2: Asylum, Clause 22 and 23 Amendment

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.

Clause 22 Priority removal notices: expedited appeals

Proposed Amendment

Page 25, line 11, leave out Clause 22

Clause 23 Expedited appeals: joining of related appeals

Proposed Amendment

Page 26, line 7, leave out Clause 23

Briefing

By clause 22 and clause 23 of the Nationality and Borders Bill, the Home Office seeks to oust the jurisdiction of Senior Courts from considering an appeal from a first-instance immigration tribunal decision. Its last substantial attempt to do so was the ouster clause it sought unsuccessfully to introduce to the Asylum and Immigration (Treatment of Claimants, etc.) Bill in the 2003-2004 session

of Parliament. At that time, it sought to oust statutory appeals and also the jurisdiction of the High Court on Judicial Review. This time the effort is focused solely on statutory appeals and is an attempt to exclude appeals to the Court of Appeal. It is still wrong. The proposed amendments remove the offending ouster clause.

A first instance tribunal decision on a question of international protection or human rights, involving compliance with international treaty obligations, ought to be capable of appeal, as part of the standard procedure in the UK constitutional order for the rule of law.

The Home Office gains nothing by this latest effort. Instead, the rule of law is damaged and the High Court is left to supervise the resulting delinquency if and when it entertains a judicial review against an immigration appeal decision impugned. To understand what is going on, one needs to look at the provision for priority removal notices in the Nationality and Borders Bill.

Priority Removal Notices (PRN)

The Nationality and Borders Bill (clauses 19-24) makes provision for priority removal notices (PRNs). Such notices may be served on anyone who is liable to removal or liable to deportation. The Nationality and Borders Bill does not set out the factors that may lead to a PRN being issued. It should do so. It is wrong that the matters to be considered when making a decision that may lead to the ousting of the appellate jurisdiction of Senior Courts should be left solely to Home Office guidance and the whim of the Secretary of State.

That said, it is likely that among one factor that will lead to a Home Office decision to issue a PRN is where a person has previously made a human rights or protection claim. Thus, one target will be fresh claims for asylum that the Home Office refuse but where there is sufficient merit nonetheless to warrant an appeal to an independent tribunal.

Where a person is issued with a PRN, they will be required to provide a statement, information, and/or evidence before a cut-off date or to provide reasons for providing such evidence on or after that date. No provision is made in the Bill for how the cut-off date is to be determined. That is wrong. An early cut-off date could frustrate a person by preventing them from marshalling the material they need to persuade the Home Office of the merits of their case.

The statement that a person makes in response to a PRN must set out the reasons for wishing to enter or remain in the UK, any grounds on which they should be permitted to do so, and any grounds on

which they should not be removed or required to leave the UK. Generally, where a person replies, this will lead to them raising matters that amount to an asylum/protection claim or a human rights claim.

A PRN will remain in force until twelve months after the cut-off date or the date on which the person exhausts their immigration appeal rights, whichever is the later. Among other things, the Bill creates a principle that evidence that is not provided in compliance with a PRN may be damaging to a person's credibility, unless there are good reasons as to why it was supplied late.

Expedited Appeals

Clause 22 of the Bill makes provision for an expedited immigration appeal route for appellants where they have been served with a priority removal notice (PRN) and they have made an asylum/protection claim (for Refugee status/humanitarian protection) or a human rights claim (or they have provided reasons or evidence as to why they should be allowed to remain in the UK) on or after the specified cut-off date but while the PRN is still in force.

In these circumstances, any right of appeal against a Home Office refusal will be to the Upper Tribunal instead of the First-tier Tribunal where certified by the Secretary of State (in default of her being satisfied that there are good reasons for making the claim on or after that date). The result of an appeal being certified is that a tier of appeal (the First-tier Tribunal) is lost and a first instance appeal from the Home Office decision, say on an asylum claim, is heard in the Upper Tribunal (normally the body to which an appeal is brought from a First-tier Tribunal decision).

As regards tribunal procedure the Bill does two things. First, it specifies that the Tribunal Procedure Rules must make provision to try and ensure that expedited appeals in the Upper Tribunal are determined more quickly than an ordinary appeal in the First-tier Tribunal. Second, it provides that those rules must allow for the Upper Tribunal to make an order that the expedited appeals process should not apply to a particular case if it is in the interests of justice. However, that safeguard will not provide protection against an ouster of the Court of Appeal's jurisdiction, once the Upper Tribunal has given judgment in a case.

Where a person is subject to the expedited appeal process, clause 23 of the Bill makes provision to treat any other appeals they may have (say an appeal against deprivation of citizenship) as a related expedited appeal that starts in the Upper Tribunal. Thus, it extends the vice found in clause 22.

The Ouster of Appeal Rights in an Expedited Appeal

Of greatest controversy is the attempt to oust the jurisdiction of the Court of Appeal and so prohibit an appeal from a first instance decision of the Upper Tribunal. The Bill amends section 13(8) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) so that there is no onward right of appeal to the Court of Appeal (and by necessary implication, the Supreme Court thereafter).

The consequences of such an ouster of jurisdiction are extremely serious. The immigration appeals concerned involve international protection rights (Refugee status/humanitarian protection) and human rights (under the European Convention on Human Rights (ECHR) and the Human Rights Act 1998). The UK has bound itself to abide by international agreements (the Refugee Convention and ECHR) that give effect to those rights.

No other decision from which s 13(8) of the 2007 Act presently excludes onward appeals to the Court of Appeal concerns such fundamental rights as the right not to be sent back to a country where one will be at risk of persecution, torture, or even loss of life. The attempt to exclude such appeals is a radical extension of the use of the 2007 Act provision. The existing exclusions, for example excluding appeals against the issue of national security certificates in Data Protection Act 2018 cases, come nowhere near this level of seriousness.

One can have full respect for the institutional expertise of the Upper Tribunal and still admit the possibility that it may lapse into error in a given case involving fundamental rights. One can also admit the possibility that the decisions of higher courts may be required to correct that error, to give binding decisions where judgments of the Upper Tribunal are in conflict on a point, or to give judgment where the wider public interest requires determination of a point at the highest level such as where there is binding precedent from which there is an arguable need to depart. All such advantages will be lost by the proposed change.

Instead, any residual jurisdiction to scrutinise the Upper Tribunal judgment will fall to the High Court where it grants permission to bring a claim for judicial review on public law principles in a given case. The High Court is a Court of unlimited jurisdiction. In contrast, the Upper Tribunal has a limited jurisdiction and is susceptible to judicial review by the High Court, albeit that such jurisdiction may be exercised only sparingly in rare and exceptional cases.

In any event, it is a waste of time to proceed in this way in excluding the jurisdiction of the Court of Appeal and forcing meritorious challenges to Upper Tribunal error into the High Court. The Upper

Tribunal is a Superior Court of Record. In some areas, it exercises its own judicial review jurisdiction (in addition to hearing appeals from the First-tier Tribunal). The High Court does not need such extra judicial review work. Indeed, as is well-known, the recent trend in allocating such work has been to move immigration judicial reviews away from the High Court and into the Upper Tribunal. It would be much better to leave the existing appeals structure between the Upper Tribunal and the Court of Appeal in place. The necessary safeguards against frivolous appeals are provided by the need to secure permission to appeal on the basis of stringent threshold tests.

If the ouster clause is enacted, the extent to which the High Court is willing to entertain applications for judicial review against judgments in excluded appeals determined by the Upper Tribunal will bear upon the question of whether there is a meaningful method of challenge to these Upper Tribunal decisions. This in turn may have some bearing on the constitutional propriety of the ouster clause in terms of its impact on the rule of law. There is a public interest in legal issues of general importance being reviewable by appellate courts and an ouster clause that excludes that possibility may not be consistent with the rule of law, see R(Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22, per Lord Carnwath at paragraph 142.[1]

The ouster clause should be dropped from the Nationality and Borders Bill. It has serious implications for the rule of law, the ability of the UK to abide by its international commitments, the fundamental rights of people at risk of harm in their home states, and for the work of the High Court. It is a bad idea, needlessly complicates an already complex immigration system, and shows a want of constitutional propriety as regards the respective roles of the Government and the Courts. Parliament should resist the temptation to indulge this proposal. The proposed amendments remove it from the Bill.

[1] https://www.supremecourt.uk/cases/docs/uksc-2018-0004-judgment.pdf