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

Summary

By Clauses 22 and 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. **We urge members of the House of Lords to oppose the question that the offending ouster clauses (22 and 23) stand part of the Bill.**

Background

The Immigration Law Practitioners' Association ('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

Oppose the Question that Clause 22 stand part of the Bill.

Clause 23 Expedited appeals: joining of related appeals

Proposed Amendment

Oppose the Question that Clause 23 stand part of the Bill.

Briefing

By Clauses 22 and 23 of the Nationality and Borders Bill, the Government seeks to commence appeals in the Upper (rather than the First-tier) Tribunal, and then oust the jurisdiction of Senior Courts from considering an appeal from the Upper Tribunal.

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.

To understand why these ouster clauses should be removed from the Bill, one needs to look at the regime for priority removal notices.

Priority Removal Notices

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 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, one factor that is likely to be relied upon by the Home Office in issuing a PRN is if there has been a previous human rights or protection claim. Thus, one target will be a fresh claim for asylum that the Home Office refuses, but which has 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 later. At Committee Stage in the House of Commons, Clause 20(4) was added to state that a priority removal notice would remain in force at least 12 months after the cut-off date, *even if the PRN recipient ceases to be liable to removal or deportation from the United Kingdom during that period*. If a person is no longer liable to be removed or deported, there can be no justification for the continuation of the restrictions imposed by the PRN.

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' - a term left undefined - as to why it was supplied late (see Clauses 21 and 25).

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 and they have made an 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, the Secretary of State will 'certify' that any right of appeal against a Home Office refusal will be to the Upper Tribunal instead of the First-tier Tribunal. The only exception to the certification is if the Secretary of State is satisfied that there are good reasons for making the claim on or after the PRN cut-off 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 *may* not apply if it is satisfied that *it is the only way to secure that justice is done in the case of a particular expedited appeal*. The appeal can then be transferred to the First-tier Tribunal. This elevated test for transferring was introduced at Report stage in the House of Commons.[1] The Bill, as introduced, permitted transfer of an appeal when in the interests of justice, without it needing to be 'the only way' to secure justice.

However, even this lowered 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 (against protection and human rights claims, deprivation of citizenship, EU citizens' rights immigration decisions, and EEA decisions) 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. Clauses 22(2) and 23(9) of the Bill amend 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).

This is the case if the appeal is for a claim brought after the PRN cut-off date, but is also the case for any related appeal. Even if the related appeal is meritorious, in-time, and pre-dates the PRN, it is to start into the Upper Tribunal, and cannot be appealed onwards.

The consequences of such an ouster of jurisdiction are extremely serious. The appeals concerned involve international protection rights (refugee status/humanitarian protection), human rights (under the European Convention on Human Rights ('ECHR') and the Human Rights Act 1998), European Union citizens' and European Economic Area rights, and deprivation of citizenship. The UK has bound itself to abide by international agreements that give effect to these rights.

[1] Clause 22(1) and Clause 23(7), as amended by amendments 39, 40, 42 and 43 at Report Stage <https://publications.parliament.uk/pa/bills/cbill/58-02/0187/amend/natbord_day_rep_1207.pdf> accessed 21 January 2022.

No other decision, from which section 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.

Thus, there will be no right to appeal the decision of the Upper Tribunal, even if it contains an error of law or a breach of natural justice.

Our proposed amendment would 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 clauses are enacted, the question will arise as to whether there is a meaningful method to challenge these Upper Tribunal decisions. This in turn may have some bearing on the constitutional propriety of the ouster clauses, in terms of their 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.[2]

The last substantial attempt of the Government to introduce an ouster clause of this kind, was when it sought unsuccessfully to introduce an ouster clause into the Asylum and Immigration (Treatment of Claimants, etc.) Bill in the 2003-2004 session of Parliament. At that time, it sought to oust statutory

[2] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 <https://www.supremecourt.uk/cases/docs/uksc-2018-0004-judgment.pdf> accessed 21 January 2022.

appeals and also the jurisdiction of the High Court on judicial review. Lord Steyn on the 3rd March 2004[3] stated the following:

> *'The Bill attempts to immunise manifest illegality. It is an astonishing measure. It is contrary to the rule of law. It is contrary to the constitutional principle on which our nation is founded that Her Majesty's courts must always be open to all, citizens and foreigners alike, who seek just redress of perceived wrongs.'*

Faced with strong resistance in the House of Lords, in 2004, the Government relented and dropped the ouster clause from the 2004 Bill.[4] We urge members of the House of Lords to once more take action to resist a clause that would oust the supervisory jurisdiction of higher courts and endanger the rule of law.

Conclusion

The ouster clauses should be dropped from the Nationality and Borders Bill. They have serious implications for the rule of law; the ability of the UK to abide by its international commitments; and the fundamental rights of people at risk of harm in their home states. They needlessly complicate an already complex immigration system, and show 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 oppose the question that these clauses stand part of the Bill.

Should you require further information regarding this briefing, please contact the Immigration Law Practitioners' Association at info@ilpa.org.uk.

[3] Immigration Law Practitioners' Association, A *Briefing for Peers on the Asylum and Immigration (Treatment of Claimants, etc.) Bill Second Reading in the House of Lords 15 March 2004, Clause 14 - the Unification of the Appeal System* <https://ilpa.org.uk/wp-content/uploads/resources/12992/04.03.334.pdf> accessed 21 January 2022. See page 11 for the extract of the speech of Lord Steyn at Inner Temple Hall on 3 March 2004.

[4] See Richard Rawlings, 'Review, Revenge and Retreat' (2005) 68 *Modern Law Review* 37 and in Andrew Le Sueur, 'Three Strikes and it's out? The UK Government's Strategy to Oust Judicial Review from Immigration and Asylum Decision Making' [2004] *Public Law* 225.