IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA BRIEFING
Proposed Amendments for
House of Commons – Report, July 2009

Borders, Citizenship and Immigration Bill – Bill 115

TRANSFER OF JUDICIAL REVIEWS & APPEALS TO THE COURT OF APPEAL

Please also see ILPA's fuller Briefing for Report on these matters.

This Briefing on Proposed Amendments provides Amendments in respect of these discrete matters – firstly, relating to appeals from the Upper Tribunal to the Court of Appeal; secondly, the transfer of judicial reviews from the High Court to the Upper Tribunal.

1.Right of appeal to Court of Appeal

AMENDMENT

New Clause

To move the following Clause –

'Section 13(6) of the Tribunals, Courts and Enforcement Act 2007 (c. 15) (right of appeal to court of appeal etc.) does not apply in relation to immigration and nationality appeals from the Upper Tribunal.'

Purpose
To preclude the Lord Chancellor introducing a restriction on the right of appeal to the Court of Appeal from immigration and nationality law decisions of the Upper Tribunal.

Briefing
The Court of Appeal currently hears appeals from the Asylum and Immigration Tribunal (AIT) where the Court considers the decision of the AIT to be arguably wrong in law and the appeal to have a reasonable prospect of success. Section 13(6) of the Tribunals, Courts and Enforcement Act 2007 (c. 15), however, would permit the Lord Chancellor to add restrictions such that, when the AIT is transferred into the new two-tier Tribunals Service, an appeal must also raise some further compelling reason or point of principle or practice. If the power to transfer immigration and nationality judicial reviews from the High Court to the Upper Tribunal is exercised (under what is currently clause 54 of this Bill), these restrictions could also apply in respect of those judicial reviews that were then decided by the Upper Tribunal.

ILPA supports this Amendment. It was tabled in the House of Lords in the names of the Lord Lester of Herne Hill, the Lord Pannick and the Lord Lloyd of Berwick. The Amendment also has the support of the Joint Committee on Human Rights, who concur with the legal opinion of Sir Richard Buxton, a recently retired Lord Justice of Appeal in the Court of Appeal, that introduction of such restrictions may not be compatible with the UK's international obligations – see the Committee's Ninth Report of Session 2008-09 *Legislative Scrutiny: Borders, Citizenship and Immigration Bill* HL Paper 62 HC 375, paragraphs 1.22 *et seq*.

2. Transfer of immigration or nationality judicial review applications

AMENDMENT

Clause 54

Page 45, line 18, leave out clause 54.

Purpose
This Amendment would remove the power to transfer immigration or nationality judicial reviews from the High Court to the Upper Tribunal.

Briefing
ILPA supports this Amendment. It is in keeping with assurances that were given in 2006-07 during the passage of the Tribunals, Courts and Enforcement Act 2007 that legislation permitting the transfer of these judicial reviews would not be introduced before the capacity of the Upper Tribunal to deal with its new workload and to deal with a new judicial review jurisdiction in other areas could be assessed. The Upper Tribunal is new, and no such assessment can be made at this time. The inclusion of this Clause in this Bill is premature and entails serious risks, for reasons more fully explained in ILPA's fuller Briefing for Report on these matters.

Amendments below constitute compromise positions. Some of which would stand alone; others of which are founded upon the removal of Clause 54.

AMENDMENT

New Clause

To move the following Clause –

(1) Section 82 of the Nationality, Immigration and Asylum Act 2002 is amended as follows.

(2) In subsection (2) after paragraph (k) insert –

> "a decision that further submissions do not amount to a fresh human rights claim or fresh asylum claim for the purposes of the Immigration Rules"

Purpose
This Amendment would reduce the workload of the High Court without the transfer of judicial reviews. It would do this by creating a statutory right of appeal to the Tribunal against a decision by the UK Border Agency that further submissions to it do not constitute a fresh claim for asylum or fresh human rights claim.

Briefing
This Amendment is founded upon the removal of Clause 54. Judicial review is a discretionary remedy, available where a public body has made a decision (or failed to make a decision) and there is no appeal right by which the public body may be challenged. By providing for an appeal right in these cases, the option of judicial review would fall away. It is understood that the High Court is particularly concerned with the numbers of judicial reviews in these particular cases.

AMENDMENT

Clause 54

Page 45, line 21, leave out subsection (a)

Page 45, line 23, leave out subsection (c)

Page 45, line 26, leave out subsection (a)

Page 45, line 28, leave out subsection (c)

Page 45, line 31, leave out subsection (a)

Page 45, line 33, leave out subsection (c)

Purpose
The effect of the Amendments would be to remove the power to transfer a class of cases. This would mean that there was no *duty* upon the High Court to transfer a case to the Upper Tribunal. The Amendments would retain the *power* to transfer an individual case that is created by Clause 54.

Briefing Note
ILPA is opposed to Clause 54 standing part of the Bill. These Amendments would, however, restrict the effect of the Clause rather than remove it. The Amendments address the point raised by the Lord Lloyd of Berwick at Second Reading in the Lords (11 Feb 2009 : Column 1142) that, instead of a duty to transfer there, could be a power so that while individual cases could be transferred there would be no obligation to transfer all cases and the matter would be for the High Court judge.

AMENDMENT

Clause 54

Page 45, line 33, at end insert –

( ) Nothing in section 31A of the Supreme Court Act 1981 (c.54) (England and Wales transfer from the High Court to the Upper Tribunal; section 25A of the Judicature (Northern Ireland) Act 1978 (c.23) (Northern Ireland: transfer from the High Court to the Upper Tribunal or section 20 of the Tribunals, Courts and Enforcement Act 2007 (c.15) (transfer from the Court of Session to the Upper Tribunal) shall permit the transfer of any application where the application calls into question a decision under:

(a) the British Nationality Act 1981 (c. 61),

(b) any instrument having effect under an enactment within paragraph (a)or

(c) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship

Purpose
This Amendment would restrict Clause 54 such that a judicial review of a nationality decision could not be transferred to the Upper Tribunal

Briefing
ILPA is opposed to Clause 54 standing part of the Bill. However, the Amendment addresses the specific issue of why nationality cases should be included among any judicial reviews that can be transferred. Nationality decisions are discretionary and thus, if challenged at all, are challenged by judicial review. The only nationality decision against which there is right of appeal to the Asylum and Immigration Tribunal is a decision to deprive a person of his or her nationality. The Tribunal does not have expertise in this area. Further, where it is contended that a person is already British, a declaration is sought from the High Court, normally before a Chancery judge. Nationality has been lumped into Clause 54 without separate consideration or thought. As was clearly articulated by the Lord Pannick at Committee stage in the Lords (4 Mar 2009 : Column 799), nationality decisions require separate consideration and ought not to be transferred.

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