ILPA Proposed Amendments Borders, Immigration and Citizenship

PARTS 3 & 4 (IMMIGRATION & MISCELLANEOUS)

House of Commons Committee Stage

ILPA is a professional association with some 1000 members (individuals and organisations), who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-government organisations working in this field are also members. ILPA aims to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on numerous government, court and tribunal stakeholder and advisory groups.

ILPA is happy to assist Members of Parliament in considering and/or drafting other amendments of interest to them.

PART 3

PROPOSED AMENDMENT

Clause 52 Restriction on Studies

Page 43, line 30, leave out subsection (2)

Purpose
A ***probing*** amendment. To provide that a condition restricting studies could only be imposed on those given leave before the passing of the Act and not imposed retrospectively on persons (whether students or not) already here.

PROPOSED AMENDMENT

Clause 52 Restriction on Studies

Page 43, line 28 before 'a condition' insert –

"where leave is granted for the purpose of studies in the United Kingdom,"

Purpose
To mean that a condition restricting studies could only be imposed upon those who have been given leave for the purpose of studying and not on anyone with limited leave to enter or remain. This is in line with the Government's stated objective, since it is said that the clause is to meet the objective in the points-based system that students should be tied to the institution that is sponsoring their entry and stay in the UK. If so, there is no need for the Secretary of State to take wider powers to impose restrictions on studies of migrants who have been granted leave to enter or remain in the UK for reasons other than studies and are not here under the points-based system. As was pointed out by Members during Second Reading, the increased tendency for Government to legislate for powers whose nature and extent is only realised much later when further regulations or guidance are introduced undermines the authority and role of Parliament. Given that no reason has been advanced for having a power to impose a condition restricting studies other than for the purposes, which would remain allowed for by this amendment, there is no good reason for the clause to be passed in its current form.

PART 4

PROPOSED AMENDMENT

New Clause

'Insert new clause –

( ) Section 4 of the Immigration and Asylum Act 1999 (c. 33) is amended as follows.

( ) In subsection (11), leave out subparagraph (b)'

Purpose
The UK Border Agency has recently recognised the inadequacy of providing section 4 support by way of vouchers. It has decided to introduce a pilot over the summer to look at how a cash card system may work. However, it cannot also pilot how cash (rather than a card) would work. This is a major disadvantage for the pilot. The Amendment would remove the preclusion on providing section 4 by way of cash. It would not require cash to be provided. However, it would allow the UK Border Agency to conduct a more meaningful pilot by both trailing card and cash.

Briefing
Section 4 is provided to refused asylum-seekers in certain, restricted circumstances – e.g. where they are taking steps to return home, where to fail to provide support would place the UK in breach of its international obligations by reducing them to destitution that would violate their human rights or where a fresh asylum claim is outstanding.

PROPOSED AMENDMENT

Amendment to New Clause 4

In subsection (1), leave out subparagraphs (a) and (c)

In subsection (2), leave out subparagraphs (a) and (c)

In subsection (3), leave out subparagraphs (a) and (c)

Purpose
ILPA opposes this new clause, and is opposed to the transfer of judicial review applications from the High Court to the Upper Tribunal (see briefing note below). To probe the Government as to the need for the New Clause, and in particular as to the need for an automatic transfer of jurisdiction of a class of judicial review application (which could be narrow or wide) from the High Court to the Upper Tribunal, where the application may be dealt with by a member of the immigration judiciary rather than a judge of the High Court. The amendments would only allow for transfer of an individual judicial review application at the discretion of the individual judge in the High Court who was seized of the application.

PROPOSED AMENDMENT

Amendment to New Clause 4

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 25 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 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
ILPA opposes this new clause, and is opposed to the transfer of judicial review applications from the High Court to the Upper Tribunal (see briefing note below). To probe the Government as to the need for the New Clause, and in particular as to the

need for transfer of nationality law judicial reviews. Questions of nationality law are almost all dealt with the in the High Court, and hence the immigration judiciary who may deal with transferred judicial reviews in the Upper Tribunal does not have experience of this area of law.

PROPOSED AMENDMENT

Insert new 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 claim on asylum or human rights grounds"

Purpose
To transfer the workload of fresh claim litigation from the High Court to the tribunal regime without the need for New Clause 4. The judiciary have indicated that fresh claims are of particular concern in relation to the volume of judicial reviews in the High Court. This would address that concern by creating a statutory right of appeal, thereby removing both the need and the possibility for judicial review in these cases.

Briefing
New Clause 4 is merely the introduction of the clause originally included by the Government in the Bill (Clause 50, HL Bill 15). ILPA's opposition to this clause has been set out in our briefings for House of Lords Second Reading and Committee stage on this clause. The following propositions were advanced by peers during the course of debate at Committee stage on this clause:

- bringing forward the clause at this time is premature[1];
- there should not be *en bloc* transfer of all or some class of immigration judicial reviews[2];
- there should not be any transfer of nationality judicial reviews[3].

That the clause is premature:
As has been recalled in the debate to date, Parliament had been assured during the passage of the Tribunals, Courts and Enforcement Bill in 2006-07 that the

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[1] *per* the Lord Thomas of Gresford (*Hansard*, HL 4 Mar 2009 : Columns 791-792, 803), the Lord Kingsland (*Hansard*, HL 4 Mar 2009 : Columns 794-795) and the Lord Cameron of Lochbroom (*Hansard*, HL 4 Mar 2009 : Columns 797-798); the Lord Lloyd of Berwick also stated that he was "*surprised*" to find clause 50 brought forward so soon (*Hansard*, HL 4 Mar 2009 : Column 795)
[2] *per* the Lord Lloyd of Berwick (*Hansard*, HL 4 Mar 2009 : Column 796) and the Lord Cameron of Lochbroom (*Hansard*, HL 4 Mar 2009 : Column 798); the Lord Pannick opposed *en bloc* transfer of all immigration judicial reviews (*Hansard*, HL 4 Mar 2009 : Column 799)
[3] *per* the Lord Thomas of Gresford (*Hansard*, HL 4 Mar 2009 : Column 793) and the Lord Pannick (*Hansard*, HL 4 Mar 2009 : Column 799)

Government would not bring forward provision to allow for transfer of immigration judicial reviews before the new tribunal regime was well established and its capacity and competence to deal with these sensitive judicial reviews could be assessed. Nobody argues, or could argue, that the new tribunal regime – to which the Asylum and Immigration Tribunal remains separate – is well established. It was only established in November 2008.

The Lord Thomas of Gresford set out the risks:

> "*The risk now in allowing the transfer of these judicial reviews without any opportunity to assess the capacity and the competency of the Upper Tribunal to deal with them is threefold. First, there is the immediate risk of injustice to the individual litigant in relation to his fundamental rights, including rights to liberty, life and so forth… Secondly, there is a risk that inadequate handling of these judicial reviews by an untested tribunal will result in an increase in the workload of the supervising court – the Court of Appeal… Thirdly, there is the risk of reduced supervision of the Home Office resulting in it taking greater liberties, leading to more instances of injustice and increased litigation.*"[4]

The Lord Kingsland added to this:

> "*I find astonishing the timing of the consultation*[[5]]. *What was the point of initiating it at a time when no one could possibly have had any experience of how the Upper Tribunal would fare? There was no evidence to submit to it, and upon which to opine. I regard* [the] *Clause* [] *as a straightforward breach of faith with your Lordship's House.*
>
> "*I suspect that pressure for premature change is being generated by members of the administrative court. It is no exaggeration to say that High Court judges, there, are inundated by applications to judicially review immigration and asylum decisions… However, the only consequence of passing these matters to the Upper Tribunal would be to create a similar problem there.*"[6]

The proposed amendment would effectively transfer a fixed category of cases without the need for transfer of the High Court's judicial review jurisdiction. It would provide a test of the capacity of the tribunal regime without running the greater risks outlined by their Lordships which would come with permitting transfer or requiring transfer of all or a larger number and class of cases. It would allow for the impact upon the tribunal regime, the High Court and the Court of Appeal to be assessed before any further transfer of jurisdiction was contemplated, in keeping with the commitment made to Parliament during the passage of the Tribunals, Courts and Enforcement Bill.

That there should be no en bloc transfer of all or a class of immigration judicial reviews:

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[4] *Hansard*, HL 4 Mar 2009 : Column 792
[5] The Home Office consultation *Immigration Appeals: fair decisions, faster justice* of August 2008 had proposed introducing the power to transfer immigration judicial reviews
[6] *Hansard*, HL 4 Mar 2009 : Column 794

The Lord Lloyd of Berwick distinguished the ordinary work of the Asylum and Immigration Tribunal from judicial review:

> "*…I can see no reason why the ordinary work of the AIT should not be transferred to the* [new tribunal regime] *as soon as the judges have sufficient experience…*
>
> "*However, applications for judicial review in such cases stand on an entirely different footing. These are the sensitive cases that raise the difficult questions of fact and law, and should be dealt with by judges of the status as a High Court judge. It is for that reason that it is so important that the applications for judicial review in asylum cases should continue to start in the administrative court as they always have.*"[7]

The proposed amendment would constitute a strictly limited divergence from this position. It would move one class of cases, which are now dealt with by judicial review, into the tribunal regime. However, for reasons explained in the recent House of Lords judgment in *ZT (Kosovo)*[8], the required judicial approach in this class of cases is the same as that in the tribunal's statutory appellate jurisdiction.

There should be no transfer of nationality judicial reviews:
Last year's consultation[9] included no proposals on nationality judicial reviews. No argument has been advanced, during debate on the Bill or elsewhere, for transfer of these cases save that the Lord West of Spithead said:

> "*We recognise that nationality cases often raise complex issues, but if we exclude them they will be almost the only judicial reviews that cannot be transferred.*"[10]

This response reveals no positive argument for transfer of these cases. Moreover, since the proposed amendment seeks to address the concerns of the Lord Chief Justice without the need for the clause, in its current form or at all, the amendment would remove the premise upon which the Lord West's statement is based.

Retaining a consistent approach throughout the United Kingdom:
As has been highlighted in debate by the Lord Thomas and the Lord Cameron of Lochbroom, there is a further sense in which the clause is premature. There are ongoing reviews of the administration of justice in Scotland, which the provision to permit or require transfer of immigration judicial reviews from the Court of Session to the new tribunal regime pre-empts[11].

Moreover, the Court of Session judiciary have clearly stated that they regard the provision as premature[12].

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[7] *Hansard*, HL 4 Mar 2009 : Column 796
[8] *op cit*
[9] *Immigration Appeals: fair decisions, faster justice*
[10] *Hansard*, HL 4 Mar 2009 : Column 803
[11] *Hansard*, HL 4 Mar 2009 : Column 793, 798
[12] by their response to the *Immigration Appeals: fair decisions, faster justice* consultation *op cit*

Pressing ahead with the clause, therefore, would be likely to lead to a divergence in the administration of justice, in an area the Government accepts to be particularly sensitive[13], as between Scotland and England and Wales. The amendment avoids this prospect. It would apply equally throughout the United Kingdom. It would ensure that dispersal of an asylum-seeker or transfer of an immigration detainee across the Scotland-England border did not change the nature of the judicial remedy available to the individual to challenge an unlawful immigration decision, act or omission.

[13] *Hansard*, HL 4 Mar 2009 : Column 803 (*per* the Lord West of Spithead); *Hansard*, HL 13 Dec 2006 : Columns 68-70GC (*per* the Baroness Ashton of Upholland)