ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA BRIEFING
House of Lords - Report

March 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL – HL 29

Clause 52
(Transfer of Judicial Reviews)

ILPA supports those peers who oppose clause 52 standing part of the Bill.

ILPA also supports the amendment in the names of the Lord Lester of Herne Hill, the Lord Pannick and the Lord Lloyd of Berwick.

The amendments that appear on the Second Marshalled listed with relate to clause 52 are set out below:

Clause 52

LORD LESTER OF HERNE HILL

LORD PANNICK

LORD LLOYD OF BERWICK

55C Page 44, line 19, at end insert—

"(4) 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."

LORD LLOYD OF BERWICK

55D* Page 44, line 19, at end insert—

"(4) Notwithstanding subsections (1) to (3), no transfer of a class of applications falling within subsection (5) may be made unless a draft of a statutory instrument specifying the class of applications to be transferred has been laid before and approved by resolution of each House of Parliament.

(5) The applications are those which call into question any decision made under—

(a) the Immigration Acts,

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

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

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

LORD THOMAS OF GRESFORD

LORD KINGSLAND

56 Leave out Clause 52 and insert the following new Clause—

"Fresh claim applications

All fresh claim applications made under rule 353 of the Immigration Rules are transferred to the Upper Tribunal."

Clause 56

LORD WEST OF SPITHEAD

62A Page 46, line 37, at end insert—

"( ) No order may be made commencing section 52(1)(a) or (c), (2)(a) or (c), or (3)(a) or (c) (transfer of immigration or nationality judicial review applications) unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament."

Purpose:

Amendment No. 55C would limit the power of the Lord Chancellor to restrict the right of appeal to the Court of Appeal against a decision of the Upper Tribunal so that this power could not be used in relation to immigration or nationality law cases.

Amendment No. 55D would require Parliamentary approval by way of delegated legislation subjected to the affirmative resolution procedure before the Lord Chief Justice (and his counterparts in Scotland and Northern Ireland) could direct that a class of immigration and nationality judicial review applications must be transferred to the Upper Tribunal.

Amendment No. 56 would remove clause 52 from the Bill, and will allow peers to probe the Government as to the suitability of a compromise whereby all judicial review applications of fresh claims were transferred but no further power for transfer of immigration and nationality judicial review applications was granted at this stage.

Amendment No. 62A would require Parliamentary approval by way of delegated legislation subjected to the affirmative resolution procedure before the commencement of those parts of clause 52 which would empower the Lord Chief Justice (and his counterparts in Scotland and Northern Ireland) to direct that a class of immigration and nationality judicial review applications must be transferred to the Upper Tribunal.

Briefing:

These amendments concerns two distinct matters:

- Transfer of judicial review applications from the High Court to the Upper Tribunal (**55D**, **56** and **62A**)
- Appeals to the Court of Appeal from decisions of the Upper Tribunal (**55C**)

These distinct matters are addressed under separate heading below.

Transfer of judicial review applications

ILPA's opposition to clause 52 has been set out in our previous briefings for Second Reading and Committee stage on this clause (at which stages the relevant provision was clause 50, HL Bill 15). Those briefings remain available in the Briefing section at www.ilpa.org.uk

The following propositions have been advanced by peers during the course of debate at Committee stage on this clause:

- bringing forward clause 52 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].

Since that debate, the Lord Chief Justice has written on 12 March 2009 to the Lord Lloyd of Berwick, which letter has been copied to other peers interested in clause 52. We have seen a copy of this letter. The Lord Chief Justice explains that he considers clause 52 to be necessary so that there can be transfer to the tribunal regime of "*'fresh claim' judicial review claims*", of which there are approximately 1,000 brought before the Administrative Court each year. These are claims related to paragraph 353 of the Immigration Rules (HC 395), and are essentially challenges against the decision of the Secretary of State that further submissions do not amount to a fresh claim.

The Lord Chief Justice's letter sets out in more detail what is a 'fresh claim' judicial review. Whereas the letter explains that the Lord Chief Justice considers there to be further scope for the application of clause 52, it makes clear that it is transfer of these cases that is of particular importance.

Amendment No. **56** seeks to address the concern of the Lord Chief Justice aspires, without the need for clause 52. ILPA has previously proposed an amendment to provide for a statutory right of appeal against a decision that further submissions do not amount to a fresh claim. This would effectively

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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)

transfer 'fresh claim' cases to the tribunal regime. Amendment No. **56** does not propose that solution. It would leave judicial review as the only means whereby a decision that further submissions do not amount to a fresh claim could be challenged. However, it seeks to remove clause 52 from the Bill and to provide for transfer of this specific class of judicial review to the Upper Tribunal.

In this way it, therefore, seeks to address the key concern of the Lord Chief Justice. It also seeks to address the concerns that have been expressed by peers.

That clause 52 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 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 Clause* [52] *as a straightforward breach of faith with your Lordship's House.*
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> "*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*

[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

consequence of passing these matters to the Upper Tribunal would be to create a similar problem there."[6]

Amendment No. **56** seeks to transfer a fixed category of cases (the fresh claim cases) without the need for any further power to transfer immigration or nationality judicial reviews. This 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 Administrative 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.

Amendment Nos. **55D** and **62A** offer some limited reassurance in response to the concern that clause 52 is premature. They seek to do so by requiring delegated legislation before clause 52 or relevant parts of clause 52 could be commenced or implemented. However, ILPA is mindful of Parliamentary convention that delegated legislation is not voted against. The limited reassurance these amendments offer is not, therefore, satisfactory; particularly given the assurances to which the Lord Thomas and the Lord Kingsland referred at Committee stage[7], which were given by the Baroness Ashton of Upholland during the passage of the Tribunals, Courts and Enforcement Bill in 2006-07.

<u>That there should be no *en bloc* transfer of all or a class of immigration judicial reviews:</u>
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.*"[8]

Amendment No. **56** seeks to introduce a strictly limited divergence from this position: to move one class of cases, which are now dealt with by the High Court to the Upper Tribunal.

Amendment No. **55D** offers some limited reassurance in response to the concern about transfer of all or classes of immigration and nationality judicial

[6] *Hansard*, HL 4 Mar 2009 : Column 794
[7] *Hansard*, HL 4 Mar 2009 : Columns 791 and 794 respectively
[8] *Hansard*, HL 4 Mar 2009 : Column 796

reviews. It seeks to do so by requiring delegated legislation before clause 52 or relevant parts of clause 52 could be commenced or implemented. However, ILPA is mindful of Parliamentary convention that delegated legislation is not voted against. The limited reassurance this amendment offers is not, therefore, satisfactory.

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 Amendment No. **56** seeks to address the concerns of the Lord Chief Justice without the need for clause 52, in its current form or at all, it 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 clause 52 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]. The Scottish Government has expressed similar concerns and asked the UK Government not to proceed with clause 52 at this time[13].

Pressing ahead with clause 52, therefore, would be likely to lead to a divergence in the administration of justice, in an area the Government accepts to be particularly sensitive[14], as between Scotland and England and Wales. Amendment No. **56** seeks to avoid 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.

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[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*
[13] http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor0319-02.htm#Col16064
[14] *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)

Permission to appeal to the Court of Appeal

ILPA supports Amendment No. **55C**. It concerns section 13(6) of the Tribunals, Courts and Enforcement Act 2007, which provides as follows:

> *The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers—*
>
> *(a) that the proposed appeal would raise some important point of principle or practice, or*
>
> *(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.*

This relates to whether a person may appeal to the Court of Appeal against a decision of the Upper Tribunal. It empowers the Lord Chancellor to restrict the right to seek permission to appeal to the Court of Appeal by imposing the two conditions set out in (a) and (b). Amendment No. **55C** would remove this power in respect of immigration and nationality matters, including the immigration and nationality judicial reviews which clause 52 would transfer to the Upper Tribunal. This would mean permission to appeal could be given where the Court of Appeal considered there to be an arguable error of law in the decision of the Upper Tribunal whether or not this raised some important point of principle or practice or provided some other compelling reason for the appeal.

ILPA agrees with the position set out in the recommendation of the Joint Committee of Human Rights in its Ninth Report of Session 2008-09 *Legislative Scrutiny: Borders, Citizenship and Immigration Bill* at paragraph 1.32:

> "***We agree with the opinion of Sir Richard Buxton that in a case where there is a real prospect that the decision of the Upper Tribunal is in breach of the UK's international human rights obligations, that issue demands the attention of a court of the stature of the Court of Appeal. We recommend a simple amendment to the Bill to ensure that the Lord Chancellor's power to impose the restrictive "second appeal" test on appeals to the Court of Appeal is not available in immigration and nationality cases:***"

The concerns expressed by peers in relation to the sensitive nature of immigration and nationality law judicial reviews, which description the Government has also endorsed, apply similarly to appeals in this area. It would, therefore, be appropriate to exclude in this area the power to restrict the opportunity for errors of law on the part of the Upper Tribunal to be appealed to the Court of Appeal.

ILPA has seen and agrees with the opinion of Sir Richard Buxton that if the power in section 13(6) is not restricted and "*section 13(6) is applied, and as an (intended) result the Court of Appeal is prevented from hearing appeals that have a real prospect of demonstrating an incorrect application of immigration and refugee law, then not only will serious injustice, and danger, to individuals be threatened, but also the United Kingdom will fail in its international obligations*".

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