ILPA BRIEFING
House of Lords - Committee

March 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL – HL 15

Clause 50
Transfer of Judicial Reviews (Nationality)

ILPA proposes the following amendment:

Page 41, line 1, 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

(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 is a ***probing*** amendment. To provide that a judicial review of a nationality decision could not be transferred to the Upper Tribunal

Briefing
ILPA supports peers who oppose Clause 50's standing part of the Bill. The amendment is thus to ***probe*** why nationality cases are included in those that can be transferred.

Under the present proposals both immigration and nationality claims are to be transferred. Judicial reviews of administrative decisions are presently heard in the Administrative Court of the Queen's Bench Division of the High Court. They are heard by High Court judges. Whatever the flawed reasons for transferring judicial review claims concerning immigration to the Upper Tribunal, those reasons do not

apply to judicial review claims concerning nationality. In addition, certain nationality claims, not brought by way of judicial review, will remain in the High Court notwithstanding clause 50 as it appears in the Bill, leading to an arbitrary and unworkable division of nationality law claims.

While there may be many judicial review claims concerning immigration matters, there are hardly any that concern nationality. Whatever pressure there may be in respect of the numbers of judicial review claims concerning immigration, there is no equivalent pressure in respect of nationality law claims. In 2007 there were only three cases concerning nationality law in the High Court and the Court of Appeal that led to final judgments after a substantive hearing. In 2008 there were two. Of course many more claims would have been issued but the figures would still have been very modest.

Unlike immigration claims, some nationality law claims may be brought in private law proceedings as well as by public law claims for judicial review. Nationality law claims concerning challenges to the refusal to register or naturalise a person as a British national of a particular description are public law claims brought by a claim for judicial review. In addition, nationality law claims may be issued for declarations as to whether a person has automatically acquired a form of British nationality, for example at birth. These may be brought in private law claims or as public law claims for judicial review.

Where a person seek a declaration, she is not seeking to challenge a decision of the Secretary of State but rather to obtain recognition from the Court about a status she holds by operation of law. Where a person seeks a declaration that she holds a form of British nationality, the view of the Secretary of State is no more than advisory in nature. It is the High Court in a disputed case, that decides whether she holds British nationality by operation of law.

A declaration may be sought in public law judicial review proceedings or in ordinary private litigation in the High Court. Even if judicial review claims concerning nationality were transferred to the Upper Tribunal, a person would still be able to apply for a declaration in the High Court by way of private law proceedings. Thus some form of nationality law claim could remain in the High Court, were clause 50 as presently found in the Bill to be enacted. In addition, it is not unusual for a person to claim both an automatic right to nationality (by way of a declaration) and then to challenge a further refused application to register or naturalise (by way of judicial review) in the alternative. Under clause 50 as currently drafted, the judicial review would be transferred to the Upper Tribunal but parallel proceedings could also be brought in the High Court in respect of a declaration. Thus some nationality law claims could remain in the High Court. This is arbitrary and unworkable. It is far better to leave all nationality law claims, whether by public law claims for judicial review or as private law claims, in the High Court.

In addition, neither the Upper Tribunal nor the Asylum and Immigration Tribunal has developed expertise in nationality law. The question of automatic acquisition of British nationality has never been within the jurisdiction of either. There is only one circumstance in which a statutory right of appeal is provided in relation to a nationality decision. A decision to deprive a person of citizenship may be appealed

to the Asylum and Immigration Tribunal[1]. There is no statutory right of appeal against any decision to refuse to register, naturalise or recognise a person as a British national (whether as a British citizen, British overseas territories citizen, British Overseas citizen, British National (Overseas), British protected person or a British subject). These decisions can only be challenged by way of judicial review.

Where it is contended that a person is British, a declaration is sought from the High Court; and applications are usually dealt with by the Chancery Division. This is not surprising as the question does not call for an administrative decision but is a question of correctness decided by the courts. Nor has there ever been a right of appeal to either Tribunal against the decision to refuse to register or naturalise a person as a citizen. Accordingly, no Tribunal Judge has expertise on that issue. The Asylum and Immigration Tribunal does hear appeals against the deprivation of nationality but only one or two have ever been heard.

In addition, the question of whether a person is a British citizen is a question of high constitutional importance affecting the composition of the body of citizens whose state and society comprise the United Kingdom. It is a wholly different question to the immigration question of whether to confer permission to enter or remain on foreign nationals. The role of the Courts in supervising questions of a constitutional nature should not be abrogated without good reason. As has been shown above there is no good reason for Clause 50 as drafted in the Bill. It is all too easy to assume nationality questions raise the same issues as immigration questions. They do not. The proposed amendment removes the harm occasioned by treating them the same.

The Government has advanced no case for the transfer of these cases, and has engaged in no consultation about the proposal to transfer these cases. Indeed, it would appear that the Government has given no thought to the distinct position of nationality judicial reviews before introducing this clause into the Bill.

At Second Reading, Lord West of Spithead said:

> "*Clause 50 relates to judicial review… There are a lot of implications that need to be looked at in detail. What is quite clear, is that the senior judiciary are very supportive of the clause…*"

In support of this statement, he referred to responses to the UK Border Agency *Immigration Appeals: fair decisions, faster justice* consultation of August 2008[2]. Responses to that consultation are not all supportive; and the senior judiciary in Scotland do not support the proposal contained in this clause.

As regards nationality judicial reviews, however, nobody – senior judiciary or otherwise – expressed any support for clause 50 in response to that consultation.

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[1] section 40(A)(2), British Nationality Act 1981 provides for an appeal to the Asylum and Immigration Tribunal

[2] The UK Border Agency consultation *Immigration Appeals: fair decisions, faster justice*, August 2008 and responses to the consultation are available at: http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/

The consultation was expressly about immigration. The proposal in that consultation was exclusively for transfer of immigration judicial reviews.

During the passage of the Tribunals, Courts and Enforcement Bill in 2006-07, Vera Baird MP, then Parliamentary Under-Secretary for Constitutional Affairs said:

> "*We expect the power* [to transfer judicial reviews] *to be used comparatively rarely – dozens of times at most and certainly not in large numbers – and that its use is likely to be confined to technical situations that would be better dealt with by technically expert people.*"[3]

But the expertise in relation to nationality law is in the High Court. Peers are thus urged to probe why nationality has been included in this clause at all.

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[3] *Hansard*, HC Public Bill Committee (Tribunals, Courts and Enforcement Bill) 15 March 2007 (Afternoon) : Column 37