ILPA BRIEFING
TRANSFER OF JUDICIAL REVIEW (CLAUSE 50)
SECOND READING (LORDS)
February 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL

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.

Transfer of Judicial Review (clause 50):

Clause 50 would allow judicial reviews of immigration (including asylum) and nationality matters to be transferred from the High Court, where judicial reviews are currently heard, to the Upper Tribunal of the Tribunals Service. Judicial review is the procedure whereby an administrative decision against which there is no right of appeal can be reviewed by a judge to determine whether it is lawful or not.

The meaning and effect of the provision

The Tribunals, Courts and Enforcement Act 2007 established a new tribunal regime, which brings together several tribunal jurisdictions into one tribunal structure under the presidency of Carnwath LJ. The new structure has two tiers – a First Tier and the Upper Tribunal. The Act allows for the transfer of certain judicial review applications from the High Court to the Upper Tribunal. Currently the Act excludes immigration and nationality law judicial reviews from those that that may be transferred. The provision would remove this exclusion.

High Court judges are members of the Upper Tribunal. So are members of the new 'tribunals judiciary' who formerly held senior positions in the different tribunals, e.g. Social Security Commissioners. The provision would, therefore, allow for judicial reviews to be dealt with by a High Court judge sitting in the Upper Tribunal. However, it would also allow them to be dealt with by members of the tribunals judiciary.

Why the transfer of immigration and nationality judiciary reviews was excluded in the Tribunals, Courts and Enforcement Act 2007:

In her response in Grand Committee on the Tribunals, Courts and Enforcement Bill, the Baroness Ashton of Upholland, on behalf of the Government expressly accepted that[1]:

- judicial reviews in immigration cases were particularly sensitive
- there was no question of removing the statutory bar on the transfer of judicial reviews at that time
- the reason for this was because, with such sensitive cases, it would be necessary to review how the transfer to the Upper Tribunal had worked in other less sensitive cases

[1] *Hansard* Lords, Grand Committee 13 December 2006 : Columns GC68-70.

Parliament's appreciation of the sensitivity of judicial reviews was succinctly summarised by the forceful observation of the Baroness Butler-Sloss in Grand Committee:

> "*I support my noble and learned friend Lord Lloyd of Berwick in relation to the requirement to have someone of the level of a High Court judge to hear a judicial review in the tribunal. It would be invidious for there not to be a judge of that rank dealing with it. I support my noble and learned friend very strongly.*" [2]

Nevertheless, the Government continued to argue for powers to remove the exclusion of transfer of immigration and nationality judicial reviews by delegated legislation and thus make provision for them to be heard by people below the rank of High Court judges. The Baroness Ashton of Upholland contended that this as necessary, rather than leaving the matter to Parliament (by requiring primary legislation to remove the exclusion), because:

> "*The noble and learned Lord* [the Lord Lloyd of Berwick] *is at liberty to say we should wait for the next passing piece of legislation; my experience is that you can wait a long time*…"[3]

The frequency of immigration legislation over recent years belies that justification.

Ultimately, the Government accepted the position advanced by peers that:

- the exclusion should only be removed by way of primary legislation; and
- the removal of the exclusion should not be contemplated prior to there being proper opportunity to review how the Upper Tribunal works and of the Asylum and Immigration Tribunal as part of new tribunal regime, if that it becomes.

What has changed since 2007?

The short answer is that there is no change to this position.

Opportunity to review the Upper Tribunal

Neither Parliament nor the Government are in any better position than in 2007 to assess whether the Upper Tribunal has the capacity and competence to deal with these particularly sensitive judicial reviews.

The Upper Tribunal was launched in November 2008, barely three months ago. In August 2008, the Home Office consulted on the jurisdiction of the Asylum and Immigration Tribunal being moved to the new tribunal regime; and for the senior immigration judiciary to join the Upper Tribunal. The Home Office has not yet published its response to this. The Asylum and Immigration Tribunal continues to sit outside the new two-tier Tribunals Service. There is, therefore, no basis on which the workings of the Upper Tribunal can be reviewed or the capacity and competence for that tribunal to deal with these judicial reviews assessed.

The sensitivity of immigration judicial reviews

Immigration judicial reviews are no less sensitive than they were in 2007. The High Court has only recently, in December 2008, had to rule in the case of *R(Abdi & Ors) v SSHD* [2008] EWHC 3166 (Admin) [4] on the legality of Home Office policy on detention in circumstances where:

- the policy had been kept secret from detainees, their lawyers and the courts for over two years
- Home Office lawyers repeatedly advised there to be serious questions as to the legality of both keeping the policy secret and the substance of the policy

[2] *Hansard* Lords, Grand Committee 13 December 2006 : Column GC68.
[3] *Hansard* Lords, Grand Committee 13 December 2006 : Columns GC70.
[4] http://www.bailii.org/ew/cases/EWHC/Admin/2008/3166.rtf

The judge began his judgment by describing the Home Office's conduct as "*unedifying*" and "*disquieting*"[5]. He found that it was unlawful to have kept the policy secret; and that the substance of the policy was unlawful. This case is far from unique in showing how the political pressures on the Home Office continue to tempt that department into unlawful practices.

The case of *R(Abdi & Ors)* emphasises the importance of Parliament being able to review the Upper Tribunal since, at the commencement of that litigation, the secret policy was unknown to the detainees, their lawyers or the court. Until the policy was revealed in the course of, and because of, that litigation, the particular significance of that case was not apparent. The risk is that removing the exclusion on transfer of judicial reviews would lead to a situation where cases such as *R(Abdi & Ors)* may be routinely transferred resulting in inadequate judicial scrutiny by an untested tribunal.

Legislative timetable

Nor is the Government's concern about the length of time that may pass before there is a further opportunity to legislate any more real now than it was in 2007. The Government has declared its intention to produce a draft Immigration Simplification Bill in October of this year. The consolidation of immigration law that Parliament ought to be dealing with at this time is an aim that has longstanding cross-party support. There will be opportunities in the relatively near future, when the result of the August 2008 Home Office consultation is known and there is the opportunity to review the workings of the Upper Tribunal, to legislate to remove the exclusion if that is shown to be desirable and practicable.

The case for change – and the case against:

The consultation on the inclusion of the Asylum and Immigration Tribunal in the two-tier Tribunals Service[6] was a Home Office-led consultation; as was the working group between the judiciary and the Home Office which led to the consultation. The consultation set out two primary aims of the proposals – to reduce the immigration workload of the High Court and Court of Appeal judiciary, particularly that of the former; and to assist the Home Office in its immigration work, particularly in relation to the speed with which asylum claims are dealt with.

It is wrong that the Home Office, whose decisions are at stake and who is a party to litigation in this area, as opposed to the Ministry of Justice which has responsibility for the Tribunals Service, should have the lead for proposing and legislating for change in the way the Home Office and its decisions are subject to judicial scrutiny.

That principled objection is supported by practical objections.

- As recognised by both the Government and Parliament in 2007, immigration judicial reviews may be especially complex or contentious often, in significant part, because of the failure by the Home Office as litigant to show proper respect for procedure in the courts and for the rule of law[7].
- The risk in allowing for the transfer of these judicial reviews, without any opportunity to assess the capacity and competence of the Upper Tribunal to deal with them is threefold. There is an immediate risk of injustice to the individual litigant in relation to fundamental rights including the rights to liberty, to life, not to be subjected to torture, inhuman and degrading treatment and to respect for private and family life. There is the risk that inadequate handling of these judicial reviews by an untested tribunal results in an increase in the workload of the supervising court – the Court of Appeal. 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.

[5] [2008] EWHC 3166 (Admin), paragraph 1 *op cit*

[6] *Immigration Appeals: fair decisions, faster justice*, Home Office August 2008

[7] As witness the ongoing delay in implementing the decision of the House of Lords in *SSHD v R(Baiai & Ors)* [2008] UKHL 53 on certificates of approval for marriage where one partner is not British nor a European Economic Area national where the House of Lords found the Home Office to have acted unlawfully and in a discriminatory manner. See www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd090730/rhome.pdf

But what of the workload of the High Court and the Court of Appeal?
It is within the gift of the Home Office to substantially reduce the workload of the judiciary at all levels, including the High Court. For example:

The delays of the past continue significantly to contribute to the workload of the High Court. Many judicial reviews concern 'fresh claims' – whether the Home Office should accept new applications from individuals who have been left in limbo for many years. Inconsistent treatment of claimants and changes in country situations and individuals' circumstances all lead to individuals putting forward a new case to stay in the UK.

The Home Office could make good its commitments to Parliament in clearing the vast backlog of unresolved asylum cases ('the legacy' – originally estimated as between 400,000 and 450,000[8]), and in dealing effectively and efficiently with the much reduced asylum caseload. Many of the cases before the High Court are part of the backlog.

The Home Office could reduce the number of speculative judicial reviews against removal directions by informing legal representatives of detention and removal directions immediately, giving more notice of removal and opportunity for individuals to seek and obtain good legal advice upon their immediate prospects and options. Currently, many individuals are detained with barely any notice of removal and without opportunity to recover or obtain paperwork or obtain good legal advice. This leaves many vulnerable to those who may charge significant sums (often collected for the individual by friends and family) for incompetent or incomplete judicial review action.

The Home Office could immediately address the many of hundreds of Zimbabwean cases that have, particularly since 2005, contributed substantially to that workload by reviewing and where appropriate conceding in cases, many of which will include findings of fact justifying a grant of refugee status in the light of the country guidance determination in *RN(Zimbabwe)* [2008] UKAIT 00083[9]. Many will include findings of fact justifying a grant of refugee status in the light of earlier and more restrictive country guidance, e.g. *SM(Zimbabwe)* [2005] UKIAT 00100[10].

The Home Office could improve its practice and its conduct as a litigant. Situations such as the unlawful secret policy, for a long time not disclosed to counsel instructed by the Home Office or the court[11], revealed in *R(Abdi & Ors)*, cause, prolong and complicate litigation adding to the courts' workload.

The outcome of the consultation on immigration appeals
Options for the future of immigration appeals remain open. We await the Home Office response to the consultation on whether the Asylum and Immigration Tribunal should join the two-tier Tribunals Service and related matters, such as whether the Home Office should, as is its stated preferred option, continue to make the procedure rules for the Tribunal before which it appears as litigant. If the Procedure Rules Committee is allowed to make rules for the new tribunal regime and if the Asylum and Immigration Tribunal benefits form the culture of that new regime, it may yet be that these arrangements increase the effectiveness of immigration appeals reducing the workload on both the High Court and the Court of Appeal.

Scotland:

[8] This estimate was given by John Reid MP, then Home Secretary, in 2006, see *Hansard* Commons
[9] http://www.bailii.org/uk/cases/UKIAT/2008/00083.rtf
[10] http://www.bailli.org/uk/cases/UKIAT/2005/00100.html
[11] [2008] EWHC 3166 (Admin) *op cit*, paragraphs 24 & 25 reveals the way in which the Home Office policy on detention had begun to be revealed and some of the delay and waste of judicial time caused by this; paragraph 42 records the Home Office acceptance that it had failed to disclose the policy in other proceedings

The future of judicial review and tribunals in Scotland is currently the subject of two unresolved enquiries. The Gill review[12] into the civil courts in Scotland is yet to report. The Administrative Justice Steering Group has made findings and proposals for the future of tribunals in Scotland[13] but these are yet to be evaluated by the Scottish Government or others and the way ahead is as yet unclear. In the meantime, the judiciary of the Court of Session in Scotland has indicated that they would not be willing to contemplate transfer of immigration judicial reviews at this time. Their response to the consultation on immigration appeals accords with the position advanced by Parliament and accepted by the UK Government in 2007[14]:

> "…*any decision as to a more general transfer of judicial review jurisdiction in this area* [immigration] *should be made only once the Upper Tribunal has gained extensive experience of implementing its proposed remit.*"

For Parliament to enact this provision now risks producing a sharpened distinction in the administration of justice across the Scotland-England border; and it could lead to the unedifying position of the UK Border Agency determining how justice is to be provided to individuals, particularly those in the asylum system, by the exercise of its power to transfer detainees and disperse supported asylum-seekers across that border.

Summary:

The inclusion of this provision in the Bill is premature. By its inclusion the Government reneges on the position it had accepted in response to the arguments of peers, led by the Lord Lloyd of Berwick, in 2007 during the passage of the Tribunals, Courts and Enforcement Bill. The position now is no different to the position at that time. The review of the workings of the new tribunal regime established by the Tribunals, Courts and Enforcement Act 2007, which was then considered necessary before this provision could be contemplated, is still not possible; and the Asylum and Immigration Tribunal remains outside that regime.

The Home Office has advanced the argument, in last year's consultation, that this provision is necessary to address the immigration workload of the High Court and Court of Appeal. However, advancing the provision at this time constitutes a serious risk for these courts and their concerns, particularly the Court of Appeal. Rearrangements of the appellate and judicial structures in the area of immigration law by the Home Office have a poor track record. The current arrangements are the result of a hastily arranged compromise following the Government's withdrawal of the notorious 'judicial ouster' in 2004[15] in the face of opposition from within and outside Parliament. Less that four years after that compromise was commenced, it is proposed to change the arrangements again. In 2007, Parliament insisted on some evidence of how the new structures were working before signing away to the Executive the power to allow for transfer of judicial review in immigration and nationality. Parliament would do all, including the courts, a service by maintaining that insistence in the face of the attempt in this Bill to renege on the position accepted to be correct in 2007.

This clause should be deleted.

Conclusion and other briefings:

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[12] Details of the review including its remit, the background, a consultation paper and responses are available at: http://www.scotcourts.gov.uk/civilcourtsreview/

[13] The Administrative Justice and Tribunals Council, Scottish Committee held a seminar on the findings and proposals in January 2009. The report of the Steering Group is available at: http://www.ajtc.gov.uk/docs/Tribunals_in_Scotland.pdf

[14] The response can be found amongst others at the following link: http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/consultationresponsesorg?view=Binary

[15] The statutory provisions were introduced midway through the passage of the Asylum and Immigration (Treatment of Claimants, etc.) Bill in 2004.

A general observation we have made in other briefings is that much of the content of the Bill is comprised of matters that do not merit inclusion in what has been billed by the Government as something that is urgently needed while the consolidation to be achieved by the ongoing simplification project remains on hold. Clause 50 is a provision to which our general observation applies.

In January and February 2009, ILPA has provided:

- an initial briefing on the Borders, Citizenship and Immigration Bill
- a general second reading briefing on the Bill
- a briefing for both this Bill and the Policing and Crime Bill on the definition of trafficking in UK law

All these briefings are available at www.ilpa.org.uk/briefings.html

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