ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 66

BRIEFING FOR LORDS REPORT 6 FEBRUARY 2006

CLAUSE 4 – ENTRY CLEARANCE APPEALS

ILPA is a professional association with some 1200 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups. ILPA briefings to date can be found at www.ilpa.org.uk For further information contact Alison Harvey, Legal Officer, alison.Harvey@ilpa.org.uk, 0207 490 1553

AMENDMENTS AND ASSURANCES - CLAUSE 4

This clause removes rights of appeal in entry clearance cases (where people are refused a visa). It gives the Secretary of State power to restore rights, by making regulations, to (as yet undefined) family visitors and (as yet undefined) dependants. It denies rights of appeal to all other categories, including students, workers, returning residents, persons with UK ancestry, working holidaymakers, ministers of religion, and many others.

Amendments proposed
Clause 4 should not stand part of the Bill.
Amendment to give the Secretary of State wider powers to restore appeal rights by order. He has no powers under Clause 4 to restore rights other than for visitors and dependants even if he wanted to do so.
Amendment to ensure that there has been demonstrable improvement in the quality of decision-making before the clause comes into force
Amendment to give the Secretary of State power to restore rights of appeal to people with indefinite leave returning for settlement.
Amendment to provide on the face of the Bill for a right of appeal in cases where the applicant contends that the decision breaches his/her rights under European Community Law

Assurances to seek
- The clause will not be brought into force until there has been a demonstrable improvement in quality of decision-making
- Guidance and structures will be provided for decision-making by Entry Clearance Officers and their managers, as recommended by the Monitor for Entry Clearance appeals.
- An administrative review will involve the giving of reasons in a form sufficiently detailed and clear for the applicant understand why s/he is being refused; then an opportunity for the applicant to respond and submit further information, if refusal is maintained
- The administrative review will not be internal to the post, but will include regional/UK oversight, to try to ensure consistency between posts.
- Files will be adequately documented and decisions evidenced, so that reviewers and the Independent Monitor can understand how the decision was taken.
- Adequate resources will be devoted to the collation, dissemination and analysis of statistics and information, to allow consistency between posts to be monitored.

- The Independent Monitor will be adequately resourced to carry out the necessary sampling, and consideration will be given to giving the Monitor resources to audit decision-making, as UNHCR does in the Asylum Directorate under the Quality Initiative.
- Discussions on the Administrative Justice Council proposed by the DCA in their White Paper *Transforming Public Services: Complaints, Redress and Tribunals* will encompass consideration of the role of the Council relating to entry clearance decisions both with and without a right of appeal.

Clause 4 should not stand part of the Bill

- Given the quality of decision-making, we need more appeals in this area, not fewer. Attempts to improve that quality are welcome, but without demonstrable improvement, all the arguments favour more scrutiny, not less.
- Measures to improve quality promised during debates do no more than reiterate what is supposed to be happening now, when there are recognised to be problems with quality as illustrated by the examples given at second reading.
- Rights of appeal in entry clearance cases are already limited: visitors, and students coming for less than six months, have no right of appeal, nor do people who do not fulfil mandatory requirements of the immigration rules.
- Appeals in the UK enable immigration judges to see and hear the sponsor. Sponsors will have an enhanced role under the new managed migration scheme and their evidence can form an important part of the assessment of the application.

Given the quality of decision-making, we need more appeals in this area, not fewer.
By definition, because entry clearance applicants are abroad, there is less scrutiny of what happens to them. Standards of decision-making at posts abroad are at best highly variable and often poor. The government may be sick of hearing it, but we recall yet again the words of the then Shadow Home Secretary Rt. Hon. Tony Blair, MP, during the passage of the Asylum and Immigration Appeals Act 1993:

> *"When a right of appeal is removed, what is removed is a valuable and necessary constraint on those who exercise original jurisdiction. That is true not merely of immigration officers but of anybody. The immigration officer who knows that his decision may be subject to appeal is likely to be a good deal more circumspect, careful and even handed that the officer who knows that his power of decision is absolute. That is simply, I fear, a matter of human nature, quite apart from anything else."*(*Hansard*, HC Report vol. 213, col 43, 2.11.92)

Measures to improve quality promised during debates do no more than reiterate what is supposed to be happening now
The government have sought to provide reassurance by promising measures to improve quality. ILPA considers that these will not work without the independent oversight provided by an appeal, but, in any event, all that has been said to date merely describes what is supposed to be happening already, according to the Diplomatic Procedures of 1 May 2005, the instructions to Entry Clearance Officers which can be found on the Ukvisas website.

Assurances that guidance will be provided to Entry Clearance Officers and their Managers

The Diplomatic Procedures already run to 28 lengthy chapters. (See www.ukvisas.gov.uk).

Assurances that there will be an administrative review.

The Minister said in Grand Committee:

"The administrative review comes about because much of the evidence that has been put forward was about information that was wrongly understood or written, or simply, as in one case, the university was not recognised by the entry clearance officer, who assumed that it did not exist… I took on board the points made by noble Lords at Second Reading. It is not an appeal in the traditional sense, but it is an important concession." (9 Jan 2006 : Column GC59)

However, the Diplomatic Procedures already contain detailed instructions for Review, both where there is no appeal, and pre any appeal, including in family visit cases, where over half the appeals succeed and success rates for appeals decided "on the papers" alone (i.e. with no hearing) already run at 38%. The Procedures say:

"**Chapter 26.2.2 - Review of non-appealable refusals**
All non-appealable refusals must be thoroughly reviewed by an ECM within one working day of the decision being taken. The Ref 1 must be stamped "Reviewed by ECM" , signed and dated. A sample of entry clearances which have been issued should also be reviewed and stamped accordingly. If the ECM considers the decision sound and defensible, no further action need be taken at this point. If the ECM agrees with the decision but considers the Ref 1 does not clearly state the reasons for refusal, a revised notice should be given or sent to the applicant with a covering letter explaining why a new Ref 1 is being issued.
If the ECM considers the refusal is not justified, he or she should consult with the ECO to decide whether the decision should be reversed on the grounds that a) the decision is not in accordance with the Rules, b) is not supported by the record of interview or c) is unreasonable on the basis of all the factors considered.
Where a decision is reversed, it must be done quickly and noted in the appropriate register. The register should also indicate cases where MPs' or other high level representations are involved and what effect they had on the actual decision.
Where there is only one ECM at Post, arrangements must be clearly laid out for a UK based officer graded C4/HEO/CIO or above to cover leave and other absences.
...
26.3.1 ....*Action by ECMs*
As with non-appealable refusals, all family visit visa refusals must be reviewed by an ECM within 24 hours to ensure that the decision is reasonable ..The procedures to follow are the same as in paragraph 26.2.2. This review is in addition to the review undertaken following receipt of an appeal (see Chapter 27).
…
27.3 - Appeal procedures at Post when refusal was decided by London
If the application was refused on instructions from the Home 0ffice, you should send all the documents concerning the case to the APC, Home Office…
27.4 - Appeal procedures at Post when refusal was made locally
On receipt of an appeal, the ECO must first review the decision. The review must take into account any new information given in the notice of appeal or in any accompanying documents which were not provided at the time of the original application…(*continues with detailed instructions)*

Enhanced role for the Independent Monitor for entry clearance cases with no right of appeal

Chapter 26.2.3 of the Diplomatic Procedures says of the Monitor's Report: "Copies are sent to all MPs and to Posts. Any criticisms made in the report must be carefully considered and action taken where appropriate". The role of the Independent Monitor is being made a full time position. The Minister explained that the full-time Monitor was intended to monitor "3,000 to 4,000 randomly chosen entry clearance refusals—those without a right of appeal" and noted the the "existing good links between the independent monitor and the UK visas operations overseas" (GC 85 11 01 06). She noted that "in 2004 the monitor examined 1,791

cases" (GC 86 11 01 06). However, with the passage of Clause 4 there will be many more entry clearance decisions with no right of appeal, so it is far from clear that the increased time for the post will do any more than keep pace with the change in workload.

If the government will not remove Clause 4 from the Bill then it should at least commit to **an amendment on not bringing it into force until there is demonstrable improvement in decision-making**, including demonstrable and sustained consistency between posts. Parliament will also want to do whatever it can to ensure that any improvements in decision-making will be demonstrable, and will be sustainable, and we suggest the **assurances** listed above as a tool for turning vague promises of quality into some concrete undertakings.

The DCA's special role: "Transforming Justice"

In July 2005 the DCA produced the White Paper *Transforming Public Services: Complaints, Redress and Tribunals (*(Cm 6243, July 2004). This proposes that "6.3 DCA will take the lead on coordinating redress policy across government". The paper states:

> *"in a democracy ruled by law, and under a government committed to high quality and responsive public services, simply appealing to a department's sense of fairness is not, and never has been, enough. There has to be redress beyond the department* (para 3.13)

The Minister should be invited to explain how those applying for entry clearance will have access to "redress beyond the department".

The paper identifies that

> "10.2 ..users need-
>
> - the ability to explain all the relevant circumstances of their case to the decision-maker;
> - a clear explanation of the decision and their options for disputing it…"

Will the Minister give an assurance that her department, taking the lead on coordinating redress policy, will have a lead in seeing that users of the entry clearance system get what the DCA identifies that they need.

The proposal in the White Paper is that

> *"4.21 What we need to do is to create the unified tribunal system recommended by Sir Andrew Legatt but transform it into a new type of organization which will not only provide formal hearings and authoritative rulings where there are needed but will have as well as mission to resolve disputes fairly and informally either by itself or in partnership with the decision-making department, other institutions and the advice sector"*

Will the Minister give an assurance that discussions on the Administrative Justice Council proposed by the DCA in their White Paper *Transforming Public Services: Complaints, Redress and Tribunals* will encompass consideration of the role of the council relating to entry clearance decisions both with and without a right of appeal and that applicants for entry clearance will an integral part of the DCA's consideration as it moves forward with reforms?

The government should take wider powers to restore rights of appeal by order

The Points system is not merely untested and untried, it still on the drawing-board. The Minister said "*As I understand it, there is no settled or final way in which the process* [points system et al] *will go forward"* (11 Jan 2006 : Column GC90). On numerous occasions during the debate on this clause, and more broadly on this Bill, the Minister has highlighted the

importance of the flexibility secondary legislation can offer (see e.g. cols GC 23; GC 28, GC46, GC 76, GC 28). While one can argue against that, if it is the Minister's position then why is the clause as drafted so inflexible? In the clause as drafted powers to restore rights of appeal are limited to visitors and dependants. Peers have suggested that this might prove inadequate in future. The amendment would not force the government to do anything, but would give them the power to restore rights of appeal to other groups should they find, in crafting or implementing the points sytem, that this is needed.

Returning residents should retain rights of appeal

The Bill retains power to restore rights of appeal to a dependant wishing to join a person settled (i.e. with indefinite leave to remain in the UK but no British passport) here, or to visit them. However, it makes no similar provision for the settled people themselves. These people are very different from those in other the categories for which rights of appeal are to be removed who are all people coming to the UK on a temporary basis. In this case we are talking about people who already had the right to spend the rest of their lives in the UK.

Rules 18 to 20 of the Immigration Rules deal with returning residents. Rule 18 states that the person must have had indefinite leave to enter or remain at the time of leaving, not have been away from the UK for more than 2 years, and not have received assistance from public funds toward the cost of leaving. They must be seeking admission for the purposes of settlement (Rule 18). Rule 19 makes provision for those who have been away for more than two years to be admitted if, for example, they have lived in the UK for most of their life. Rule 19A makes special provision for those accompanying members of the armed forces serving overseas, or diplomats, for example where those people have non-British spouses.

The Minister of State said in response to this amendment at Commons Committee:

> *"We think that amendment No. 83 is otiose. We are talking in the Bill of restricting appeal rights for those settled only on family visits. Clearly, the position of the dependants of those not settled, but here entirely legitimately for employment or education, will remain the same."* (Standing Committee E, 20 10 05 Col 118 to 119)

This seems to imply that seeming to imply that the clause would not affect this group. In many cases the Minister will be right, because these returning residents will not need to apply for entry clearance. However, circumstances do arise in which they have problems. Recent examples from ILPA members' caseload include:

- A person who lost his passport while abroad. He asked for an ILR stamp to be placed in his new passport. The ECO was not satisfied that he had been out of the UK for less than 2 years and declined to issue the stamp. He had to appeal to prove that indeed he had been out of the UK for a shorter period.
- A person who needed to leave the UK in an emergency and travelled on a one-way emergency travel document, obtaining a national passport once home and asking for the indefinite leave to remain stamp to be put in this. Again, there was a dispute as to whether she was entitled to this.

The numbers of people in this position will be very small, the cases rare. But nothing in the government's logic in bringing forward Clause 4 suggests that they should lose this right of appeal and indeed the evidence from within the clause points the other way, because of the way dependants of settled people are treated.

Those claiming that the refusal breaches their rights under European Community Law should retain a right of appeal

The Minister has acknowledged the need to provide a right of appeal where the allegation is a breach of community law. She indicated that she wished to do this in secondary legislation for flexibility:

"I agree with the principle of what the noble Lord said. We are trying to achieve the same end in a different way.. if Community law develops and the right of appeal is extended, then of course that will be given effect" (9 January 2006, Col. GC61).

However, secondary legislation may turn out to be less flexible than providing a right of appeal on the grounds that the decision breaches the applicant's rights under community law on the face of the Bill. This would be the case if, rather than provide that people had a right of appeal under community law, the secondary legislation gave rights of appeal to specific EEA (European Economic Area) nationals in specific circumstances. Such an approach would mean that a national alleging a breach of an EEA treaty right other than in those specific circumstances, perhaps a right that had not been tested or litigated before, would be unable to appeal.

At the end of the new s.88A inserted by Clause, provision is made in new clause 88A(3)(a) for the retention of rights of appeal against refusal of entry clearance on the grounds that the decision breaches the applicant's human rights or is vitiated by race discrimination. This is done by reference to permissible grounds of appeal before the Asylum and Immigration Tribunal under s.84 of the Nationality, Immigration and Asylum Act 2002. Another ground of appeal set out there is that a decision breaches the appellant's rights under community law. It would be straightforward to include reference to that ground in s. 88A(3)(a). This would ensure compliance with community law.

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