ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 43
VARIATION APPEALS: CLAUSES 1, 3, 11 AND 13 FOR GRAND COMMITTEE
09 JANUARY 2006
(briefings on amendments available on request)

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.

LOSS OF APPEAL RIGHTS

An end to in-country Variation Appeals

1. **Clause 1** will mean no more in-country appeals for those refused a variation (including an extension) of their existing leave. A right of appeal against variation decisions was created by Immigration Act 1971, s. 14 (and subsequently retained, albeit subject to limitations by Immigration and Asylum Act 1999, s. 61 and Nationality, Immigration and Asylum Act 2002 s.82(2)(d) and (e)), giving effect to the recommendations of the *Report of the Committee on Immigration Appeals* which recommended immigration rights of appeal because of the '*basic principle*' that *'however well administered the present* [immigration] *control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal.'* (August 1967, Cmnd. 3387)

2. The House of Lords Committtee on the Constitution wrote to the Minister of State on 13 December 2005 stating:

> *"Our concern at these proposals arises from the fact that it has been generally accepted, ever since the system of immigration appeals was established over 30 years ago, that decisions by officials should be subject to appeal, ensuring that justifiable standards of decision-making are maintained. For this reason, there needs to be a strong justification for the proposed restrictions in the rights of appeal, particularly since the available statistics show that a significant proportion of appeals in the categories to be excluded are currently successful. My Committee would welcome your observations on this matter…"*

3. An exception to the abolition of variation appeals is made for people with existing leave as refugees. Further, the Secretary of State has an absolute discretion to restore rights in 'circumstances of a kind specified by order' or not to, as he sees fit. The House of Lords Committee on the Constitution state in their letter to the Secretary of State (13 12 05):

> *… on appeals, you will be aware that it has long been the view of the Council on Tribunals (and one that my Committee would endorse as a matter of constitutional principle) that rights of appeal should be defined in primary legislation and not in secondary legislation, capable of being added to or cut down by regulations. Some provisions in this Bill infringe that principle, and we should welcome your assurance that appropriate amendments will be introduced".*

4. We are told that it is intended that the Secretary of State to the Home Office, a party to any appeal, will exercise these powers and not, as fairness and the appearance of fairness would demand, the Lord Chancellor. The House of Lords Committee on the Constitution have asked the Minister to make the clear who will exercise the power in their letter.

5. The government has indicated that it intends to use these order-making powers to give those with existing humanitarian protection in-country rights of appeal and that it is considering how best to protect the position of unaccompanied children granted discretionary leave (usually to 18), who are refused further leave. At 2nd reading the Parliamentary Under-Secretary of State reiterated the commitment given by the Minister of State in the Commons that *"former unaccompanied asylum-seeking children will have a separate right of appeal against refusal or curtailment of leave"* (6 Dec 2005: Column 580). We have yet to learn details of the scope of this concession.

6. No assurances similar to those given for unaccompanied children have been offered for others with discretionary leave. They and everyone else: students, workers, spouses, civil partners etc. will lose their right of appeal against refusal to vary leave. An appeal against the decision to remove will remain but this will only be heard once the person has left the UK, and thus left their job, course of study, marriage or other partnership, save where people raise asylum or human rights claims that are not certified as clearly unfounded. All those refused become overstayers, with no rights to work or other entitlements, and liable to detention and removal, from the moment of refusal.

W – Work permit appeal W held a work permit. She applied for a new job and got a work permit for that. However, she changed her mind about changing jobs (she had in the meantime learned that she was pregnant). She continued working in her old job. She was then informed that she was in breach of the immigration rules because, unbeknownst to her, the grant of the second work permit had wiped out the first and so, when she refused the second job, she had no valid work permit. The Home Office accepted at the appeal hearing that she had been working throughout on the basis of, and in accordance with, the first work permit. On the basis of that, the appeal was allowed on the spot. Under the new Bill she would be expected to leave the country to appeal, with her baby, or leaving her baby behind.

S- Spouse applying for settlement S came in 1990 as a visitor for medical treatment - he had done so several times in the past, as he has complications arising from polio as a child. While here he was told it was unsafe to return. He applied for asylum. Meanwhile he met and married the widowed Ms K, and they had a child. S received Disability Living Allowance. S's application for asylum was refused and his appeal did not succeed. He returned to his country and applied for entry clearance as a spouse. This was granted and he returned. But when he applied after the two years probationary leave, for indefinite leave to remain as a spouse, he was refused, on the grounds that the couple could not support themselves without recourse to public funds. This was because S was in receipt of Disability Living Allowance. This was classified as "public funds" for immigration purposes in April 1996.But S had never known of this changed classification and no one had ever told him. After six extremely worrying months for the family S won his appeal and with it permission to stay with his wife and 6 year old daughter in the country in which he had lived for the best part of 15 years. Had the Bill been in force S would have had to leave the UK for those six months, or, if he argued human rights, remain as an overstayer.

T - Student T's course closed. He phoned the Home Office to ask what he should do. He was told to get onto another course. This he did, but it took a little time to sort out. In the meantime, he went to Ibiza for a week's holiday. On return to the UK he was asked by the Immigration Officer if he was still studying. He explained that no, because he was sorting out a new course as the Home Office had recommended that he do. The Immigration Officer did not believe him and treated him as being in breach of the immigration rules. Removal directions were set for a couple of days later. His new course was all sorted by the time of the hearing (in an appeal against refusal to vary leave the evidence as at the date of hearing is considered). The appeal was allowed.

P – same sex partner applying for indefinite leave P had probationary leave on the basis of his same sex relationship. At the end of the probationary two years he applied for indefinite leave to remain on the basis of the relationship. It was a very careful application and included over 130 pages of evidence of the relationship, which had been accepted in the context of the earlier grant of leave in any event. The Home Office responded with a letter asking for more evidence (without specifying what) but P never received that letter. The Home Office refused P's application on the basis of a failure to supply information. A small army of witnesses attended the appeal hearing and the Home Office Presenting Officer chose to make no submissions (this is usually as near as a Presenting Officer gets to conceding the case). The appeal was allowed on the spot. Under the Bill, P would have had to leave the UK and the partner with whom he had been living for two years and make the application from abroad.

Problems with the approach set out in the Bill

- Home Office decision-making is often poor. One third of appeals against refusal of leave succeed, even with current levels of scrutiny and precedent setting by the courts. Rather than removing appeal rights, decision-making needs to be improved, and subject to greater scrutiny.

- The Bill blurs the existing distinction made in immigration, as in other areas of the law, between those who comply with the rules and those who do not. There will be no incentive to put in an application before leave expires.

- It is misleading to say people will still have a right of appeal, against removal, when they will only have it once they have left.

- The White Paper *Controlling our borders: making migration work for Britain*[1] states that the areas chosen for removal of appeal rights have been chosen "because the issues raised are less important" (paragraph 33). Not so. Rights to be with spouse and children; rights to continue businesses in which at least £200,000 has been invested, rights to continue in employment or a profession, rights to pursue an education or training are important, for the person affected and for the UK economy.

- New managed migration schemes do not affect the fundamental injustice and administrative chaos of these clauses: people who have come in under whatever scheme is operating, who keep to the conditions of their leave, and make applications that comply with the mandatory requirements of the immigration rules, should have an opportunity to challenge a refusal in the UK, before it disrupts their lives. There is a risk that the very people whom the new managed migration scheme seeks to attract will be discouraged from coming to the UK by the provisions.

- Any impression that the Bill streamlines matters is purely illusory, as set out in the following bullet points.

- The possibility of judicial review is not removed simply by having a right of appeal to hand. The right of appeal must be an effective remedy. In many variation cases it will not be. There will be opportunities to challenge the initial refusal on the basis that having to leave the country, or remain in the country with no right to work or other entitlements pending appeal is not an effective remedy.

- Many variation cases involve human rights claims, and certifications of these as clearly unfounded can also be challenged in the courts. A person will go to court and contend that s/he is being asked to leave the UK and their spouse or partner, leaving behind or taking with them their children, or being asked to cease to run a business

[1] February 2005, Cm 6472

that will then fail, or to leave their job, before the merits of the refusal have even been examined. S/he will that a breach of human rights, to family and private life, or to peaceful enjoyment of possessions, is not clearly unfounded. There is a strong chance of success and of injunctions to support this.

- Even where the person remains in-country for an asylum or human rights appeal, if under the provisions of Clause 11,s/he becomes an overstayer and cannot work, or enjoy other entitlements, the subsequent appeal will not undo the damage that has been done during the period of waiting for the appeal to be heard. In such cases judicial review will be available. Human rights appeals, normally a residual category for those who cannot bring themselves within the immigration rules, will be the first port of call for people whose primary contention is that they have been wrongly determined not to fall within the rules.

- At the moment people follow, and are advised to follow, Home Office guidance not to apply until 28 days before their leave expires, because the right of appeal arises only where the decision would result in a person having no leave left. In rare cases where a person receives a refusal before leave expires it is open to them to put in a subsequent application, which will then attract a right of appeal. No indication is given as to whether the Home Office will issue guide times for making applications under the new system, but in any event there will no incentive to follow them.

- There will be out of country appeals. Given what is at stake for appellants and sponsors appeals will be lodged from abroad. Hearings in such cases are costly and complex and it is harder to do justice when the appellant is not present in court and cannot give oral evidence. Claims for compensation and redress will arise. Other people, depending on their situation and the country to which they are returned, will effectively be kept out of any appeal by the provisions reducing the level of scrutiny.

7. These are unnecessary and draconian provisions that ILPA opposes, not least since there is no indication whatsoever of a problem with variation appeals. The immigration rules make wide and varied provision for persons to remain lawfully in the United Kingdom and there is no reason whatsoever why those lawfully present, who have since 1969 enjoyed appeals against refusals to vary their leave, should now be deprived of such right. There are already restrictions on unmeritorious variation appeals. Nor is it justifiable where people have been granted discretionary leave to remain on other compelling human rights and compassionate grounds. Certainly nothing about the standard of Home Office decision-making could justify such change.

The possibility of changing this Bill

8. ILPA considers that the architecture of the Bill is the root of these problems: the single right of appeal (out-of-country) is against the decision to remove; a decision that can only be made once a person is an overstayer. Whatever patching up may be suggested, confusion as to entitlements post decision and pending appeal will result. It appears that the government are also becoming queasy about this. The Parliamentary Under-Secretary of State said at 2nd reading *"I am particularly inviting suggestions from your Lordships that might identify an alternative approach that creates what is central to this part of the Bill—an effective, one-stop appeals process but one that might confer in-country appeal rights on a wider range of cases."* (6 Dec 2005 : Column 580).

9. ILPA drafted amendments put forward at Committee to show exactly how this could be done, and how the government's desire for a single appeal can be achieved using existing powers.

Using existing powers

10. First, amendments demonstrated that existing powers were sufficient to achieve a one-stop appeal. The position is as follows:

- There is already provision to deny a right of appeal entirely in cases where an applicant does not meet a mandatory requirement of the Immigration Rules (see s.88 Nationality, Immigration and Asylum Act 2002). This is used, for example, to limit the permitted changes between different categories of leave. Thus, already, hopeless applications do not get to appeal. (See Clause 5, which adds a new ground of ineligibility, failure to provide medical certificates).

- There are already broad and flexible powers under s.96 of the Nationality, Immigration and Asylum Act 2002 to deny a person a subsequent appeal, or appeal on a particular matter, where they have raised that matter at a previous appeal, or could have raised it. These powers extend to cases where a person had a previous right of appeal that they failed to exercise. There is thus provision in the current system to ensure that there cannot be two appeals on the same point. Yes, that certificate could be challenged on judicial review. But decisions made under the new rules could also be challenged, on the basis that an out-of country appeal provides an insufficient remedy. Moreover, under the proposed new system human rights or asylum appeals not certified as clearly unfounded will still be heard in-country and the "clearly unfounded" certificate can still be challenged by judicial review.

- Section 85 of that Act permits the AIT to treat an appeal before it as including an appeal against any decision which the applicant has an appeal right, or to consider any matter constituting a ground of appeal, or to consider a statement or evidence arising after the date of decision. This is already reflected in the practice of the AIT. In ILPA's discussions with Home Office officials the latter appeared unaware that AIT already conflates variation and removal appeals where the person, as a result of the refusal, has no leave to remain in the UK. (*RH (Human Rights Appeal – Risk of Removal – variation of Leave) Serbia & Montenegro* [2004] UKIAT 00084). Representatives therefore tend to raise any grounds related to a subsequent removal at the variation appeal for fear that if they do not, any subsequent attempt to appeal will be the subject of a section 96 certificate.

11. The amendment created a presumption of s.96 certification of appeals against removal where there had already been a variation appeal. The Minister of State did not address the substance of the amendment (Amendment 77) in debates at Commons Committee but on 18 10 05 wrote to members of the Committee about it (letter to Dr Evan Harris MP). His only complaint about the amendment was that the certificate would be subject to judicial review. This is true, but a review could only succeed on the grounds that the matter could not have been raised at the variation appeal; a high hurdle to meet. Moreover, the same arguments, and stronger ones, can be directed at the government's proposals in this Bill as noted above.

Creating a new, in-country appeal

12. We feared that arguments that existing powers were sufficient, however valid, would not be politically acceptable. So, we drafted another amendment proposed at Committee. First, this provided for a decision to refuse to vary leave and a decision to remove to be served simultaneously. The amendment provided for matters pertaining to refusal to vary leave and to removal to be heard simultaneously at an appeal hearing pre-removal, with the terms and conditions of leave preserved pending that decision.

13. The Minister of State's only argument against the amendment (see Standing Committee E, 2nd session 19 10 05 col. 60) was "*It cannot be right. We want to get to a stage where we have a one-stop appeals system. The appeal process on removal is about all the*

decisions made thus far.". He seemed to suggest that an appeal to look at the whole process could only happen at the end of the process. But Immigration Judges are used to looking forwards to the later effects of a decision. Central to all asylum and human rights cases are the risks on return. In any event, all judges are used to considering the "reasonably foreseeable" consequences of a decision. Faced with a person who is pregnant, it is perfectly proper for a judge to assume that she is going to have a baby. There is no good reason why a judge hearing a variation appeal should not take into account that refusal will mean that the person has to leave the UK.

TERMS AND CONDITIONS OF LEAVE PENDING APPEAL (CLAUSES 1, 11,& 13)

14. The government amended the Bill in Commons Committee to allow those with an in-country right of appeal against refusal to vary their leave to stay in the UK on the same terms and conditions (right to work etc.) until a final decision is made on the appeal. Everyone else refused a variation of leave, whether or not their appeal against the refusal is in-country (human rights cases), will, by operation of **Clauses 1 and 11**, become an overstayer on receipt of the refusal to vary leave or when their original leave expires, whichever is the earlier. As such they will be unable to work or receive benefits or health care, and will be liable to detention and removal. The Parliamentary Under-Secretary of State said at 2nd Reading *"It is not the purpose of the Bill to make people do something illegal accidentally."* (6 Dec 2005 : Column 580). In that case, it is necessary to amend the Bill.

15. A concern repeatedly voiced in the Commons, as at 2nd reading, was that those who left the country immediately on refusal would nonetheless risk endorsement of their passport confirming them as an overstayer as they left the country, which would seriously prejudice future applications to travel to the UK or third countries. The Parliamentary Under-Secretary of State said at 2nd reading that

> *"Anyone who has had leave refused or curtailed and embarks within any time that an appeal in-country could be brought, which is within 10 working days, would not be committing an offence. However, I shall look very carefully when we are in Committee to make sure that we have covered this point…We believe we have captured that properly but I am very comfortable about making a commitment to make sure that we are clear about it.* (6 Dec 2005 : Column 580).

This sounds suspiciously like the debates in the Commons, where the Minister of State initially appeared sympathetic to concerns about making people overstayers saying

> *"In terms of leave, we must get to a stage—this is a fair point, however disingenuously put by some—at which people are not affected at all until the exhaustion of their last appeal against removal. That is the situation that prevails now, anyway."* (Minister of State, Standing Committee E, 19 10 005, Col. 60)
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> *"The only issue… is the difference and gap between the cancellation of leave and removal. I made it clear during the debate on clause 1 on appeals that we would examine that gap and not leave people in limbo. I am happy to give that assurance again in terms of any cancellation of leave*." (Minister of State, Standing Committee E, 6th session 25 10 005, Col.245 – dealing with Clause 40)

16. Then at Commons Report, to the dismay of all sides of the House, the government returned only with a nugatory amendment **(now Clause 13)** to provide those whose appeal against a decision to remove is to be heard in country with immunity from prosecution under s.24(1)(b) of the Immigration Act 1971 between receipt of the decision to remove and final determination of their appeal. Clause 13 has no effect on any of the other consequences of overstaying.

17. The House of Lords Committee on the Constitution said in its letter to the Minister of 13 December 2005 that '*We should also welcome your view on the adverse effect of the changed 'overstaying' on individuals who are otherwise of good standing".*

18. If the Parliamentary Under-Secretary of State wants not merely to ensure that people are not committing an offence, but that they are not made overstayers and their passports are not endorsed as they leave, then she will need to amend the Bill. There is express provision in statute to do what she describes and preserve rights during the time within which an appeal could be brought. This is s.3C(2)(b) of the Immigration Act 1971. Unfortunately for her, it is repealed by **Clause 11(2)**of this Bill.

AMENDMENTS

ILPA supports amendments

To Clause 1

- **to leave out Clause 1 subsections (2) and (3)** and thus retain an in-country right of appeal in variation cases.
- **to illustrate how existing powers under s.96** of the Nationality, Immigration and Asylum Act 2002 are available to prevent repeat appeals while still allowing an in-country right of appeal.
- **to illustrate that it is possible to create a single in-country appeal dealing with the decision to refusal to vary leave and the decision to remove**.
- **to preserve an in-country right of appeal in specific variation cases,** for example students, spouses and civil partners, workers and Ministers of religion, so that effects on these groups can be considered.
- **to clarify the scope of protection for unaccompanied children** to be afforded by regulations made under Clause 1

To Clause 11

- **to leave out Clause 11** and thus ensure that terms and conditions of leave are preserved until an appeal is finally determined.
- **To amend Clause 11(2)** to give effect to the assurance to given by the Parliamentary Under-Secretary of State that terms and conditions of leave will be preserved until the time for giving notice of appeal has expired.

To Clause 13

- **To leave out subclause 13(3)** to provide immunity from prosecution from the moment of refusal to vary leave. If, as the Parliamentary Under-Secretary of State said at 2nd reading, it is the government's intention that the refusal and decision to remove be made simultaneously, they have no reason to resist this amendment.