ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 13
HOUSE OF LORDS GRAND COMMITTEE 9 & 11 JANUARY 2006
ENTRY CLEARANCE AND REFUSAL OF ENTRY 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 on www.ilpa.org.uk .

OVERVIEW

1. For an overview of these provisions we recommend reference the House of Commons Library Research Paper on the Bill [1]. This deals with the history and context of the legislation in considerable detail, making reference to the Reports of the National Audit Office and the Independent Monitor for entry clearance cases in which there is no right of appeal. It contains the important statistic that last year 53% of appeals against refusals of entry clearance were allowed. A sample of appeals success rates submitted to the Monitor are set out in the House of Commons library research paper. These shows consular posts where the success rate for family visitor appeals is over 80% and even over 90% and posts where student success rates on appeal were between 70 and 90%. Not an impressive basis for reducing scrutiny of the executive.

2. A person can always reapply, said the Parliamentary Under-Secretary of State pointed out at 2nd reading[2]. This conveniently forgets that a previous refusal may in itself be a reason to refuse a subsequent application. It ignores the real difficulties applicants face: entry clearance applications can take up to 4 months to process in some posts abroad according to the UK Visas website and in some individual cases they take much longer. Loss of time may result in loss of a job or business opportunity, missing a significant event in the life of a friend or relative, or even one's own wedding. People also have to pay each time they apply. Charges for visas and other entry clearance applications are authorised by the Consular Fees Act 1980. Entry clearance can cost up to £260 (for a spouse, fiancé(e) or child coming for settlement). Immigration employment documents cost more. Highly skilled migrants pay £315. For those refused entry at port, the cost of travel must also be factored in, as must the costs of sorting out one's affairs prior to departure and on unexpected early return.

CLAUSE 4 – LOSS OF RIGHTS OF APPEAL AGAINST REFUSAL OF ENTRY CLEARANCE

3. The effect of **Clause 4** is to remove rights of appeal against being refused entry clearance abroad from all those refused except those applying to visit specified (as yet undefined) family members or those applying as dependants of specific and equally undefined people. The House of Lords Committee on the Constitution wrote to the Minister on 13 December 2005 saying:

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[1] Research Paper 05/52, 30 June 2005, *The Immigration, Asylum and Nationality Bill Bill 13 of 2005-06.*
[2] Col 582, 6 December 2005.

"… 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".

Moreover, we understand it to be the intention that these powers are exercised by the Secretary of State of the Home Department, himself a party to any appeal, rather than the Lord Chancellor.

4. The Explanatory Notes merely indicate an intention to specify those proposing family visits or seeking entry for settlement as family members in regulations. This would mean that no students, workers, working holiday-makers, ministers of religion, innovators, business people, those with UK ancestry, returning residents, investors, applicants under EC Association Agreements or any other categories of people, would be able to appeal against the refusal of entry clearance, save on the grounds that their human rights have been breached or that they have suffered discrimination on the grounds of race.

A new points system and managed migration plans will not obviate the need for appeals

5. The government's response during the Commons stages of this Bill was essentially to acknowledge that decision-making was poor but say that it was going to improve, because of plans to introduce a points system, better management and administration and make the monitor role full-time. Our primary contention is that without the independent scrutiny of appeals it will not be possible to improve quality and to sustain such improvements. There is considerable support for our view. It is utterly misleading to suggest, as did the Parliamentary Under-Secretary of State at 2nd reading[3] that removal of appeal rights is somehow an integral part of the new system.

Independent scrutiny is essential for a fair system

6. The government may be sick of hearing it, but we recall 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." Commons Hansard, volume 213, column 43, 2.11.92

7. The *Report of the Committee on Immigration Appeals* 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)

8. 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

[3] 6 December 2005 Col 516

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…"

Government plans to improve quality cannot be taken on trust

9. The government cannot rely on vague statements about the Points system and new plans to improve quality to assert that quality will improve. It is open to them to return to the House when improvements have been achieved and present this as evidence. At the moment there is no such evidence. ILPA noted in its response to the consultation on the points system in November:

> *"We have considered carefully the* Annexe A Work Underway to improve quality of decision-making *to the Minister of State's letter of 18 October 2005 to Dr Evan Harris, MP (Immigration, Asylum and Nationality Bill: Commons Committee) and make the following points.*
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> - *The reports of the Independent Monitor for entry clearance applications have identified a range of substantial concerns, including the wrongful denial of rights of appeal. We are concerned at proposals to impose new decision-making duties on posts while substantive work is ongoing to improve the quality of decision-making. Doing everything at once risks doing nothing well.*
> - *ECOS are likely to require substantial training on the new system prior to any roll-out. There should be training prior to a pilot, and then further training developed in the light of the pilot. The five-day Immigration Officer ECO Conversion course and the three-week ECO course are described in the paper. These will need to be supplemented prior to any roll-out of the new system. The ECO course at the moment is more focused on process than substantive content and will thus not serve as an induction course for the new system.*
> - *The full network of Regional Managers should be in place and their work having been subject to appraisal prior to implementation. The results of the appraisal of the network should be made publicly available prior to any implementation.*
> - *Results of the trialling of pre-decision review by ECMs in Mumbai should be published prior to any implementation.*
> - *The Annexe states that a temporary staff member is collating and analysing success/failure rate at appeal. We would suggest the need for a permanent mechanism to strengthen and maintain the "dialogue with immigration judges" over the quality of refusal decision in cases that attract a right of appeal. The results of this and of the mechanism to provide regular feedback from Presenting Officers on the quality of appeal preparation should be publicly available prior to any implementation.*
> - *The results of the DCA study of quality of end-to-end decision-making should have been made available and reviewed prior to any roll-out.*
> - *We should appreciate more information on the new ECO support helpline and the resources being channelled to this.*
> - *Information and evaluation of Risk Assessment Units and Best Practice Reviews should be made publicly available prior to any implementation of new schemes.*
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> *While confidence in the quality of ECO decision-making on their current and long-established caseload is so low, it is difficult to envisage any confidence from employers, would be employees and business people… we consider that the very*

limited information made available regarding the new Managed Migration scheme means that the consultation process has been substantially devalued."

The Minister of State himself observed in Commons Committee "*I cannot pre-empt the final nature and shape of the points system*[4]."

10. The Independent Monitor, Ms Fiona Lindsley who looks at entry clearance cases in which there is currently no right of appeal (non-family visitors and students coming for short courses) told the Home Affairs Committee on 13 December:

> *"one of my major findings in my reports is that when you take away a tranche of appeals you take away other appeal rights that Parliament did not intend to remove through wrongful interpretation of the legislation, and over my three reports I have estimated that approximately 46,000 applicants for visas were denied appeal rights when they should have been given them….the overwhelming majority of people I look at the files of have no lawyers, no community organisations, nobody; they act solely on their own in person. So they do not know it is wrong, they do not know that it is wrong to refuse them a right of appeal on the basis of the length of the module. They have no idea, so they accept it and they go away, they do not challenge it. Again, another point in which I would oppose any removal of right of appeals would be simply the quality of decision-making as reflected in the high rates of success on appeal, really incredibly high rates of success on appeal…you also lose the information about the quality of decision-making if you take away the right of appeal, and it stays out there rather than being back here".* (Uncorrected evidence. To be published as HC 775-i).

11. The Monitor had endeavoured to obtain information about quality differences between posts. She told the Home Affairs Committee that while posts might have different refusal rates, depending on the applications presented to them, posts making decisions of similar quality they should have similar success rates on appeal. She had therefore asked UKVisas to collect these figures. But, as she explained to the Committee: *"As far as I know UKvisas did collect some data but they told me they did not have enough time to analyse it. So they collected some data on the main family visit posts - I think the top ten - but it was never processed in any way."* (Uncorrected evidence. To be published as HC 775-i). Thus opportunities to assess quality have not been taken.

12. ILPA members' experience supports the view that quality differs greatly from post to post.

Case of G G, a spouse, applied for entry clearance for he and his two young children to join his wife in 2003. The application was refused in 2004 "in particular" on the basis that he could not be adequately maintained without recou4se to public funds. It was asserted that the letter offering him a job was not genuine and that his wife's income was insufficient to support him and his children. An appeal was lodged. The decision was reviewed in the light of the grounds of appeal in July 2004. The post abroad was persuaded by being sent the employer's trading accounts with the grounds of appeal that the letter offering the applicant a job was genuinely written by those employers but used the trading accounts to argue that the company would not really pay the applicant a salary of £8000 a year (20% of their total staff costs) as he said in his application, nor that his being a cousin was a reason to believe that they would really hold the job offer open indefinitely The appeal was heard in November 2005 and won in approximately 30 minutes. G and his children are still waiting to be granted entry clearance to come to the UK. While Clause 4 may preserve appeal rights for spouses, if they are treated as "dependants" the case gives an indication of the extent of problems with decision- making.

[4] 20 October 2005 Standing Committee E col.116

Case of K (as featured in Asian News in December 2005)
The Asian news has described how a wife was refused entry clearance to join her husband in the UK because the letter from the manager at the supermarket, part of a national chain, where he worked, used capital letters to spell the supermarket's name and did not leave a gap between the two words of the name. The letter was therefore rejected as false despite the fact that the sponsor had submitted payslips, bank statements and a letter from the Inland Revenue all confirming his paid employment with that supermarket. The manager's spelling and grammatical errors, and the letter's being on cheap paper (which was, in fact, standard A4 paper) were all cited as reasons for refusal. The sponsor told the newspaper "*I have a letter from the Inland Revenue saying I work at* [the supermarket]*, my bank statements show a regular wage coming in from the* [the supermarket] *yet still they refused my wife's application. All it would have taken was a phone call to the.. store or even to the Inland Revenue to find out."* While Clause 4 may preserve appeal rights for spouses, if they are treated as "dependants" the case gives an indication of the extent of problems with decision- making.

Case study
An ILPA member in Oxfordshire explained "We have noticed real differences in ways Entry Clearance Officers (ECOs) deal with applications for entry clearance for family reunion for those granted refugee status. The wife and children of one of our clients were refused by an ECO in Jordan on the basis that they did not believe that they were his wife and children. They refused to recognise the birth certificates and marriage certificates that were provided, saying they could be forged too easily, and when I asked about DNA testing, they said that they had absolutely no experience of such tests and had no arrangements for validating such DNA evidence. This is very different from our experience of ECOs in African countries, for example, Uganda.

13. The Independent Monitor noted in her February 2005 report that over 38% of family visit appeals considered by an adjudicator without an oral hearing, simply looking at the papers, were allowed. Asked to comment on this when she gave evidence before the Home Affairs Committee on 13 December 2005 she noted:

> *"I think that is indicative of poor decision-making because when an appeal goes to a paper hearing all that happens is that an immigration judge gets the same pieces of paper that the entry clearance officer reviewed in the post… I think entry clearance officers think in family visit cases….that they are won by the sponsor in a suit and what I have spent time to them saying is, "Okay, yes, in oral appeals you have a sponsor in a suit potentially. But what about these other ones? What about these ones where you have nobody present and all you have is the judge with the papers that you had? Why are they allowing such a high percentage of appeals there?"* (Uncorrected evidence. To be published as HC 775-i).

14. Other reports have highlighted the substantial challenges to be faced in improving quality. On 24 November the National Audit Office's published its report *Consular Services to British nationals*[5]. While dealing with passport rather than visa services, the report provides an insight into the real difficulties that will in changing systems in posts. It notes that "*Posts are struggling with existing systems because of a combination of problems with supporting information technology infrastructure, software, hardware, and training*"[6] and also notes the lack of quality assurance services to date[7] and the lack of monitoring[8]. The introduction of biometric passports gives rise to questions about sustainability and requires major work in posts in the short to medium term. Training and consistency across posts was a problem[9]. The Report analyses in detail problems with the casework management system[10],

[5] HC 594
[6] Before para 2.4
[7] Para 2.12
[8] Para 2.14
[9] Chapter 3, see e.g. 3.19

relevant because the new points system is intended to rely heavily on information technology. The report noted difficulties in achieving flexibility in staffing and sufficient funding[11]. While the points system plans to move much more decision-making out to posts, the FCO is working, and the NAO recommended, concentrating passport production in a number of hubs[12]. All this provides a much-needed injection of reality into thinking about the points system: posts are stretched, face huge changes because of the introduction of biometrics and new passport systems designed to increase security. Against this background it would be easy to over-estimate the capacity of posts to address radical changes in the way entry clearance applications are handled with the introduction of the points system and at the same time move to robust quality control.

15. A full-time independent monitor is not going to be the answer to all woes. The monitor will have many more cases to look at, because there will be many more categories of case with no right of appeal. Giving evidence to the Home Affairs Select Committee the outgoing monitor estimated that her successor would monitor *"more files, about double the number I have monitored"*. This will provide nothing like the oversight currently provided by appeals. The Parliamentary Under-Secretary of State said at 2nd reading that "the independent monitor will be there much more quickly than a review would be and will give rapid feedback on entry clearance"[13]. But the Monitor will not be "there" at all save in a limited number of cases.

Clause 4 and family members

16. Family members with a right of appeal are currently set out in regulations[14] made under the Nationality, Immigration and Asylum Act 2002. The government should be urged to lay the regulations before in draft before parliament before parliament votes on the proposed new clause to demonstrate that new legislation is necessary at all and to allow parliament to determine for what it is being asked to vote.

17. The significant change to the regulation-making power in Clause 4 of the Bill is that the new regulations may 'make provision by reference to an applicant's purpose in entering as a dependant' (**Clause 4**, inserting **a new s.88A(2)(d)** into the 2002 Act. This wording recalls the 'primary purpose rule' – whereby spouses could be refused entry clearance because they could not prove a negative and show that the primary purpose of their marriage was not immigration to the UK. That rule proved unworkable in practice and the government should be pressed on the risks that their new rule will create the same difficulties.

18. The government has stated that it intends to remove the right to an oral hearing in family visitor appeals and is reviewing whether to charge for these appeals[15] – fees having been steadily reduced from 2000 until their abolition in 2002. The government said in their Five Year Strategy that *"we will limit the right of appeal to cases where the proposed visit is to a close family member"*[16]. The Minister of State said in Commons Committee "*We are looking at the notion of charging, a redefinition of family and simply paper appeals, not oral*

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[10] See para 3.18 ff

[11] Para 5.2 and see Chapter 5 *passim.*

[12] See recommendation section at the end

[13] 6 December 2005 col 580

[14] See *Immigration Appeals (Family Visitor) (No.2) Regulations 2000* SI 2000/2446, *Immigration Appeals (Family Visitor) (Amendment) Regulations 2001*, SI 2001/52, *Immigration Appeals (Family Visitor) Regulations 2002*, SI 2002/1147, *Immigration Appeals (Family Visitor) Regulations 2003*, SI 2003/518. These are discussed in detail on page 16 of the House of Commons Library Research Report on the Bill.

[15] *Controlling our borders: Making Migration work for Britain*, Cm 6472 para 33.

[16] *Controlling our borders, making migration work for Britain* paragraph 34.

appeals and other similar elements"[17]. No mention is made of this in the Bill, nor in the Explanatory Notes. Again, parliament needs to see the draft regulations to know what it is being asked to vote for, and if these are not produced should be reluctant to give the government the powers it seeks.

19. ILPA argued when the right of appeal for family visitors was restored that the definition was unduly restrictive, and that friends or great-aunts may be emotionally closer than the relatives listed. The new proposals do nothing to address the difficulties with the existing rules and, if they result in more restrictive provisions, will suggest that the government is not serious in its commitment to the family and the maintenance of family ties when part of that family is abroad. There is a risk of breaches of Article 8 of the European Convention on Human Rights, the right to respect for private and family life, alone or read with the prohibition on discrimination in respect for rights protected by the Convention.

Applicants for entry clearance other than family visitors

20. Other visitors, be they family members not given a right of appeal by regulations, friends, or those coming for pleasure, have no right of appeal against refusal of entry clearance. Nor do those asking for entry clearance for a course of study of less than six months. Those who do not meet a mandatory category of the Immigration Rules (e.g. age, being of the correct nationality for a leave that is only granted to certain nationalities, such as working holiday makers) also have no right of appeal. Other categories of applicant for entry clearance do. In contrast to Clause 1(4) and the family visitor provisions of Clause 4, the government has not even given itself the power to grant any of these people a right of appeal by regulations. Those affected include students coming for a longer course of study, including those who have been accepted at an educational establishment, Innovators, Ministers of Religion and Working Holiday-Makers. They will also affect people with residence in the UK seeking to return and those applying for settlement. It seems ludicrous that a power has been retained to allow the dependants of a resident a right of appeal if denied permission to join him/her, but that the resident him/herself has no such rights.

21. The government has not even given itself a power to restore appeal rights where this is necessary to give effect to obligations under European Community Law. The Minister of State promised at Commons Committee to examine this[18] but so far no government amendments have been forthcoming.

22. There is particular confusion as to who is a dependant for the purposes of new s.88A (1)(b). Is a spouse, a civil partner or a fiancé(e) a dependant? How wide do these rights extend? The Parliamentary Under-Secretary of State said at 2nd reading that loss of appeal rights was a "manifesto commitment" but the Labour Party Manifesto says "Appeal rights in non-family immigration cases will be removed". There has been no explanation for the decision to take away rights in family cases.

CLAUSE 6 APPEALS AGAINST REFUSAL ON ENTRY

23. **Clause 6** of the Bill deals with rights of appeal against refusal of leave to enter for those who arrive at a UK port.

24. Not everyone arriving at a port gets a right of appeal under the current system. Those without valid entry clearance or continuing leave (leave is 'continuing' if it was for a period

[17] Standing Committee E, 20 10 05, col. 119
[18] Standing Committee E, 20 10 05, Col 118

of over 6 months, and has not expired) have no right of appeal against refusal of entry at port, even if they are non-visa nationals –i.e. people who do not need to get a visa to visit the UK.

25. Where people do have entry clearance or continuing leave this can be cancelled by an immigration officer on arrival in the UK in circumstances set out in the immigration rules. The current position is that a passenger refused in these circumstances will have a right of appeal in-country (before removal) if that leave is cancelled for any reason *other than* that the purpose of their visit is not the same as that specified in the entry clearance. If the refusal was on the basis of the purpose of the visit, the right of appeal remains, but is heard out of country.

26. **Clause 6** will mean that those whose right of appeal is currently in-country will henceforth have only an out-of-country right of appeal, after they have left the UK. Those who currently have an out-of-country right of appeal (those refused on the basis of the purpose of their visit) will have no appeal at all. There will, of course, be no independent check on whether cases are being properly categorised as being about the purpose of the visit because of the lack of a right of appeal. Rights of appeal on grounds of asylum, human rights and race discrimination are preserved.

27. Moreover, **Clause 6** would reverse the current burden of proof: it assumes that a person arriving at port has a purpose in entering other than that for which entry clearance has been granted by an Entry Clearance Officer abroad, and places the burden on the person to show that this is not the case.

AMENDMENTS

ILPA supports amendments as follows

Clause 4

To leave out Clause 4 and thus maintain the status quo on entry clearance appeals.

- **To preserve the power to restore appeal rights** more widely than to specific groups
- **To provide for order making powers giving and taking away appeal rights to be exercised by the Lord Chancellor** and not by the Secretary of State for the Home Department, a party to an appeal.
- **To restore rights of appeal to specific groups,** thus highlighting the effect on these groups. Groups made the subject of such amendments include students, EEA nationals and returning residents
- **To new subsection 88A(2)(c)(i) to limit the reference to the person in the UK needing to be settled** there to cases where the person seeking entry clearance to join them is applying for settlement, not just to visit.
- ***To remove new subsection 88A(2)(d)*** so that a subjective test, that of intent, cannot be made the determinant of whether or not a person has an appeal against refusal of entry clearance.
- **To put the definition of "dependants"**, those to whom appeal rights can be restored, **in primary legislation.**
- **To probe the scope of rights to complain to the Parliamentary Commissioner for Administration** about maladministration in entry clearance cases.

TO CLAUSE 6

- **To preserve the status quo** on rights of appeal for those refused entry at port.