ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA Parliamentary Briefing

Immigration Asylum and Nationality Bill: Second Reading, House of Lords 5th December 2005

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. Our briefings on the Bil can be found at www.ilpa.org.uk

The Immigration Law Practitioners' Association (ILPA) has provided detailed submissions on the Immigration Asylum and Nationality Bill currently before Parliament. We do not seek to repeat those submissions but highlight the following matters.

The appeal process is an important part of immigration management. Its management role is severely eroded by the radical redesign proposed in the Bill. It is ILPA's view that the Bill amendments will have far-reaching and adverse effects on affected parties and entities and on immigration management.

The current legislative arrangements provide immigration appeal rights for decisions by entry clearance or immigration officials refusing leave to enter or remain or giving directions for a person's removal. Subject to important qualifications, the current legislation gives appeal rights to those with UK connections (this may be family or a sponsoring/affected UK entity, such as an employer or educational institution), to persons in the UK who have complied with their conditions of entry and made an in-time application for extension or variation of stay and to persons subject to removal who claim that removal breaches their asylum or human rights.

These appeal arrangements have been carefully crafted. They should not be seen as rights conferred on unqualified, undeserving applicants but as mechanisms which recognise and protect the affected interests of the UK 'sponsor,' (such as universities or employers or families), which encourage compliance with the terms of visas and which also allow 'careful scrutiny' of the protection and human rights issues at stake.

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 NIAA 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)

There has been consistent recognition since 1971 that appeal rights improve the quality of immigration decision-making. Speaking in opposition to provisions in what became the Asylum and Immigration Appeals Act 1993 the Prime Minister, then Tony Blair MP said:

> 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, volume 213, column 43, 2.11.92)

This rationale for the immigration appeal system remains apposite and relevant but has been overlooked in the proposed model.

The Bill takes away all entry clearance appeals except to family visitors and those termed 'dependants.'(Clause 3). It is not clear who will qualify as 'dependants'. The Bill also

removes all in-country rights of appeal against variation decisions except in the following circumstances (Clause 1):

a. where the person subject to the variation decision had been granted leave to enter or remain as a refugee and the result of the decision is that he or she has no leave to enter or remain (c. 1(4);
b. where the result of the variation decision is that the person has no leave to enter or remain and the variation decision was taken in circumstances specified by order of the Secretary of State or the original grant of leave to enter or remain was made in circumstances specified by the Secretary of State.

The Minister has indicated that it is the government's intention to reinstate variation appeal rights for EEA applicants and families, for humanitarian leave cases and has stated that he will reconsider the position of child asylum seekers denied asylum appeals because they were granted discretionary leave of less than 12 months. These appeal rights are not to be included in primary but secondary legislation.

The Bill represents the most significant modification of the immigration appeals system since 1971. There will no appeal right on applications for entry or variation under the Immigration Rules for the vast majority of applicants. Those affected include families, partners, children, students, workers (nurses, teachers, social workers, carers, doctors and dentists who comprise a core component of our functioning welfare systems) business people, investors, ministers of religion, the highly skilled. Family members may have an appeal against the refusal of entry clearance (if they are dependants or visitors). For all the other named applicants, their only appeal right will be a right of appeal against removal which is exercised (except for asylum/human rights claims) only after they have left the UK. By legislative amendment in Clause 11 the Bill converts applicants who have complied fully with their visa requirements into overstayers and subjects them to a removal decision (which is what attracts their out-of-country rights of appeal). Those who depart before they are deemed overstayers, avoiding the stigma of being an immigration offender, and who therefore avoid removal directions, will have no appeal

rights against any decision, whether the refusal to vary their leave or any subsequent refusal of entry clearance. Applying the 1993 words of the Prime Minister, the Bill is a recipe for poor immigration decision-making for the vast majority of immigration claimants.

The removal of these appeal rights will impact adversely upon UK families, upon UK enterprises, upon public services and upon the capacity of UK entities and enterprises to attract highly qualified overseas staff or students. Perversely these changes are made at a time when the UK is focussed on competing with other developed countries to attract and retain skilled foreign employees, business people and investors. Many of these skilled and affluent applicants are advised by relocation firms who list the benefits offered by various countries including early or secure residence or settlement and family reunion rights. There has been no consideration to how these appeal arrangements fit with the Five Year Strategy recruitment and retention plans. The Minister has stated that the appeal changes are designed to retain appeals on issues of fundamental importance. It is ILPA's contention that the government has failed to analyse the important interests and issues sacrificed by these appeal modifications.

The government's stated aim with these amendments is to implement a one-stop appeals system. It is ILPA's contention that all of the necessary mechanisms for one-stop appeals exist in the current legislation. The government does not utilise the mechanisms it has for this purpose. In ILPA's discussions with Home Office officials they were unaware that the Tribunal 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) This is a model one-stop appeal. It does not require modification to section 3C of the Immigration Act 1971 (Clause 11). It is properly within the catch-all arrangements in section 85 of the Nationality immigration and Asylum Appeals Act 2002 which permits the Tribunal to treat an existing appeal 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 a statement or evidence arising after the date of decision. Any repeat appeal by applicants

who have had such one-stop appeal is able to be prevented by certification of the subsequent removal decision. (Nationality Immigration and Asylum Act 2002 section 96)

Many of the perceived inefficiencies in the present appeal system arise not from design faults in the appeal system but from inefficiencies in the Home Office decision-making and removal systems. Applications are often left undetermined over many years. These extended delays occur in spite of repeat reminders by applicants and the interventions of Members of Parliament. Persons liable to removal are not removed. These administrative deficits produce 'fresh', changed circumstances claims on asylum or human rights grounds. The Court of Appeal has endorsed the principle that where the Home Office has significantly delayed consideration of the case or removal proceedings, 'it hardly lies in the Secretary of State's mouth to say that the facts were not "exceptional"' and the person's removal a disproportionate interference with the family/private lives she has created here during the period of Home Office delay. [*Secretary of State for the Home Department v Akaeke* [2005] EWCA Civ 947 (27 July 2005); *GS (Article 8, public interest not a fixity) Serbia and Montenegro* [2005] UKAIT 00121 (09 August 2005)] The amendments do not address and serve as a smokescreen for these abiding inefficiencies in the appeal system.

ILPA's additional concern is with the Bill's effect on fundamental premises of immigration law. It is a bedrock principle of immigration law and management that persons who are compliant should be encouraged and rewarded and the non-compliant deterred and discouraged. Overstayers for example are expected to leave the UK and re-qualify for entry even if they have a claim to remain under the Rules. [*Huang & Ors v Secretary of State for the Home Department* [2005] EWCA Civ 105 (01 March 2005)] The current Bill turns this principle on its head. The compliant are made into overstayers, lose their rights of appeal against a refusal to vary their leave and have only an out-of-country appeal against removal. The non-compliant are rewarded with the in-country appeal rights against removal on asylum or human rights grounds. Cases concerning the Rules are litigated out-of-country. The in-country appeal system will be driven solely by Convention obligations. The immigration jurisprudence on the Human Rights Convention

currently mandates that these rights and obligations are reserved for a residue of exceptional cases. The government seems bent on making human rights the mainstream and driver for immigration appeals. It is ILPA's consensus view that the proposed amendments will have far-reaching consequences for immigration management. We would expect many more human rights appeals and that the present, confined human rights jurisprudence will change as the Tribunal and Courts consider cases where the variation refusal was manifestly wrong.

ILPA predicts the following consequences from these amendments

- The blurring of the concept of immigration offending. If the amendments are passed, future overstayers will include both the culpable and those who acquire this status because of the repeal of section 3C of the Immigration Act 1971. The latter group were compliant applicants. It is difficult to see how the government can ensure that the Tribunal and Courts take immigration offending seriously if the Parliament devolves illegal status on innocent parties simply to restructure the appeal system.
- The quality of immigration decision-making will deteriorate as there is no independent check on almost all decisions
- There will be a significant increase in the number of human rights claims and onshore human rights appeals as persons refused variation of leave seek to challenge that decision within the UK via the Human Rights Act. There is no incentive to return and reapply as there is no appeal right for entry clearance refusals.
- The human rights jurisprudence will change to reflect and accommodate the loss of substantive appeal rights under the Rules
- There will be a significant increase in judicial review claims against entry and variation decisions as there is otherwise no effective remedy.
- The provisions will be challenged in the European Court of Human Rights as breaching the Article 13 requirement for an effective remedy against administrative decisions.