

IMMIGRATION, ASYLUM AND NATIONALITY BILL – HL BILL 43

SUMMARY BRIEFING AS BILL ENTERS HOUSE OF LORDS

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

APPEALS

Variation Appeals

Clause 1 will mean no more in-country appeals for those refused a variation (including an extension) of their existing leave. An exception is made for people with existing leave as refugees. The government has also indicated that it intends to use 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. No similar assurances 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.

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, with endorsement of their passport as an overstayer on leaving the country. ILPA considers that the architecture of the Bill is the root of this problem: 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.

The government in Committee appeared to take seriously concerns voiced at this way of proceeding but at Report 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.

Our main points

- The government's desire for a single appeal can be achieved using existing powers.
- 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.

- 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 rights at stake are important: 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; the opportunity to do all these things will be lost if people have to leave the country for the appeal against removal to be heard.
- It ain't broke – don't fix it.
- 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.
- Many variation cases involve human rights claims, and certifications of these as clearly unfounded can be challenged in the courts. Human rights points will become stronger if people are forced to leave the UK pending appeal.
- 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.
- If the government insists on taking new powers, then it must redesign the clauses so that there is a broader in-country appeal that anticipates the consequences of removal, and not base its new proposals on an appeal right available only to those who have left the UK.

Entry Clearance and refusal of entry appeals

Clause 4 limits rights of appeal in entry clearance cases (where people are refused a visa) to family visitors and dependants prescribed by order. It denies rights of appeal to all other categories, including workers and students. Clause 6, which denies in-country rights of appeal to all and, in many cases, all rights of appeal, to those refused entry on arrival in the UK.

Our main points

- Over half of family visitor appeals succeed. 38% decided on the papers succeed.
- The matters at stake in the other appeals under threat are important: for example opportunities to study and to work.
- 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.
- 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.
- The government has taken no powers to restore rights of appeal to workers, students, returning residents or others.
- Parliament has not seen the regulations that will determine who continues to enjoy rights of appeal. Family visitors are likely to be more narrowly defined than now, and to be limited to those visiting people settled in the UK. It is far from clear whether spouses, civil partners or fiancées, to give but three examples, are dependants. Given the quality of decision-making, we need more appeals in this area, not fewer.

Other appeals provisions

Under Clause 5 failure to supply a medical certificate can be a mandatory reason for refusal of an application, resulting in no appeal right. This is currently intended to be used for TB cases, although the power is broader. Clauses 8 and 9 are tidying up provisions. Clause 12 removes the statutory requirement, although not the intention, that all claims for asylum should be made in person, and states, by reference to the immigration rules, that materials not judged to amount to a fresh claim fall outside the definition.

NATIONAL SECURITY AND TERRORISM

New clauses, added in Commons Committee, are linked to the new Terrorism Bill but apply to a much wider class than those suspected of terrorism, under any current definition. ILPA's view is that the case for new legislation in this area has not been made and that the new provisions fail to respect rights and civil liberties. All the arguments about breadth of definitions of terrorism in the Terrorism Bill are relevant to these clauses.

Clause 7 provides powers to hear only human rights aspects of national security appeal cases in country, with the national security aspects of the case deferred until after removal. The clause contains a sub-section that would allow it to be repealed were the government to succeed in its attempts to persuade the European Court of Human Rights (ECHR) to overturn its jurisprudence on an absolute ban on return to a place where a person is at real risk of torture and substituting a balancing test.

Our main points

- The clause flies in face of the government's statement that it will not export risk but charge and try, or extradite, offenders
- It may be the assertion of a national security case that creates the risk for a person on return: if this is made only after removal there will be no protection against that risk. In other cases information pertaining to the national security case may well be relevant to risk on return and will thus have to be considered twice, once pre and once post removal. Hardly a "one-stop" process.
- The Jurisprudence of the ECHR restates a norm of customary international law: no torture, and that means no return to a place where people are to be tortured. In instrument after instrument and court after court it has been made clear that this is not a balancing act.
- The proposals are incompatible with a fair trial: the appellant will not be present in court as the national security case against him/her is made, unless expensive video links are used.

Clause 52 purports to define in statute the meaning of Article 1F of the 1951 Refugee Convention, which set out the circumstances in which a person should be denied recognition as refugee because they are not deserving of it. UNHCR has expressed the view that the Clause is incompatible with the Convention. The clause draws on the definition of terrorism in section 1 of the Terrorism Act 2005 to define "acts contrary to the principles and purposes of the United Nations" far more broadly than the accepted definition.

Our main points:

- The 1951 Convention is an international convention. UNHCR statements and international jurisprudence are relevant. To purport to interpret it in statute is to fail to respect this jurisprudence and to usurp the role of judges in interpreting it.
- There is no need to define Article 1F to exclude terrorists from recognition as refugees: Article 1F already does that. The clause uses definitions incompatible with Article 1F in that they are too broad.

Clause 53 extends the grounds on which people, including but not limited to, terrorists, can be deprived of British citizenship, a test of "not conducive to the public good" that will draw on the list of unacceptable behaviours published by the Home Office. New provision is made

in **Clause 54** to deprive people of a “right of abode” in the UK. Rights of appeal and protection against statelessness are preserved.

Our main points:

- People can be deprived of citizenship on grounds incompatible with civil liberties due to the breadth of the provisions.
- The provisions equate deprivation of citizenship and of the “right of abode” (a fundamental right associated with citizenship) with migration control. When the government consulted on the list of “unacceptable behaviours” this was in the context of deportation and exclusion.
- The new 2002 powers to deprive people of their British citizenship have never been used. The case for their extension is not made out.

Clause 55 applies the “good character” requirement to all cases where people register as British citizens, rather than naturalise. It thus ends the concept that certain groups, including many children, should be entitled to register. Everyone seeking to register will be subject to a good character test.

Our main points

- Registration by is there for those who should not have to go through all the hurdles of naturalisation, including children and people who previously held other British nationalities.
- The new measures fail to respect the special obligations to people who previously registered by entitlement.

OTHER PARTS OF THE BILL

Information: Searches: Contracting Out (clauses 40 & 41)

There is widespread concern, including from PCS, the union representing immigration officers, at these clauses 39 and 40 which for the first time give private contractors powers to detain (for up to three hours, at ports). Private contractors, who need not be licensed individually, will also be given powers to search the people they find and/or detain.

Information: Other provisions

Clause 42 provides new powers to detain embarking passengers for up to 12 hours. Clause 30 imposes more stringent time limits on people seeking asylum to attend for fingerprinting than on people in other categories. No significant changes have been made to provision in clauses 30 to 38 for sharing exchanges of data on arriving and departing passengers, including with “foreign law enforcement agencies” (clause 38), nor to the extension of powers to retain passports (clause 26).

Claimants and Applicants

The government has amended Clause 48 the Bill to ensure that failure to comply with the specified requirements for applications, where these are set out other than in the immigration rules, cannot be a ground for mandatory refusal. Under Fees (Clauses 48 and 49), the government have indicated that the Home Office would not charge individuals for advice, but could charge advisors. Provision is made for integration loans to be given to those with humanitarian protection (Clause 44) and for local authorities to provide “hard cases” support under s.4 of the 1999 Act. The powers of Her Majesty’s Chief Inspector of Prisons are formally extended to cover short term holding centres and escort services (Clause 44) and incapacity will no longer be a bar to making a nationality application (Clause 46).

Employment

The shape of proposals in Clauses 15 to 26 to punish employers employing those who do not have permission to work in the UK has not changed. The main change is the introduction of a civil penalty for employing persons here illegally. Concerns have been expressed about the

likely increase in discrimination against foreign-looking or sounding employees, and the proposed on-going obligation on employers to check on current employees.

Miscellaneous

The Bill has been amended to reflect recommendations of Her Majesty's Chief Inspector of Prisons and others that detainees have the opportunity to work. The amendment provides that those who work in immigration removal centres need not be paid the National Minimum Wage, paving the way for them to work. Minister's explained that detainees could chose whether to work or not, and agreed to look at safeguards to ensure that private contractors could not make use of the provision to use detainees as cheap labour.

OTHER MATTERS

The Bill has been the focus of lobbying to repeal s. 9 of the 2004 Act which denies all support to failed asylum-seekers and their dependants and an opportunity to express concern at the end of indefinite leave to remain for refugees. The government has indicated that it will not roll out Section 9 if the pilots are not a success and has acknowledged that local authorities involved in the pilots have voiced their concerns, especially around compatibility with the Children Act.

Members of all parties noted the need for consolidating legislation and the Minister made this point on a number of occasions, suggesting that such consolidating legislation was "long overdue." ILPA urges that:

- a person or team within the Home Office be given the task of preparatory work toward consolidating legislation now;
- efforts be made to consolidate regulations as and when amendments are issued, or to tidy up some of the messiest.