ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 70

BRIEFING FOR COMMONS REPORT WEDNESDAY 16 NOV. 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. ILPA briefings to date can be found at www.ilpa.org.uk. For further information please contact Alison Harvey, Legal Officer, alison.Harvey@ilpa.org.uk, 0207 490 1553

APPEALS (Clauses 1 to 13)

Variation Appeals *(Detailed briefing available from ILPA)*

Clause 1 will mean no more in-country appeals in variation cases, where people apply to extend their leave or to change from one category to another. The only exceptions are variation appeals by people with existing leave as refugees, and those who raise asylum or human rights claims that are not certified as clearly unfounded. The government has also indicated that it intends to use order-making powers in Clause 1 to give those with existing temporary humanitarian protection in-country rights of appeal. Everyone else: students, workers, spouses, etc. will lose their in-country right of appeal. If they have a right of appeal at all, they will have to leave the country to exercise it.

Clauses 1 and 11 make anyone refused an extension of leave with no in-country right of appeal into an overstayer: as such they would be unable to work, study or receive benefits or most health care, and would be liable to detention and removal, to having their passport endorsed as an immigration offender, as well as being liable to prosecution. They could also be refused entry clearance in the future, in the UK or in another country, simply because of this technical and unavoidable immigration offence. The government has amended the Bill to give those who will have an in-country right of appeal continued leave pending a final decision on the appeal. It has agreed to look again at **Clauses 1 and 11.** ILPA welcomes the rethink but remains convinced 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 make removal directions; 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 has also agreed to look again at particular difficulties caused for unaccompanied children granted discretionary leave and turning 18, especially those granted such leave for less than one year, and to consider both the loss of substantive rights and support implications. These difficulties arise for unaccompanied children and others.

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.

Amendments

Clause 1

ILPA supports Amendments 3 and 4 (Mr Humfrey Malins, Mrs Cheryl Gillan & Mr Henry Bellingham) to retain variation appeals for students.

ILPA proposes similar amendments to retain those appeals for people in other categories, with unaccompanied children, spouses, and high level investors used as examples.

Clause 3

ILPA supports Amendment 5 (Mr Humfrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham) to ensure that the remaining appeal, against the decision to set removal directions, is heard within the UK, before the person must leave.

Clause 11

ILPA proposes that Clause 11, which makes people overstayers the moment they receive a refusal, if their original leave has run out by then, should not stand part of the Bill.

Entry Clearance Appeals *(Detailed briefing available from ILPA)*

ILPA opposes **Clause 4**, which limits rights of appeal in entry clearance cases to family visitors and dependants prescribed by order and denies rights of appeal to all other categories, including workers and students. ILPA opposes **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 here.

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.
- There is insufficient clarity on the meaning of dependants, so the ambit of the group deprived of entry clearance appeals is unclear. Is a spouse a dependant?

Amendments
Clause 4
ILPA supports Amendment 6 (Mr Humfrey Malins, Mrs Cheryl Gillan & Mr Henry Bellingham) that Clause 4 should not stand part of the Bill.
ILPA proposes an amendment to leave out subsection 88A(2)(d) inserted by Clause 4, would look at a person's purpose in coming to the UK, recalling the notorious "primary purpose" rule in marriage cases.
ILPA proposes a probing amendment to give the Secretary of State wider powers to restore appeal rights by order. He has no powers under the clause to restore rights other than for family visitors and dependants even if he wanted to do so.
ILPA proposes a probing amendment to clarify the position of people with indefinite leave returning for settlement. We can detect nothing in this clause that gives them a right of appeal against refusal.
ILPA proposes a probing amendment to clarify that the Clause conforms with European law.
Clause 5
ILPA proposes amendments to ensure that people who are refused entry on the basis that the purpose of the visit is not the same as that set out in their entry clearance have a right of appeal – the Bill as drafted gives them no right of appeal, whether in-country or outside.

Appeals: "terrorism"(Detailed briefing on terrorism provisions available from ILPA)

Clause 7 (Deportation) provides powers to hear only human rights aspects of national security appeal cases in country, with all considerations of 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 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
- 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.
- The clause is unworkable in practice: information pertaining to the national security case may well be relevant to risk on return.

Amendments:
ILPA proposes that Clause 7 should not stand part of the Bill
ILPA proposes an amendment to provide that the in-country appeal against removal should be heard before the Asylum and Immigration Tribunal, not the Special Immigration Appeals

Commission, to probe the government's contention that the two appeals can be separated and to challenge the government to substantiate the claim that they will not export risk.
ILPA proposes an amendment to leave out subsection 97A(4) inserted by Clause 7. This subsection envisages repealing the clause if the government succeeds in persuading the European Court of Human Rights that the absolute prohibition on returning people to a place where they are at risk of torture will be lifted.

Other provisions on appeals

Clause 12 Asylum and Human Rights Claims: definition removes the statutory requirement, although not the intention, that all claims for asylum should be made in person, and tries to define a "fresh claim" in statute.

EMPLOYMENT (Clauses 14 to 25) *(Detailed briefing on employment available from ILPA)*

The shape of proposals to punish employers employing those who do not have permission to work in the UK has not changed, with the main change being 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.

INFORMATION (Clauses 26 to 41) *(Detailed briefing available from ILPA)*

There are new powers to detain embarking passengers for up to 12 hours. There are new powers to fingerprint those detained, although not arrested, for example on embarkation. Information exchanges of data on passengers are increased, and powers to retain passports are extended.

Searches: Contracting Out (clauses 39 & 40)
There is widespread concern, including from PCS, the union representing immigration officers, and from Labour backbenchers, at clauses 39 and 40 giving private contractors powers to search people, and to detain them for up to three hours, at ports.

Amendment
ILPA proposes an amendment to deny private contractors power to detain, a power they do not enjoy under current legislation.

CLAIMANTS AND APPLICANTS (Cls. 42 to 49) *(Detailed briefing available from ILPA)*

Procedure (clause 47)
The government has agreed to look again at proposals to make failure to comply with the specified requirements for applications, where these are set out other than in the immigration rules, a ground for mandatory refusal.

Amendment
ILPA proposes leave out 47(2)(c), which provides for mandatory refusal for failure to comply with procedures even where procedures are not set out in rules or regulations.

Fees
The government have indicated that they would not charge individuals for advice, but might charge third parties such as advisors.

MISCELLANEOUS Cls. 50 to 54 ("TERRORISM" clauses- *Detailed briefing available*)

The government has added new clauses on terrorism to the Bill, **Clause 7** above and those in this section. They are linked to the Terrorism Bill 2005 and the proposals therein. However they 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 provision in the Terrorism Bill are relevant to these clauses.

Clause 51 purports to define in statute the meaning of Article 1F of the Refugee Convention, which sets out cases in which a person can be excluded from recognition as a refugee as not deserving of protection under the Convention.
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.

Amendments
ILPA proposes that Clause 51 should not stand part of the Bill

Clause 52 extends the grounds on which people, including but not limited to, terrorists, can be deprived of British citizenship. New provision is made in **Clause 53** 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 their 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. Citizenship is of a different order and special protection should apply. Rights to reside in the UK, to vote, entitlements in the UK, to travel as a UK national abroad and to the assistance of British Consular authorities in third countries are all engaged.
- The new 2002 powers to deprive people of their British citizenship have never been used. The case for their extension is not made out.

Amendments
Clauses 52 and 53
ILPA supports amendment 26 (Mr Humpfrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham) that Clause 52 should not stand part of the Bill.
ILPA does not consider that the case has been made for Clause 53 to stand part of the Bill.
ILPA supports amendments 1 and 2 (Mr Humfrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham) which probe the degree of certainty that must attach to a decision to remove a person's citizenship or right of abode. ILPA proposes amendments to retain the current test (in citizenship cases) of the Secretary of State being satisfied that a person has done something seriously prejudicial to the vital interests of the UK, rather than the new test, borrowed from migration cases, of deprivation being conducive to the public good.

Clause 54 applies the "good character" requirement to all registration, as well as naturalisation, applications thus ending the concept of registration by entitlement. Children, who can only become British through registration, will for the first time be subject to a good character test.

Our main points

- Registration 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 these people, previously recognised by provision for registration by entitlement.

Amendments

Clauses 54

ILPA does not consider that the case has been made for this Clause to stand part of the Bill ILPA proposes an amendment make the current test used in citizenship cases: the Secretary of State being satisfied that a person has done something seriously prejudicial to the vital interests of the UK, the test for refusing to register those who would otherwise be registered by entitlement, rather than a general good character test.

ILPA, 09 November 2005