ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 70

HOUSE OF COMMONS REPORT 16 NOVEMBER 2005

ENTRY CLEARANCE APPEALS CLAUSES 4 AND 6

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, and provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups. For further information contact Alison Harvey, Legal Officer, alison.harvey@ilpa.org.uk, 0207 490 1553

Introduction

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 and, as far as we can discern, returning residents. ILPA also opposes Clause 6, which denies in-country rights of appeal to all and, in many cases, denies any right of appeal at all, before or after removal, to those refused entry on arrival in the UK.

For an overview of these provisions we recommend reference to the House of Commons Library Research Paper on the Bill.[1] This deals with the history and context of the legislation in considerable detail. It contains the important statistic that last year 53% of appeals against refusals of entry clearance were allowed, as discussed below. Not an impressive basis for reducing scrutiny.

Government amendment 27 provides powers to appoint a monitor, but does not make it clear whether this is in addition to the existing Independent Monitor or offering power to extend his/her role, to look at appeals where rights of appeal are refused. The current Monitor's post is under recruitment and has already been advertised as a full-time post. There are no indications as to what the powers of that Monitor will be, for example whether they can intervene in individual cases. This looks like a red herring. The government proposes new management structures and a "review". There is a danger of becoming so caught up in discussions of the details of a review mechanism (which have not been fully worked up yet) that we lose sight of what is at issue here: we have a system now where the quality of decision-making is poor, and we already have a review: it is called an appeal. Even if the monitor has the power to intervene in cases, one person could not possibly replace an appeal system.

Extra management structures or more oversight by the Independent Monitor for entry clearance cases where there is no right of appeal are useful complements to an appeals system, but not a substitute for it. Without this amendment, the Minister had already said in Committee

> *"One of our aims is to enable the monitor's report to be more regularly used, not only to monitor quality but to promote it. If we receive both our official reports and the more routine reports during the course of the year, and they reflect more closely what*

[1] Research Paper 05/52, 30 June 2005, *The Immigration, Asylum and Nationality Bil,l Bill 13 of 2005-06*.

is actually happening rather than being retrospective, we will be able to achieve that aim…It will be a full-time post. The monitor will review as many cases as is considered necessary to establish a robust assessment of the quality of decision making. We will set no limit on that; it will be a matter for the person in the new, full-time post to assess what is needed in order to get to grips with the notion of quality. …I would hope that if that person is in place by the end of the year, as anticipated, we shall be able to avail ourselves of that new full-time role in order to discuss with him or her not simply what follows from the passage of this Bill, but other matters such as the role and function of an ECO; decision making outwith the Bill in terms of the five-year plan; and, crucially, the points system." (Standing Committee E, 20 10 05, 4th session, col. 131)

Who does not have a right of appeal at the moment?

- Family members not given a right of appeal by regulations
- Other visitors, be they friends of people in the UK or those wishing to visit for pleasure.
- 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)

Who will lose rights of appeal under Clause 4?

It is a long list, but examples are:

- Students wishing to come to study for more than 6 months, including those who have been accepted by an approved educational establishment;
- Employees, those wishing to come to work in the UK or on business trips
- Self employed people, those wishing to come to work in the UK, or on business trips
- Working holiday-makers
- Ministers of religion
- Business people
- People with UK ancestry
- Returning residents (people with indefinite leave to remain in the UK who are out of the country and seeking to return)
- Carers
- Family visitors to people not settled in the UK, e.g. wishing to visit people living here for work or study.
- Spouses, fiancées, unmarried or civil partners etc? (see below)
- Those coming under European Community Association Agreements (the government have agreed to look at the clause as drafted to check its conformity with European Law)

What we know from looking at Clause 4 – and what we don't

Clause 4 is drafted so that it denies all rights of appeal, then provides limited powers to restore these by making regulations. Rights of appeal on the grounds that human rights have been breached or that people have suffered discrimination on the grounds of race are preserved, as now (N.B. a successful appeal on the grounds of race discrimination would not necessarily result in a grant of leave to enter). The powers are limited to restoring rights of appeal to two groups:

i) **Visitors**. Who is a family visitor will, as now,[2] be defined in regulations. The government have indicated that they intend to give rights of appeal only to would-be family visitors of

[2] 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*

people settled here, as opposed to family members wishing to visit a person working or studying here, however long that person has been here. The Minister said in Committee that the government are looking at charging, at a redefinition of family and at having simply paper appeals not oral hearings (Standing Committee E, 4th session, 20 10 05, col 115). The government has made these points before[3] – fees having been quickly reduced after their introduction in 2000 until their welcome abolition in 2002. 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.

ii) **Dependants**. Again, the government have indicated that they intend to use the powers for dependants of those settled here. The definition of a dependant is unclear. Is a spouse, or a fiancée a dependant or not? The current Immigration Rules have a section (Part 8) headed *Family Members* which is divided into separate sections on *Spouses; Fiancées; Unmarried Partners; Children; Parents, grandparents and other dependant relatives* which suggests that the class of dependants is even smaller than that of family members.

There is **no power to use regulations to restore rights of appeal to anyone else**. In a clause where the emphasis is on flexibility, the government has been happy to tie its hands completely where vast swathes of applicants are concerned.

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.

Key questions to ask:

- **Will the government define "family visitor" more narrowly than at the moment?**
- **Can parliament see draft regulations to be made under this section, and thus see exactly who will have appeal rights, before being asked to vote on the legislation**
- **Is a spouse a dependent relative?**
- **Is an unmarried or civil partner a dependent relative?**
- **Is a fiancée a dependent relative?**
- **Is the government going to amend the Bill to ensure conformity with European Community Law?**
- **If so, when will the regulations be laid before parliament?**
- **What is to happen to returning residents – people with indefinite leave to remain in the UK who have been out of the country and seek to return but are refused? They will lose the opportunity to return to their long-term home, with no right of appeal. Why?**

Consequences of the loss of an appeal right

- Loss of time. Entry clearance applications can take up to 4 months to process in some posts abroad, according to the UK Visas website and in some cases they take

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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.

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

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.

- Loss of money.[4] Entry clearance can cost family members up to £260 per person (for a spouse, fiancé(e) or child coming for settlement). Immigration employment documents cost more. Highly skilled migrants pay £315.
- Loss of confidence – and a result we may lose them: students or business people may decide to go elsewhere, either as a result of a refusal or, in the first place, given lack of confidence in the system.

Why the government should think again

- Given the quality of decision-making, we need more appeals in this area, not fewer. Attempts to improve that quality are welcome, be they monitors or reviews, but without demonstrable improvement, all the arguments favour more scrutiny, not less.
- In 2003, there was a 53% success rate in appeals against refusal of entry clearance. More than half the initial decisions were wrong. Over half of family visitor appeals succeed. 38% decided on the papers succeed.
- "Managed migration proposals" may result in more targeted applications and may, although we remain to be convinced, simplify decision-making. These in turn may mean fewer refusals. They will not mean no refusals and unless the government contends that under Managed Migration they will always get it right first time then they provide no reason to deny people the opportunity to challenge these decisions, whether this clause is brought into force **before or after** the implementation of the managed migration proposals. (for further information - see ILPA's briefing on managed migration for Committee stage and our response to the consultation on the 5 year strategy at www.ilpa.org.uk, under *Submissions*). The Minister indicated in Committee that the managed migration proposals would not be rolled out before 2007 (Standing Committee E, 4th session, 20 10 05, col 115) and officials have indicated 2008. Offers to delay implementation of these proposals promise nothing that the government is not likely to be doing already.
- Under new "managed migration" proposals those applying for leave to come as workers, self-employed people or students will not make a separate prior application for a work permit. The entry clearance application will be the sole application. A refusal may have consequences for future attempts to enter the UK or third countries. Many business people and others may decide not to take the risk – we will lose the opportunity to have them come here.
- 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.

CLAUSE 6

Clause 6 (previously clause 5) of the Bill deals with rights of appeal against refusal of leave to enter for those who arrive at a UK port. The current position is[5] that those who arrive at port without valid entry clearance or continuing leave (leave is 'continuing' if it was for a period 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.

Entry clearance or continuing leave 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

[4] See the House of Commons Library Research Paper on the Bill at page 64, a discussion of fees.
[5] Our view of the position is different from that set out in the House of Commons Library Research Paper. This no fault of the authors of that paper, but of the tremendous complexity of the legislation

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. One effect of **Clause 6** is to make this an out of country right of appeal, for which the passenger can only lodge the appeal after removal.

Two other changes are envisaged. The first concerns those refused on the basis that the purpose of their visit is different from that for which entry clearance is granted, who currently have an out of country appeal against removal of leave to enter. Under the Bill they will lose any right of appeal altogether. ILPA is concerned that there will be no independent check on whether this extension of powers is operated fairly, because there will be no opportunity to appeal.

Finally, **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. Rights of appeal on grounds of asylum, human rights and race discrimination are preserved.

ANNEXE – AMENDMENTS

BFORE CLAUSE 4

Proposed amendment from ILPA

New clause before clause 4

For Sections 90 and 91 of the Nationality, Immigration and Asylum Act 2002 (Restricted right of appeal in relation to entry clearance for Visitor or Student) substitute the following:-

90 Entry clearance
(1) A person may not appeal under section 82(1) against refusal of entry clearance as a visitor unless the application was made for the purpose of visiting a member of the applicant's family.
(2) In subsection (1) the reference to a member of the applicant's family shall be construed in accordance with regulations made by the Secretary of State.
(3) Regulations made under subsection (2) may in particular
(a) define "member of the applicant's family" for the purposes of this section;
(b) make provision by reference to the duration of two individuals' residence together;
(c) confer a discretion.
(4) A person may not appeal under section 82(1) against refusal of entry clearance as a student if the application is for entry clearance to follow a course of study and:
(a)The course of study for which he has been accepted will not last more than six months; or
(b) He has not been accepted for a course; or
(c) The course of study for which he has been accepted is not at a UK education institution on the approved register.
(5) Where a person has no right of appeal under subsections (1) or (4) above, a person applying for entry clearance as a dependant on his application shall have no right of appeal.
(6) Nothing in this section prevents the bringing of an appeal on either or both of the grounds referred to in section 84(1)(b), (c) and (g)

Purpose
A probing amendment, primarily designed to ensure that these amendments are selected for debate and thus ensuring debate for the amendment laid by Mr Humfrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham to leave out clause 4. To preserve the status quo on entry clearance applications for visitors and students save that in no circumstances will students who are not coming to study at an institution on the approved register have a right of appeal and that students will only be admitted for courses of study at UK institutions on the approved registers and that regulations as to family visitors can confer a discretion.

CLAUSE 4

Amendment 6
Mr Humfrey Malins Ms Cheryl Gillan Mr Henry Bellingham
ILPA supports the proposal that Clause 4 should not stand part of the Bill
Amendment also supported by (based on Committee stage briefings: IAS, UUK, NUS, AOC, UKCOSA, Law Society)

Page 2, line 36, leave out Clause 4 (Entry Clearance Appeals)

Purpose: Maintain the status quo re Entry Clearance Appeals, keep rights as they are now.

Proposed amendment from ILPA (Repeat of Amendment 79 laid by Dr Evan Harris, Mr John Leech at Report)

Clause **4, p**age **3** line **24 Leave out** sub-clause (2)(d)

Purpose
To avoid making a subjective test, that of intent, the determinant of whether or not a person has an appeal against refusal of entry clearance.

Briefing
Sub-section 2(d) recalls the notorious "primary purpose" rule in marriage applications. If the new section 88A(2)(d) were only intended to cover objective criteria this could be achieved by specifying categories of dependant on the face of the legislation.

Proposed amendment from ILPA (repeats Amendment 78 laid by Dr Evan Harris, Mr John Leech)

Clause 4, page **3** line **9** , at end insert - ", or

(c) entering for any other purpose prescribed by order for the purpose of this subsection"

Purpose
To probe the government's intention in denying itself the power to retain, through the making of regulations, a wider range of appeals against refusal of entry clearance than just those for dependants. ILPA is opposed to the granting or denial of rights of appeal being made a matter for secondary legislation. Nonetheless, the government should be asked to explain why, in taking such powers, it has not taken powers to extend rights of appeal to persons other than family visitors, for example students and workers. This probing amendment is intended to clarify the meaning of this clause, and the intentions behind it.

Proposed amendment from ILPA (repeats Amendment 83 laid in Committee by Dr Evan Harris, Mr John Leech)

Clause **4**, page **3**, line **9** at end insert- ", or

(c) entering for settlement as a returning resident in accordance with the provisions of the immigration rules."

Purpose
To preserve a right of appeal for those who have already been granted indefinite leave to remain (settlement), and who are applying overseas to be permitted to re-enter for that purpose. The Minister suggested in Committee that there was not a problem in such cases but we can see nothing in the clause that preserves their rights of appeal against refusal of entry clearance.

Briefing
This group of applicants currently has a right of appeal. The government's stated intention, to remove appeal rights from students and workers, fails to mention this group. The effect of the clause, which is that they lose appeal rights, may be an oversight. The numbers who need to apply from abroad in these cases is small, but the right of settlement they are seeking to exercise ought not to be denied them, without good reason, after it has previously been granted. Giving a right of appeal would avoid this group of applicants pursuing inappropriate human rights claims or judicial reviews.

Proposed amendment from ILPA (repeats Amendment 84 laid in the names of Dr Evan Harris, Mr John Leech)

Clause 4, page 3, line 9, at end insert- ", or

(c) entering in accordance with the terms of any provision of the immigration rules which relates to a provision of Community law."

Purpose

The Minister agreed in Committee to look at whether Clause 4 made adequate provision for European nationals (Standing Committee E, fourth session, 20 10 05, col. 118), this amendment gives him an opportunity to report back.

CLAUSE 6

13. Proposed amendment from ILPA

Clause 6**,** page **4**, line **3** Leave out sub-clause (1)(b)

Alternative (see below):

Clause 6, page 4, line 3, leave out subclause (b) and insert -
"(b) if section 92(3C) applies"

Purpose

A probing amendment. Under the proposed Clause 6 those refused on the grounds that the purpose of the visit is not the same as that specified in the entry clearance will have no right of appeal whether within or out of country. The amendment goes beyond restoring the current position (whereby, for example, students entering for a course of study of less than 6 months duration are denied any right of appeal) but provides a sufficient vehicle to probe the government as to why there should be no right of appeal at all in any cases turning on the purpose of the visit (a more sensible version was tried at report – amendment 103, although it was incorrectly worded as "92(3)(c) instead of 92(3C), but the Minister gave it short shrift so we provide the option of going for something more categorical although less good technically). This reason for refusal can be very subjective and should be subject to oversight. If the technically correct amendment, which would not restore rights to those who do not have them at the moment is wanted, then it should be Clause 6

Briefing Note

A passenger arriving with entry clearance will already have demonstrated to the satisfaction of the Entry Clearance Officer overseas that he or she has a claim to enter the United Kingdom. If an immigration officer at a port in the United Kingdom is considering taking away a status already granted by a colleague, there should be some safeguards. Again the clause recalls the 'primary purpose' rule, repealed by the government in 1997. In the primary purpose cases there was at least a right of appeal, even if it was always difficult to satisfy a court of someone's intentions when they were not available to give oral evidence. The new clause removes any right of appeal at all, on a negative presumption about a passenger's intentions.