ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 70

HOUSE OF COMMONS REPORT 16 NOVEMBER 2005

VARIATION APPEALS – CLAUSES 1, 3 AND 11 and government proposed NC1

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. For further information contact Alison Harvey, Legal Officer, alison.harvey@ilpa.org.uk, 0207 490 1553

IN-COUNTRY RIGHTS OF APPEAL REMOVED.

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 exception on the face of the Bill is for variation appeals by people with existing leave as refugees. There is a power to except other groups by orders made under new subsection 82(2)(fb) inserted by Clause 1 and the government has indicated that it intends to use these to give those with existing temporary humanitarian protection in-country rights of appeal.

Those who raise asylum or human rights claims that are not certified as clearly unfounded will have an in-country right of appeal, but will have all the problems set below as far as terms and conditions of their leave are concerned.

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. Why? These are people who have come here legally, have abided by the terms and conditions of their leave and now seek more. Very often the initial leave is given with a view to the likelihood of further leave being given in the future. A spouse, unmarried or civil partner, is expected to stay with his/her partner for more than the initial two-year period: if there were doubts about that, leave would not have been given in the first place. Business people are expected, and expects, to grow a business in which over £200,000 has been invested, for more than two years.

The Minister suggested in Committee that there was some unfairness in giving a right of appeal against refusal to vary leave in cases where the decision results in people having no leave left, whereas those who applied and got refused before their original leave has run out get so such appeal. This unfairness does not exist in practice. The Home Office urges people not to apply for a variation until a short time, usually a month, before their leave expires. In the vast majority of cases, the decision on the application for an extension does not arrive until after their original leave expires. Where a person applies for a variation and does get a refusal before their leave runs out, normal practice would be for them to make a fresh application before their leave runs out, addressing what are considered to be the short-comings in the refusal in that application. At the moment, most people prefer not to do this, because it means paying two lots of Home Office fees [£335, or £500] . However, faced with the prospect that if they do not they risk becoming overstayers, more will apply earlier –

possibly applying for the extension very soon after they first arrive. The Home Office will have more applications to decide. So much for streamlining.

- **Will the Home Office confirm that it will not continue to tell people not to apply for a variation more than 28 days in advance of their leave expiring if Clause 1 becomes law?**

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. The special problems the clause creates for unaccompanied children refused recognition as refugees but granted discretionary leave until their 18th birthday are discussed in detail in the briefing from the Refugee Children's Consortium. ILPA is a member of the consortium and endorses all their points.

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 the UK.
- 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.
- Home Office success rates at appeal may look better, but only at the cost of justice and efficiency.
- 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.

Who loses in-country the right of appeal?

People living, studying and working in your constituency, complying with immigration law. Students, workers, those running businesses, spouses, unmarried partners, carers, ministers of religion, children and quite a few other people besides. All facing considerable disruption if they have to leave the country to appeal, even if they win in the end. For example:

- A person who married here and has been living for two years with their British citizen or British resident, spouse, perhaps with children, and has been refused indefinite leave to remain on the basis of that marriage.
- A work permit holder, e.g. a nurse, maths teacher, head of an export department in a big company, whose employer wants them to extend their contract but whose application is refused.
- A person established in a business in which s/he has invested at least £200,000 and who has created at least two jobs for people settled in the UK refused leave to continue in business.
- A student several years into their studies, refused leave to stay for a viva voce examination or graduation ceremony, or do a higher degree as a fee-paying overseas student.
- An unmarried or civil partner who has been living with his/her partner for two years and applies for indefinite leave on the basis of the relationship.

Do those refused have hopeless cases?

- No. Hopeless cases, those where the person does not fit a mandatory requirement for the leave requested (e.g. as to age; nationality, or requirements for switching from one category of leave to another) do not attract a right of appeal in any event.
- 33% of in-country non-asylum appeals succeeded in 2003[1]. Reasons range from administrative errors to failures to apply the law correctly to failures to weigh supporting evidence and exercise judgement as required at the initial stage. While the Minister warned in Committee against "casual empiricism"; he acknowledged that there was a problem with quality.

The Mistakes

If the person checking your application to see whether the provider of training is a bona fide institution types (correctly) "Sotheby's" for the, s/he will be told not that the auction house is not a registered provider. If s/he types "Sothebys" s/he will be told that it is a registered provider. Similarly the order in which City Univerity Business School is typed will determine whether the School is recognised as a registered provider.

A notice of refusal sent to an ILPA member on a client's case earlier this year (without appeal papers) stated in a single sentence that the person had applied on 9 March, their leave ran out on 12 March, and therefore [quite wrongly] they had applied when they no longer had any leave and did not qualify for an appeal.

WHY THE GOVERNMENT SHOULD THINK AGAIN

This is not a building block of the managed migration system

- The government says that its new points-based managed migration system will improve initial decisions to allow people to come here to work or study. But the better the initial decision to grant a person leave to enter, the more reason to scrutinise carefully a subsequent refusal to let them stay. If the government thought that they would get every decision right, they would have no reason to retain appeal rights in or out of country. Managed migration stands or falls on its own merits, as does the decision to remove in-country appeal rights.
- 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 uncertainty created by the provisions.
- *(See www.ilpa.org.uk, Briefings for our briefing on managed migration and Clause 1 for Commons Committee)*

[1] *Control of Immigration Statistics United Kingdom 2003* (Nov 2004) Cm 6363

This is not about streamlining.

- There is nothing streamlined about denying people who are already working or studying in the UK, with family, the chance to go to the Asylum and Immigration Tribunal and explain that the Home Office got it wrong before their life is disrupted when you look at the alternatives.
- Many variation applications already make reference to human rights: family life, right to peaceful enjoyment of possessions. The proportion will increase, and it will be more difficult to certify the human rights claim "clearly unfounded" (thus denying an in-country right of appeal) when the person faces departure from job, family, business, before the merits of their appeal have ever been tested. There will be more challenges to certificates in the High Court and more chances of success and of injunctions, because of the disruption and irreparable consequences for people's lives of a precipitate wrongful departure, ranging from effect on mental health of children or partner to destruction of business.
- People will turn to their MPs, others in positions of influence or grass roots movements to put a case they should be able to put before a judge.
- While some people will not be able to overcome the hurdles involved in mounting an out of country appeal others, for example people with the support of their employers or educational institutions, or standing to lose a valuable business, will appeal from abroad. This is a complex and costly produce and it is harder to do justice when the appellant is not present in court and cannot give oral evidence(unless video link is used)
- If people win they (and their employers or family members) may have compelling claims for compensation and redress, which will become all the more compelling as they await fresh entry clearance to return.

Yes, people still have a right of appeal against removal, but they only get to exercise it after they have left.

- A decision to remove can only be made once the person is an overstayer. The government have pinned all their hopes on a single right of appeal that only exists for those here without legal leave, while abolishing the right of appeal that existed for those here with legal leave.

Key questions: Taking away in-country rights of appeal

- **Why take these rights away?**
- **Who outside government thinks that this is a good idea?**
- **Why is an in-country right of appeal not considered better than people making representations to MPs, or seeking to challenge cases before the High Court? There is an easy way and hard way to resolve problems – why chose the hard way?**
- **Will not forcing people to leave the UK, families, work and studies, until the case is finally decided increase the likelihood of breaches of human rights, and of human rights claims being made, including in the High Courts, and succeeding?**
- **Who will compensate people who leave the country, their job and business, only to win their appeal? Who will compensate their employers?**

TERMS AND CONDITIONS OF LEAVE

Clauses 1 and 11 make anyone refused an extension of leave with right of appeal under new subsection 82(2)(fa) inserted by Clause 1 (recognised refugees applying to stay) or under the order-making powers in 82(2)(fb) into an overstayer. So, not only is the nurse or spouse refused further leave, but finds him/herself at once converted into an overstayer for doing no more than, like Oliver Twist, asking for more.

" *I understand and accept the …use of the term "criminalisation", but if someone's application is unsuccessful and they no longer have a right to stay in the country, that is as it is across the piece in terms of any other aspects of immigration. Yes, he is strictly right, in the sense that that criminalises people"* (Minister of State, Standing Committee E, First Session 18 10 05, Col 36)

The Minister noted in Committee that it is relatively rare that an overstayer be prosecuted and charged with the criminal offence of breaching immigration control. Thus we are disappointed that the only amendment brought forward (**government NC1)** merely addresses the question of the criminal offence.

It is not rare but an everyday occurrence that once an overstayer a person is denied the right to work, the right to access benefits, many rights of access to the health service, the right to study and is liable to detention. It is also the case that the employers of an overstayer risk prosecution. There is also the confusion that will inevitability result from lack of clarity about entitlements. The Minister appeared to take these problems seriously in Committee and this is another reason for being our wholly unimpressed by **NC1**. He said:

"We intend to clarify things, rather than "give ground" or "make a U-turn" and all that sort of stuff, so that the practice is, as it is now—this is where the disingenuous bit comes in—that people are not pursued, hounded and criminalised between the expiration of their leave and the outcome of their appeal. That is done in a very informal way. If there is confusion in the Bill and in the terms, we will need to amend the Bill and reflect the amendments in the rules. In terms of leave, we must get to a stage—this is a fair point, however disingenuously put by some—at which people are not affected at all until the exhaustion of their last appeal against removal. That is the situation that prevails now, anyway. People are not hounded as overstayers. " (Minister of State, Standing Committee E, 2nd session 19 10 005, Col. 60

Thus, he dealt first with liability for a criminal offence. His argument was: we do not prosecute now. Yet **NC1** offers no more than a promise that, in very limited circumstances, the government will not prosecute in future. It gives nothing more than what the Minister said was the status quo now. He then dealt with the wider question of leave and being an overstayer. **NC1** does nothing to address that. In the Minister's own terms it is a failure, for he said:

"*I do not want to get to the stage where there is a neutral position because of legislation between legal routes and illegal routes or, worse, that by some perverse design, the consequences of legislation or of immigration rules in the wider context encourages illegality rather than legality.*(Minister of State, Tony McNulty MP Col 37, Standing Committee E)

" There is confusion about people's status at the tail end of the decision-making process, after the decision to remove, and during the subsequent appeal against removal. I fully accept that." (Minister of State, Standing Committee E, 2nd session 19 10 005, Col. 60

"Let me be clear: if we need to amend the primary legislation in the Bill to clarify section 24(1)(b) of the 1971 Act, I shall. ***Equally,*** *if I need to clarify the same point in the immigration rules in relation to the gap between a final decision and the commencement of the appeal process, I shall."* (Minister of State, Standing Committee E, 2nd session 19 10 005, Col. 60 – emphasis added)

> *"The only issue. is the difference and gap between the cancellation of leave and removal. I made it clear during the debate on clause 1 on appeals that we would examine that gap and not leave people in limbo. I am happy to give that assurance again in terms of any cancellation of leave*." (Minister of State, Standing Committee E, 6th session 25 10 005, Col.245 – dealing with Clause 40)
>
> (In the context of looking how these problems would affect unaccompanied children) *"We must get straight, across a whole range of fronts, support and other elements of the process"* (Minister of State, Standing Committee E, 2nd session 19 10 005, Col. 61)

The government amended the Bill in Committee to give those who will have an in-country right of appeal for which special provision is made in new subsections (fa) and (fb) of Clause 1, continued leave pending a final decision on the appeal (see now Schedule 4 paragraph 1). Other people who have in-country appeals, for example human rights appeals, will, under the Bill as drafted, remain in the UK for their appeals but be overstayers.

NC1 does not even rectify the problem in the limited context of the criminal offence. The Minister noted in Committee: *"There is a long time between refusal of leave and removal decisions being made"* (Standing Committee E, First Session, 18 10 05). All **NC1** does is to ensure that people will not be liable for prosecution between the time when the Home Office (finally) makes a decision to remove them to the time when the appeal is finally determined. Condition 2, set out in subsection (3) of the new clause, means that during the lengthy period identified by the Minister, a person is not even protected from criminal prosecution but is a sitting duck until such time as the decision to remove is made. Presumably the Minister will say that it is not usual to prosecute in these circumstances. But that would only serve to highlight that NC1 is mere window-dressing, failing to address the substance of any concerns.

Those with out of country appeals, however quickly they leave the UK, they risk having their passport endorsed with a note that they are an overstayer. 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 Immigration Rules, paragraph 320(11) state as follows:

> **"Grounds on which entry clearance or leave to enter the United Kingdom should normally be refused**…(11) failure to observe the time limit or conditions attached to any grant of leave to enter or remain in the United Kingdom."

Under the new system, a person will have no control over whether they are made an overstayer or not. They apply before their leave expires but it will depend entirely on the Home Office whether they get a decision on that application before their leave expires, or after.

Key questions: Rendering people overstayers

- **Is NC1 it?**
- **Is the government going to ensure that people with an in-country right of appeal (for example because they have alleged a breach of human rights) retain their existing conditions of stay until the appeal is finally decided?**
- **All of them or some of them?**
- **How?**
- **What will happen if a human rights claim is certified clearly unfounded (so that the appeal would be out of country)? What is the person brings a judicial review – will they retain their existing conditions of leave until this is decided?**
- **Will a person who leaves the country to do appeal so become an overstayer before they depart or future will amendments avoid this?**

- **How?**
- **When will we see the amendments?**

What is going wrong?

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 Minister acknowledged the problem (see quote above) in the debate on unaccompanied children when reiterating his promises to look again at the effects of Clause 11. If a person is left technically an overstayer, even if the government goes beyond **NC1** and allows them to remain on the same terms and conditions as before, pending the decision on their application, there will be confusion as to their entitlements and whatever the government's intention, they will be unlikely to access that to which they are supposed to be entitled.

Clause 3 provides for the subsequent, usually out of country, appeal against the decision to remove to address the question of why the variation was refused in the first place. We queried the drafting but the Minister assured us that it would allow all matters that could have been raised against the refusal to vary leave to be raised, and that if it were held that the refusal to vary leave had been wrongful, the appeal against the decision to remove could succeed on this basis.

There are other ways to achieve a one-stop appeal, without all this fuss.

- The government has power to issue certificates (under s.96 of the 2002 Act) preventing people from raising on appeal matters they have raised *or could have raised* at an earlier appeal. Yes, these certificates can be challenged on judicial review. But so can certificates under the proposed system that the human rights element of the claim is manifestly ill-founded. ILPA proposed a probing amendment, moved by Dr Evan at Harris at Committee (Amendment 77), that would have structured the clause around an expectation that such certificates would be issued.
- The government is running into all the problems of people becoming overstayers because the right of appeal it has fixed on to be the single right of appeal, a right of appeal against the decision to make removal directions, demands that people be overstayers.
- The Minister said in Committee *"When the application for further leave is refused, the problem…arises in large part because a decision to remove cannot be made until after the appeal against the refusal of variation of leave"*(Col 31). ILPA proposed a probing amendment, moved by Dr Evan Harris at Committee stage (Amendment 71), that would have enable the government to make simultaneous variation and removal decisions thereby presenting an alternative way of curing any perceived mischief of multiple appeals. The Minister's response to the amendment was "*It cannot be right. We want to get to a stage where we have a one-stop appeals system. The appeal process on removal is about all the decisions made thus far.*" (Col 60). We disagree. Immigration judges spend a good deal of time anticipating the consequences of removal: the law requires them to do this in asylum and human rights claims and when undertaking. If they are asked to consider whether a student was wrongly refused variation of leave, we do not see that they would be incapable of addressing their minds to the point that if refused the variation, the student would have to leave the UK and interrupt his/her studies. 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.

Key Questions

- **Won't the government keep getting stuck because the way it has written the Bill the only right of appeal is against a decision to remove; a decision that can only be made once a person has become an overstayer?**

ANNEXE : NOTES ON AMENDMENTS

Proposed amendment from ILPA

New Clause before Clause 1-

() The Nationality, Immigration and Asylum Act 2002 (c.41) is amended as follows:
( ) After s. 82 insert-

> **Section 82(A) One Stop variation appeals**
> " (1) An immigration officer may decide that directions are to be given for the removal from the UK of a person if the Secretary of State has varied or refused to vary the person's leave to enter or remain, with the effect that he has no leave to enter or remain otherwise than under subsection (3) below.
> (2) The immigration officer may give directions for the person's removal once the time for giving notice of appeal against the decision described in subsection (1) above has expired and no appeal under that sub-section is pending.
> (3) The person's leave to enter or remain in the United Kingdom, notwithstanding the variation or refusal to vary his leave to enter or remain, is extended for the period during which no decision under subsection (1) above is taken and an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (c.41) could be brought against that decision or is pending."

Purpose
To probe the government's intentions and increase the chances of debate on Clause 1, ranging wider than government NC1, being selected. These is a probing amendment; ILPA sees no reason to get rid of variation appeals as the government proposes. The effect of the amendments is to enable the government to make simultaneous variation and removal decisions thereby presenting an alternative way of curing any perceived mischief of multiple appeals. There is already provision in the Nationality, Immigration Act 2002 s. 85 which would allow the Immigration Judge to consider both appeals at the same hearing. Based on amendments moved by Dr Evan Harris and Mr John Leech at Report

(Proposed consequential amendments from ILPA

Leave out Clause 1.

Leave out Clause 11

Schedule 1
Page 32, line 5 leave out paragraphs 16 and 18 & 19 of Schedule 1)

CLAUSE 1

Amendment 4
Mr Humpfrey Malins, Mrs Cheryl Gillan Mr Henry Bellingham
ILPA supports the proposed amendment

Clause 1, page 1, line 16, at end insert

() the leave was granted to a person to follow a course of study at a UK education institution on the approved register; or

Purpose:

Give all students studying at approved institutions an in-country (by virtue of Schedule 1, paragraph 9) right of appeal against a refusal to vary leave. Also, by virtue of Schedule 1, paragraph 4, solves the problem created by Clause 11, which the government says it will examine, which makes people overstayers between refusal and appeal.

Amendment 5
Mr Humpfrey Malins, Mrs Cheryl Gillan Mr Henry Bellingham
Support from : IAS, UUK, NUS, AOC, UKCOSA
ILPA supports the proposed amendment

Clause 1, page 1, line 16, at end insert

(fc) Variation of, or refusal to vary, a person's limited leave to enter or remain in the United Kingdom if

(i) leave was granted to a person to follow a course of study at a UK educational institution on the approved register; and

(ii) (the result of the variation of refusal taking effect is that the person is unable to complete that course of study, attend or undertake any event or action in connection with that course of study or move from that course of study to another course of study at the same or another institution.

Purpose:
Give students studying at approved institutions a right of appeal against a refusal to vary leave. More limited than the amendment above – catches only those whose application to vary leave is for the purposes of continuing that course, moving from one course to another (or changing institution) or attending a viva voce examination, graduation ceremony or other such event connected with the course. Because it creates a new subsection, (fc), it does not, unlike the amendment above, provide for an in-country right of appeal, nor address the problem of a person becoming an overstayer between refusal and appeal. ILPA would propose adding the two consequential amendments suggested below, to ensure an in-country appeal and a continuation of leave pending appeal.

Proposed consequential amendment from ILPA

Schedule 1, paragraph 9, line 26, after "(fb)" insert "(fc)"

Purpose of consequential amendment: Ensure that an appeal under new subsection (fc) inserted by the first amendment will be in-country.

Proposed consequential amendment from ILPA

Schedule 1, paragraph 4, line 9, leave out "or (fb)" and replace with "(fb) or (fc)"

Purpose of proposed consequential amendment: Ensure that pending the final decision on an appeal under new subsection (fc) inserted by the first amendment the appellant's leave will continue on the same terms and conditions. Note that paragraph 4 was inserted in Committee by Government Amendment 59. The effect of this amendment was that, despite the provisions of what is now Clause 11, those appealing against a decision to refuse to extend their leave following recognition as a refugee, or because they have been given an in-country right of appeal by an order made under the proposed 82(2)(fb) would retain their current leave, with the attendant rights (for example to work, to family reunion) during the period between refusal and final determination of the appeal. In the debate the Minister said rather less than this in speaking to the amendment and, for reasons we do not understand, spoke to it in a group on Clause 4 of the Bill, describing it as "consequential to many of the other elements in clause 4 and should have been included when we drafted the amendments." (Hansard HC Report Standing Committee E Immigration, Asylum and Nationality Bill,

Thursday 20 October 2005 (Afternoon) col 133.) This appears to be incorrect: new subsections 82(2)(fa) and (fb) are inserted by Clause 1 and have nothing to do with Clause 4. The Bill team have confirmed to us that government amendment 59 relates to Clause 9.

Some of the arguments have most resonance in relation to students, but other points may be made more strongly in relation to other categories. Some 40 categories of people (at least) will lose appeal rights under this clause. We cannot put down 40, but two or three examples (see our proposals below) should suffice to allow MPs to raise a range of concerns and to note in speaking the effect on other groups. Examples from the categories on offer appear in the table below. We are also looking at the possibility of an amendment re unaccompanied children to allow the Minister to explain what thinking he has done on this matter, which he promised to take away from Committee.

Proposed amendment from ILPA

Clause 1, page 1, line 16, at end insert

"() leave was granted to the person as the spouse of a person present and settled in the United Kingdom and the person has completed a period of 2 years as that spouse and is applying for indefinite leave as a spouse; or"

Purpose: To mirror the first amendment on students, above, and provide an opportunity to raise the problem of the loss of in-country appeal rights for spouses who have completed the 2 year probationary period and are now applying to stay with their husband/wife in the UK (see Immigration Rules, HC 395, paragraph 284). Also an opportunity to probe on dependants, including the young and the elderly, carers, unmarried and civil partners and other domestic cases

Proposed amendment from ILPA

Clause 1, page 1, line 16, at end insert

"() leave was granted to the person to establish himself in business and he has invested more than £200,000 of his own money directly into the business in the United Kingdom, has created full-time paid employment for at least two persons settled in the United Kingdom and is applying for an extension of stay to remain in business."

Purpose
To mirror the first amendment on students, above, and provide an opportunity to raise the problem of the loss of in-country appeal rights for business people (the £200,000 investment and providing of jobs for 2 people settled in the UK are drawn from the relevant passage of the Immigration Rules (HC 395, paragraph 206). Also an opportunity to probe on loss of appeal rights for workers in employment, as opposed to self-employment, and to highlight the effect on the employers as well as the migrant. A chance also to raise the question of compensation claims.

CLAUSE 3

Amendment 5
Mr Humpfrey Malins, Mrs Cheryl Gillan Mr Henry Bellingham
ILPA supports the proposed amendment
Amendment also supported by (based on briefings at Committee stage) IAS, UUK, NUS, AOC, UKCOSA

Clause 3, page 2, line 31, at end insert-

( ) An appeal under subsection (2) may be brought in the United Kingdom

Purpose: To ensure that appeals against a refusal to vary leave (ie by operation of Clause 1 decisions to remove when a person has previously been refused a variation of leave) are heard in the UK. This general amendment will also provide the opportunity to raise the special problems of unaccompanied children, which the government agreed to examine.

NB – alternative (**Amendment 7a**).

Schedule 1, page 32, paragraph 9, line 26, after "(fb)" insert "(g)"

Purpose This amendment would ensure that a person who was not an illegal entrant (illegal entrants are dealt with at 82(2)(h)) would have an in-country right of appeal against the decision to make removal directions. The way it is drafted does not include dependants.

CLAUSE 11

Proposed amendment from ILPA (repeats Amendment 22 laid at Committee stage by Mr Humphrey Malins, Mrs Cheryl Gillan, Mr Henry Bellingham, Dr Evan Harris, Mr John Leech.)

Clause 11, page 5, line 25, leave out Clause 11

Purpose
To preserve the existing position whereby leave for those refused a variation application continues on the same terms and conditions until the application and any appeal is finally determined. The government promised to come back to this matter on report and this amendment gives them a chance to do so.

CLAUSE 45 Removal: cancellation of leave

Proposed amendment from ILPA

That Clause 45 should not stand part of the Bill

This clause takes us back to the debates on clauses 1 and 11. Section 10 is the power to issue removal decisions, and it is against the decision to issue removal directions that an appeal will lie for those refused variation of leave, once variation appeals are abolished. The decision to cancel leave in these circumstances raises the same problems that are raised by Clause 11 (see above)

Amendments to Government New Clause 1 NC1

Amendment no. ??
Dr Evan Harris, Mr John Leech

As an amendment to NC1

Line 8, leave out subsection (3)

Presumed purpose
To ensure that people are not liable to prosecution in the period between refusal to vary leave and a decision to remove being made. As the Minister noted in Committee, this gap can be very long.

Proposed ILPA Amendments to NC1

First amendment

Line 5, at end insert
"At a time when the conditions in this section are satisfied a person's leave to enter or remain is extended by virtue of this section save that such extension shall not prevent a decision to remove the person from the United Kingdom being made.

Second amendment

Line 8 after "been" insert ", or could be,"

Third amendment

Line 11 before "the person" insert "where a decision to remove the person from the United Kingdom has been made"

Fourth amendment

Line 11 leave out from "while" in line 11 to "Kingdom" to (appeals) in line 12

Purpose
To ensure that a person whose leave has been curtailed does not commit a criminal offence during the period during which s/he could appeal or, if the appeal is in country, while it is pending. Improves on NC1 because it also ensures that the person's leave continues on the same terms and conditions as before while s/he remains in the UK.

Details
First amendment: adds in (mirroring the wording in schedule 4 paragraph 1) that not only does the person not commit a criminal offence but leave continues on the same terms and conditions as before – ie rights to work, study, receive health care and other welfare support are preserved as per original leave, no liability to detention or removal during the period in question. But does not prevent a decision to remove being made (a bit like our suggested new clause before clause 1).

Second amendment and third amendment: Taken together ensure that the person is not liable to prosecution (and, as per first amendment) retains leave during the period preceding the making of a decision to remove) by changing the conditions from a decision to remove having been made to that such a decision could be made or, where it has, time for appealing has not expired.

Fourth amendment: (read with third amendment) ensures that regardless of whether the appeal is in-country or out of country, the person is not liable to prosecution and leave continues on the same terms and conditions during the period until the time limit for appealing against the decision to remove has expired. Has all the flaws of that approach – entitlements are clear in the clause but will not be so in practice, to schools, colleges, employers, health service providers etc., as Neil Gerrard MP described in Committee, but such problems are inherent in the government's approach.

Other appeals provisions

On entry clearance appeals, and appeals against refusal of entry, see separate ILPA briefing on Entry Clearance appeals. On Clause 7, see separate ILPA briefing on Terrorism.

Other new provisions

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