ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 13
HOUSE OF COMMONS STANDING COMMITTEE
COMMITTEE SESSION, 19 OCTOBER 2005

CLAUSES 3: NOTES FOR CLAUSE STAND PART

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.

Briefing Note - to this amendment and to Clause Stand Part

1. This will be the only appeal people refused a variation (including an extension) of leave have to challenge their removal. Save in human rights and asylum cases, these will be heard after the person has been removed. In all cases, save those of people already recognised as refugees and seeking leave to remain as refugees (**Clause 1(4)** inserting new subsection **(fa)** and anyone given protection under **(fb)**) a person would, by the operation of **Clauses 1 and 9** become an overstayer prior to being able to appeal against a decision to set removal directions.

2. A person who loses their right to appeal against variation (including extension) of leave by operation of Clause 1, will instead be able to appeal against the decision to remove them from the UK. The effect of **Clause 3(2)** is stated in the **Explanatory Notes** to be that "a person affected by the removal of a right of appeal by Clause 1 has the earlier decision taken into account in an appeal against the later removal decision". By virtue of the **new s. 84(1A)** as inserted by **Clause 3(2)** the person appealing against the decision to remove him or her would also be able to raise grounds of appeal against any decision that 'gave rise to or facilitated' the decision to give removal directions. A decision that gave rise to or facilitated the decision to give directions for a person's removal for having stayed beyond the time limited by his or her leave might be the previous decision refusing to vary his or her leave.

3. In other words, in appealing against the decision to remove them, the person should be able to challenge the original refusal to vary their leave and the merits of that decision.

4. This will be scant comfort to a person who has already become an illegal overstayer, had to stop working or studying, been forced to leave the UK and had it noted in their passport that they are an overstayer.

5. It may be of even less comfort than the Explanatory Notes suggest. The Bill as presently drafted will not necessarily achieve the objective of allowing people to raise any complaint they may have about the variation decision in an appeal against any subsequent and consequent decision to remove them from the UK. The reasons are rather complicated, and rather technical.

6. First, **Clause 3** of the Bill as drafted does not appear to have the effect that an appeal could be allowed if the tribunal found that a decision which 'gave rise to or facilitated the making of the appealable decision' was wrong.

7. An appeal may only be allowed if 'a decision against which the appeal is brought *or is treated as being brought* was not in accordance with the law…or a discretion exercised in making a decision against which the appeal is brought *or is treated as being brought* should have been exercised differently' (Nationality, Immigration and Asylum Act 2002, **s. 86(3)** (emphasis added)). The clause would appear to need to be amended to ensure that a person could win their appeal against the decision to make removal directions on the basis that the original refusal to extend their leave was wrong. This, we suggest, could be achieved by providing expressly that 'for the purpose of **section 86(3)** such other decision is to be treated as a decision against which the appeal is being brought'.

8. Secondly we would ask the Minister to clarify that it is the intention of the government in putting forward this clause that the decision is to refuse to vary leave in the circumstances envisaged by **Clauses 1 and 3**, is always to be treated as a decision that 'gave rise to or facilitated' the decision to remove. We want to be absolutely clear that people will not be denied the opportunity to call into question the merits of the original refusal to vary leave on a technicality.