IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 13
HOUSE OF COMMONS STANDING COMMITTEE
COMMITTEE SESSIONS 3 & 4, 20 OCTOBER 2005

CLAUSES 4 and 5 GENERAL BRIEFING FOLLOWED BY NOTES ON AMENDMENTS

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

Guide to Briefing
This briefing contains:

A. An overview of the clauses

B. What the government may say (with statistics, case studies, quotations, examples):
- Trust us, we're the government - we always get it right first time – the people whom we refuse are just trying it on;
- You are making a fuss about nothing- these are not important rights;
- They lose nothing – they can simply apply again for entry clearance;

C. A review of amendments laid

A. Overview

1. For an overview of these provisions we recommend reference 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 of the executive.

2. The effect of **Clause 4** is to remove rights of appeal against being refused entry clearance abroad from all those refused except those applying to visit specified (as yet undefined) family members or those applying as dependants of specific and equally undefined people. The Explanatory Notes merely indicate an intention to specify those proposing family visits or seeking entry for settlement as family members in regulations. This would mean that no students, workers, working holiday-makers, ministers of religion, innovators, fiancées, carers, business people, those with UK ancestry, returning residents, investors, applicants under EC Association Agreements or any other categories of people, would be able to appeal against the refusal of entry clearance, save on the grounds that their human rights have been breached or that they have suffered discrimination on the grounds of race. Currently some 40 distinct categories of people enjoy such rights under the Immigration Rules.

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

Family members

3. Family members with a right of appeal are currently set out in regulations[2] made under the Nationality, Immigration and Asylum Act 2002 and there is nothing to prevent the government making changes to the family members given rights by appeal by issuing yet another set of these regulations. The government should be urged to lay the regulations before in draft before parliament before parliament votes on the proposed new clause to demonstrate that new legislation is necessary at all and to allow parliament to determine for what it is being asked to vote.

4. The significant change to the regulation-making power in Clause 4 of the Bill is that the new regulations may 'make provision by reference to an applicant's purpose in entering as a dependant' (**Clause 4**, inserting **a new s.88A(2)(d)** into the 2002 Act. This wording recalls the 'primary purpose rule' – whereby spouses could be refused entry clearance because they could not prove a negative and show that the primary purpose of their marriage was not immigration to the UK. That rule proved unworkable in practice and the government should be pressed on the risks that their new rule will create the same difficulties.

5. The government has stated that it intends to remove the right to an oral hearing in family visitor appeals and is reviewing whether to charge for these appeals[3] – fees having been steadily reduced from 2000 until their 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.

6. ILPA argued when the right of appeal for family visitors was restored that the definition was unduly restrictive, and that friends or great-aunts may be emotionally closer than the relatives listed. The new proposals do nothing to address the difficulties with the existing rules and, if they result in more restrictive provisions, will suggest that the government is not serious in its commitment to the family and the maintenance of family ties when part of that family is abroad. There is a risk of breaches of Article 8 of the European Convention on Human Rights, the right to respect for private and family life, alone or read with the prohibition on discrimination in respect for rights protected by the Convention.

Applicants for entry clearance other than family visitors

7. Other visitors, be they family members not given a right of appeal by regulations, friends, or those coming for pleasure, have no right of appeal against refusal of entry clearance. Nor do 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) also have no right of appeal. Other categories of applicant for entry clearance do. In contrast to Clause 1(4) and the family visitor provisions of Clause 4, the government has not even given itself the power to grant any of these people a right of appeal by regulations. Those affected include students coming for a longer course of study, including those who have been accepted at an educational establishment, Innovators, Ministers of Religion and Working Holiday-Makers.

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[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 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.

8. **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[4] 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 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 5** 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 5** 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. ILPA is concerned that, as with other proposals to remove rights of appeal this is likely to lead to an increase in claims and appeals lodged on spurious grounds.

B. What the government may say

"Trust us, we're the government - we always get it right first time – the people whom we refuse are just trying it on"

9. Not so. See the discussion in the House Of Commons Library Research Paper, citing both the Independent Monitor for Entry Clearance refusals and the National Audit Office, which we summarise here. In 2003, there was a 53% success rate in appeals against refusal of entry clearance. More than half the initial decisions were wrong. Moreover, the Independent Monitor for entry clearance refusals, who monitors those cases in which there is no right of appeal against entry clearance, noted in her February 2005 report that over 38% of family visit appeals considered by an adjudicator without an oral hearing, simply looking at the papers, were allowed.

10. In the same report, the Independent Monitor outlined "drastic differences" between posts in numbers of appeals allowed and dismissed. As she wrote, different refusal rates in difference posts could be the result of differences in the quality of application, but one would not expect vast differences in the in the percentage of refusals upheld. A sample of appeals success rates submitted to the Monitor are set out in the House of Commons library research paper. These shows consular posts where the success rate for family visitor appeals is over 80% and even over 90% and posts where student success rates on appeal were between 70 and 90%. The Library research paper cites the concerns of both the Independent Monitor and the National Audit Office (in their June 2004) report about quality of decision-making and quality control.

11. The Independent Monitor also found that those entitled to appeal were being denied this right:

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[4] Our view of the position is different to 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

> *"Extrapolating from my file samples in 2002 and 2003 I calculate that 28,00 applicants have been wrongly denied rights of appeal in these two years…12% of those denied rights of appeal are not the applicants whom parliament intended to be denied such a right"*

12. The overall picture is that of decisions of the executive requiring greater, not less scrutiny. This is born out by the experience of ILPA members and no doubt by many MPs considering their constituency caseloads.

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.

"You are making a fuss about nothing- these are not important rights)"

13. Not so. These are rights to pursue courses of study, to pursue a career, and to maintain relationships and fulfil obligations within these relationships. The matters affected include some of the most serious and significant decisions individuals will make.

15. In addition to the effect on individuals the effect on the UK must be considered. The Prime Minister's initiative to attract extra international students, the CBI encouraging workers, and the setting up of a new points system and new categories for potential workers show that other areas of the government and society are encouraging people from abroad to come here. If people in those categories are unable to appeal against refusals, and face refusals which without the right of appeal are likely to be more arbitrary and less well reasoned, the economic intentions of the government will not be met. Students and workers will vote with their feet and go to countries where their contribution is recognised.

"They lose nothing – they can simply apply again for entry clearance"

16. Applicants lose 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 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.

17. They lose money[5]. Charges for visas and other entry clearance applications are authorised by the Consular Fees Act 1980. Entry clearance can cost up to £260 (for a spouse, fiancé(e) or child coming for settlement. Immigration employment documents cost more. Highly skilled migrants pay £315. For those refused entry at port, the cost of travel must also be factored in, as must the costs of sorting out one's affairs prior to departure and on unexpected early return.

18. They lose 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 n the system.

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[5] See the House of Commons Library Research Paper on the Bill at page 64, a discussion of fees.

C. ILPA NOTES ON AMENDMENTS LAID TO CLAUSES 4 & 5

At the time when this briefing was prepared, amendments printed as of 14 October were available. This briefing gives numbers where known and deals with amendments in the order in which they are marshalled, save where another grouping appears more logical .It covers amendments supported by ILPA and government amendments. Separate clauses appear on separate pages.

CLAUSE 4

Amendments 72 to 76 and 82
Dr Evan Harris, Mr John Leech
ILPA supports the proposed amendments

72 Clause **4,** Page **3**, line 7, leave out "regulations" and insert "order"

(Amendments 73 to 76 are in the same terms, so that throughout the clause all references are to regulations)

82 Clause 4 Page **3**, line **37** at end insert -

"() An order under this section shall not be made unless a draft has been laid before and approved by resolution of each House of Parliament."

Purpose
These amendments probe the Secretary of State's intention as to appeal rights in future. Their effect would be to ensure that regulations restricting rights of appeal are subject to the affirmative resolution procedure in parliament.

Briefing Note
The Bill will give the widest discretion to the Minister as to whether or not a decision can be appealed. The only direct precedent for this at present is the ability for the Minister to specify the family members who may appeal against refusal of a visit, under s 90 of the Nationality, Immigration and Asylum Act 2002, which the new clause would repeal. The amendment provides an opportunity to press the government on whether it is appropriate to deal with matters of affording/taking away a right of appeal in delegated legislation. It also provides an opportunity to press the government on their intentions as to retaining rights of appeal and to ask that draft regulations be laid before parliament. If told that some categories of person were certainly be given appeal rights then the question arises – why not specify this on the face of the legislation?

Amendment 79
Dr Evan Harris, Mr John Leech
ILPA supports the proposed amendment

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

See general briefing and discussion of the "primary purpose" rule. 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.

Amendment 24
Mr Humphrey Malins, Mrs Cheryl Gillan, Mr Henry Bellingham
ILPA supports this amendment

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

> (c) following a course of study of more than six months duration at an institution on the approved register for which they have been accepted."

Presumed purpose
To ensure that those accepted for a course of study at a reputable institution will have an appeal against refusal of entry clearance. See general briefing.

Amendment 78
Dr Evan Harris, Mr John Leech
ILPA supports the proposed amendment

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
See general briefing. 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.

Briefing Note
See general briefing. As set out therein, 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. This probing amendment is intended to clarify the meaning of this clause, and the intentions behind it.

Amendment 83
Dr Evan Harris, Mr John Leech
ILPA supports the proposed amendment

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.

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. Their inclusion 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.

Amendment 84

Dr Evan Harris, Mr John Leech
ILPA supports this amendment

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

This amendment is necessary because certain rights of free movement guaranteed by Community law are set out in Part 7 of the Immigration Rules, rather than in the Immigration (European Economic Area) Regulations (refusal under those Regulations carries separate rights of appeal, not affected by the new clause). In each case these applicants have rights of appeal recognized by the European Court of Justice.

Briefing Note

At least three groups are potentially affected: (1) Swiss nationals (Switzerland is not a member of the EEA, but its nationals have the same rights of free movement); (2) non-EEA nationals who are the primary carers of children resident here who themselves have rights of residence (in accordance with the European Court judgement in Chen); and (3) nationals of countries with relevant Association Agreements with the EU (Bulgaria, Rumania and Turkey) seeking to enter for the purpose of business or self-employment. Denial of a right of appeal in these cases will bring the United Kingdom into conflict with Community law, and is likely to give rise to expensive litigation.

Amendment 90

Dr Evan Harris, Mr John Leech
ILPA supports the proposed amendment

Clause 4, page **3** line **9** , at end insert - “, or
> (c) entering for any other purpose prescribed by regulations for the purpose of this subsection"

Purpose

See note to **Amendment 7**8 above. This variant, using the word regulations rather than order, takes account of the proposals in **Amendments 72** to **76** and **82**, as described above.

Amendment 80

Dr Evan Harris, Mr John Leech

Clause 4, page **3** line **20** at beginning insert “in the circumstances specified in subsection (1)(a) above,”

As ILPA understands it, the way in which the amendment was introduced suggests that it was meant to say:

Clause 4, page **3** line **20** at beginning insert “in the circumstances specified in subsection (1)(a) above,”

It is to this version that we provide the briefing below. However, it must be acknowledged that the Minister, in responding, was responding to the amendment as laid.

Purpose

To limit the reference to the person in the UK needing to be settled there to cases where the person seeking entry clearance to join them is applying for settlement, not just to visit.

Briefing
An application from a family member of a person who is living lawfully in the United Kingdom with permission to stay for a long period – for example as a businessperson, graduate student, researcher, writer or artist, or who has been granted– would appear to lose any right of appeal under Clause 4 as it is currently drafted. This is likely to lead to unnecessary requests for the intervention of Members of Parliament, and perhaps to inappropriate reliance on human rights claims in order to gain the right of appeal. It has not been suggested that there is any abuse of this provision at present, and the relatives to be visited will all be lawfully in the United Kingdom, most of them gainfully employed to the benefit of this country, or engaged in higher education.

Government Amendments 55, 56, 57 & 58
Mr Tony McNulty

55 Clause 4, page 3, leave out lines 28 to 32.

Presumed purpose
Of government amendment **55** - to remove the proposed new subsection 88(3) – the power of the Secretary of State to deny appeal rights by order limited only by the requirement that the right "relate to" a provision of the Immigration Rules. A mendments **56, 57,** and **58** are all consequential on amendment **55.** Speaking in the debate in Committee on 20 October 2005, the junior Minister, Andy Burnham MP said: *"..the Minister of State…is fond of describing Opposition amendments as otiose. In the interests of balance we can acknowledge that that description could apply to a small section of our own Bill. The amendment removes the order-making power in clause 4(3) to remove full rights of appeal in entry clearance cases. The power was taken by the Government in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and was intended to be used to remove full rights of appeal by the specification of provisions of the immigration rules. Perhaps it would help the Committee if I gave an example of the kind of scenario in which it was envisaged it would be used. It could have been used to remove full rights of appeal for people refused entry clearance to study, but who fail to satisfy the requirements of the rule that their educational institution must appear on the register of providers. Under clause 4, full appeal rights in entry clearance cases are conferred by the making of the regulations that we have been discussing today. There is therefore no requirement to retain the power currently contained in subsection (3). That is why in the interests of keeping our legislation tightly drafted, the Government intend to remove it from the Bill. The other amendments are consequential"* (Column 125). In ILPA's view the amendment does not rectify the mischief of Clause 4.

Government amendment 59
Mr Tony McNulty

Schedule 1, page 27, line 9, at end insert-
(3A) If a person has made an application for variation of limited leave to enter or remain, of a kind referred to in subsection (2)(fa) or (fb) and that application has been refused, his leave to enter or remain is extended by virtue of this subsection during any period within which an appeal against refusal-

(a) could be brought (ignoring any possibility of an appeal out of time with permission), or
(b) is pending".'.

Presumed purpose
To provide that, despite the provisions of Clause 9, 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. This would appear to be no more than is required given the government's obligations under the 1951 UN Convention relating to the status to refugees. *Note: 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. Schedule 1, page 27, line 29, leave out from "orders)" to the end of line 30 and insert "for subsection (3A) substitute"

Government amendment 60
Mr Tony McNulty

Schedule 1, page 27, line 29, leave out from "orders)" to the end of line 30 and insert "for subsection (3A) substitute"

Presumed purpose
See Hansard HC Report Standing Committee E Immigration, Asylum and Nationality Bill, Thursday 20 October 2005 (Afternoon) col 134 and 138.) The Minister refers to this saying "if all that we have decided to do is accepted, the affirmative procedure will relate to a provision that is no longer there, which is why I said that amendment 60 was consequential." As ILPA understands the amendment, it removes the provision whereby orders made under s.88A of the Nationality, Immigration and Asylum Act 2002 (*Ineligibility: entry clearance* – inserted by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004) which prescribes the circumstances in a person may not appeal against a refusal of entry clearance, are subject to the affirmative resolution procedure in parliament. That provision will no longer exist. As far as we can see, by operation of this amendment, powers in the new section 88A inserted by Clause 4 will be subject to the negative resolution procedure in parliament by operation of s.112(2) of the 2002 Act. It preserves the position in the Bill as drafted whereby the new orders to be made under s.82(2)(fb) inserted by Clause 1 will be subject to the affirmative resolution procedure in parliament. Again, this is confusing because the amendment was debated under Clause 4 of the Bill.

Government NC2
Mr Tony McNulty

To move the following Clause

> "After section 82(2)(b) of the Nationality, Immigration and Asylum Act 2002 (c.41) (appeal: ineligibility) insert-
> "(ba) has failed to supply a medical report or a medical certificate in accordance with a requirement of the immigration rules"

Presumed purpose
Section 88(2) deals with mandatory refusals – denying a right of appeal where the appeal would be bound to fail, because the person does not satisfy a mandatory requirement of the immigration rules. Eg – applies as a child while recording his/her age as an adult, applies as a Working Holidaymaker from a country to whose nationals these visas are not available. Thus the desired effect of this clause is to make failure to supply a medical report grounds for a mandatory refusal. The person who failed to supply such a report would be refused with no right of appeal. Section 88 already provides for mandatory refusals where people do not have the required immigration document. However it has not, to date, made matters of evidence the ground of a mandatory refusal. The government should be asked to explain why matters

of evidence may be the subject of a mandatory refusal. It should be recalled that questions of medical ethics may arise in carrying out certain medical tests, e.g. on a child, for non-therapeutic purposes. Introducing the Clause in Committee, the Minister, Tony McNulty MP, said *"The new clause extends the scope of section 88 of the 2002 Act so as to restrict the availability and full rights of appeal in cases in which the applicant has failed to supply a medical report or a medical certificate as required by the rules. The provision would apply where an applicant for entry clearance was required by the immigration rules to hold a medical certificate confirming that he was free of tuberculosis but failed to supply such a certificate. In that situation, an appeal against a refusal of entry clearance could be brought only on the grounds that the decision was racially discriminatory or a breach of the applicant's human rights. It is the absence of documentation that is the issue"* (20 July 2005, Col 134).

Amendment 87 (Stand part)
Dr Evan Harris, Mr John Leech
ILPA supports this amendment
Clause **4,** Page **2**, line **37** "Leave out Clause 4".

Purpose
This amendment preserves the existing position as set out in the Nationality, Immigration and Asylum Act 2002 (C.41), s.82, and the appeal rights it contains for those applying for entry clearance to come to the United Kingdom have a right of appeal from abroad against refusal.

Briefing Note
See general briefing above. The clause as drafted will remove appeal rights from anyone other than certain visitors, and others seeking to enter as dependants, in circumstances that are not set out on the face of the Bill. With no remedy, and no judicial oversight of decisions the number of poor first refusals can only increase from its current high levels.

Clause 5

Amendment 103
Dr Evan Harris, Mr John Leech
ILPA supports the proposed amendment

Clause **4,** page **4**, line **1** Leave out sub-clause (1)(b) and replace with -

"(b) if section 92(3C) applies to the refusal of leave to enter."

NB – the amendment was wrongly laid as referring to 92(3)(c), a section which does not exist, but was debated as though it referred to 92(3C).

Purpose

This amendment preserves the existing position as set out in the Nationality, Immigration and Asylum Act 2002 (C.41), s.92, as amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, whereby a passenger who arrives with a valid entry clearance and is then refused entry to the United Kingdom has a right of appeal from within the country before removal, unless the reason for refusal is that entry is being sought for a purpose other than that for which the clearance was granted, in which case the person has a right of appeal from outside the country after removal. The amendment also provides an opportunity to probe the government on why it is seeking to deny any right of appeal to those refused on the grounds that the purpose of the visit is not the same as that specified in the entry clearance – denying any chance to challenge the Immigration Officer's decision.

Briefing Note
See general briefing. 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, so that the clearance has the effect in law of constituting a grant of leave to enter the country. If an immigration officer at a port in the United Kingdom is considering taking away a status already granted by a colleague the burden of justifying the decision to go behind the earlier decision ought to rest with the officer who alleges it, rather than with the passenger.

The **new clause 89** of the Nationality, Immigration and Asylum Act 2002, inserted by this clause, presumes that a passenger's intention is other than specified. This 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. The new clause is more elegantly drafted than the existing provision and for this reason we have proposed to amend the new clause rather than leave it out entirely.