ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION, ASYLUM AND NATIONALITY BILL – BILL 13
HOUSE OF COMMONS STANDING COMMITTEE
COMMITTEE SESSIONS 1-2, & 4: 18,19 & 20 OCTOBER 2005

# CLAUSES 1, 3 & 9 & SCHEDULE 2: 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.*

## Guide to Briefing

This briefing contains:

A. An overview of the clauses
B. What the government might say (with statistics, cases, quotations, examples):
- They lose nothing – we are just streamlining - they'll still have a right of appeal against removal where all matters can be considered;
- Trust us – we're the government: we'll take care of any problems through regulations;
- Trust us, we're the government - we always get it right first time – the people whom we refused are just trying it on;
- Without these powers we'll be snowed under by hopeless or abusive applications;
- You are making a fuss about nothing- these are not important rights;
Trust us, we'll decide all applications quickly so no-one will be criminalised ;
It is not technically possible to amend the law in any other way;
C. A review of amendments laid – those supported by ILPA and government amendments
D. An annexe for those interested in the technicalities of the clauses.

## A. Overview

1. Under the current law a student, family member or work-permit holder lawfully in the UK refused an extension of stay in the UK or other variation of their leave (for example from one category of leave to another where a variation is permitted by the Immigration Rules) has a right of appeal against the refusal and may remain in the UK while that appeal is being heard.

2. **Clause 1** will prevent people from appealing whilst they are in the country. It abolishes the appeal against variation (including extension) of leave. People will retain a right of appeal against removal from the UK – but can only appeal after they have left/been removed from the UK. By operation of **Clause 3**, the reasons for the decision to refuse the variation can be considered at that out-of-country appeal. A person refused permission to stay will be compelled to leave the country immediately.

3. **Clause 1** must be read with **Clause 9**. The effect of **Clause 9** is to criminalize those refused an extension of stay/variation of leave in the UK: a person can be rendered illegal the moment the variation of leave is refused, if their original leave has expired by the time they receive the refusal. These will be people here lawfully, whether as employees, students,

family members or business people. Under the current law, if a person's leave expires while they are awaiting a decision on an application their leave is deemed to continue, on the same terms and conditions (for example the right to work), until that decision is made, then until the time limit for appealing has expired and, if they appeal, until the appeal is finally decided. If **Clause 9** becomes law a person's leave will be deemed to continue only until the initial decision is made.

4. The Home Office does not allow people to apply for an extension of leave more than 28 days before that leave expires. Given Home Office delays, it is usual for the decision to arrive after a person's original leave has expired; leave is extended pending receipt of the decision. There is nothing the applicant can do about this – it is a question of how quickly the Home Office makes its decision. **Clause 9** will mean that if the decision arrives after the person's existing leave has expired they are in breach of immigration law from the moment of receipt of the refusal. Even if they leave the country the same day they will by that stage be an overstayer. Their passport may be endorsed on departure, with the potential to cause them future difficulties as an immigration offender if they try to return here or go to another country.

5. The existing, vital distinction between those who breach immigration law and those who have complied at every stage is thus broken down – the latter are nonetheless rendered illegal the moment they receive the negative decision.

6. However erroneous the refusal a person will have to stop studying or working the day they receive the notice of refusal. They will have to leave the country. Their studies/work or caring for a family member is interrupted for all this time. If they succeed in their appeal against removal they must make their way back to the UK (which may involve applying for entry clearance again, with attendant delays). Nothing in the Bill suggests that the government anticipates bearing the costs for this, nor compensating them or their employers. Although generally appeals relating to those benefiting from Community law fall within the (separate) scope of the Immigration (EEA) Regulations 2000 (as amended), there are real risks that these provisions will breach European Community law by denying in-country rights of appeal in cases involving the directly effective rights of Bulgarian and Romanian nationals establishing themselves in self-employment; rights of Turkish nationals under the Association Agreement with Turkey and rights of parents of self-sufficient EEA children. ILPA raised this matter with IND on 15 September 2005 and awaits a response.

7. **Clause 1(4)** makes provision for a limited class of people to have an in-country right of appeal against refusal of variation. The first are those who have leave to enter or remain as refugees and are seeking to extend their leave to remain as refugees. Such people used to be given indefinite leave to remain in the UK, but, since August this year, are now given leave for 5 years, after which time the Home Office assesses whether they are still at risk on return. No similar provision is made either for those who applying to vary their leave from a different category to that of a refugee, nor for those who are seeking to vary their leave on human rights grounds. As we understand it, by operation of Section 77 of the Nationality, Immigration and Asylum Act 2002 those who apply to vary other leave to that of leave as a refugee cannot be removed from the UK nor required to leave until their application and any appeal has been finally decided, but they will be treated as any other overstayer applying for asylum. Those who apply to remain on the grounds that removal will breach their human rights will, by operation of s.92 of the 2002 Act be able to remain in the UK while they appeal against a decision to remove them, but will have to sit and wait, without any legal leave, for that decision to be made, and will not be allowed to work while they wait for the appeal. **Clause 1(4)** also gives the Secretary of State power to specify classes of people who will be given still be allowed a variation appeal. No indication is given as to the cases for which this will be used. **Amendments 14 and 15**, in the names of Mr Humphrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham proposes to delete/amend respectively this second part of

**Clause 1(4)** thus providing an opportunity to probe the government's intentions. **Government Amendment 59** may be relevant in this regard. **Clause 3** seeks to provide that when the person does exercise the out of country appeal against removal they can raise objections to the original refusal to vary their leave at the appeal. However, it would be worth pressing the government on this and asking them to confirm that all matters that could have been raised at the variation appeal will be able to be raised at the appeal against removal.

## B. What the government might say

***"They lose nothing – we are just streamlining - they'll still have a right of appeal against removal where all matters can be considered"***

8. Yes – after they have left. After they have had to stop working, interrupt their studies, leave family members, homes, and property behind. After they have been rendered criminals: immigration offenders with implications for future applications to the UK or to third countries. Moreover, it is no easy task to run an appeal hearing from abroad, nor to be able effectively to challenge the Home Office when you are not present in the court.

***"Trust us – we're the government: we'll take care of any problems through regulations"***

9. More specifically: in the case of any difficult scenario you present, we can introduce a right of appeal by order (under Clause 1(4), new subsection (fb). In the case of people being made illegal at the moment of refusal, we could give them 24 hours to leave the country by deeming that they have not been refused until 24 hours after they get the decision by using the new power to make regulations under **Clause 9(3)** inserting a new section 3C(6) into the Immigration Act 1971.

10. This is not good enough. It treats parliament with contempt; it does not give individuals, employers or educational establishments the certainty they need to plan. It gives no promises as to how the legislation will be used in future. Rights of appeal against decisions involving fundamentally important interests should be protected by being embodied in primary legislation and parliament should be allowed to know the scope of the laws it is passing.

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

| Year | Appeals dealt with | Allowed | % allowed |
|---|---|---|---|
| 1997 | 5,150 | 480 | 9 |
| 1998 | 5,300 | 500 | 9 |
| 1999 | 3,350 | 280 | 8 |
| 2000 | 1,080 | 260 | 24 |
| 2001 | 2,640 | 765 | 29 |
| 2002 | 3,560 | 1,060 | 30 |
| 2003 | 5,580 | 1,865 | 33 |

11. Not so. The government has published statistics showing the outcome of appeals to immigration adjudicators during the period 1997-2003[1]. They show the outcomes of all appeals; appeals against refusal of entry clearance; appeals against refusal of asylum and appeals against 'after entry into the UK' non-asylum decisions. That last consists

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

substantially if not exclusively of appeals against variation decisions. The proportion of these appeals that have been allowed is set out in the table above. In 2003, adjudicators determined that 1/3 of the decisions in these cases were wrong.

12. It is also likely that the quality of decisions will go down once the level of scrutiny is reduced. Some people will not deem it worthwhile to appeal once they have been refused, others will find it impossible or very difficult to do so out of country. They will not be present at the appeal hearing, limiting their scope to challenge the Home Office. We recall the words of the then Shadow Home Secretary, one Rt Hon Tony Blair MP, QC, speaking on the Bill that became the Asylum and Immigration Appeals Act 1993 said:

> *"When a right of appeal is removed, what is removed is a valuable and necessary constraint on those who exercise original jurisdiction. That is true not merely of immigration officers but of anybody. The immigration officer who knows that his decision may be subject to appeal is likely to be a good deal more circumspect, careful and even handed that the officer who knows that his power of decision is absolute. That is simply, I fear, a matter of human nature, quite apart from anything else*[2].

13. He was echoing the rationale for creating the right of appeal against variation decisions in the first place. This was created by Immigration Act 1971, s. 14 giving effect to the recommendations of the *Report of the Committee on Immigration Appeals*[3]. The Committee recommended that there should be a right of appeal against variation decisions as well as other immigration decisions because of the 'basic principle' that:

> *"however well administered the present control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal…In many other fields of public law – such as that relating to national insurance – there are now well established methods of resolving disputes between a private individual and the administration under a procedure requiring a clear statement of the administration's case, an opportunity for the person affected to put his case in opposition and support it with evidence, and a decision by an authority independent of the Department interested in the matter. The safeguards provided by such a procedure serve not only to check any possible abuse of executive power but also to private individual a sense of protection… We believe that immigrants and their relatives and friends need the same kind of reassurance against their fears of arbitrary action on the part of the Immigration Service."*

14. Only a year ago, this was echoed in a White Paper 'about improving public services and improving access to justice'[4] the government, having cited as an example decision making in relation to immigration status[5], said this:

> *"No system will ever be perfect. There will always be errors…There will always be uncertainties about how the law should be applied to the circumstances of individuals. There will often be gaps in knowledge and understanding about an individual's circumstances. We are all entitled to receive correct decisions on our personal circumstances; where a mistake occurs we are entitled to complain and to have the mistake put right with the minimum of difficulty; where there is uncertainty we are entitled to expect a quick resolution of the issue; and…. that where things have gone wrong the system will learn from the problem and…do better in the future*[6].

***"Without these powers we'll be snowed under by hopeless or abusive applications"***

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[2] Hansard, Volume 213, column 43, 2.11.92
[3] August 1967, Cmnd. 3387
[4] *Transforming Public Services: Complaints, Redress and Tribunals,* July 2004, Cm 6243
[5] Paragraph. 1.2
[6] Paragraph 1.5

15. Not so. In practice, a precondition for being able to bring a variation appeal is that the appeal has some prima facie merit. There are already ample powers to deal with applications with no prospect of success and those deemed abusive. A variation appeal may not be brought against an immigration decision taken on the ground that the person does not satisfy a mandatory requirement of the immigration rules[7] (e.g. as to age, nationality, citizenship, possession of the appropriate documentation) or is making an impossible application (e.g. to stay in the for a period greater than permitted by the immigration rules or for a purpose not permitted therein[8]). In those circumstances an appeal may stillbe brought on asylum or human rights grounds, but the Secretary of State can prevent this from being brought "in-country" by certifying the claim as "clearly unfounded"[9]. The only people who may bring a variation appeal are people who have already been accepted as qualifying for leave to enter or remain and are able to put forward a claim that they continue to qualify for such leave under the immigration rules or a claim that the Secretary of State does not characterise as 'clearly unfounded' that refusal of leave breaches the UK's international human rights obligations.

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

15. This may seem the least likely response, but the White Paper *Controlling our borders: making migration work for Britain*[10] states that the areas chosen for removal of appeal rights have been chosen "because the issues raised are less important" (paragraph 33). Judge the importance for yourselves by looking at the rights at stake, set out below.

**Those who will lose rights of appeal under the new system.**

*All references are to paragraphs of the Immigration Rules, HC 395*

- A person granted limited leave for a probationary period of 2 years as the spouse of a UK citizen or settled person, applying for indefinite leave to remain on the basis of that marriage. (Paragraph 277ff)
- A person holding a work permit applying to extend leave to continue in employment. (Paragraph 128ff)
- A person with leave to establish self in business applying to continue in business (Paragraph 200ff). An applicant for such leave should have invested at least £200,000 in the business[11] in which he or she seeks to continue and have created at least two jobs for persons settled in the UK – which will also be at risk.
- A person with leave to enter or remain as a student applying to extend his or her leave in order to continue his or her studies (Paragraph 57ff). The person who unsuccessfully sought an extension of stay will most likely have had leave to enter or remain as a student[12] and so would be likely to have commenced his/her studies, and perhaps be several years into them, prior to the variation decision being made and having invested substantial amounts of money and time in those studies. Note that other decisions affecting a person's education – such as a decision to exclude a pupil from school[13] or to allocate a school place to a child other than at his or her preferred school[14] attract a right of appeal.
- A close family member of and dependant on a British citizen or settled person with limited leave applying to extend that leave (Paragraph 317)
- A person whose removal from the UK would breach his or her right to respect for family life under Article 8 of the European Convention on Human Rights in exceptional circumstances.

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[7] Nationality, Immigration and Asylum Act 2002, s. 82(4)
[8] Nationality, Immigration and Asylum Act 2002, s. 88
[9] Nationality, Immigration and Asylum Act s. 94 as amended by Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s. 27.
[10] February 2005, Cm 6472
[11] HC 395 201(ii) and 206(ii)
[12] because the rules require that in order to obtain leave to remain as a student, the applicant must have had leave to enter as a student – HC 395, para. 60
[13] Education Act 2002, s. 52
[14] School Standards and Framework Act 1998, s. 94

- A person at risk of torture or other inhuman or degrading treatment on return, in violation of Article 3 of the European Convention on Human Rights. Those with appeals on human rights grounds would have to wait as overstayers without leave for a decision to remove them to be made, at which point we think they could appeal from within the UK. A person who had applied for recognition as a refugee but had been given leave to remain in some other capacity and now sought to extend that leave. by operation of s.77 of the Nationality, Asylum and Immigration Act 2002, which provides that a person with a pending claim cannot be removed or required to leave the UK, but if this is correct they would still be treated as any other overstayer applying for leave to remain on the basis of asylum.

16. Below, we cite examples from recent cases, supplied by ILPA members.

**D – applied for variation May 2001. Appeal allowed July 2005**

D came to the UK in 1995 to do an MBA at a British university. He continued his studies and applied in May 2001 for continued leave to study. He was refused on the basis that he had not provided proof of progress in his studies. This proof had been delayed in the post. When he appealed in November 2001 he provided that proof with his grounds of appeal. He heard nothing. He completed his MBA and then enrolled on a nursing course successfully completing that. All the while he kept the Home Office informed of what he was doing. He married a naturalised British woman) in March 2004 and applied for leave on the basis of marriage. He heard nothing. Finally his student appeal was listed for July 2005. He won the appeal (his studies were by this time long since completed. He was given leave for a month to make an in time application for leave as a spouse. This was granted in September 2005 and thus he was able to start work in October 2005, just a short while before the birth of the couple's first child.

Under the proposed law this man would have been in the country illegally from the time of first refusal, even though a mere postal error was the reason for that refusal (as was clarified four years later). He would have had a record as an immigration offender, would have been forced to leave the UK, interrupting his MBA. He would not have been able to appeal until he had left the country and would have had to stay outside the country for four years waiting for the appeal to be decided. The Immigration judge hearing the case noted:

*"The appellant has been made to wait for nearly four years for his appeal against his refusal to remain as a student to come on for hearing. In the meantime he has successfully completed two courses and has become qualified as a registered mental nurse and has been offered employment in a sector of the health service which is known to be short of staff."*

**A – appeal allowed August 2005**

The appellant, who is Albanian, came to the United Kingdom when he was 14 years of age and was given exceptional leave to remain whilst he was a minor. He lived with a very supportive foster family. He continued to live with them after turning 18 and provided considerable support to his foster mother, who is in her late 60s and registered as disabled. At the time of his variation appeal he had an NVQ level 2 in engineering, and was sitting for a national diploma in construction with a view to continuing his education and going into the construction industry. His appeal was allowed in August 2005 on the basis that, in the exceptional circumstances of his case, removal from the UK would have been a disproportionate interference with his right to family and private life under Article 8 ECHR.

Under the proposed law this young man would have had to cease his education and would not have been able to sit for his diploma. His education would have been interrupted. He would have had to stop work. He would have had a record as an immigration offender and been expected to leave the UK.

**G**

G, from the Caribbean, had leave to remain as an unmarried partner. He has made an application under the Highly Skilled Migrant Programme for his work in a specialized industry. His relationship broke down but in addition to his application as a highly skilled migrant he seeks leave to remain to exercise rights of access to his partner's child by a former partner. The child's father had died and G had been the only father the child had known since babyhood. G meets the substantive requirements of the relevant immigration rules but not all, because the child is not his own. Decisions are awaited on the applications. G's current leave has now expired. He continues to work, and to see the child. Under the proposed law, if refused then from the moment of refusal, G would be unable to work and would be illegally in the UK. He would face having to leave or risk detention or removal, with the attendant difficulties on return.

***"Trust us - we'll decide all applications quickly so no-one will be criminalised"***

17. An applicant will be criminalised under Clause 9 from the moment they receive notice of refusal if their original leave has ended by the time their application is refused. The Immigration and Nationality Department may well make best efforts to decide the application quickly. Experience to date, of MPs working on behalf of their constituents as well as ILPA members working on behalf of clients, to put it mildly, is that far from all applications will be decided before existing leave has expired. But in any event the applicant has no guarantee that s/he will be one of the lucky ones whose application is decided before existing leave expires. By the very act of making an application a nurse or a Master's student wishing to read for a doctorate, risks acquiring a record as an immigration offender.

***"It is not technically possible to amend the law in any other way"***

18. The way the government have drafted the bill:
    - they preserve only the right of appeal against a decision to remove
    - a decision to remove can only be made against a person with no leave
    - therefore to make its proposals work, the used Clause 9 to take away people's leave at the moment of refusal – stranding people who have always complied with immigration law in the UK illegally and without leave, with nothing they can do to prevent this happening.

19. ILPA has suggested two probing amendments, discussed below, designed to demonstrate that the government has all the powers it needs to streamline the appeals system and to give effect to the desire to ensure that people do not have two bites at the cherry, without creating this disruptive muddle. The amendments are designed to probe why the government is proceeding in this way: what is the agenda behind the clauses? Other probing amendments have been laid to similar effect.

20. Short briefings to amendments laid appear on the pages that follow.

**ILPA NOTES ON AMENDMENTS LAID ON CLAUSES 1, 3 & 9 & SCHEDULE 2**

*This briefing gives numbers and deals with amendments in the order in which they were marshalled, with separate clauses on separate pages. It covers amendments ILPA supports and government amendments.*

**CLAUSE 1**
*(Clauses 1 and 9 are interlinked – the government needs both to achieve its desired changes to the appeals procedure.)*

**Amendment 13**
Mr Humphrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham
*ILPA supports this amendment.*

Clause 1, page 1, line 6, leave out subsection (2).

**Amendment 14**
Mr Humphrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham
*ILPA supports this amendment.*

Clause 1, page 1, line 7, leave out subsection (3)

**Presumed purpose**
To preserve the in-country right of appeal against a refusal to vary leave and thus to probe the decision to take away this right of appeal and, through the operation of clause 9, make a person refused a variation illegal in the UK from the moment the decision is served.
See general briefing above.

**Amendment 77**
Dr Evan Harris, Mr John Leech,
*ILPA supports this amendment*

Clause 1, page 1, line 7, at end insert-

"() In paragraph (g)(decision to remove person unlawfully in the UK) at end, after "Kingdom", insert save where that person had a right of appeal under paragraph (d) or (e) above (whether or not he exercised that right of appeal) and the Secretary of State or an immigration officer issues a certificate under s.96".
"() In paragraph (i)(decision to remove: family) at end, after "(family)", insert "save where that person had a right of appeal under paragraph (d) or (e) above (whether or not he exercised that right of appeal) and the Secretary of State or an immigration officer issues a certificate under s.96".
"() In paragraph (ia)(decision to remove: seamen and aircrews) at end, after "(aircrews)", insert "save where that person has had an of appeal under paragraph (d) or (e) above to which section 92 applies.

**Purpose**
To probe the government's intentions. To be read with Amendment **70.** The effect of the amendments is to highlight scope for using the government's existing powers (under s.96 of the Nationality, Immigration and Asylum Act 2002) to deny a person who has had an in-country appeal against refusal to vary leave a subsequent appeal against removal, presenting an alternative way of curing any perceived mischief of multiple appeals. The amendment, with amendments 13 and 14, enable the applicant to appeal against the decisions before having to leave the UK and to stay in the UK whilst appealing without thereby committing a criminal offence. The amendment also allows for the possibility of preserving the appeal against removal as a safeguard in cases in which the Secretary of State recognises (by declining use s.96 powers) that such a safeguard should be available.

**Briefing note**
See general briefing above. It is ILPA's position that the government's objective of creating an effective "one stop appeal" can be achieved using existing statutory powers, notably those under s.96 of the Nationality, Immigration and Asylum Act 2002 which allow the Secretary of State to deny a person the opportunity to raise on appeal a matter that they have, or could have, raised at an earlier stage. In our view there is no need to abolish the appeal against refusal to vary leave nor the subsequent appeal against removal. All necessary powers exist to prevent abuse.

If the government contends that Clause 1, supported by Clause 9, is merely intended to deny successive appeal rights then this probing amendment provides the vehicle for responding "Why do that in a way that forces people to leave the country and renders them illegally present here until they do, when you could deny successive appeals by using s.96 powers? Why have you written the Bill in the way you have?"

**Amendment 70**
Dr Evan Harris, Mr John Leech
*ILPA supports the proposed amendment*

Clause 1, page 1, after line 21 insert-
" ( ) After paragraph g insert-
(ga) a decision that a person is to be removed from the United Kingdom by way of directions under section 10A of the Immigration and Asylum Act 1999"
( ) Section 92(2) of the Nationality, Immigration and Asylum Act 2002 (c.41) is amended as follows.
( ) Leave out "82(2)(c),(d)(e)(f)and (j)" and replace with "82(2)(c),(f), (fa), (fb),(ga) and (j)"

**Purpose**
See under **Amendment 77** above.

**Amendment 12**
Mr Humphrey Malins, Mrs Cheryl Gillan and Mr Henry Bellingham.
*ILPA supports the proposed amendment*

Clause 1, page 2, line 14, at end insert "and shall be eligible for legal aid for each appeal."

**Presumed purpose**
Self-explanatory.

**Amendment 71**
Dr Evan Harris, Mr John Leech
*ILPA supports the proposed amendment.*

Clause 1, page 2, after line 12, insert -
() The Immigration and Asylum Act 1999 (c. 33) shall be amended as follows:
( ) After s. 10 insert-
**Section 10A**
" (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 s. 10A(3).
(2) The immigration officer may give directions for the person's removal once the time for giving notice of appeal under s. 82(2)(ga) of the Nationality, Immigration and Asylum Act 2002 (c.41) 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 s. 10A(1) is taken and an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (c.41) could be brought against a decision under s. 10A(1) and whilst any appeal against that decision is pending."

**Purpose**

To probe the government's intentions. 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. The amendments enable the applicant to appeal against the decisions before having to leave the UK and to stay in the UK whilst appealing without thereby committing a criminal offence.

**Briefing Note**

See general briefing above. As the law stands, it is possible for a person to appeal against a variation decision and, if she loses the appeal but does not leave the UK, to appeal against a subsequent decision to remove her (under Immigration and Asylum Act s. 10). If the government contends that Clause 1, supported by Clause 9, is merely intended to deny successive appeal rights then this probing amendment provides the vehicle for responding "Why do that in a way that forces people to leave the country and renders them illegally present here until they do, when you could deny successive appeals by making simultaneous variation and removal decisions? Why have you written the Bill in the way you have?"

**CLAUSE 9**

**Amendment 22**
Mr Humphrey Malins, Mrs Cheryl Gillan, Mr Henry Bellingham, Dr Evan Harris, Mr John Leech.
*ILPA supports the proposed amendment.*

Clause 9, page 4, line 29, leave out Clause 9

**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.

**Briefing note**
See general briefing above. Section 3C of the Immigration and Asylum Act provides for extension of leave while an application to vary that leave is being decided. Under 3C(2)(a), which is not abolished, if you apply to extend your leave before it expires, then if the Home Office fail to decide your application before your leave expires the leave is deemed to continue on the same terms and conditions until that decision is made (or until you withdraw the application). It is worth noting that the Home Office frequently provides that people can only apply to extend their leave a short time (e.g. one month) before it expires, not earlier, and that it is very common for applications not to be decided before the original leave has expired.

Under the existing law, 3C(2)(b), which this Bill proposes to abolish, when a person is refused their leave continues for the period during which they could lodge an appeal. Under the existing law, 3C(2)(c), which this Bill proposes to abolish, when a person does appeal their leave continues until the appeal is finally determined (or withdrawn). The effect of Clause 9 is that the moment you receive a refusal you are in the UK illegally. However speedily you depart, and even if the decision is wholly erroneous, you have blotted your immigration history copybook, with effects for future applications not only in the UK but in many other countries who will regard you as a person with a dubious immigration history. If you go into work the day of your refusal, your employer could be committing an offence under Clause 11 by continuing to employ you. You would be liable to detention and removal. Despite always having complied with immigration law, and with your only misdemeanour having made an application (perhaps to extend your leave in the UK to work, or to study) to extend that leave that did not succeed, you would become an immigration offender.

**Schedule 1**

**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.

**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.

**Annexe – technical notes**

1. **Clause 1** of the Bill amends Nationality, Immigration and Asylum Act 2002 ('NIAA') s. 82 so as to abolish the right of appeal against decisions to vary or refuse

to vary leave to enter or remain. (variation decisions), save in certain circumstances. It does so by amending the list set out in NIAA s. 82(2) of 'immigration decisions' that attract a right of appeal.

2. Non UK and non EU citizens must obtain leave to enter the UK. Such leave may be for a limited period of time. A person in the UK with limited leave to enter may apply to vary his or her leave so as to extend the time for which the person may stay in the UK. He or she may as a result be granted indefinite leave to remain or leave to remain for a further limited period. If he or she is granted limited leave to remain, further application may be made for the leave to be extended.

3. A right of appeal against variation decisions was created by Immigration Act 1971, s. 14 (and subsequently retained, albeit subject to limitations by Immigration and Asylum Act 1999, s. 61 and NIAA s. 82(2)(d) and (e)).

4. The present right of appeal against variation decisions is limited (Nationality, Immigration and Asylum Act 2002 (NIAA 2002), s. 82(4)) so that a variation appeal may not be brought against an immigration decision taken on the ground that the person does not satisfy a requirement of the immigration rules as to age, nationality or citizenship or does not have an immigration document of a particular kind or is seeking to be in the UK for a period greater than permitted by the immigration rules or to remain for a purpose not permitted under the immigration rules (NIAA s. 88.)

5. In those circumstances an appeal may only be brought on asylum or human rights grounds, but the Secretary of State may still prevent an appeal from being brought by certifying the human rights or asylum claim as 'clearly unfounded' (NIAA s. 94 as amended by Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s. 27).

6. An appeal may be brought against an 'immigration decision' only if it is of a kind set out in that list. Section 82(2)(d) which c. 1(2) of the Bill repeals identified as an appealable immigration decision 'refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain in the United Kingdom'. Section 82(2)(e) which c. 1(3) of the Bill repeals identified as an appealable 'immigration decision' 'variation of a person's leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain.

7. Applications for asylum or to remain because return would put the person at risk of torture in violation of Article 3 of the European Convention on Human Rights are not "immigration decisions" within the meaning of s.82(2) but instead grounds of appeal under s.84. It is arguable that a person making an application for asylum could not be removed from the UK – because s.77 of the 2002 Act protections such people against removal or being required to leave, but if indeed this protection continues, then it is arguable that the person will be treated in exactly the same way as any other overstayer who claims asylum. Those whose claim is based on the contention that removal from the UK would breach their human rights would, as far as we can see, have to sit it out as illegal overstayers, unable to work and liable to detention, until such time as a decision to make removal directions was served, at which point the Nationality, Immigration and Asylum Act 2002 provides for an in-country right of appeal against such a decision where it is made on human rights grounds.

8. It is worth noting in this context that decisions affecting a person's education – such as a decision to exclude a pupil from school[15] or to allocate a school place to a child other than at his or her preferred school[16] attracts a right of appeal.

9. The European Court of Human Rights has recognised that a person's working life may form part of his or her 'private life' protected by article 8 of the European Convention on Human Rights[17]. A person's employment is considered as being so important that he or she should have a right to take proceedings in an employment tribunal if the person thinks he or she has been unfairly dismissed[18].

10. An applicant for leave to remain as a businessperson should have invested at least £200,000 in the business[19] in which he or she seeks to continue and to have created at least two jobs for people settled here. The variation decision may put those jobs and the capital invested at risk.

11. The European Court of Human Rights has recognised that rights may be violated where government actions interfere not only with a person's family life but also with his or her working life and with the broad network of social and economic relations that make up private life[20]. Interference with private and family life may nevertheless be justified if it is necessary in the interests of immigration control and proportionate. The Courts in the UK have established that generally speaking, a decision refusing to allow a person to enter or remain in the UK that interferes with his or her private or family life will not breach article 8 if the person does not qualify under the immigration rules[21]. Conversely, however, if the true position is that a person qualifies under the immigration rules but he has wrongly been refused leave to enter or remain then if that decision interferes with his or her private or family life, it will breach his or her fundamental human rights as protected by Article 8 ECHR.

12. There are many reasons why adverse variation decisions may be taken but from which it cannot be inferred from a refusal to vary leave that an application was unmeritorious or made to frustrate immigration control. For example:

    a. an applicant, although making a variation application in good faith simply cannot show that he or she continues to meet the requirements of the rules;
    b. many applicants who actually meet the requirements of the rules are unaware of the kind of evidence needed to satisfy the decision maker that they do. In particular, they are unable to anticipate the kinds of concerns and assumptions (and sometimes, prejudices) operating in a decision maker's mind and leading to a decision maker being unconvinced by the evidence presented;
    c. many variation applications require assessment of an applicant's intentions, e.g. whether a spouse intends to continue living with his or her spouse; whether a student intends to continue his or her course and intends to leave the UK at the end of his or her studies. These assessments are usually made by Home Office caseworkers without meeting the applicant so that there is obviously enormous scope for inaccurate and wrong assessment;

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[15] Education Act 2002, s. 52
[16] School Standards and Framework Act 1998, s. 94
[17] *Niemetz v Germany* (1992) 16 EHRR 97
[18] Employment Rights Act 1996, s. 111
[19] HC 395 201(ii) and 206(ii)
[20] e.g. *Slivenko v Latvia*
[21] *Huang v SSHD*

d. many applications require assessment of complex material (e.g. as to the history of a family relationship; the fortunes of a business; the cultural or religious context of a practice or an action or an inaction) so that there is considerable scope for misunderstanding and error on the part of a decision maker;
e. immigration law, including the immigration rules is very and increasingly complex so that there is substantial scope for decision makers to make errors in the application of relevant principles.

13. **Clause 3(2)** of the Bill creates a new subsection of Nationality, Immigration and Asylum Act 2002, s. 84, i.e. s. 84(1A). That subsection means that on an appeal against an immigration decision the grounds of appeal that are provided by s. 84 may be raised not only against the immigration decision against which the appeal was brought but also against any decision in respect of the appellant which gave rise to or facilitated the making of the appealable decision. So, for example, a person who remains in the UK after the expiry of his or her leave to enter or remain may be the subject of a decision to give directions for his or her removal under Immigration and Asylum Act 1999, s. 10. Such a decision is appealable under s. 82(2)(g). By virtue of the new s. 84(1A) as inserted by c. 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 extend his or her leave to enter or remain.

14. It is assumed, not necessarily correctly, that one intention here is to provide those who are subject to adverse variation decisions with an eventual opportunity 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. However it is necessary to probe the scope of the out-of country appeal to try to confirm this.

15. Second **Clause 3** of the Bill will not 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 by reference to the available grounds of appeal. 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 need to be amended to provide 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'.

***16.*** Under the Immigration Act 1971, s. 3C, a person's leave to enter or remain is extended until any appeal brought against a variation decision has been disposed of. A person whose leave permitted him or her to work (e.g. a work permit holder or a spouse of a citizen or settled person) would be able to continue to work pending determination of an appeal. Abolition of variation appeals and the amendment of Immigration Act 1971, s. 3C by **Clause 9 (2)** of the Bill mean that a person's leave will not be extended by the commencement of an appeal. He or she will not be able to work once the variation application has been refused because it is an offence for an employer to employ a person who does not have subsisting leave to enter or remain[22].

[22] Asylum and Immigration Act 1996, s. 8