ILPA Asylum and Immigration (Treatment of Claimants, etc) Bill House of Lords debate at Third Reading 6th July 2004

Asylum and Immigration Bill (Treatment of Claimants etc.) Bill List of priorities and suggested amendments for 3rd reading in Lords

Claue 26 - unification of appeals:

- **A Conditional fees**

ILPA remains opposed in principle to the proposal to bring in conditional fees for applications to reconsider first decisions by the new Tribunal. We agree with the view expressed by Lord Kingsland and others during debate on 7th June:

> *I share entirely the views of the noble Lord, Lord Goodhart, and many other noble Lords, that a conditional fee approach is wholly inappropriate in asylum cases.*
>
> *'The outcome in asylum cases is particularly difficult to predict because of the central role credibility plays. Yet a degree of accuracy of prediction is vital for the operation of a successful conditional fee system.*
>
> *Secondly in a conditional fee system, the client insures himself against losing a case so as to reimburse the solicitor for his expenses in the event of losing. An asylum seeker will be in no position to do that..*
>
> *Perhaps the most fundamental objection of all is this: conditional fees are not appropriate to human rights cases, which require, as the judges have repeatedly reminded us in the High Court and above, the most anxious scrutiny.'*

Without prejudice to any future consultation on the issue, ILPA argues that all asylum cases where there is a reasonable chance of success must be funded. The Law Society and others join us in this view. We support deletion of section 103D, or if that is not possible we support the other amendments et out below:

Suggested amendment

ILPA supports all Lord Goodhart's amendments on clause 26, including the following:

Page 26, line 20, insert

'( ) The Tribunal shall make an order under subsection 4 unless satisfied that there were no arguable grounds for making the application.'

B Time limit for applications under new section 103A

ILPA welcomes the amendments at report that raised from 5 to 10 days the time limit for making the application under new section 103A of the 2002 Act to review an IAT decision. However we remain concerned that the government retains the power to vary these time limits by way of statutory instrument. We seek to limit this power by further amendment:

Page 27 line 43, delete 'vary' and insert 'increase.'

C Lay membership of the Asylum and Immigration Tribunal

ILPA welcomes the amendments to clause 7 of Schedule 1 at Report, which now provides that 'the jurisdiction of the Tribunal shall be exercised by three members unless the President from time to time directs.'

However we note that as the wording stands, the government will be able effectively ignore the requirement for a 3-member panel because it controls the resources necessary for it to be put into effect. This will give the President no option but to direct sittings of single members, contrary to the sentiments expressed by the House on Report. While ILPA is not formally proposing the following amendment, the opposition may wish to consider:

Possible amendment

Page 46 line 8, delete from 'unless' to the end of line 9.

Clause 29 – Entry Clearance

ILPA remains fundamentally opposed to this clause for the following reasons:

1. ILPA supports action to tackle the abusive 'bogus' colleges – but does can not see how removing appeal rights furthers this cause in any way. The government have not explained what the link is, or said how many appeals would be affected. Anyone abusing the system will not want their case to have scrutiny at appeal.

2. Appeal rights are vital check on the quality of decision-making. The quality of entry clearance decision-making generally is poor, as is shown by the fact that 43% of appeals in 2002 were allowed.

3. The evidence shows that removal of appeal rights in recent years has led to gross injustice. This is clearly the case with the existing restrictions on appeal rights, which restrict appeal rights for non-family visitors,[1] and students who seek to follow a course of less than 6 months duration[2]. We not that the report for 2002 by Fiona Lindsley, the Independent Monitor for Entry Clearance,[3] states that appeal rights were wrongly denied in a staggering 10,000 cases:

> 35 9.9% of my entire sample consists of students and visitors who ought, in my opinion, to have been accorded rights of appeal as they ought to have been categorised as students on courses of more than six months or family visitors. If I am correct, by extrapolation from my sample, this means that 10,000 applicants were wrongly denied the right of appeal in 2002. Just under a third of those denied the right of appeal in this group were students, the remaining two thirds were family visitors. I have referred all of the individual cases in my sample to UKvisas with recommendations that the applicants be contacted and offered a new gratis application for a visa if they so wish. In many cases UKvisas have agreed with my assessment and the post has contacted the applicant with this offer. It is gravely concerning that almost 10% of those denied rights of appeal are not the applicants whom Parliament intended to be denied such a right. *Parliament may wish to consider this when and if consideration is given to removing other rights of appeal.*

It appears that there were approximately 3,000 cases of 'Students are being classified as on a course of six months or less simply because a module of

their course lasts less than six months.[4]'

The Monitor's findings demonstrate:

- how even 'objective' criteria can routinely be wrongly applied, resulting in widespread injustice.
- It is clearly nonsense to suggest, as Lord Rooker has done in debate, that judicial review is an adequate alternative remedy for those denied appeal rights – if it were a realistic remedy, why are cases not flooding the courts? In reality proceedings are expensive, legally complex and remote from applicants. The challenge is limited to narrow points of administrative law, not the broad questions of assessment of facts.

As currently worded clause 29 enables the government to remove, by way of statutory instrument, the right of appeal for virtually all entry clearance refusals.

Suggested amendments

1. In the light of the evidence from the Independent monitor, ILPA maintains its position in pressing for **deletion of this clause**. It has not been justified and will inevitably lead to poor decision making and injustice.

2. ILPA notes assurances from Lord Rooker in debate on 28th June that the intention at present is for the power to be 'used only in respect of decisions based on objective criteria.' [col 84]. He further stated 'The best brains in Whitehall are on the case. If we can clarify and make more transparent what we seek to do, to meet the points raised, we will do so.' [col 85]. If we take this at face value, we can see no reason why the government will not table or support an amendment such as the following, either at third reading in the Lords or subsequently in the Commons:

   Page 30, line 24 add

   ( ) relate to an issue of objectively verifiable fact, and not questions requiring subjective assessment of evidence or intention, and

However, the evidence of the Independent Monitor is that the application even of apparently objective criteria, such as enrolment on a course of 6 months duration, can be routinely misapplied. Such an amendment would thus do only little to assure us that the clause will not lead to widespread future injustice.

3. If, and only if, deletion is not possible, ILPA would support an amendment to the effect that the measure is restricted to the only potential target identified by the government in debate, that of students enrolled at colleges not on an approved list:

   Page 30, line 24, add:

   ( ) relate to the requirement that an applicant for entry as Student shall provide evidence that he is enrolled to study at an educational establishment that has been approved for the purpose by the Secretary of State.

Clause 2

ILPA remains opposed to the new offence of entering the UK without a passport etc. Refugees are often forced to travel on false documentation and the government have specifically refused to confirm that prosecutions will not be brought against those awaiting determination of an asylum claim. We understand draft regulations for implementation of the new offences may have been sent to peers, but have not yet had a copy on which to comment.

Clauses 19 to 25 – procedure for marriage

While condemning unreservedly the use of sham marriages for immigration purposes, ILPA opposes the restriction on the ability of non-EEA nationals to marry in the UK. The proposals are discriminatory, and disproportionate and unnecessary.

They **discriminate** in the following ways

- Registrars are being asked to apply differing procedures to applicants on the basis of their nationality. There has been no proper explanation of how this will be done in practice, in particular when a passport cannot be easily produced to back up a declaration of nationality.
- As these provisions apply to all non-EEA citizens, this includes long-settled people who have retained their nationality of origin. There will be a fee of some £200 to give notice to a special registrar and then to be given the 'certificate' from the Home Office allowing people to marry. This will certainly discriminate on the basis of nationality, and will be indirectly, if not directly, race discriminatory.
- The new provisions do not apply to those who marry in the Church of England, regardless of their nationality. They discriminate against all other religions.
- 'because some creeds believe that it is a sin to have a relationship without marriage and some do not, the effect is discriminatory even if the intention is not..' (Lord Russell, 15th June 2004, Hansard col 696)

Sham marriages result from the misapprehension that immigration benefits will result. In fact the Home Office already know about them and do not recognise them. To impose state control over the freedom to marry in a discriminatory manner is both disproportionate and unnecessary.

My Lords, we have got things the wrong way round here? Why do we have bogus marriages? Because people who we are married to United Kingdom citizens very often find that they are allowed to stay. Why do we not make it clear, either at the point of marriage or beforehand, that marriage will not under any circumstances constitute a reason for allowing someone to stay in this country over and above the reasons that he already has? Then the couple can either undertake the marriage or wait until the permission to stay is granted and then marry. Why do we not do that? All this rigmarole with registry offices and everybody else involved is taking it the wrong way round.

The Countess of Mar, debate on report on 28th June.

The new provision is **unnecessary** because of existing provisions to prevent benefit from 'sham' marriages:

- ***s.24 Immigration and Asylum Act 1999*** – this imposes a statutory duty on registrars to report suspicious marriages to the Home Office. Statistics given by Lord Rooker at Committee clearly indicate that s24 is increasingly effective in providing intelligence on which immigration enforcement action can be taken.
- ***Immigration Rules for status on the basis of marriage to a UK citizen or someone settled here.***
  - Those in the UK for temporary purposes – ie less than 6 months – *cannot switch* to longer-term status. [rule 284(i)].

- Parties to the marriage have to satisfy the Home Office that they *intend to live together permanently* as man and wife.

- Those who have remained *illegally* are similarly precluded. [rule 284(iv)].

- The probationary period after which a spouse can apply obtain indefinite leave on the basis of a marriage is now *24 months*. They will need to show that they have been living together with their spouse for the whole period.

- ***The Immigration (European Economic Area) Regulations 2000* -** paragraph 2

  Those who are party to a marriage of convenience are not able to obtain immigration rights as the *family members of EEA nationals***.**

If these controls are properly implemented then sham marriages will be pointless. Yet again the Government is legislating on impulse and recklessly whittling away at civil liberties. There is no need to impose State control into a new area of the private lives of residents. Clause 19 is a *wholly disproportionate response to the problem of sham marriages*.

ILPA also seeks further clarification as to the following points:

- Exactly what evidence of citizenship will the initial registrar ask for to check who needs to be sent to the special registrar?

- How you get the written permission – do you have to ask the Home Office direct, in which case there are likely to be delays? Or do you ask the immigration officer attached to the special registrar? Or might you be deemed to have that written permission if you have written (stamped) permission in your passport to be here for more than six months?

Possible Amendments

1. **ILPA supports deletion of clauses 19 to 25 from the Bill**.

   However, we to accommodate the possibility of an amendment, we make the following suggestions:

2. Page 19, line 17, insert new subclause after 19(3)

   ( ) In respect of obtaining the written permission from the Secretary of State to marry in the UK and permission from the specified registrar to marry, no fee shall be payable by any person who has indefinite leave to enter or remain in the UK.

   [This amendment could be applied to the legislation for Scotland by insertion at page 20 line 35, and in Northern Ireland by insertion at page 21, line 39.]

3. Page 18 line 36 at the end add

   'and does not have indefinite leave to enter or remain in the UK'.

   [This amendment could be applied to the legislation for Scotland by insertion at page 20 line 17 and in Northern Ireland by insertion at page 21 line 25.]

4. We cannot fully support the amendment of the Countess of Mar in its current form, as it is largely otiose and does not replace the existing clauses 19 to 25. We note that subclause (1) (a) reflects provisions already in the immigration rules[5]. In addition subclause (2) relates to restricting the grant of leave to remain on the basis of an intention to marry, an application which is already restricted under the rules to those who have come in with an entry clearance specifically for the purpose of marriage and whose marriage has been unavoidably delayed.[6]

<u>ILPA's view on other amendments tabled for third reading.</u>

Lord Kinglsand's **New Clause on *Review after exhaustion of rights of appeal.***

ILPA opposes this clause, which appears to promote a 'comprehensive' statutory review mechanism to replace the current Judicial Review. A change to statutory review would be retrograde in the following respects:

a. Although judicial reviews applications are made on the papers, there is an opportunity to renew them orally. *This is a vital safeguard* that enables advocates to explain detailed points of law. The right to an oral hearing would be particularly important when, as here, strict timetables may hamper preparation of argument on paper, and there will have been no prior appeal on the issue in question. This is a very different situation to the government's clause 29 proposal for statutory review following a full Tribunal appeal hearing on determinative issues.

b. There is a right to renew a judicial review application in the Court of Appeal should it fail in the High Court. This safeguard again is vital, although it is relatively rarely used. ILPA is particularly concerned that High Court judges would make errors if, as is anticipated, they worked only from the papers.

c. The time limit for application is set as 10 days. Although the time limit for judicial review in general is 'promptly and in any event within 3 months', in reality the immigration service apply a strict timetable - often 5 working days - to applications challenging removal. IPA is concerned that the imposition of too strict a statutory scheme would impose a rigid timetable.

ILPA

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[1] Nationality Asylum and Immigration Act 2002, s90

[2] ibid s 91(1) (a) and (b).

[3] Published 30.6.04 on the Ukvisas website.

[4] Para 36

[5] Rule 284(i)

[6] Rule 293