ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

Asylum and Immigration (Treatment of Claimants, etc.) Bill
A briefing and for Peers
On clause 14 – the Unification of Appeals
28.3.04

The Lord Chancellor's announcement at second reading that the ouster was to be withdrawn was welcome but gave no details of what might replace the version of clause 14 as drafted. Baroness Scotland indicated at second reading that precise details have yet to be worked out.

ILPA supports retention of a two-tier appeals system, with onward rights of appeal to the Court of Appeal and House of Lords. We believe that this is the most effective and efficient system and that the Government has made no persuasive arguments to the contrary.

We believe that the following are crucial characteristics of the appeal system, which must be improved or retained:

Full supervision by the courts of all decisions and procedures of immigration tribunals [and the Secretary of State]. This is needed to ensure the rule of law, and to ensure the quality of decision-making by the executive and by administrative tribunals. In this respect we welcome the announcement that the ouster of judicial review is not to be pursued.

A right of appeal. It is fundamental that mistakes by immigration tribunals can be rectified. We believe this is best done through a right of appeal to the second tier tribunal, the Court of Appeal and the House of Lords. It would seem practical to have some mechanism to filter out unmeritorious cases at an early stage. This filtering function is currently carried out the requirement to get permission to appeal

A law making function. It is vital that an immigration appeal decision is able to set and be bound by authoritative legal precedent. This is fundamental to the needs of quality, consistency, justice and the development of a modern approach to immigration issues. The Court of Appeal and the House of Lords are law makers in other spheres and should remain so in immigration.

Effective representation for appellants. We endorse Sir Andrew Leggatt " There was general agreement that the serious consequences of IAA decisions and a complex and

rapidly developing body of case law meant that few appellants could realistically be expected to prepare and present their cases themselves".[1] To ensure an appellant's case is properly and fully articulated, it is vital to have a legal aid system which not only will adequately fund individual cases, but attracts and supports sufficient numbers of solicitors specialising in asylum and immigration to ensure representation is of adequate quality. Quality legal representation is needed not only at the appeal hearing, but also at earlier stages of the procedure. We believe such 'front loading' is the only way to ensure improved standards of decision making both at the Home Office decision stage and at appeal. We are very concerned at the new restrictions of legal aid, which prevent attendance at the asylum interviews that the Home Office will advise new asylum seekers is the 'only chance to explain why you fear return to your own country'.[2] We also note with concern that they are to advise asylum seekers they do not need legal advice at all.[3]

Proper and full independence of appeal decision makers must be preserved. This is both in the carrying out of their day-to-day functions and their management and selection. There should be immunity from interference from the Home Office and protection from political influence.

Administrative efficiency. It is important that the system balances speed, quality and cost; but always with due regard to the paramount need to safeguard against error in this area of fundamental human rights. Undue administrative delays are in not in the interests of users, who are often in situations of great stress and financial hardship. We believe that in most cases delay can be largely resolved through proper case management and resourcing which is adequate and responsive to rises and falls in the numbers of appeals.

Rectification of inconsistent decisions. ILPA's members' experience is that an appellant's chances on appeal are too frequently determined by the luck of the draw of which adjudicator decides the case. Some adjudicators are renowned for refusing cases, others for allowing them. In this context the current breadth of possible grounds of appeal to the Tribunal, and the possibility of remittal by the Tribunal to another adjudicator are important safeguards

[1] Leggat 2001, p150

[2] Induction process DVD script

[3] ibid

The following are our principal concerns with the single tier proposals in Clause 14 as published [HL Bill 36]:

1) *Right of appeal:* As drafted there is no right of appeal from the new Tribunal. There must be a right of appeal by both parties to the higher courts, most appropriately to the Court of Appeal and then to the House of Lords. The power of the President to refer to the Court of Appeal for an opinion prevents any review when the President is blind to his own error.

2) *Single Tier Tribunal:* ILPA does not believe that any single tier appeal system can be robust enough to protect asylum seekers against errors which could result in them being tortured or killed if removed from the UK. The second tier also fulfils the important role of filtering out weak cases from applying for appeals to the higher courts. There must be a second and transparent tier which where oral argument is possible.

3) *Internal review:* If, and only if, an independent second tier is not possible, then there must at the very least be a robust and transparent internal review procedure. If such a review is to go any way to fulfilling the function of a second tier it is vital that the grounds for appeal are broad enough to allow a full and fair reassessment of a decision, that there is a right of oral argument, and the review process is fully supervised by the High Court through judicial review, or statutory review with a right of oral argument. The Government's plan for an internal review process [Clause 14 (6)] is defective because:
   a) It does not amount to a fully *independent* review. The reviewer will be a colleague, a peer and quite possibly a manager of the first appeal decision-maker. This offends the basic principle of natural justice that 'no one should be a judge in his own cause.' It is difficult to see how sufficient independence can be achieved within a 'single tier'.
   b) It is very difficult to see what form this proposed review would take. On one reading it seemed that review would have to take place on any application by the parties that alleged an error of law. Without a filtering mechanism the Tribunal would have to under take extremely scant reviews on all cases, without there being any filter of weak cases which could apply for onward appeal to the Court of Appeal. It is that filtering mechanism that needs supervision through external review by the courts (be it judicial review or statutory review). Without a filter of some sort, the courts will be flooded.
   c) The criterion for success in the internal review is draconian. The Tribunal can only consider whether the initial decision would have been different but for a clear error of law [clause 14 (6) new 105A section (2) and (3)]. We consider this test to be so high as to deny any realistic prospect of a review in practice.
      i) It is difficult to envisage how one could argue that the hypothetical – that the Tribunal *would* have come to a different decision.
      ii) There may be compelling reasons of fact that would require a review in the interests of justice – such as rapid political developments in the country of

origin, or when an appeal has been dismissed because of an unforeseeable failure of notification to the appellant. Such reasons may even include matters that the appellant is unaware of - one recent example of such a grant of permission stated "in view of the fact that the tribunal is soon to consider new evidence on the risk of return to the DRC."

iii) Under the plans for internal review there is no opportunity to introduce further evidence to illuminate how a decision on credibility was clearly wrong on the facts or irrational. The drafting is likely to effectively prevent reviews of the country conditions and risk, or indeed of decisions where the main issue is the handling of evidence going to the credibility of the appellant – probably the most common point of dispute. In many cases findings on credibility are difficult to predict – they are strongly influenced by the individual approach of a particular adjudicator and are not limited to points raised by the Home Office in advance. For this reason appellants may quite reasonably wish to submit further evidence – such as expert opinions – that can counter the adjudicator's findings, but do not relate to a point of law.

d) Oral consideration is limited to exceptional cases [clause 14 (6) new 105A section (5) and (6)]. As worded this clause appears to impose an unnecessary constraint on the exercise of discretion by the Tribunal, who should be trusted to call parties for an oral hearing if the interests of justice require it. Further oral argument is frequently vital and the Tribunal may not be able to identify why this is so from the papers. Grounds of appeals do not prove themselves, and it is likely to be unrealistic to expect all evidence to be available and digestible in written submissions.

e) It is absurd and unjust that a case can be reviewed only once.

f) It is unjust that there is no power to remit the case for rehearing. In the first version of the Bill it was envisaged that the result of the review might be an order that the appeal be reheard – but this was deleted by amendment at Commons Standing Committee. It is notable that the Immigration Appeal Tribunal used its power to remit cases in over 44% of its decisions in the 12 months to September 2003, and clearly finds its power to do so an attractive one.

4) *Powers of the President:* As drafted, the President of the AIT will have huge powers, including the power to render certain AIT decisions as authoritative. We believe that the President should not have any enhanced law making powers or any other enhanced powers. The higher courts should supervise all exercise of the President's powers.

5) *Law making:* The bill envisages the President may refer a case to the Court of Appeal for an opinion, which will be non-binding [clause 14 (7) new 108B clause (3)]. At Commons Standing Committee the junior DCA minister Mr Lammy was persuaded to 'look again at the ability to bind the decision of the Court of Appeal'[4]. However no amendment to reflect this was put forward at Commons Report. All judgments (or

[4] Hansard Standing Committee B 20 Jan 2004 col 310.

opinions) of the Court of Appeal and High Court must be binding on any appeal tribunal, not simply persuasive.

6) *Supervision* (see Sched 2, Part 1, para 21)*:* The power to make procedure rules for allocating responsibility to some Tribunal members for supervising other members and staff of the Tribunal is contrary to open justice and to the responsibility of decision-making which all AIT members should assume.

7) *Terms and conditions:* The terms and conditions of appointment of members of the AIT must not include provisions that may in any way be perceived to compromise their independence or judicial discretion. We support Lord Woolf's remarks about this at second reading in the Lords on 15th March:

> *Under the proposals contained in the Bill, the role of adjudicators within the single tier would be even more important than it has been until now. The adjudicators would be the majority of members of the new tribunal. Their role would be judicial. It is therefore a cause of some concern that Schedule 1(3)(1)(c) provides that a member "shall hold and vacate office in accordance with the terms of his appointment (which may include provision for dismissal)".*
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> *I am unaware of such a proposal for "dismissal" ever previously being included in a judicial officer's terms of appointment. The Council of Immigration Judges is concerned that this provision will be used as a justification for members of the new tribunal being dismissed because of dissatisfaction with their decisions. Their concerns are exacerbated because of the novel proposal that it should be a term of their engagement that they have to comply with practice directions. Judicial officers observe practice directions if they are issued by someone with such authority, but I am surprised that it should be felt necessary to have a term of appointment to that effect.*

8) *Nomenclature* [see Sched 4 para 4]: The Bill gives the Lord Chancellor power to make provision for the title of members of the AIT. We oppose the renaming of adjudicators as 'immigration judges': they are not judges and to call them this is obfuscatory. It should be clear to the public and to appellants alike that the AIT is a tribunal and does not have the status of a court

9) *Claimant's credibility - Clause 7*: Clause 7, although radically amended by the government in Standing Committee, has not yet received any debate. As originally drafted it required immigration tribunal members and other decision makers merely to take into account various behaviour when deciding credibility. The list of behaviour involved was extended and the wording was changed to say the matters *must* be taken into account *as damaging credibility*. This clause is now a blatant attempt by one of the parties to the appeals – the Secretary of State – to interfere with the independent function of tribunal members to assess credibility, as they feel fit in the light of all the circumstances of the case.

We support the recommendation of the Joint Committee on Human Rights that "the deciding authorities should at all times be conscious, when applying clause 6, that a claimant whose credibility is deemed to be damaged could well be telling the truth none the less"[5]. We believe this clause is pernicious and attempts to divert members of the Tribunal from such a balanced approach. We also endorse UNHCR's opposition in particular to clause 7(3): 'The fact that a refugee has transited a country regarded as "safe" bears no relationship to his or her credibility'.[6]

ILPA
President Ian Macdonald QC

ILPA members are barristers, solicitors and advocates practising in all aspects of immigration and asylum. Academics, NGOs and others working in this field are also members. The Association exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. It represents members on numerous government and Tribunal Stakeholder and Advisory Groups.

ILPA has advised parliamentarians of all parties on five immigration and asylum acts in the last 10 years: drafting amendments, briefing; sitting in the Advisors' box – we are busy people, but this matters to our clients: we know your procedures, and we are happy to help.

ILPA can provide detailed written briefings for those wishing to speak in debates, or improve their own understanding of this field and experts to speak to individual and groups of parliamentarians.

Please do not hesitate to contact the ILPA office on 0207 251 8383 or 0207 490 1553 or email billteam@ilpa.org.uk

[5] Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc.) Bill, Fifth Report of Session 2003-04*, HC 304, para 32.

[6] UNHCR briefing for second reading in the House of Lords.