Asylum and Immigration (Treatment of Claimants, etc.) Bill

Clause 11

An end to the Rule of Law?

ILPA briefing for Report Stage

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An End to the Rule of Law?

As long ago as 1771 the principle was established that an African slave was no less entitled to the protection of the courts than was a British subject: '*Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection.'*[i]

Under the Asylum and Immigration Bill this will end. ILPA's main concern with the Bill is the removal of higher court supervision of all immigration appeals and linked Home Office action (clause 11)**.** Our other concerns, including new criminal sanctions that endanger human rights, are set out in separate briefings. **Clause 11 will upset the constitutional checks and balances on government power. It is undemocratic and sets a dangerous precedent of restricting the fundamental legal rights of an unpopular minority.**

An end to court oversight

Clause 11 is subtitled the "unification of the appeal system". It creates a single tier Tribunal called the AIT to hear all immigration appeal cases. Much more significant is the ousting of *all* supervision of both the AIT *and* the Home Office by the higher courts in such cases. This will mean that there will be:

- ***no*** rights of appeal from the AIT to the Court of Appeal or the House of Lords;
- ***no*** judicial review by the High Court of the AIT; and
- ***no*** legal challenges to Home Office acts connected with subsequent deportation. This could include acts of detention, the timing and nature or removal.

There is specifically NO right of challenge a decision or act that is outside the law. This breaches the fundamental constitutional principle of the Rule of Law.

These provisions are an unprecedented and unconstitutional assault on the immigration system. Proper judicial oversight is vital in this complex area of human rights law. It is a cornerstone of our democracy.

The courts currently recognise asylum decisions as requiring "most anxious scrutiny" because of the grave nature of the human rights at stake. The government is turning this on its head. The abolition of constitutional legal safeguards will undoubtedly lead to miscarriages of justice. Britain will be sending refugees abroad to torture and death.

Mistakes can currently be rectified by judicial review. As a High Court judge said in such a case recently: "If the possibility of judicial review had not existed the claimants would wrongly have been returned to the Ivory Coast."[ii]

Clause 11 affects all those subject to immigration control. Husbands, wives, sons and daughters from all ethnic groups in the UK will be barred from challenging the new Tribunal's decisions. Fixated on asylum, the Government seems impervious to the inevitable adverse effect on race relations.

The Government's case

The proposals came under sustained attack in standing committee on 20th January. The Minister floundered trying to defend the indefensible.

The minister said the proposals were necessary to counter abuse and delay in the appeals system. This problem is overstated in our view. The refugee council estimate that in 2001 51%

of asylum seekers were successful either at the different stages of appeal or where the Home Office withdrew their refusal decision. [iii] It is easy *but wrong* to think of all cases that fail as abusive. The President of the soon to be abolished Immigration Appeal Tribunal, Sir Duncan Ousely, recently suggested that *none* of the cases that got beyond the existing first (Adjudicator) tier of appeal should be considered abusive. [iv] Nor can the Tribunal itself spot all these cases. When their filtering decisions – refusals of permission to appeal - are challenged by statutory review, 17% are being overturned by the High Court.[v] The current safeguards are vital to protect cases with merit.

Delays in the system have been due much more to Home Office bureaucracy than to appeals. All avenues of appeal are already subject to strict timetables. In 2003 a new restricted and speedy form of judicial review –*statutory review* - was introduced. The government suggests there are too many opportunities to challenge at every stage – but with abusive cases filtered out, what are the courts for if not checking questions of fundamental human rights?

Weak cases can be effectively targeted by existing measures addressing the merits of individual cases – such as improved decisions on legal aid funding, or the targeted use of costs penalties or certificates curtailing appeal rights. The government legislated radically in these areas in 2002, and is in the process of severely tightening controls on legal aid. We need time for such changes to bed down, not new experimentation with basic constitutional safeguards.

The government argues that the changes are proportionate as in only a small percentage of asylum cases is the first appeal outcome changed by further appeal. They have sought to rely on inconsistent sets of statistics from internal DCA data.[vi] In fact the available appeal statistics are unreliable, as they do not track cases over time. Most importantly, the government's percentages show the changes would impact on *thousands* of asylum appeals a year[vii] – not to mention non-asylum immigration cases. Even if it were only hundreds as the minister has suggested – is this really an acceptable level of miscarriage of justice to sacrifice in the name of expediency? What area of justice is next for such treatment?

The government says the new AIT will provide adequate legal safeguards because it will supervise itself. This is muddled and dangerous thinking:

- The new single tier Tribunal model is untested and wholly at odds with the recommendations of the 2001 Leggat report into the Tribunal system.

- The opportunity to apply to the AIT itself for a limited *review* of its own decision offends the basic principle of natural justice that 'no one should be a judge in their own cause'. This is a rotten foundation on which to build a new legal institution.

- The internal review occurs only once and is limited to written grounds raised. Only exceptionally can there be oral argument or evidence at the review. This clearly inhibits justice. It will prevent review of important issues that may have arisen late or have been overlooked. It is of particular concern when many appellants are poorly represented – a problem likely to be exacerbated by new restrictions in legal aid.

- The ability of the Tribunal to seek an opinion from the Court of Appeal is clearly inadequate. It prevents the courts from intervening in cases where the Tribunal is blind to its own error.

- The new Tribunal President will have unprecedented and unchecked power to supervise his own law making.

In the new AIT speed is valued over justice and over getting the result right.

Who agrees with us?

- The *Joint Committee on Human Rights*: "The Committee considers that it could be strongly argued that there is a real danger that the ouster of judicial review of tribunal decisions contemplated by clause 11 would violate the rule of law and that the differences of legal authority and seniority between the proposed Tribunal on the one hand and the Court of Appeal and the House of Lords on the other make it inappropriate to allow self-review by the Tribunal to be the only way of correcting errors which affect Convention rights or rights under the Refugee Convention.[viii]

- The *Home Affairs Committee:* "the real flaws in the system appear to be at the stage of initial decision making, not that of appeal.." It recommended that the appeals proposals "should not be brought into force until the statistics show a clear reduction in the number of successful appeals at first tier adjudicator level."[ix]

- The *Council on Tribunals*: "It is of the highest constitutional importance that the lawfulness of decisions of public authorities should be capable of being tested in the courts. … In the Council's view it is entirely wrong that decisions of tribunals should be immune from further legal challenge."[x]

- *Sir Andrew Collins – High Court judge and former Tribunal President:* "And do not forget that this jurisdiction can be life and death. It is all very well to talk about the problems of asylum and flooding in with bogus cases but the fact is there are some genuine ones and, if you make a mista1ke, you can be costing someone his life."*[xi]*

- *Professor Vernon Bogdanor of Oxford University:* "The clause….is not to be condemned merely because it will promote inefficiency. It is a constitutional outrage, and almost unprecedented in peacetime."[xii]

- *Wade on Administrative Law* - the leading constitutional law text: "Judicial review is a constitutional fundamental which even the Sovereign Parliament cannot abolish."

- *Claire Curtis-Thomas MP* – We will return after a year or so…. but we will not have served those people [asylum appellants] well…They will have been denied justice by an ineffective and inefficient system that needs to be revised." *[xiii]*

- *Edward Garnier MP* – "This is a an unnecessary disproportionate and wholly irregular attack on the rights of the citizens and non citizens who bring themselves within the jurisdiction of our courts."[xiv]

- *Annabelle Ewing MP* – "The clause places the tribunal above the law…our founding constitutional principles should not be used as a plaything of the Government"[xv]

- *Humphrey Malins MP* – " [Clause 11] has been described by one senior judge as a clause that would "no doubt appeal to Mr Mugabe"."[xvi]

What about Tony Blair?

"It is a novel, bizarre and misguided principle of the legal system that if the exercise of legal rights is causing administrative inconvenience, the solution is to remove the right.. … a right of appeal is a valuable and necessary constraint on those who exercise original jurisdiction." So said Tony Blair in 1992 attacking proposals to limit immigration appeals. [xvii]

We agree. Clause 11 is novel, bizarre and misguided. It is also unconstitutional and fundamentally undemocratic. It institutionalises second-class legal treatment of immigration issues. It sets a dangerous precedent.

Please support amendments to delete the restriction of access to the courts when the Bill comes to report.

Some examples showing the importance of court supervision in asylum appeal cases.

Case of A - A is an Iranian who feared persecution due to her activities for a Kurdish party. As a child she was imprisoned in an Iranian prison with her mother who suffered injuries that are still visible today. Her mother had subsequently been recognised as a refugee. In dismissing A's appeal an Adjudicator found her not to be credible. The Tribunal refused to fully consider further appeal, finding that the conclusions of the adjudicator were fully supported by the evidence and finding no arguable legal error. When this was challenged on judicial review, the High Court accepted there was an arguable case, and the matter was returned to the Tribunal. They then considered the matter fully on the papers and suggested that the adjudicator had been wrong in all conclusions on credibility. As a result the Secretary of State granted leave to remain.

Case of B - B is an Albanian, whose wife had been raped. Both he and his wife were diagnosed as suffering from Post Traumatic Stress Disorder. On appeal the Adjudicator gave no weight to two expert psychiatric reports because he did not believe the accounts upon which they were based. This approach was roundly rejected by High Court as "putting the cart before the horse". This established case law on the point as consequence.

Case of M - M is a Tamil from Sri Lanka. He claimed to have been tortured while in detention there. An Adjudicator rejected this claim and the Tribunal refused leave to appeal. The Administrative Court overturned the Tribunal decision despite reliance by the Home Office on a note from a detention centre medical officer that he had no injuries (or possibly a tiny injury). When the case returned to the Tribunal, fresh medical evidence showed huge and extensive scarring which should not have been missed. The Tribunal allowed the appeal.

Case of K - K is from the Ivory Coast, where she was detained for supporting an opposition political party. Her asylum claim in the UK was refused after 5 months. Her first appeal was heard 5 months later. At her appeal her story was only partially believed by the Adjudicator and the case was dismissed. Five months later fresh evidence was submitted to the Home Office. The Home Office ignored the new material, and a month later detained her, and a daughter born while her claim was being considered, and set directions for removal. Judicial review was initiated to prevent removal until the Home Office had properly considered the fresh evidence and developments that included the eruption of civil war in Ivory Coast. Her detention, with her 1-year-old daughter, was maintained for a period of over 6 months before bail was granted. Thirteen months after fresh evidence had first been presented, the Home Office finally agreed to allow a fresh asylum appeal to an adjudicator on the new evidence. K won this appeal. The High Court later held that all but one week of the family's detention had been unlawful and she should be awarded damages. The judge suggested this was a cautionary tale showing that decisions of the Home Office and Adjudicators can be wrong and the need for judicial assessment.

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[i] Lord Scarman in *R v Home Secretary Ex parte Khawaja* [1984] AC 74

[ii] R(Konan) and SSHD 21 January 2004

[iii] Refugee council statistics 2002: http://www.refugeecouncil.org.uk/infocentre/stats/stats004.htm

[iv] Evidence to Constitutional Affairs Committee 20 January 2004

[v] Evidence of Sir Andrew Collins to Constitutional Affairs committee 4th February 2004.

[vi] Figures given in committee on 20.1.04 differ from those given to the Home Affairs Committee by Beverly Hughes on 8.12.03.

[vii] In the 12 months to 1 Oct 2003 there were approx 78000 asylum appeals. 3.6 % of this is 2,800.

[viii] HC304 published 10.2.04.

[ix] HC109 published 16.12.03

[x] In written submission to the Constitutional Affairs Committee

[xi] Evidence to the Constitutional Affairs Committee, 3rd February 2004.

[xii] Times 9th January 2004

[xiii] Debate in Standing Committee, 20 January 2003 Hansard col 237

[xiv] Debate in Standing Committee, 20 January 2003 Hansard col 279

[xv] Debate in Standing Committee, 20 January 2003 Hansard col 276

[xvi] Debate in Standing Committee, 20 January 2003 Hansard col 230

[xvii] Tony Blair, House of Commons, 2nd November 1992.