Immigration Law Practitioners' Association's briefing for House of Commons Standing Committee B

10.01.04

Asylum and Immigration (Treatment of Claimants etc) Bill 2003

Clause 10

ILPA's priority in this Bill is clause 10, a draconian measure aimed against foreigners who seek to live and work in the UK.

AMENDMENT TO CLAUSE 10:

Page 9, line 27, leave out Clause 10

BRIEFING:

1. CLAUSE 10: ABOLITION OF THE IMMIGRATION APPEAL TRIBUNAL

"If Tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end" Denning LJ, Master of the Rolls[1]

1.1. ILPA is totally opposed to the package of provisions contained in clause 10 of the Bill. They represent an unconstitutional assault on the immigration system, leaving decision-making without proper scrutiny by the courts where people's lives and human rights are at risk.

1.2. It is worth recalling the words of Prime Minister, Tony Blair, when in opposition during debate on proposed immigration legislation in 1992:

"No justification has been advanced [for the withdrawal of rights of appeal from visitors and students by the Asylum and Immigration Appeals Act 1993] other than this, which we heard again from the Secretary of State: the system is overloaded. 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. No doubt that might satisfy the bureaucrats and Government administrators in many areas, but it can hardly be a justification for removing rights…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 than 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"

Tony Blair, House of Commons, 2nd November 1992.

1.3. Clause 10 will affect everyone who benefits from the appeals system: husbands, wives, sons and daughters from all ethnic groups in the UK will find that they are barred from challenging decisions of the Asylum and Immigration Tribunal (AIT). We are unaware of any concern by the Government about the effect on race relations of these provisions.

1.4. Clause 10 is about the way we are governed. By removing the scrutiny of the higher courts (the High Court, the Court of Appeal and the House of Lords) in immigration decisions, it will upset the checks and balances on government powers, contrary to our long established democratic tradition and contrary to the rule of law.

1.5. Without the vigorous supervision of a separate, more senior court, such as the IAT, consisting of experienced judges (many of whom have been Adjudicators), miscarriages of justice will inevitably occur.

1.6. Applications for permission to appeal are also made by the Home Office if they are of the view that an appeal has been allowed in error. ILPA's perception is that the Home Office is increasingly appealing against Adjudicator decisions. This surely demonstrates that both parties are of the view that Adjudicators need to be supervised by a higher court.

1.7. The IAT has been effectively supervising Adjudicator decisions for 34 years, since it came into existence in the Immigration Appeal Act 1969. As immigration, asylum and human rights law has become more complex, the IAT has been invaluable in giving guidance to Adjudicators on matters of law and the approach that should be adopted in deciding cases. This guidance leads to more efficient and consistent decision-making.

1.8. Under clause 10, there will only be the opportunity to apply for a very limited *review* of a decision – not to an independent body, but to the very Tribunal which has itself reached the decision under review.[2] This offends the basic principle of natural justice that 'no one should be a judge in their own cause'. Worse, such review can only be carried out once.[3] This is entirely illogical: it means that if one party has previously requested and obtained a review, the other party will be cut out of the right of review at a later stage even if that party has a cast iron case for review. Speed is placed over justice and over getting the result right. The review will, save in exceptional circumstances, be only by reference to written submissions[4] without the opportunity (as presently exists) to have an oral hearing to argue about what may be complicated issues of law and fact. The grounds of review will be limited to those raised in writing, so the AIT will be barred from considering other defects it may notice. This is of particular concern when you consider that many appellants are properly represented.

1.9. The AIT will have to decide the potentially complicated issues of whether to uphold the decision, have a re-hearing, or substitute the first decision with another decision. The AIT will have to decide the contents and nature of a substituted decision without the benefit of oral argument. This means that there would be no opportunity to consider any new oral evidence if required. If an appellant - whether claimant or Home Office - had new information there would be no opportunity to have that heard by the AIT.

1.10. Only the AIT will have the power to review itself and therefore will not be accountable to anyone. There will be no review by a supervisory or independent body.

If it refuses to review itself there will be no challenge against such a refusal.[5]

Clearly the legitimacy of the AIT will be undermined by a lack of independent supervision in addition to having the onerous task set out above.

The President of the AIT

1.11. The new President will have enormous power. It is unprecedented in British legal history for an individual to have so much power that cannot be checked and monitored by a senior court.

1.12. Put simply the new President of the AIT will be the only person who has the power to refer a legal point to the Court of Appeal.[6] This reference will be to obtain the *opinion* of the Court of Appeal only. The President will not be obliged to follow the opinion of the Court of Appeal.[7] The ancient foundation of our common law process is based of the principle of deference to the decisions of the highest courts. This Bill gives the President the unchallengeable power to ignore the opinion of the higher courts and make binding his/her own decisions.

1.13. The President also has the power to control the decision making of other members of the Tribunal. He/She can order his/her colleagues to treat decisions as final and authoritative on a particular issue. The President will be able to do this by issuing a document called a practice direction. The contents of a practice direction will be entirely at the discretion of the new President.

1.14. Practice directions have been used by the Chief Adjudicator since February 2000 and the President of the IAT since March 2000.[8] To date practice directions have dealt with the procedure that ought to be followed when preparing for and appearing before the IAT, the way in which IAT decisions should be cited and other administrative matters. The intention was to increase the efficiency of the IAT by stipulating for example what documents are required by the IAT at a hearing of the appeal.

1.15. Practice directions have not been made to date to fetter the discretion of the decision making of the IAT or Adjudicators.

1.16. The new President will however have the power to control how AIT members decide a case by requiring them to come to a particular conclusion about an issue.[9] The new president can make a practice direction at any time about any matter. He/She does not have to consult anyone or hear any submissions about any issue before deciding how all cases on a particular issue will be decided in the AIT.

1.17. The new President's powers undermine the principal of legislative supremacy. New law can be made in a practice direction that will not have the status of primary or secondary legislation.

1.18. It seems that the new President will be more powerful than Parliament and will not be accountable to the safeguards of the higher courts. The effect of the powers of the new President additionally means the end of the application of the rule of law to asylum, human rights and immigration decisions in the AIT.

The real dangers of a one-tier system

1.19. Poor quality decision making by the Home Office at the outset of the process

and a lack of Home Office Presenting Officers to represent at appeal hearings serve only to exacerbate the fundamental lack of safety of a one-tier appeal process without further possibility of redress. These are problems that have now been acknowledged by the government, but no assurance has been given that implementation of the appeal changes will be delayed until real improvements materialise. In ILPA's experience, many if not most adjudicator hearings involve the adjudicator grappling with new facts, new information and new issues, which the Home Office have not considered prior to the hearing or have never previously raised with the appellant. There needs to be a right of appeal from what are in effect first instance decisions where things can and do go seriously wrong.

1.20. The burden upon Adjudicators to get the decision right the first and only time of appeal would be unreasonably onerous. The impact upon the appellant of an incorrect dismissal of an appeal *could often be fatal.*

The Government's justification

1.21. The Government has set out extremely limited reasons for abolition of the IAT. In the annex to the DCA/Home Office consultation letter of 27 October 2003 (signed by Beverley Hughes and David Lammy; available on IND and DCA web sites), the Government stated that:

'A single tier would simplify the appeals system and reduce the risk of people seeking to play the system by making unfounded appeals to frustrate final resolution of their case…The current appeals system is still too long and complicated. It provides people with opportunities to abuse the system in order to cause delay or abscond'.

Taking these elements in turn:

'Opportunities to cause delay or abscond'

1.22. It is not the right of appeal to the IAT that causes delay in the asylum system. An asylum seeker has only ten working days (five days if in detention) to appeal from an adjudicator to the IAT. If his/her grounds of appeal have no merit, permission to appeal will be refused and the appeals system is exhausted subject only to any resort to the very speedy paper process of statutory review under Nationality, Immigration and Asylum Act 2002 section 101. Do we not need to address the point that there is a huge backlog at the IAT but that only demonstrates the number of cases given permission- and the point is that you don't abolish something because people are using it!!

1.23. Contrast the frequent delays of at least months caused by Home Office inefficiency. For example the delay between a person claiming asylum in the UK and his/her interview by the Home Office; between interview and Home Office decision; and perhaps most significantly between exhaustion of appeal rights and removal from the UK.

1.24. In any event the large reduction on asylum claims in recent months will very soon feed through to reduce delays at all stages of procedure. There simply is no need for such drastic action to kill off a patient who has every prospect of a dramatic improvement.

1.25. Common sense dictates that, by comparison with these severe delays, it is highly unlikely that the small time scale involved in applying for permission to the IAT provides any major opportunity to cause delay or abscond.

'Too long and complicated'

1.26. As to the Government's comment that the two-tier system is 'complicated', it is no more complex than any other system of appeal rights in the UK.

1.27. Government's desire to simplify the asylum and human rights appeal process will not automatically simplify the substance of asylum, human rights and immigration law. It is right that asylum, human rights and immigration law is complex and fast moving. It is an area of law that deals with the most serious violations of humanity that are changing moment by moment on a global scale. Mistakes made by a one tier Tribunal will result in preventable deaths, torture, inhuman and degrading treatment that may or may not amount to persecution.

1.28. Other, comparable tribunals (such as the social security appeals system and the employment tribunals system) are two-tier. Indeed, this was the model suggested by Sir Andrew Leggatt in his report 'Tribunals for Users One System, One Service' (March 2001). In addition, both the Social Security Appeals Tribunal and the Employment Tribunals are three-member panels even at first instance. Yet, it is proposed that migrants and asylum seekers should be denied a second-tier appeal without even the added safeguard of a panel decision at first instance.

A one-tier appeals system will lead to low-quality justice that is neither speedy nor fair:

1.29. In his written evidence to the Constitutional Affairs Committee's enquiry into immigration and asylum appeals, the Chief Adjudicator has written:

'Productivity in terms of deciding cases [at adjudicator level] is high and reasoned determinations are produced at greater speed than in much other judicial work'.

ILPA agrees that appeals are currently dealt with by adjudicators in a speedy manner. However, speedy decisions from adjudicators are appropriate only when there can be resort to a higher tribunal that can remedy any defects in quality. Without the safeguard of a higher tribunal, adjudicators will be bound to spend more time on each case, in order to try to ensure the requisite quality. Adjudicator hearings may well become longer as a consequence of this legislation. Thus, the Government's proposals lose their justification even by the Government's own policy parameters:

1.30. In essence, the current system already operates speedily. Therefore, if further speed is to be introduced:

- Current quality will suffer.
- There will be no scope for further improvements in quality: the learning curve for adjudicators, provided by IAT scrutiny, will vanish.

1.31. In his written evidence to the Constitutional Affairs Committee's enquiry into immigration and asylum appeals, the Chief Adjudicator has written:

'We have an efficient training system, a reasonably well developed mentoring system and I have introduced judicial appraisal which is currently rolling out satisfactorily'.

ILPA shares the Chief Adjudicator's concern for training. We would hope that the Government is in a position to say that IAA training is as good as it can get. We do not think that the Chief Adjudicator believes that there are defects in training. Given this,

improved training could not be an answer to concerns about quality in a one tier system. If current training is already effective, how will future training be significantly more effective than now?

1.32. In any event, rights of appeal in any court do not rest on the right to appeal from a low quality judge to a high quality judge. They are concerned with rectifying errors which are bound to creep into any judge's decisions at some time or other, or with clarifying difficult issues. We do not have the right to appeal from a High Court to the Court of Appeal because of quality concerns with our High Court judges. The Court of Appeal would not be redundant on the grounds that we could provide further training to High Court judges. Similarly, in immigration cases, arguments relying on further training for adjudicators are arguments that avoid grappling with the basic principles involved in rights of appeal.

The statistics

1.33. The Government has justified the abolition of the IAT on basis of statistics. The Home Secretary has consistently referred to 3% of appeals to the IAT being successful and, therefore, a 97% success rate at the adjudicator stage[10]. But this is not borne out by any analysis of the statistics published by the government.

1.34. According to government statistics, around a third of applications for permission to appeal to the Immigration Appeal Tribunal are successful. In 2002, the majority of appeals determined by the IAT were either allowed (11%, 620 cases) or remitted back to an Adjudicator for further consideration (49%, 2,700 cases). The remainder were either dismissed (36%, 2,015 cases) or withdrawn (4%, 225 cases). Where the Home Secretary gets his 3% from is not understood by anyone, but we can only presume it inexplicably excludes the large group of cases which are remitted. There is always a danger in the use of statistics, which can be manipulated. What is clear is that in 61% of cases determined by the IAT in 2002 the Adjudicator was found have made an error, or re-consideration was found to be required. This must demonstrate that there is a need for proper scrutiny of Adjudicator's decisions.

In any event, would we want to abolish the right to challenge miscarriages of justice in the criminal courts on the basis that only a small proportion of people will be affected?

An example

Case of T

The Tribunal remitted the appeal of Mr T, a Cameroonian because in rejecting his evidence as to method of escape from detention, the Adjudicator had effectively set himself up as construction expert. The Adjudicator had also held matters against Appellant not put to him at appeal. On remittal to another Adjudicator fresh expert evidence was adduced and accepted. Refugee status was granted.

2. CLAUSE 10 (7): THE DEMISE OF JUDICIAL REVIEW

This provision makes clear that no court will have ANY supervisory or other jurisdictions in relation to the AIT. Even where the decision of the AIT is unlawful, or where the AIT has acted in breach of natural justice or outside of its jurisdiction, the higher courts will have no power to entertain applications or appeals. Furthermore this provision excludes ANY supervisory or other jurisdiction in relation to decisions by the

Secretary of State to remove or deport a person from the UK, or in respect of any action in connection with such decision.

2.1. The Government's proposals to curb judicial review came as a bolt from the blue. The only prior indication lay in the opaque, vague and uninformative words of Annex A of the DCA/Home Office consultation letter dated 27 October 2003, where the Government said that 'we are looking at ways to restrict access to the higher courts'. It is truly worrying that a British, democratic government can purport to abolish constitutional checks on the powers of the executive without any prior consultation or openness. *Respondents to the consultation letter were denied any opportunity to comment on this extremely important aspect of the Bill.* Bearing in mind that the Bill was published only one month after the consultation letter, the implication is that either the Government kept quiet about this radical proposal or that it was hastily cobbled together.

2.2. Currently if the Immigration Appeal Tribunal refuses permission to appeal from an Adjudicator's decision, there is no further right of appeal. The only remedy is *statutory review* (rather than judicial review). This is a paper only review by a High Court judge of the decision to refuse permission by the Immigration Appeal Tribunal. ILPA considers that Statutory Review is already a significantly reduced form of judicial scrutiny - Judicial Review, which exists in other areas of law, involves an opportunity for full oral argument. Statutory Review was only introduced in April 2003, and the Government has not explained why it is now necessary to abolish the right to review entirely, even before the dust has settled.

2.3. Yet more remarkable is the provision to prevent any form of judicial oversight of any action in connection with decision to remove someone from the UK if this is in consequence of an appealable immigration decision[11]. There would be no legal safeguard whatsoever to prevent removals, even in error, prior to the exhaustion of appeal remedies. There would be nothing to prevent removal even if newly available evidence had been put to the Secretary of State for fresh consideration. There could be no High Court challenge to the legality of detention pending removal in such cases.

Constitutional implications

2.4. It is unconstitutional for a person to have no remedy to the higher courts. The provision risks refugees being returned to persecution and the families of ethnic minorities suffering from human rights violations and separation. The AIT would have unprecedented power. ILPA fears that without judicial scrutiny, decision-making will deteriorate in the way expressed by Tony Blair above in 1992.

2.5. Judicial scrutiny of administrative action is a vital element of the rule of law. It is the procedure by which the Judiciary assume a constitutional responsibility to prevent the abuse of executive power. The judiciary ensures that public bodies are not above the law.

2.6. The proposals call into question the delicate balance between legislative supremacy and the fundamental common law right of access to the courts.

2.7. Over forty years ago the House of Lords ruled that clauses such as clause 10 of the Bill cannot 'oust' access to the higher courts. The House of Lords stated that it was of paramount constitutional importance that it is possible to challenge a decision of a lower level Tribunal. The House of Lords stated that challenges of the lower court would be necessary where its jurisdiction had been exceeded, it had breached the

principles of natural justice, it had applied the wrong legal test, had asked the wrong legal question or had made a decision based on irrelevant considerations.

2.8. Clause 10 is the most extreme example of a 'modern' Government's attempt to curtail the right of access to the courts. The effect of clause 10 will mean that there is no longer be possible for someone who is unlawfully detained to challenge this detention under the ancient writ of *habeas corpus*.[12] This is a common law writ that can be applied for in the High Court which has been used in circumstances where people have been detained under the Immigration Acts where there is no power to detain.

2.9. The clause provides expressly that the AIT and the Secretary of State can take decisions which are based on "lack of jurisdiction, irregularity, error of law, breach of natural justice, or any other matter" and no court can even "entertain proceedings" to challenge such decisions.[13] This proposal is undemocratic, unconstitutional and antithetical to the rule of law. Such a proposal would be disapproved of elsewhere at any time, but in a modern democracy in the 21st century it is thoroughly reprehensible. It should be deleted from the Bill.

2.10. In practical terms those who have previously been able to access the courts will now seek advice and help from their representatives in the community. MPs' surgeries are likely to be inundated with people seeking advice as to the impact of these measures on their case whether for asylum or because a family member wishes to enter the country as a visitor or student etc. MPs will be faced with the task of explaining that in this country the right of access to the High Court has been abolished, but only for those who are asylum seekers or who wish to immigrate here.

The Statistics

2.11. Statistics show that permission was granted in approximately 20-25% of applications for JR in 2003. In all these cases the High Court accepted there was an arguable point of law. However, the great majority of cases with permission were then withdrawn before a substantive decision. In ILPA's view the high numbers of withdrawals reflects the practical approach to problem solving both of the courts and the Treasury solicitor, as we believe (but can not prove because of limitations on the statistics recorded by the courts) that in most cases the Home Office effectively concedes the case, leading to a withdrawal in statistical terms. Thus the importance of Judicial Review cannot be judged by the number of cases allowed at substantive hearing. The numbers of applicants granted permission show that it is a remedy providing a vital last line of defence to hundreds of people each year.

Some examples

1 Case of U

U is a Somali woman who has fled the violent civil war in Somalia. She has claimed asylum. The Home Office refused her asylum claim on grounds that they believed she is not a Somali, but is an Ethiopian national. The Adjudicator dismissed the appeal; reaching a finding of fact that U was not a Somali national. Professor Lewis from the London School of Economics was asked to comment upon the Adjudicator's findings that the Adjudicator had made in respect to U's ethnicity and nationality. He was of the opinion that the Adjudicator had made numerous errors in her approach to the evidence and he reached the firm view that

U was a Somali national. An application for leave to appeal to the IAT was made and the report from Professor Lewis was submitted.

The IAT refused permission to appeal concluding that an appeal would have no prospect of success. U applied for a statutory review of this decision by the Tribunal. The decision of the IAT was notified on the 10th of September 2003 and the outcome of the statutory review was received on the 3rd of October 2003 i.e. within just over 3 weeks. The statutory review was successful. Mr. Justice Maurice Kay reversed the decision of the Tribunal to refuse permission stating "in my view it was legally erroneous for the IAT to deal with the report of Professor Lewis in the peremptory manner it did".

2 Case of F

F is an Algerian national with serious mental health problems. He feared persecution from armed Islamic groups in Algeria. The Adjudicator dismissed the appeal partly because of his account of his journey through Europe, which the Adjudicator did not find credible. An application for permission to appeal to the IAT was supported by an expert's report in response to the Adjudicator's Determination, which concluded that F's account was indeed credible. The IAT refused permission to appeal. F then applied for a judicial review of this decision. The Treasury Solicitors conceded the matter before it went to court for the reason because "the Secretary of State accepts that it is arguable that the IAT has erred".

3 Case of R and her baby

R is a Ugandan national suffering from AIDS. She has an 8-month-old baby who was born in the UK. Prior to the birth of R's baby, R applied for asylum and was refused. She appealed to an Adjudicator who dismissed her case on both asylum grounds and in respect of her human rights. R and her baby were within 10 hours of being removed when solicitors intervened arguing that neither the Secretary of State nor the Adjudicator had considered the rights of R's baby who would undoubtedly be orphaned if they were returned to Uganda. The Secretary of State insisted that R's baby had no rights and it was not necessary for him or an Adjudicator to consider those rights since the baby was making a "voluntary departure" with her mother. R commenced judicial review proceedings against the Secretary of State. Treasury solicitors eventually conceded that an Adjudicator should reconsider R's case and that of her baby's and the alleged breach of human rights in removing them.

4 Case of A

A is an Iranian who feared persecution due to her activities for a Kurdish party. As a child she was imprisoned with her mother and as a small child detained in an Iranian prison with her mother who suffered injuries that are still visible today. Her mother was recognised as a refugee. In dismissing her appeal an Adjudicator found comprehensively against her credibility. The Tribunal refused leave to appeal, finding that the conclusions of the adjudicator were fully supported by the evidence and finding no arguable legal error. On a Judicial Review challenging the Tribunal permission was granted and by consent the matter was remitted to the Tribunal, who on considering the matter fully on the papers, commented extensively on the adjudicators determination. The Tribunal indicated that it seemed to them that the adjudicator was completely wrong in all of his conclusions on credibility. As a result the Secretary of State made a decision to grant leave to remain.

5 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 they 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.

6 Case of Y

Y is from Pakistan. Despite the non-appearance of a Home Office representative the Adjudicator totally disbelieved Y, and both his brother and cousin (both recognised as refugees), and didn't accept Y was of the Ahmadi sect. The adjudicator recommended that the witnesses' refugee status be revoked. Although the adjudicator failed to put any adverse matters to his witnesses, the Tribunal said there was no error of law and refused leave to appeal. The Administrative Court granted permission on the issue of procedural fairness. The case has been remitted back to the Tribunal for further consideration.

7 Case of M

M a Tamil had been detained in Sri Lanka and claimed to have been tortured. An Adjudicator rejected this claim and the IAT refused leave to appeal. The Administrative Court quashed the Tribunal decision despite reliance by the SSHD 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 IAT, fresh medical evidence showed huge and extensive scarring which shouldn't have been missed. The IAT allowed the appeal.

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3. CLAUSE 10: REMOVAL OF APPEALS TO THE COURT OF APPEAL

3.1. ILPA considers this removal of the jurisdiction of the Court of Appeal and the House of Lords to be entirely unjustified. ILPA considers that the supervision of the higher courts is vital if decision-making by the Home Office and the AIT is to be kept in check and this important area of law is to keep pace with international human rights developments.

If higher courts cannot set down the law, British immigration law will grind to a halt: it will not longer be a body of principle fairly applied, but a mish mash of decisions lacking coherence or joined up thinking. ILPA fails to understand how that will benefit refugees, migrants or the British public.

Existing rights of appeal

3.2. The Asylum and Immigration Appeals Act 1993 was condemned by Tony Blair during its passage through Parliament as being unfair, arbitrary and seriously detrimental to good race relations. He did, however, welcome the extension by the Act of rights of appeal to asylum seekers. The Act also introduced a new right of appeal from the Immigration Appeal Tribunal to the Court of Appeal on a question of law[14].

3.3. An appeal to the Court of Appeal may only be brought with the permission of the

Immigration Appeal Tribunal or, if refused, the permission of the Court of Appeal itself [15]. Such permission will only be granted by the Court of Appeal if it considers that 'the appeal would have a real prospect of success' or 'there is some other compelling reason why the appeal should be heard'[16].

3.4. The Court of Appeal has made clear that as far as immigration appeals are concerned, 'properly reasoned well structured judgments of the IAT will normally mark the end of the road unless there is some uncertainty about the applicable law'[17]. At the same time the Court of Appeal has acknowledged that appeals to the IAT often raise complex issues of fact and difficult questions of law, that the law is still developing and that decisions of some panels of the IAT are of 'uncertain quality'[18] so that appeals to the Court of Appeal would still be necessary.

3.5. The requirements that a would-be appellant must identify an error of law in the tribunal's determination and that he or she must then convince the tribunal or the Court of Appeal that an appeal would have a real prospect of success mean that very few immigrants even attempt to appeal to the Court of Appeal, let alone obtain permission to do so.

3.6. The Lord Chief justice Lord Woolf, in his report *Access to Justice*, said of appeals to the Court of Appeal that they *serve two purposes: the private purpose, which is to do justice in particular cases by correcting wrong decisions, and the public purpose, which is to ensure public confidence in the administration of justice by making such corrections and to clarify and develop the law and to set precedents.*

3.7. Immigration and asylum is an extremely complex and difficult area of law. Decision makers are required to interpret and apply several pieces of primary legislation, numerous pieces of delegated legislation, the immigration rules, the Immigration and Asylum Appeals Procedure Rules, two major international treaties (the Refugee Convention and the European Convention on Human Rights), the relevant case-law of the UK courts and the Immigration Appeal Tribunal, the European Court of Human Rights, the European Court of Justice and, increasingly, the domestic courts of other jurisdictions. Decision makers are required to determine difficult questions of fact, often on the basis of very limited and fragile information, about the autobiographies of individual immigrants and about conditions in the countries from which they come. In doing so, they are obliged to take into account every relevant consideration and to disregard every irrelevant consideration and they are under a particular duty to give 'anxious scrutiny' to cases where fundamental human rights, including the right to life itself may be at stake.

3.8. These are formidable requirements and it is therefore inevitable that even the most able and conscientious decision makers will from time to time make a decision that is wrong in law, particularly when they are also subject to immense pressure to determine as many appeals as quickly as possible.

The public purpose

3.9. Lord Woolf identified the public purpose of appeals to the Court of Appeal as including the clarification and development of the law and setting of precedents. For the reasons given immigration law is immensely complex and subject to constant change (not least because of the frequency with which new legislation is introduced). For that reason, there is a heightened need in this area for the

clarification and development of the law and for the setting of precedents. Refugee and human rights law is particularly subject to change and development. The refugee and human rights Conventions are 'living instruments'. They are intended to provide real and effective protection to individuals falling within their scope in a world in which change is constant but otherwise unpredictable. That means that both Conventions have to be interpreted and reinterpreted in order to determine whether the UK owes any obligation to protect individuals fleeing from circumstances to which the law has not previously had to respond.

Some examples where the Court of Appeal has carried out this public purpose

a) Misunderstanding as to the jurisdiction of the tribunal

The tribunal's jurisdiction is defined by the relevant statutory provisions. How those provisions are interpreted determines what appeals the tribunal can and cannot hear and what questions it can and cannot address. Those are absolutely fundamental questions and the tribunal has on occasion answered them wrongly.

One example is the case of *Zenovics v SSHD*[19]. The tribunal decided that it had no jurisdiction to hear appeals on human rights grounds where an appellant's claim on refugee convention grounds, but not his or her claim on human rights grounds, had been certified by the Secretary of State under Schedule 4 to the 1999 Immigration and Asylum Act. Had that decision been correct, then a substantial number of appellants who might have been at real risk of serious harm, albeit not for a reason falling within the refugee convention, were they to be removed from the UK would nevertheless have no right of appeal to the Tribunal. The Court of Appeal overturned the Tribunal's decision and held that the Tribunal did have jurisdiction to hear a human rights appeal where only the asylum, but not the human rights claim had been certified. This decision is no longer of practical relevance because the legislative provisions concerned have been repealed. However, it provides a clear illustration of (a) the complexity of the kind of legislative provisions that the tribunal is required to interpret and apply; (b) the potentially disastrous consequences for individuals of an erroneous interpretation of the legislation; (c) the importance of an appeal to the Court of Appeal in order to clarify the meaning and effect of the legislation.

b) Interpreting the Refugee Convention

The Court of Appeal and the House of Lords have made numerous decisions interpreting (amongst other things) the Refugee Convention definition of a refugee. To take but two examples:

In *Adan v SSHD*[20] the Court of Appeal and then the House of Lords were faced with the question fear of persecution arising in the context of clan based civil war could satisfy the Convention definition of a refugee.

In *Shah and Islam v SSHD*[21] the House of Lords very importantly found that women in Pakistan accused of adultery were entitled to asylum. The House of Lord's decision clarified and provided guidance on one of the most difficult issues in refugee law, i.e. what is meant by 'membership of a particular social group'. It is important to note that in this case, the tribunal refused leave to appeal in the *Islam* case (*Shah* was a judicial review of the tribunal's refusal to grant her leave to appeal).

c) Errors of approach by the tribunal

It is an elementary requirement that in reaching its decision the tribunal is to take account of all relevant evidence. There are many cases where the Tribunal has failed to do that, thereby arriving at decisions that, if left uncorrected, could have potentially disastrous consequences for the appellant. Again to take but two examples:

In *Drrias v Secretary of State for the Home Department* [22] an adjudicator had found that the appellant was a Coptic Christian from Sudan and that if returned to Sudan there was a real risk that he would be detained, physically abused and otherwise persecuted for reasons of his religion by the Islamist regime. The Tribunal allowed the Secretary of State's appeal. The Tribunal did so because it was completely mistaken as to what the adjudicator had found about the appellant. The Tribunal thought that the adjudicator had disbelieved his evidence. In fact, the adjudicator had believed his account. The Court of Appeal struck down the tribunal's determination without hesitation.

In *Demirkaya v Secretary of State for the Home Department* [23] the Tribunal found that the appellant, a Turkish Kurd suspected by the authorities of being a separatist had been severely tortured in the past. On one occasion he had been detained by Gendarmes who sliced his back with a bayonet so that he was left with 35 scars. On a number of other occasions he was detained by the police and severely beaten and tortured, including one time when he was pushed through a window so that he was cut by the glass and then hanged upside down out of the window until he lost consciousness. He was told by the police that he would be killed and his death would be passed off as a suicide. The tribunal found, nevertheless, that he could be returned to Turkey. The Court of Appeal overturned that decision because the tribunal had failed to identify any reason why he would not be treated in the future as he had been in the past.

d) Inconsistent decisions by the Tribunal

Many asylum seekers flee from similar problems arising in particular countries. Deciding whether they qualify for asylum depends in part upon assessing a common body of evidence about general conditions in those countries (e.g. UN reports, reports by NGOs such as Amnesty International, expert evidence and so on). There have been a significant number of occasions where different Tribunals have reached opposite and irreconcilable conclusions on claims that have been factually almost identical, both in terms of the individual's particular predicaments and in terms of what the evidence shows about circumstances in his or her country.

e) Procedural unfairness

The Court of Appeal has also allowed appeals against tribunal decisions because of procedural unfairness.

In *Macharia v Immigration Appeal Tribunal* [24] the Tribunal heard an appeal by the Secretary of State against an adjudicator's decision that the appellant had well founded fear of being persecuted in Kenya. At the hearing before the Tribunal the asylum seeker's representative was presented by the Secretary of State's representative and by the Tribunal itself with fresh evidence forming a bundle of documents almost 1" thick. She was allowed only 10 minutes in which to look at the documents and prepare her response to them. The Court of Appeal found that that was wholly inadequate time in which to assess that evidence and allowed the appeal because of procedural unfairness.

The statistics

3.10. During 2002 the tribunal determined 5,565 appeals[25]. During the 'legal year' (October – September) 2000 – 2001 the Court of Appeal heard only 57 appeals from the Immigration Appeal Tribunal. During the legal year 2001 – 2002 the Court of Appeal heard only 66 appeals from the Immigration Appeal Tribunal [26]. In other words, only just over 1% of Immigration Appeal Tribunal determinations was appealed to the Court of Appeal.

Bearing in mind the actual numbers of appeals from the tribunal to the Court of Appeal, it is quite impossible to justify abolition of the right of appeal to the Court of Appeal in terms of any need to remove an impediment to speedy resolution of appeals.

Will references by the President of the AIT to the Court of Appeal be an adequate safeguard?

3.11. In hardly any of the cases mentioned above did the tribunal itself grant leave to appeal to the Court of Appeal. Each of these cases was of considerable importance to the individuals concerned but they also raised complex and important questions of law of wider significance.

3.12. The Bill envisages the Court of Appeal being seised of a case only if the president of the tribunal decides to make a referral to the Court. The current unwillingness of the tribunal to grant leave to appeal to the Court of Appeal even in genuinely important and complex cases provides a strong indication that such cases will not in future be referred to the Court of Appeal.

3.13. No rational or convincing justification has been offered for denying appellants the right to appeal to the Court of Appeal and for denying immigrants access to the High Court. 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'*[27].

3.14. Absent such justification for departure from so fundamental a principle of English law, Tony Blair's analysis of an earlier piece of Immigration legislation applies with even greater force to this Bill than it did to the Asylum and Immigration Appeals Bill 1993, of which he said:

We do not take exception to the detailed provisions of the Bill alone, but to the ethos and prejudice that underlie it. We take exception to the assumption that asylum seekers should be treated as bogus until shown to be genuine…That prejudice which runs throughout the Bill…is nasty – worse than that; it is calculated. It is part of a design to play up this issue not for any interests of the public or the country, but simply for the interests of the [Labour] party...hysterical claims were made earlier when isolated cases of fraud were used to construct an entire argument to provide that the current system is subject to wide-scale abuse.

> *An attempt has been made to portray anyone who has opposed the provisions on the ground of natural justice as someone who is advocating an irresponsible or open-door policy for immigration. All that has been done in the knowledge that that those who will be most affected by the bill will be of a different race or colour. I cannot believe that that is irrelevant to the way in which the Bill has been handled. This is a matter which arouses alarm among some of the*

population and which is designed to arouse the most virulent type of nationalism among others. An attempt has been made to pretend with varying degrees of crudity that those who seek to enter this country do so from the worst of motives rather than the worst of circumstances. Some elements of the debate may have been more elevated than that, but in several respects we have witnessed a fairly distasteful exercise-an attempt under the guise of making necessary regulations to stir up passions and prejudices that were better left dormant.

It will not be members of Parliament who suffer once the bill is enacted: it will be those who are least able to defend themselves and in the poorest condition to withstand some of its provisions – those most vulnerable to racial sentiment. I do not believe that that can possibly help good race relations in this country. The way in which the Bill is presented and the sentiment that underlies it do not merely make it objectionable in its provisions and unjust and arbitrary in its operation but reflect discredit on the Government who have introduced it.[28]

4. AMENDMENT TO SCHEDULE 2:

Page 33, line 16, at end add -

4.1.1. ( ) A member of the Asylum and Immigration Appeal Tribunal shall be known as an adjudicator.

BRIEFING

4.2. In the Home Office/DCA letter dated 27 October 2003, the Government stated at Annex A of the letter that:

> 'The new judiciary will generally be titled Immigration Judges or Senior Immigration Judges, but the precise hierarchy remains to be determined'.

4.3. This amendment aims to probe the Government on this issue, so that we can learn more details of how the AIT would work on a day-to-day basis. The Bill is very silent about this.

4.4. It is quite clear that the qualifications for membership of the AIT are the same as the current qualifications for adjudicators (see Sched 1 of the Bill). Adjudicators are not judges. Changing their title will not make them judges. Giving them additional training will not make them judges. It would be highly unsatisfactory if even the title allocated to members of the AIT were to be used for political purposes. By calling them 'judges', the Government gives the impression to lay people that AIT members have equal status as members of the judiciary, which would imply that the one tier appeal is sufficient because asylum seekers have judicial hearings before persons of the same status as litigants in the courts. The title 'immigration judge' appears to be political spin. It is disappointing that the Government chooses to obfuscate the issues by its use of language.

4.5. The Government has not set out in detail who will qualify as a senior immigration judge. The workload of senior immigration judges would appear to lie to a significant extent in the discretion of the President of the AIT (see Sched 1, new Sched 4, para 8 of the Bill). Yet, the President's actions will under clause 10 lie outside the scrutiny of any court.

4.6. Moreover, tasks and duties to be performed by senior immigration judges (as opposed to immigration judges) are not spelt out in the Bill. These important matters - serious issues about the division of functions within the AIT - should be considered by Parliament now and not simply aired at a time and in a form that suits the Government. This is not democratic.

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[1] R v Medical Appeal Tribunal; Ex parte Gilmore [1957] 1 QB 574 at 586

[2] Clause 10 (6), new section 105A.

[3] Clause 10 (6), new section 105A (6).

[4] Clause 10 (6), new section 105A (2).

[5] Currently it is possible to apply for Statutory Review to a single High Court Judge if the IAT refuse permission to appeal. Statutory Review was created by section 101 of the Nationality, Immigration and Asylum Act 2002 to prevent refusals of permission to appeal to the IAT to be the subject of judicial review. Section 101 has only been in force since June 2003 and in that time according to Royal Court of Justice Statistics there have been 278 applications made of which 53 were successful.

[6] Clause 10 (7), new section 108B (1).

[7] Clause 10 (7), new section 108B (3), (c) & (d)

[8] See the IAA website for a full list of IAA Practice Directions.

[9] Schedule 2, paragraph 22 (3).

[10] see for example HC Deb 2 December 2003 c377 and cc399-400

[11] Proposed section 108A (2) (e) of the 2002 Act, inserted by clause 10(7).

[12] The writ is traceable in its existence beyond Magna Crater in the fourteenth century.

[13] Clause 10(7).

[14] Asylum and Immigration Appeals Act 1993, section 9, reproduced Immigration and Asylum Act 1999, Schedule 4, paragraph 23 and Nationality Immigration and Asylum Act 2002 s. 103.

[15] Nationality Immigration and Asylum Act 2002, s. 103(2)

[16] Civil Procedure Rules, rule 52.3

[17] *Koller v Secretary of State for the Home Department* [2001] EWCA Civ 1267

[18] Brooke LJ in *Koller*

[19] [2002] EWCA Civ 273

[20] [1998] Imm AR 338

[21] [1999] Imm AR 283

[22] [1997] Imm AR 584

[23] [1999] Imm AR 498

[24] [2000] Imm AR 190

[25] Control of Immigration Statistics United Kingdom 2002 (Cm 6053)

[26] Court of Appeal Review of the Legal Year 2001 - 2002

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

[28] House of Commons, 11th January 1993.