Asylum and Immigration (Treatment of Claimants, etc) Bill 2003

Clause 10

ILPA Briefing for Second Reading 17 December 2003

Why is clause 10 important?

- Clause 10 is about **rights:** the rights of individuals to challenge decisions of the State.

- 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 the AIT's decisions.

- Clause 10 is about **the way we are governed**. By removing the scrutiny of the higher courts 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.

What does clause 10 say?

At present, people can appeal to an immigration adjudicator and then, with permission, to the Immigration Appeal Tribunal and onwards to the Court of Appeal and House of Lords. Under clause 10:

- People who receive a negative immigration decision may appeal to the Asylum and Immigration Tribunal.

- No one (including the Home Office) will be able to appeal from the AIT to any other court.

- Instead, the AIT will have power to review its own decisions BUT

  - This 'in house' review cannot realistically be described as an independent review.

  - The grounds for review will be very narrow.

  - There can be no more than one review - so a person who is subject to successive errors by adjudicators has no remedy.

- In legally complex cases, the President of the AIT may refer a point of law to the Court of Appeal BUT

  - This is not the same as an appeal to the Court of Appeal, which will not be able to overturn an AIT decision but will only advise the AIT on a point of law.

  - No one can challenge the President's actions - he can refer or not

refer a point to the Court of Appeal at his own, unchallengeable volition.

- In addition, clause 10 will severely restrict judicial review in immigration cases: for example, if the Home Office gets the identity of a person muddled up and seeks to remove the wrong person to the wrong country, the person's family will be unable to ask a Judge to stop the removal, or even to order the Home Office to bring him back.

- The Government is saying that only 3% of all those who use the appeals system benefit from a second tier appeal BUT, according to government statistics, around a third of applications for permission to appeal to the Immigration Appeal Tribunal are successful. 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?

We urge you to give clause 10 high priority.

For further information, please contact ILPA's representatives Judith Farbey [07958 308 512] or Nicola Rogers [07961 310505].

ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS ETC) BILL 2003

CLAUSE 10 BRIEFING FOR SECOND READING 17 DECEMBER 2003 FROM THE IMMIGRATION LAW PRACTITIONERS ASSOCIATION (ILPA)

INTRODUCTION

This briefing is divided into three parts

Part 1: Abolition of the Immigration Appeal Tribunal

Part 2: Judicial Review ouster

Part 3: Removal of appeals to the Court of Appeal

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

It is worth recall 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

PART I:

THE ABOLITION OF THE IMMIGRATION APPEAL TRIBUNAL

CLAUSE 10 NEW SECTION 81 AND 105A

UNIFICATION OF APPEAL SYSTEM

Summary of New Proposals:

The Bill if enacted in its current form will reduce the current two tier appeal process into a single, renamed, Asylum and Immigration Tribunal. This one level, all encompassing appellate body will not be accountable to any other court and it is stated that all decisions at this one level will be final.

ILPA believes that this will cause injustice and refugees being returned in error to persecution and human rights abuses. This provision will apply not only to refugee cases but also to all immigration cases, and ILPA fears it will result in cases of UK residents being denied the right to be joined by their families from abroad.

THE EXISTING PROCESS: WHAT IS THE IMMIGRATION APPEAL TRIBUNAL (IAT)?

The current process of appeals against a negative immigration, asylum and/or human rights decision of the Secretary of State for the Home Department is to appeal to a first instance Adjudicator. This is an automatic right of appeal afforded to anyone who has received a full decision either from the Home Office or an Entry Clearance Officer.

If the first instance Adjudicator makes errors in deciding the appeal it is currently possible to appeal against those errors. The right of appeal is not automatic however and permission to appeal has to be obtained from the IAT. This application has to be made in writing within 10 working days of having received the written decision of the Adjudicator ensuring that potential appellants act quickly.

The Procedure Rules in place make clear that permission to appeal will be granted by the IAT *only if* there is merit in the application and there is a real prospect of success or if there is some other compelling reason why the appeal should be heard.

Once permission to appeal is obtained one of two things can happen. Either the Tribunal will list the appeal for an oral hearing so argument can be heard about the errors of the first instance Adjudicator. Or, if the errors of the Adjudicator are very clear from reading the application, the Tribunal will send the appeal for re-hearing by a different Adjudicator, without an oral hearing (remittal).

IAA statistics show that permission to appeal is granted to approximately a third of the applications made for permission to appeal.[1] Of those cases where permission is granted approximately half are sent back to a different Adjudicator for a fresh hearing. [2]

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. The Home Office is increasingly appealing against positive Adjudicator decisions. This surely demonstrates that both

parties are of the view that Adjudicators need to be supervised by a higher court.

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.

WHAT WOULD BE THE EFFECT OF THE NEW PROPOSALS?

No Appeal

Clause 10 (1) – (6), new section 81 and schedule 4 will create a single tier Asylum and Immigration Tribunal (AIT). There will no longer be a right of appeal against any errors of the new Tribunal. No appeal will be able to be brought against this first and only instance of appeal.

Only limited paper review by AIT itself

Instead 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.[3] This offended 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[4] and will be only by reference to written submissions[5] without the opportunity (as presently exists) to have an oral hearing to argue about what maybe complicated issues of law.

The AIT will have to decide the potentially complicated issues of whether to uphold the decision, have a re-hearing or to 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 had new information there would be no opportunity to have that heard by the AIT.

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.[6]

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.

No member of the judiciary as President

The legitimacy and the accountability of the AIT is further undermined by the removal of the requirement that the President of the AIT be a High Court Judge. The Nationality, Immigration and Asylum Act 2002 made it a requirement that a High Court Judge be appointed by the Lord Chancellor.[7] This requirement was introduced into the 2002 Act in the knowledge that it might be mitigation for the abolition of Judicial Review of the IAT if a High Court Judge was presiding over it so that senior judicial supervision was maintained over the IAT ('statutory review' replaced judicial review in the 2002 Act: section 101refers).

Without the supervision of a separate, more senior court, consisting of experienced judges (many of whom have been Adjudicators), miscarriages of justice will inevitably

occur. People who have genuine claims for international protection will be sent back to their country of origin to potential persecution and human rights abuses in error.

Dangers of poor Home Office decision making

Whilst there continues to be 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 it is not safe to have a one tier appeal process. 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 if an incorrect dismissal of an appeal could be fatal.

Overburdening of Adjudicators and delays

Additionally, if the current proposals for cut backs in Legal Services Commission funding are implemented it is very likely that there will be a shortage of quality representation for appellants. The Adjudicator would then have to decide very serious issues without any assistance from experience representatives. This would mean current output of Adjudicator hearings would necessarily have to reduce to deal with the inevitable increased length of hearings caused by lack of representation. Furthermore, errors which might not have been made with the assistance of representatives may go unchecked.

The impact on immigration (non asylum and human rights) appeals

A very important effect of the abolition of the IAT is that it will not only affect refugees and those who face human rights abuses. It also will affect established and settled immigrant communities in the UK and British Citizens. Non asylum and human rights appeals are called Immigration appeals. They are currently dealt with by the IAT as part of the present two tier process. They include appeals against decisions made by Entry Clearance Officers who are posted in overseas British High Commissions, whose job it is to decide if someone who applies for entry clearance qualifies or not.

In order for someone to obtain entry clearance in these circumstances they require a sponsor to be able to maintain and accommodate the person seeking to come to the UK without recourse to benefits or any other public funding.

Typical applications for entry clearance are for (i) family visits, (ii) spouses to come to the UK to live and join UK national or settled partner (iii) elderly relatives and /or children to come and live with UK based relatives. Entry Clearance appeals have been historically plagued by delay with decisions made by Entry Clearance officers that are of even worse quality than the very poor quality Home office decisions.

Disillusionment of immigrant communities

The impact for established immigrant communities of the curtailed appeal rights is that if an immigration appeal is dismissed they will be denied the right to have family members join them in the UK at the very least causing distress and a lack of confidence in the even handedness of the process.

The statistics

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[8], but this is not borne out by any analysis of the statistics published by the IAA.

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. There is always a danger in the use of statistics which can be manipulated, but 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.

PART II:

THE DEMISE OF JUDICIAL REVIEW

CLAUSE 10 (7) NEW S.108A

Summary

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.

ILPA is totally opposed to this "ouster" of any form of judicial review of the Tribunal's and Home Office decisions.

It is unconstitutional and contrary to human rights for a person to have no remedy to the higher courts. The provision risks refugees being returned to persecution. The power of AIT that would result from the implementation of this provision is unprecedented. ILPA fears that without judicial scrutiny decision making will deteriorate, placing people's lives in danger and exposing the UK to repeated breaches of its international human rights obligations.

"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[9]

What is Judicial Review [JR]?

JR is a procedural mechanism, which allows High Court Judges sitting in the Administrative Court to scrutinise public bodies and public law functions. The court assesses the legality of actions by administrators and if it finds unlawfulness on their part decides what remedy should be given. The court may quash, prevent, require or clarify an action and occasionally it may decide that compensation should be awarded.

A JR is not a review of the merits of a judgement or decision. It must be founded in public law. The court will consider whether a decision was **unlawful, unreasonable or unfair.**

Statutory Review [SR] was brought in to replace Judicial Review by the 2002 Act[10] for challenges to decisions of the Immigration Appeal Tribunal to refuse or allow an application to appeal. Statutory review is a paper based application where a High Court judge can either affirm or reverse the decision of the Tribunal.

Why is it important?

The Judicial scrutiny of administrative action is a vital element of the rule of law. It is the procedure by which the Judiciary take on a constitutional responsibility to prevent the abuse of executive power. It acts in the public interest to ensure that public bodies are not above the law.

Particular importance to Asylum and Immigration Law

Asylum and immigration decisions, above all others, require rigorous review by the courts.[11] They often involve decisions, which if wrongly decided will potentially put at risk the life and liberty of a claimant and will almost always involve issues affecting these and other fundamental human rights.

The present system

Under current legislation if the Immigration Appeal Tribunal refuses permission to appeal from an Adjudicator's decision, there is no further right of appeal. The person can apply for statutory review (instead of judicial review). This entails a paper review only by a High Court judge of the decision to refuse permission by the Immigration Appeal Tribunal. It has only been in place since April 2003 and ILPA considers that this is already a significantly reduced form of judicial scrutiny as compared to judicial review which exists in all other areas of law.

If the Secretary of State makes a decision to remove or deport, if there is no other right of appeal the individual can bring an action for judicial review on grounds that the decision is unlawful, unreasonable or unfair. The 2002 Act had already made it clear that giving 'removal directions' after an earlier refusal decision was classified as a purely administrative decision which would not attract a right of appeal.[12]

Consequences of the proposals

(i) Legal

In Clause 10 new s.108A (1) to (3) the Government proposes to abolish judicial review of decisions of the AIT and the Secretary of State in all but two extremely restricted circumstances. This attempt to prevent judicial scrutiny is known as an 'ouster clause'. If enacted the clause will eliminate the right of an individual to question an adverse decision by way of JR. The proposal calls into question the delicate balance between legislative supremacy and the fundamental common law right of access to the courts.

Over forty years ago the House of Lords ruled[13] that such clauses cannot 'oust' access to the higher courts to challenge a decision where the jurisdiction of an inferior Tribunal has been exceeded by breaking the rules of natural justice or applying the wrong legal test and answering the wrong legal question or by basing decisions on legally irrelevant considerations. Clause 10 is the most extreme example ever drafted of a 'modern' Government's attempt to curtail the right of access to the courts. It will result also in the abolition of a claimant's right to seek a writ of *habeus corpus*[14].

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.[15] 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.

(ii) Human

The impact in human terms is enormous. The 'ouster clause' will affect both asylum seekers and all those affected by immigration decisions such as, an application for leave

to enter as a visitor, spouse or work permit holder. In relation to asylum seekers the consequences are horrendous. In asylum law mistakes can cost lives or result in a person being returned to a country where they risk persecution. Unfairness in relation to immigration decisions is also likely to cause great distress to those affected and may also breach fundamental rights. A fair system is imperative.

(iii) Practical

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. MP's 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 immigrants.

The statistics

The statistics for the new statutory review brought into force in April 2003 already demonstrate the importance of judicial scrutiny of the Tribunal's decisions. Between June and November 2003 19% of all applications to the High Court for statutory review succeeded.

The dust has barely settled on the 2002 Act and the Government is seeking to remove entirely all forms of judicial safeguard in this area. The Government has not explained why, having replaced judicial review with a paper only statutory review for challenging decisions of the Immigration Appeal Tribunal, it is necessary to curtail these rights even further.

Some examples

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 the grounds that they believe 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 Determination, in particular the 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 ie within less than one month. 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".

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 not finding F credible, partly because of his account of his journey through Europe which the Adjudicator did not find credible. An application for permission to appeal was submitted to the IAT. This 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 that "the Secretary of State accepts that it is arguable that the IAT has erred".

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.

These are but three examples which represent extremely common features of the present system. Under the new proposals in the Bill, none of the above people would have had a remedy. ILPA believes that many cases like these will result in people being returned to their countries without any protection, exposing them to persecution and treatment contrary to their human rights.

PART III:
REMOVAL OF APPEALS TO THE COURT OF APPEAL

CLAUSE 10 NEW S.108A & S.108B

Summary

Clause 10 makes the AIT's jurisdiction final, and there will be no statutory appeals to the Court of Appeal. Instead only the President of the Tribunal may refer to the Court of Appeal for its opinion on a point of law. Beyond this cases may never be referred to the House of Lords.

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

Existing rights of appeal

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[16].

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 [17]. 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'[18].

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'[19]. 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'[20] so that appeals to the Court of Appeal would still be necessary.

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.

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.*

The proposed changes

The proposed new section 108A of the Nationality Immigration and Asylum Act 2002 (clause 10(7)(1) of the Bill) will have the effect of removing that right of appeal to the Court of Appeal. In its place will be the power of the President of the Tribunal to refer 'a point of law' to the Court of Appeal if he or she thinks it appropriate to do so because of the complexity or importance of the point of law.

ILPA is opposed to this change. Immigration and asylum law is extremely complex and judicial oversight of the Tribunal's decisions is required.

Complexity of the area of law

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.

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 range of possible errors of law that have been made by the IAT, and no doubt in future will continue to be made, include: misunderstanding the scope of its own jurisdiction with the result either that it fails to determine an appeal that it should have determined or it determines an appeal that it should not have determined; misunderstanding the scope of the Refugee Convention so that a person whose predicament should entitle him or her to asylum may be refused asylum; failing to pose for itself, and to answer, the proper question; failing to take account of relevant evidence; proceeding in a manner that is unfair and prevents a party from presenting his or her case to the tribunal.

The public purpose

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 are 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 of cases where the Court of Appeal has carried out this public purpose will be set out below.

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 they have on occasion been answered wrongly by the tribunal.

One example is the case of *Zenovics v SSHD*[21]. 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.

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*[22] the Court of Appeal and then the House of Lords were faced with the question whether 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*[23] 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).

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 which, 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* [24] 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 his evidence had been disbelieved by the adjudicator. 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* [25] 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.

Inconsistent decisions by the tribunal

Many asylum seekers flee from similar problems 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.

Procedural unfairness

The Court of Appeal has also allowed appeals against tribunal decisions because of procedural unfairness. In *Macharia v Immigration Appeal Tribunal* [26] 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

During 2002 the tribunal determined 5,565 appeals[27]. 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[28]. In other words, only just over 1% of Immigration Appeal Tribunal determinations were 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?

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

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.

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[1] Calculated by reference to Immigration Appellate Authority (IAA) statistics for 2003 as published on IAA website.

[2] The IAA does not publish the amount of cases that are remitted for a fresh hearing before an Adjudicator. This figure is estimated from the experiences of ILPA members. It is believed that half of all of the cases remitted by the Tribunal are done so without the need for an oral hearing. It is hoped that these statistics will be verified by further research in due course.

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

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

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

[6] 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.

[7] Schedule 5, paragraph 3.

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

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

[10] s. 101 of the Nationality, Immigration and Asylum Act 2002

[11] The common law has developed a concept of ‘anxious scrutiny’ to be applied in

cases which engage fundamental rights (R v Secretary of State for the Home Department ex parte Bugdaycay [1987]AC 514

[12] *Nationality, Immigration and Asylum Act 2002* s82(2)(g),(h) and (i)

[13] *Anisminic v Foreign Compensation Commission* [1969] 2AC 147

[14] An ancient prerogative right to secure the release of a person who has been unlawfully detained.

[15] Clause 10(7).

[16] 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.

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

[18] Civil Procedure Rules, rule 52.3

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

[20] Brooke LJ in *Koller*

[21] [2002] EWCA Civ 273

[22] [1998] Imm AR 338

[23] [1999] Imm AR 283

[24] [1997] Imm AR 584

[25] [1999] Imm AR 498

[26] [2000] Imm AR 190

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

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