ILPA's RESPONSE TO UKBA CONSULTATION ON IMMIGRATION APPEALS: FAIR DECISIONS; FASTER JUSTICE

1. ILPA is a professional association with some 1000 members (individuals and organisations), who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA aims to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

2. ILPA is surprised and concerned that a consultation on the basis upon which asylum and immigration appeals might be incorporated into the new two tier tribunal structure is being issued by the Home Office's UK Border Agency. The Home Office is the respondent to the appeals in question. It is manifestly inappropriate that a consultation paper on the tribunal arrangements for resolving disputes between the Home Office and claimants should be issued by the Home Office.

3. ILPA does not accept the basic premise of the consultation document, that speed of decision is the paramount consideration in an appeal, rather than seeking justice. The document's statement (para 14) that 'if appeals and legal challenges are not concluded in a reasonable time we cannot achieve the required volume of removals' is no basis on which to build a fair judicial system. It assumes that the decisions will be unfavourable to the appellants or, perhaps even more worrying, that removals should be carried out without the chance of establishing whether or not they are correct in law. We also do not think that the language used about people 'seeking to prolong their appeal by applying for reconsideration … where there is no arguable error of law …

often raising issues which have already been dealt with' gives a fair explanation of the reasons why there are many immigration and asylum applications for judicial review. The standards of decision making at the Home Office, by entry clearance officers abroad and by the Tribunal are flawed and need correction.

4. ILPA's concern is exacerbated by the fact that the proposals stem from the recommendations of a small working group (para v of the Foreword) involving representatives of the judiciary, the AIT, and the Treasury Solicitor, who acts for the Home Office in the higher courts and important AIT cases. ILPA would submit that it is inappropriate for a working party to consist of the respondent to the appeals, the respondent's solicitor and the judiciary, without any representation of the other side in this adversarial litigation. The current Tribunal is run by the Tribunals Service, under the aegis of the Ministry of Justice. The original document proposing the tribunals structure now set up under the Tribunals, Courts and Enforcement Act came from the Department of Constitutional Affairs (now the Ministry of Justice), responsible for the system of justice. It argued that immigration and asylum should not be part of the new system. The Ministry of Justice is the department which should be responsible for considering any change, so quickly after the establishment of the new system.

5. ILPA further understands that while the interim report from the group has been disclosed, FOIA requests for the minutes of this working group have been refused under the s.35 exemption on the basis that "Disclosure of the information concerned would, furthermore, not be in the public interest as it would harm the policy-making process for Home Office officials in future when developing policies in this area." That the Home Office should engage with the judiciary in the formulation of policy on appeals in circumstances where not only are the other side in the litigation unrepresented but the Home Office denies them knowledge of the deliberations raises serious questions about the separation of powers in relation to the Home Office and the judiciary.

6. ILPA asks on what basis the working group was formulated and why the judiciary and the Treasury Solicitor participated in it but neither ILPA nor any other group representing claimants was invited to join it. The interim report includes a 'list of potential consultees' but gives no indication of when this consultation would be implemented. ILPA requests further clarification of the FOIA basis upon which the Home Office is denying sight of minutes of the deliberations with the judiciary.

7. We must emphasise that ILPA has received repeated communications from its members and others expressing disquiet that this proposed change to the tribunal arrangements is owned by the Home Office and has involved deliberations with the judiciary which the Home Office claims it is entitled to keep secret because they involved the development of Home Office policy. ILPA recalls similar concern over a press statement by the Home Office on the Draft Practice Direction on Applications for Permission to Apply for Judicial Review in Immigration and Asylum Cases during November 2006 which stated that "together with the judiciary we are consulting on changed processes for minimizing the number of bogus judicial review applications we get against removal or deportation."

8. The manner in which the consultation has come about causes our members and, we understand, other stakeholders to doubt whether the new appeals procedure will enhance judicial independence in resolving disputes between the Home Office and claimants under the new tribunal structure.

General observations

9. The consultation document is the partisan views of one side of adversarial litigation, without any balanced input from the other side in the litigation. The implication throughout the document is that the burden on the courts comes about as a result of abuse by claimants, without any suggestion that the burden may be influenced by any other factors, such as poor Home Office decision making, practices by the Home Office as a litigant that would be unacceptable

in any other jurisdiction, severe cuts in public funding for representation before the AIT, and defects in the AIT's decision making.

10. The document gives no consideration to non-asylum appeals. While the majority of applications for judicial review may be on asylum grounds (although no figures are given to support this) important immigration and human rights decisions are also made. Removing rights to apply for further appeal in those cases will also cause substantial injustice. The delays in appeals against refusal of entry clearance come typically from the respondent to the appeal, when the visa officers do not review the decision and often do not prepare their bundle for the appeal in time, thus keeping a family separated unnecessarily.

11. The statistics given by the Home Office appear incomplete and are unsourced and unexplained. No indication is given of the total Administrative Court workload and whether immigration and asylum cases are an increasing or decreasing proportion of the total. There is no recognition that immigration or asylum cases, where the decision may be literally a matter of life or death, or whether a couple or a family may live together or not, raise very much more fundamental issues than, for example, an income tax or VAT appeal. There is no indication of the proportion of people who lose their appeal before the Tribunal who continue to try to appeal - or of the number or proportion of cases where the appellant is successful at the Tribunal but the Home Office applies to appeal. Para 11 states that only 2% of asylum applicants gain a reconsideration hearing but does not say what proportion apply and are refused. It seems likely that the 2% figure is a reflection of the low percentage of total cases in which applications to the Administrative Court are made. Moreover, the Home Secretary has in recent years remarked on the unreliability of internal Home Office statistics, even those given to John Reid personally. These proposals could not be justified without a very much clearer factual basis.

12. The present system is plainly imperfect. ILPA opposed the move from a two tier to one tier tribunal. The Home Office insisted on pursuing the change. A

great deal of litigation and confusion resulted. Only now, three years after the one tier system was introduced, is there any sense of a tolerably coherent and familiar system which those involved can work with. ILPA is disturbed that after so much work has gone into the present system the Home Office is proposing a U-turn by reverting to a two tier system. The constant and inconsistent changes to the system make providing representation with constantly reduced funding far more difficult. While ILPA opposed the abolition of the two tier system, what it most wishes to see is a period of stability. The proposal to return to a two tier system so soon seems to be an indictment of Home Office policy in recent years.

13. ILPA therefore opposes another fundamental change to the appeal system unless there are clear and concrete benefits to justice. When the incorporation of asylum and immigration appeals into a general administrative tribunal structure was first mooted, ILPA was interested in whether such a move might lead to norms of fairness from other jurisdictions being applied to immigration and asylum appeals, thus meaning that the Home Office was less able to act in a way which would be unacceptable for other litigants.

14. ILPA was surprised and disappointed to find that not only is a separate chamber proposed in the First Tier Tribunal but that, in the words of the consultation document (para 22), "We think there is a case for a specialist chamber of the Upper Tribunal, which would be able to develop a high level of expertise in dealing with immigration cases."

15. The Immigration Appeal Tribunal had developed expertise in immigration cases. Following abolition of the IAT, the Senior Immigration Judges based at Field House (in effect, the IAT under a different label) maintained that expertise. The proposal now is that asylum and immigration appeals should not be heard in the Administrative Chamber but by a separate chamber which ILPA understands would be based at Field House. (Indeed, AIT Stakeholders were told they should see little difference in case management.)

16. As indicated above, ILPA sees the benefit in continuity but in that case, there is no need to change at all. However, given such continuity, it plainly cannot be argued that the proposal will effect some fundamental change in the nature of the tribunal hearing these appeals which will justify shutting off the constitutional right of access to the High Court and severely restricting access to the Court of Appeal.

Judicial review: ouster revisited?

17. ILPA is concerned at the unacceptable lack of information in the proposals. The consultation paper states that "the Government has been advised that except in the most exceptional circumstances, decisions of the Upper Tribunal will not be subject to judicial review." This statement is of no use to consultees without being told who gave the advice and upon what the advice was based. ILPA asks to be provided with a copy of the advice referred to. The consultation paper also (and apparently inconsistently) states that the government "may bring forward legislation ... to ensure that decisions of the Upper Tribunal are not routinely challenged by judicial review" (para 24). There is no information in the paper about what legislation is being considered. ILPA asks that this is disclosed.

18. ILPA is exceptionally concerned that the Home Office's agenda is once again to oust the jurisdiction of the courts to control the legality of the Tribunal. The Home Office sought such an unconstitutional step through clause 10 of the Asylum and Immigration (Treatment of Claimants, etc) Bill 2003. ILPA observed at the time that:

> **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.**
>
> **...**
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> **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 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 habeas corpus.

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. 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.

19. The debates on the Bill showed widespread opposition to the ouster clause and support for ILPA's argument. As an example, Neil Gerrard MP, then a veteran of five immigration bill Committees, stated:

> **The Bill goes further than any that I have ever seen in removing judicial oversight of the asylum system. I cannot help wondering what we would have said if this Bill had been introduced by a Tory Government. I recall what was said by the then hon. Member for Sedgefield (Mr. Blair) when the Tories were removing certain rights to appeal in 1992:**
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> > **"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."-[Official Report, 2 November 1992; Vol. 213, c. 43.]**
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> **Now that he is Prime Minister, he should remember those words. (House of Commons Hansard, 17.12.2003, col. 1639)**

20. The Select Committee on Constitutional Affairs recorded opposition to the proposal.

> **59. The provision in Clause 11 of the Bill to exclude the possibility of further appeal from the Tribunal and statutory or judicial review of the Tribunal's decisions by the higher courts (the "ouster" clause) is one of the most controversial provisions of the Bill. This provoked some of the most strongly worded evidence which we received in the course of the inquiry.**
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> **60. Review by the courts protects and applies the law. Although there have been attempts in the past to limit the jurisdiction of the courts the clause has been interpreted as being especially severe. In a legal opinion by Michael Fordham, received by the Committee as an annexe to the submissions of the Refugee Legal Centre, it is suggested that for Parliament to purport to exclude judicial review strikes at 'a constitutional right (access to law), but furthermore at a constitutional protection (judicial review) supported by a constitutional imperative', namely the rule of law.**

61. The effect of Clause 11 on the jurisdiction of the courts has been criticised by several leading counsel, including Hugh Tomlinson QC and Booan Temple who said:

"In practice, this [clause] will prevent the courts from reviewing any deportation and removal decision and any decision of the new tribunal. There can be no challenge for "lack of jurisdiction", "error of law" or "breach of natural justice". This means that if, for example, the tribunal fails to hear argument from both sides or misreads a statute, there is no comeback. If the tribunal does something it has no power to do, it is just too bad. The tribunal will be able to do whatever it wants. It will be the ultimate unaccountable public body. In the past, governments have often been tempted to try to avoid judicial scrutiny of their decisions. In almost every other country in the world, this would be forbidden by the constitution. In Britain, the unwritten constitution requires restraint on the part of parliament and the government. For nearly 40 years, governments of both parties have held back. They have accepted that the rule of law requires that the courts must have the final say as to whether the law has been broken. This bill tries to turn the clock back".

62. Nicholas Blake QC, who appeared on behalf of the Bar Council, in a note on the clause published by Matrix Chambers and supported by many figures from that Chambers wrote:

"Our concern is that the proposed clause 10 to the Bill [now clause 11] contains the most draconian ouster clause ever seen in Parliamentary legislative practice. It has been introduced without allowing any time for the bedding down of the new appellate regime under the 2002 Act that restricted judicial review of refusals of leave to appeal by the Immigration Appeal Tribunal from decisions of adjudicators. It has been introduced without any public consultation or debate. The short "consultation" announced by the Home Office and Department of Constitutional Affairs in October, was unspecific as to what was intended. It is a clause that will operate far beyond asylum decisions, and provides a precedent for exempting the executive and administrative tribunals from seeking to understand, apply or be governed by the law. This is a matter of great constitutional consequence. It is happening at a time of constitutional turmoil where the common law principles of division of responsibility between the executive and courts are being torn up, and no new written constitution is replacing traditional values and beliefs. This is a time when traditional institutions that have served to provide some measure of balance in the law making activities of the executive and Parliament—the role of the office of Lord Chancellor and the significant revising work performed by the House of Lords—have either been removed or are under threat by the pronouncements of the present government, without sufficient guarantees that their replacements will respect basic principles of judicial independence and democratic accountability. Historical experience suggests that it is easier to erode established safeguards than to provide new effective ones".

63. He went on to state that:

"Access to independent courts is an integral part of democracy. Inferior tribunals are not courts and cannot be transmuted into them by a legislative magic wand. They have an expert and valuable role to perform but like the executive itself, their decisions must be subject to the scrutiny of the higher courts at the instigation of the losing party. The full system of binding precedent means that no case can be arbitrarily cut off by statute from review by the next level, condemning inferior courts to apply precedents that may need re-examination. Constitutional government should recognise this principle in the laws it promotes. This form of ouster clause undermines the principle and threatens the entire basis of our constitutional arrangement. This is why the

debate on ouster clauses is of significance and far broader than asylum".

64. Mr Justice Ouseley indicated that:

"What is not, I believe, genuinely controversial is that so extensive an ouster clause is without precedent: it seeks to oust the High Court's supervisory role not just over the decisions of a lower Tribunal, even those made unfairly or without jurisdiction; it also seeks to oust the High Court's control over the legality of certain executive acts and decisions, and to do so in an area where life and liberty may be at stake. Such an ouster clause is unprecedented because, and again this is not controversial, the United Kingdom's conventional constitutional framework, albeit unwritten, is predicated on the allocation of different, but equally necessary functions to Parliament, the Courts and the executive. To the Courts is allocated the necessary task of reviewing the lawfulness of the decisions of lower Tribunals and the lawfulness of the executive's acts and decisions. An unwritten constitution only works on the basis of an acceptance by each component of the differing and important roles of the others. The ouster clause is inconsistent with those constitutional conventions. As a matter of constitutional principle, higher judicial oversight of lower Tribunals and even more so of executive decisions should be retained."

65. The Council for Tribunals concurred with this view, writing that it was: "…particularly concerned about the provisions in clause [11] of the Bill excluding any further scope for further challenges to the decision of the Tribunal either by way of appeal to a higher court, (as is usual in the case of tribunals) or by judicial review. It is of the highest constitutional importance that the lawfulness of decisions of public authorities should be capable of being tested in the courts… In respect of tribunals under its supervision, the Council has consistently advocated an avenue of appeal to the courts on points of law. In the Council's view, it is entirely wrong that decisions of tribunals should be immune from further legal challenge".

21. The Select Committee concluded that

70. An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake.

71. The system of statutory review under the 2002 Act, which was invented to abridge the previous system of judicial review, has only been operating for a matter of months. It appears to be working. No change should be made to this system until there has been more experience of its impact.

22. News reports indicated deep and widespread concern from the judiciary, academics and all sections of civil society. That concern resulted in the 'ouster clause' being withdrawn in 2004 and the government recognising that it was unnecessary. The then Lord Chancellor, Lord Falconer of Thoroton, stated:

I have listened carefully to the arguments put by the senior judiciary, including those of the Lord Chief Justice, the noble and learned Lord, Lord Woolf. I have also talked to my predecessor, my noble and learned friend Lord Irvine of Lairg, who has forcibly made representations about the Bill. … I believe that we can have the necessary judicial oversight of the system by the higher courts and obtain the aims of speed and reduction in abuse. These are aims which I believe we share. There are a variety of ways in which we could achieve this, and I am confident that we can find a solution which meets the needs of all. I am sure that

noble Lords will want to work with us.

In those circumstances, I am prepared to bring forward amendments to replace the judicial review ouster with a new system allowing oversight by the administrative court in those decisions." (House of Lord Hansard, 15.3.04, col.51)

23. The Lord Chancellor accepted then that there is a need for review by the courts of immigration and asylum decisions. Nothing has changed nor is any change proposed in the nature of the senior immigration tribunal arrangements that obviates that constitutional requirement.

24. The Home Office's current consultation paper (para 8) states that "The volume of immigration cases is a reflection of the fact that people do not accept the decision of the Asylum and Immigration Tribunal as the final resolution of their case." That plainly reflects the partisan view of one side in this adversarial litigation. The implication is that the volume of cases demonstrates abuse. ILPA considers that it is unsafe to draw any such conclusion. In a large number of cases, the failure to accept the decision of the AIT is because the decision making both there and at the Home Office has been unfair or otherwise flawed. Where decisions may raise life and death issues, it is critical that there is proper access to the Courts. ILPA is therefore wholly opposed to any measure aimed at ousting the constitutional right of access to the Court.

25. During the previous ouster debate, it was said by the Home Office that because the Tribunal would from now on be presided over by a High Court judge, it was legitimate to oust the jurisdiction of the High Court to review the Tribunal. The Home Office now repeats essentially the same argument.

26. ILPA submits that that argument was and is manifestly flawed. ILPA has no objection to judges sitting on important cases of the Tribunal. However, the fact that a few more High Court judges than currently sit in the AIT may sit on some important cases cannot justify shutting off access to the High Court where the Tribunal has acted unlawfully on matters of the utmost gravity. Indeed, given that one rationale for restricting access to the Administrative Court is lack of resources, and that the consultation paper envisages a similar

number of cases, it seems likely that High Court judges will not be available to sit on most cases in the Upper Tier or to determine most applications for permission to appeal.

27. Similarly, oral renewal of permission applications would assist in reaching better decisions but in no sense is a substitute for access to the courts.

28. The reality appears to be that the 'second tier' will be the Senior Immigration Judges at Field House. Procedures cannot be equated to the High Court or those of a superior court of record. In particular, ILPA has expressed repeated concern about the way in which certain decisions are selected for 'reporting' whereas representatives are prevented from citing other decisions. The Practice Directions give no indication of the criteria and process by which it is decided to report a case other than the statement that 'The decision whether to report a case is that of the Tribunal and is not perceived to be an issue in which the parties to the appeal have an interest.' In its submissions on the Tribunal's Practice Directions in 2006, ILPA stated that:

> **We strongly submit that the criteria by which it is determined whether a determination is reported and the procedure by which this is done should be formalised in the Practice Directions. The only previous guidance offered is that many determinations are only of interest to the parties. ILPA agrees. However, ILPA has also seen many determinations which assess issues which are of relevance to other cases which are unreported; whereas determinations of no more apparent relevance *are* reported. ILPA understands that previously, it was a matter for the individual discretion of panel chairs whether the determination was reported but that there is now a system in place for determining this. Given the legal significance in terms of citation of determinations, ILPA submits that the criteria and process must be transparent.**

Only in response to a Freedom of Information Act (FOIA) request in December 2007 was the existence of a Reporting Committee formally disclosed and that:

> **The Reporting Committee (under the general guidance of the President, and chaired by a Deputy President) decides whether a determination (whether country guidance or not) is to be reported.**

29. Nothing is presently known about the criteria that the Reporting Committee applies, including how it deals with conflicting determinations. Other tribunals such as the Social Security Commissioners also have a system for reporting

determinations but the criteria for publishing determinations are published and there is no rule restricting the citation of unreported determinations.

30. The notes to the original version of the Practice Direction (IAT PD No. 10) stated that

> **3 By restricting the number of determinations capable of being cited at either level, the Tribunal intends both to promote consistency of decision-making and to give a reliable indicator of the current judicial thinking on frequently (and less-frequently) occurring issues. Determinations will not, however, be reported if in the Tribunal's view they contain no new principle of law or matter of real and generally-applicable guidance to parties, Adjudicators or the Tribunal, and no assessment of facts of such generality that others ought to have regard to it.**
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> **4 It should be emphasised that both Adjudicators and the Tribunal remain open to arguments that the reported decision or decisions should not be applied or followed. The effect of the Practice Direction is that such arguments will need to be supported by sound reasons, rather than by some previous decision.**

31. ILPA understands that there is no procedure comparable to that of the Social Security Commissioners whereby decisions which it is proposed to report are circulated amongst the Commissioners to determine whether 'the decision commands the broad assent of the majority of the Commissioners'. While it is obvious why cases are not reported if they reach no conclusion on issues of any interest beyond the parties to the appeal, ILPA has expressed concern that many determinations of wider interest have not been reported for no obvious reason. The absence of transparency in the criteria for reporting determinations has contributed to a perception that they are not fully representative of the Tribunal's caselaw.

32. The rules for citing an unreported determination include that the party should provide a 'summary analysis of all other decisions of the Tribunal and all available decisions of higher authority, relating to the same issue' for the last six months. The Practice Directions state that 'This analysis is intended to show the trend of Tribunal decisions on the issue.' The response to the FOIA request referred to above stated that

> **Unreported determinations following hearings in which a Senior Immigration Judge sat are put on the 'unreported cases' part of the AIT website principally for purposes of comparison.**

33. Whereas reported determinations are searchable on the Tribunal's website, the Tribunal has so far failed to make unreported determinations available in a searchable form. As long as this remains the position, the Tribunal cannot reasonably expect the analysis required by the Practice Directions to encompass other unreported determinations.

34. Another reason that the Administrative Court has experienced difficulties is, in ILPA's view, the result of the removal of proper public funding arrangements which means that in a large proportion of cases, grounds are put in by unrepresented appellants or the grounds submitted to the AIT are simply repeated. There was no difficulty on a similar scale in respect of the old statutory review procedure under the 2002 Act for which proper funding was available.

Access to the Court of Appeal

35. Immigration and asylum cases raise issues of the greatest importance. The Court of Appeal already gives appropriate weight to the expertise of the Tribunal. ILPA would be gravely concerned about any move to prevent appeals from the Tribunal where there is an arguable error of law in the Tribunal's decision. Once again, the proposed continuity in arrangements at Field House does not justify any fundamental change in this regard.

36. In *AA (Uganda) v SSHD* [2008] EWCA Civ 579 (at para 46), Carnwath LJ, the Senior President of Tribunals, adopted the guidance in *ECO Mumbai v NH (India)* [2007] EWCA Civ 1330 in which Sedley LJ (with the agreement of the other members of this court) said:

> **the House of Lords in *AH (Sudan)* [2007] UKHL 49 has stressed that appellate courts should not pick over AIT decisions in a microscopic search for error, and should be prepared to give immigration judges credit for knowing their job even if their written determinations are imperfectly expressed. This is no more than a paraphrase of a decision which, I respectfully think, is intended to lay down no new principle of law (cf, for example, *Retarded Children's Aid Society v Day* [1978] IRLR 128, §19, per Lord Russell) but to ensure that appellate practice is realistic and not zealous to find fault. Their Lordships do not say, and cannot be taken as meaning, that the standards of decision-making or the principles of judicial scrutiny which govern immigration and asylum adjudication differ from those governing other judicial tribunals, especially when for some asylum-seekers adjudication may literally be a matter of life and death. There is no**

principle that the worse the apparent error is, the less ready an appellate court should be to find that it has occurred.

37. Referring to the Tribunal reforms, he said that "while the special role given by Parliament to an expert tribunal must be respected, so must the constitutional responsibility of the Court of Appeal for the correct application of the law" (para 50).

38. ILPA submits that there should be no interference with the role of the Court of Appeal in exercising its "constitutional responsibility ... for the correct application of the law" and in particular, would very strongly oppose any move to prevent the Court of Appeal correcting unlawful decisions by the Tribunal in the most anxious cases because the point was deemed not to raise an important point of principle.

39. It is noted that there is no suggestion that the cases being heard by the Court of Appeal are generally without merit. Indeed, the Court of Appeal already has the power to prevent a hearing even of the permission application if it views a case to be totally without merit.

40. The present burden on the Court of Appeal is purely a result of the current procedure by which cases which the effective second tier at Field House remit to other hearing centres for rehearing by immigration judges go directly to the Court of Appeal on further appeal rather than back to Field House as they did under the previous adjudicator/ IAT procedure. If cases requiring rehearing are remitted to the First Tier (as is what in effect happens now via the transfer to ordinary hearing centre) and further challenges go first to Field House, the problem will be addressed.

<u>'Judicial review' cases being heard by the Tribunal</u>

41. ILPA considers that removing the statutory bar on transfer is wholly premature at this stage. ILPA is also concerned that a precedent for developing proposals through informal and exclusive joint working groups of the judiciary

and the respondents to the judicial reviews/ appeals may have been established. ILPA would ask for an assurance that it will not be repeated.

42. ILPA would also be gravely concerned about funding arrangements for representation of judicial review claims in the Tribunal given the wholly inadequate funding arrangements in the AIT. The interim report shows that the option of statutory appeal to the AIT in fresh claim cases was rejected. Theses cases will therefore involve equally complex legal principles as does judicial review in the Administrative Court.

43. Once again, the fact that only one side of the litigation (and its solicitor) was represented on the working group is reflected in the one sided analysis. The reality is that the numbers of judicial reviews of fresh claims reflect woeful decision making by the Home Office and the inability or unwillingness to engage in any reasonable communication until a judicial review is lodged and the Treasury Solicitor is instructed. Legal aid cuts in the AIT and, in particular, the severe effects on the fixed fee regime which are now emerging, also increasingly contribute to the failure to present all relevant evidence first time round.

44. Members also repeatedly find that only at the judicial review stage where the Treasury Solicitor is routinely instructed is there a reasonable chance of being able to engage in any form of constructive discussion with the Home Office to resolve issues.

Procedure Rules

45. The consultation document refers to the procedure rules committee but states (para 35) that "While this model is appropriate for most administrative jurisdictions, the Government remains to be convinced that the Committee is the appropriate body to set procedure rules for immigration matters."

46. The suggestion that despite being incorporated in the new tribunals, the procedure rules will continue to be made by the old system undermines yet

further confidence in the intentions behind the proposals. The procedure rules made by the Government tend to favour the Home Office and have on a number of occasions been found to be unlawful.

47. For example, in *FP (Iran) v SSHD* [2007] EWCA Civ 13 [2007] Imm AR 450, the Court of Appeal declared unlawful a rule which required that "The Tribunal must hear an appeal in the absence of a party or his representative" in certain circumstances: r.19(1) of the Asylum and Immigration Tribunal (Procedure) Rules 2005, quoted at para 17 of the judgment. Sedley LJ said that the Procedure Rules were unlawful in that they "forfeit what our constitutional law (consonantly now with article 6 of the European Convention on Human Rights) regards as a fundamental right, the right to be heard on an issue of radical importance to the individual" (para 49).

48. Arden LJ said that "The requirements of fairness must depend on the context. When the issue of fairness arose in *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402, at 414, Bingham LJ, as he then was, held that asylum applications are of such moment that only the highest standards of fairness will suffice, and Sir John Donaldson and Mann LJ agreed with his judgment on that issue. In addition, unless a minimum level of fairness is achieved, the principle of the rule of law will be infringed. The rule of law is a fundamental constitutional principle in the United Kingdom..." (para 58-59)

49. Wall LJ said that "In the final analysis ... I have come to the conclusion that, absent the availability of ECHR Article 6, the concepts of fairness and natural justice on which the common law prides itself must prevail." The Court of Appeal declared the rule unlawful.

Conclusion

50. This proposal is not consistent with fairness and natural justice. It is built on an unproven assumption about the motives of appellants for bringing cases and the reasons for refusals of leave; and has no valid statistical basis for

policy change. It makes no mention of the inefficiencies and inadequacies of Home Office officials making refusal decisions, preparing cases and then presenting them, or then applying for leave to appeal when it loses. It ignores the significant proportion of immigration cases and entry clearance cases going through the appellate system and the need to ensure that people whose cases have been wrongly decided have the chance to contest that decision. The proposals should not form the basis of a change in the immigration and asylum appellate system.

51. The ex-Minister's foreword to the proposals states that he wants to collect together views and suggestions before proceeding with any necessary legislation. ILPA urges that any proposals for change should not be through the Home Office but through the Ministry of Justice and that their aims must be to set up an efficient, effective and just system.

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