House of Lords Second Reading Briefing
Crime and Courts Bill (HL Bill 4)
28 May 2012

ILPA is a professional association the majority of whose members are immigration, asylum and nationality law practitioners. Academics and charities are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law. ILPA is represented on numerous Government, including UK Border Agency and Legal Services Commission, consultative and advisory groups.

General:

The Bill contains several provisions for the extension of immigration officers' powers, provisions to enable a wider range of tribunal and courts' judges to sit in the immigration and asylum chambers of the First-tier and Upper Tribunals, and two discrete provisions to remove appeal rights: in family visit cases and in cases where leave to be in the UK is curtailed or cancelled. These various provisions are dealt with under separate headings in this Briefing. However, the Bill provides opportunity to draw attention to wider though related concerns. Four, in particular, demand attention:

- the complexity of the statutory immigration appeals scheme, which complexity will be exacerbated by the provisions of this Bill;
- the removal of race discrimination grounds in immigration appeals (save in Northern Ireland) by commencement provisions of the Equality Act 2010;
- previous concerns expressed by parliamentarians regarding access to the Court of Appeal in immigration appeals; and
- the longstanding inadequacy of provision in respect of training, supervision and regulation in relation to immigration officers' powers, which powers are to be significantly extended by this Bill.

Removal of full appeal rights in family visit cases (clause 24):

It is intended by clause 24, as revealed by the Explanatory Notes to the Bill,[1] that refusal of a family visit visa will no longer be subject to a (full[2]) right of appeal, save on human rights or race discrimination grounds. ILPA is opposed to clause 24. And, as explained below, the race discrimination ground has (save in Northern Ireland) been inadvertently removed.

The Immigration Minister, in his recent evidence before the Home Affairs Select Committee,[3] spelled out the Government reasons for proposing to remove the right of appeal against refusals by entry clearance officers of family visit visas. He highlighted that there were many more appeals than had been anticipated in 2000 (when the appeal right had been restored), and suggested that the removal of the full appeal right would be better for applicants:

[1] See paragraphs 370 *et seq*, in particular paragraph 373 and the reference to "full right of appeal" (our underlining) in paragraph 375; the intention is also confirmed by the news item on the UK Border Agency website *Removing full right of appeal for family visitors*, 10 May 2011, see http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/2012/may/28-family-appeal

[2] The Explanatory Notes refer to the removal of the full right of appeal, which is simply intended to highlight that a right of appeal is intended to be retained (as in other entry clearance cases) on human rights and face discrimination grounds

[3] Uncorrected transcript of oral evidence given by Damian Green MP, HC 71-i, Q103-Q113

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"...in 2000, the projection was that there would be 20,000 appeals a year. There are now 50,000 appeals a year, costing £29 million, and of the cases that the UKBA loses-you're right, Mr Chairman: it loses many of them-63% are lost entirely because of new evidence introduced at the appeal stage. So not only does it absolutely not work from the taxpayer's point of view, but from the point of view of the individual, if you have made a genuine mistake on your application and you apply again, you will normally get a replay within 15 days. If you go through the appeal system, it can take eight months, so for the individuals it's better to just apply again. If you have made a genuine mistake, that's quicker, better and cheaper."

The Minister appears to misunderstand what happens and why. The reason people appeal is not because they relish delay or expense, but because they have no confidence in the decision made by the entry clearance officer. It is often the case that the real basis on which the application is refused is not revealed until the appeal hearing and applicants cannot properly be criticised for submitting additional evidence in the face of reasons for refusal which they could not have anticipated and/or which are vague or unintelligible.

In 2011, the Chief Inspector of the UK Border Agency (now of Borders and Immigration) carried out a global review of entry clearance posts and decisions.[4] He looked at entry clearance decisions where there is currently no full right of appeal – i.e. those decisions subject to the same limitations as the Bill would extend to family visit decisions. Of the around 1,500 cases at which he looked, in 33% the entry clearance officer had not properly considered the evidence submitted and in a further 14% it was not possible from the file to assess whether the evidence submitted had been properly considered. In 16% of cases, applications had been refused on the basis of a failure "*to provide information which* [the applicant] *could not have been aware* [was required] *at the time of making their application.*" ILPA recognises these same problems in family visit cases, and addressed very similar concerns in response to last year's consultation[5] in which the removal of the full appeal right in family visit cases was proposed.[6]

If the full right of appeal is withdrawn, it will normally only be possible to challenge refusals by way of judicial review or administrative review. The latter is a process internal to the UK Border Agency. Essentially, it involves a review by an entry clearance manager of the decision by the entry clearance officer. As David Winnick MP put it to the Minister during the latter's evidence before the Home Affairs Select Committee,[7] this means the UK Border Agency is effectively "*judge and jury*" in its own cause. ILPA has no confidence in the internal review system. The Chief Inspector in his global review[8] looked at 475 such internal reviews, and found that in 30% of cases the entry clearance manager failed to pick up on poor decision-making by the entry clearance officer.

Clause 24 provides example of one of the more egregious complexities in the statutory immigration appeals scheme. Currently, there are in force two sections 88A of the Nationality, Immigration and Asylum Act 2002. One introduced by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004; the other by the Immigration, Asylum and Nationality Act 2006. This confusing arrangement results from the latter having been commenced to replace the former for only certain types of appeals to which the two sections relate. In seeking to address this complexity in the changes to be made by the current Bill, the draftsman has been driven to make precisely the same amendments to both section 88A as it appears in section 4 of the 2006 Act and the same section 88A (i.e. that which derives from

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[4] see *Entry Clearance Decision-Making: A Global Review*, December 2011 at http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Entry-Clearance-Decision-Making_A-Global-Review.pdf
[5] *Family migration: a consultation*, July 2011 is available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary
[6] ILPA's response to *Family migration: a consultation* is available at (and our response to Q32 is relevant) http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf
[7] HC 71-i, Q108-109, *op cit*
[8] *Entry Clearance Decision-Making*, *op cit*

the 2006 Act, as distinct from that deriving from the 2004 Act) in the 2002 Act. Hence, subparagraphs (1) and (2) of clause 24 in the Bill.

Curtailment of in-country appeal rights in certain cases where leave to enter or remain is curtailed or cancelled (clause 25):

Clause 25 will apply where someone, who has leave to enter or remain in the UK, leaves the UK during the course of that leave and the Secretary of State cancels or curtails that leave while the person is outside of the UK. If the Secretary of State certifies that the decision "*is or was taken wholly or partly on the ground that it is no longer conducive to the public good for the person to have leave to enter or remain in the United Kingdom*" the person will be precluded from exercising any right of appeal from within the UK. This Bill goes so far as to extend this effect even to where the person has returned to the UK and lodged his or her appeal before the certificate is made: clause 25, subparagraph (4). In such circumstances, the effect of the certification will be that the appeal lapses and the person will be excluded from any right of appeal until he or she has again left the UK.

ILPA is opposed to clause 25 which is oppressive and contrary to the principles underpinning a fair trial. This clause will exacerbate the complexity of the statutory immigration appeals scheme by introducing yet another distinction into the scheme whereby two persons with the same immigration decision will have qualitatively different rights of appeal.

Clause 25 is designed to reverse the effect of the judgment of the Court of Appeal in *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333.[9] That case concerned a refugee from Tunisia, who had been living in Manchester for several years with his wife and daughters. He was extradited to Italy in 2008, further to a European arrest warrant issued in 2007. While out of the UK, his leave was cancelled. He was acquitted of all charges in Italy. Nonetheless, the Secretary of State sought to block his return to the UK. Lord Justice Pill, with whom Lord Justice Rix and Lord Justice Lloyd agreed, held that an appeal could be exercised in-country under section 82(2)(e) of the Nationality, Immigration and Asylum Act 2002[10] if the person returns to the UK within the short time-limit of 10 days for lodging an appeal in-country; and opportunity should have been given to MK to do so. Meanwhile MK was facing onward *refoulement* from Italy to Tunisia, something the UK courts, in allowing his extradition to Italy had identified would not happen, which was significant in their decision to permit extradition in the first place as they had determined that MK would face torture in Tunisia.[11] The Bill now seeks to achieve that for which the Secretary of State had argued before the Court of Appeal.

Clause 25 will catch equally the person who has left the UK voluntarily (e.g. for a weekend trip to Paris) or involuntarily (e.g. on extradition). It will catch equally the person who has a home country to which he or she can safely return and the person who does not (e.g. the person recognised as a refugee in the UK; or a stateless person granted leave to remain). The effect of the provision upon the refugee or stateless person may be especially detrimental in leaving him or her stranded overseas in a country where he or she has no permission to stay but no country to which he or she can return; and in the case of the refugee (such as MK) at risk of being *refouled* to a country in which he or she faces torture.[12] The Joint Committee on Human Rights had requested further information from the Government about several of these concerns in extradition cases.[13] However, ILPA is not aware that any such information has been provided to the Committee.

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[9] ILPA provided further detail of MK's case in submissions to the Joint Committee on Human Rights: see fn. 11

[10] often referred to as a variation appeal (i.e. because it is an appeal against the variation of existing leave to enter or remain by the Secretary of State), which may only be exercised if the person is left without any leave

[11] See ILPA's evidence to the Joint Committee on Human Rights Enquiry into Extradition Policy of 21 January 2011, available at http://www.ilpa.org.uk/data/resources/14418/11.01.21-ILPA-to-JCHR-re-extradition.pdf

[12] ILPA addressed these concerns in detail in evidence to the Joint Committee on Human Rights; our submission is available at http://www.ilpa.org.uk/data/resources/14418/11.01.21-ILPA-to-JCHR-re-extradition.pdf

[13] Fifteenth Report for Session 2010-12, *The Human Rights Implications of UK Extradition Policy*, 22 June 2011, HL Paper 156/HC 797, paragraph 224

Complexity in immigration appeals provisions:
At Lords' Report for the Legal Aid, Sentencing and Punishment of Offenders Bill, Lord Bach drew attention[14] to the observations of Lord Justice Stanley Burnton in *Lamichhane v Secretary of State for the Home Department* [2012] EWCA Civ 260, 7 March 2012:

> "*There is an urgent need for a simply-stated and clear codification of statute law on immigration rights, restrictions, administrative procedures and appeals.*"

One aspect of the complexity in immigration law and procedure, to which Lord Pannick among others drew attention during the passage of that Bill,[15] are the highly complex provisions of Part V of the Nationality, Immigration and Asylum Act 2002 governing whether a person has a right of appeal, from where it may be exercised, on what grounds it may be exercised, what evidence may be adduced in respect of it, and what considerations may be addressed and decision may be given by an immigration judge. Having determined to remove legal aid for non-asylum immigration applications and appeals, it might have been supposed that the Government would take the opportunity in the current Bill to address the urgent need identified by Lord Justice Stanley Burnton.[16] Clauses 24 & 25 of the Bill, both highlight the current complexity of the statutory immigration appeals scheme and exacerbate it. ILPA urges peers to press the Government firstly to address the need to simplify the statutory immigration appeals scheme, which can best be done by removing myriad intertwining exclusions and limitations to the basic right of appeal, and secondly, reconsider its decision to exclude legal aid in immigration appeals, having particular regard to the Government's acknowledgement that welfare benefits appeals raising points of law require legal aid.[17] The complexity of immigration appeals where points of law arise, the potential consequences to appellants and the difficulties those appellants face without legal aid, including that no alternative advice or representation is available to them because of the unique way by which immigration advice is regulated, are certainly no less serious than is the case in welfare benefits appeals.

Race discrimination grounds of appeal:
In the course of commencing provisions of the Equality Act 2010, the Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011, SI 2011/1060 removed race discrimination as a ground of appeal in immigration appeals (save insofar as the appeal relates to Northern Ireland). The ability to appeal on the grounds of race discrimination had stemmed from the Race Relations Act 1976 (as amended). Its removal was a consequence of the Equality Act 2010 replacing the 1976 Act. The Secretary of State omitted to substitute a race discrimination ground of appeal stemming from the 2010 Act. The Crime and Courts Bill provides an opportunity for peers to draw attention to the omission, which may and should be rectified by secondary legislation.

Immigration officers' powers (clause 26 & Schedule 14):
ILPA continues to oppose the extension of immigration officers' powers, which is taking place in circumstances where there continues to be inadequate provision for training, supervision and regulation in respect of the current powers retained by immigration officers.

The Heathrow Independent Monitoring Board in its annual report for 2011/12 states: "*The conditions under which children are held and that detainees have to endure overnight are degrading and disgraceful.*"[18] The facility at Heathrow is a short-term holding facility, i.e. one of those places in respect of which over

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[14] *Hansard* HL, 12 Mar 2012 : Column 70
[15] e.g. *Hansard* HL, 12 Mar 2012 : Column 72; 25 Apr 2012 : Column 1797
[16] Maurice Kay and Lewison LLJ expressed their agreement with Stanley Burnton LJ in *Lamichhane*; and similar observations have been made by other senior judges, including by Jackson LJ in *Sapkota & Anor v Secretary of State for the Home Department* [2011] EWCA Civ 1320, 15 November 2011
[17] *Hansard* HC, 17 Apr 2012 : Column 226 (*per* Secretary of State for Justice)
[18] see Executive Summary, paragraph 2.1 at http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2012/heathrow-2011-2012.pdf

many years the UK Border Agency and its predecessors have consistently failed to finalise and adopt rules to regulate the conditions and treatment of those held in the facility. As the Immigration Minister said when in opposition, having emphasised the need for strict training and supervision:[19]

> "*There is a very serious underlying principle: it is relatively easy for Ministers to say "My job is to increase security in this area and therefore I will take whatever measures need to be taken to do that." That always needs to be balanced against the appropriate use of those powers by the appropriate people.*"

The absence of any rules governing conditions and treatment of detainees in short-term holding facilities is longstanding, despite the then Immigration and Nationality Directorate having made available and consulted upon a draft set of rules in early 2006, to which consultation ILPA responded in detail. No rules were published. A further draft was made available and consulted upon in early 2009, to which ILPA again responded in detail. ILPA was asked to provide comment, and did so, upon a further revision a couple of months later. Nonetheless, no rules have ever been published.

The powers of immigration officers are being expanded by this Bill, and in several respects in especially intrusive ways, without any attempt being made to address the inadequate provision for training, supervision and regulation in relation to current powers, which include powers of arrest, search and detention.

Judiciary in immigration appeals (clause 19 & Schedule 13, Part 4):
Clause 19 and Schedule 13 of the Bill concern judicial deployment far more widely than the immigration and asylum chambers of the First-tier and Upper Tribunal. However, Part 4 of Schedule 13 does provide for greater flexibility in the judges who may be called upon to sit in those chambers.

The Borders, Citizenship and Immigration Act 2009 extended the test for appeals from the Upper Tribunal to the Court of Appeal in immigration appeals. That test requires there to be some important point of practice or principle or some other compelling reason, in addition to an arguable error of law in the decision of the Upper Tribunal, for permission to be granted for appeal to the Court of Appeal. Concern was expressed in both Houses about this requirement, particularly in refugee and human rights appeals.[20] Minister's then said that refugee and human rights appeals would be "*precisely the sort of cases that would meet the test...*"[21] This has not been the result.[22] Insofar as the greater flexibility in judicial deployment may result in those of lesser experience sitting on appeals in the immigration and asylum chambers, ILPA's concerns and those of parliamentarians in 2009 will be exacerbated by Part 4 of Schedule 13. ILPA would welcome a return to the amendments pursued in the Lords during the passage of the Borders, Citizenship and Immigration Bill before the giving of assurances by Ministers, which assurances have now proved to be ineffectual.

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[19] *Hansard* HC, Borders, Citizenship and Immigration Bill Committee, First Sitting, 9 Jun 2009 : Column 22 (*per* Damian Green MP)
[20] See *Hansard* HL, 1 Apr 2009 : Column 1121 *et seq* (*per* Lord Lester of Herne Hill, Lord Lloyd of Berwick, Lord Kingsland, Lord Pannick, Lord Goodhart [who also indicated the shared concerns of Lord Thomas of Gresford] among others)
[21] e.g. *Hansard* HC, Borders, Citizenship and Immigration Bill Committee, Sixth Sitting, 16 Jun 2009 : Column 182 (*per* Phil Woolas MP)
[22] *PR (Sri Lanka) & Ors v Secretary of State for the Home Department* [2011] EWCA Civ 988 (see in particular paragraphs 40 & 41); *JD (Congo) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 327