ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

House of Lords Committee Stage
Crime and Courts Bill (HL Bill 4)

Clause 24 (Appeals against refusal of entry clearance to visit the UK)

ILPA is opposed to Clause 24, by which it is intended that refusal of a family visit visa will no longer be subject to a right of appeal, save on human rights or race discrimination grounds. We propose three Amendments relating to this Clause.

Amendment A

Page 22, line 20, leave out clause 24.

Purpose:
To remove Clause 24 from the Bill, and hence retain the right of appeal in full against a refusal of a family visit visa. Amendment A is ILPA's preferred position.

Amendment B

Page 23, after line 2, insert –

( ) This section shall not have effect in relation to an appeal against a refusal of entry clearance where that decision was taken wholly or partly on a general ground for refusal in rules as laid by the Secretary of State for the purposes of section 1(4) of the Immigration Act 1971 (c.77).

Purpose:
To restrict Clause 24, so that the full right of appeal is not lost where the refusal of a family visit visa is made wholly or partly on a general ground for refusal (e.g. where the entry clearance officer alleges the applicant has made a false representation in his or her application). Amendment B is an alternative to Amendment A, the latter being ILPA's preferred position.

Amendment C

After Clause 24, insert –

24A Immigration appeals: race discrimination grounds

(1) The Nationality, Immigration and Asylum Act 2002 is amended as follows.

(2) In section 84(1)(b), after "Race Relations (Northern Ireland) Order 1997" insert –

"or relates to section 115 of the Equality Act 2010 (c.15) in relation to the protected characteristic identified in section 9 of that Act"

Purpose:
To provide opportunity to press Ministers to urgently correct an error created by the commencement of the Equality Act 2010, whereby the specific race discrimination ground of appeal in immigration appeals has been removed inadvertently.

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

In July 2011, the UK Border Agency stated in its consultation document *Family migration: a consultation*:[3]

> "*Many British citizens and settled persons in the UK have family members living outside the UK. This results in a high volume of visa applications from people wishing to visit family in the UK. Such visits are a means of maintaining family links and of enabling family members living abroad to participate in important family occasions in the UK, such as births, weddings and funerals. Such visits and associated tourism also bring economic benefits to the UK.*"

The following month, the Prime Minister, the Rt Hon David Cameron MP, announced:[4]

> "*If it hurts families, if it undermines commitment, if it tramples over the values that keep people together, or stops families from being together, then we shouldn't do it.*"

Clause 24 will stop families being together by denying those refused a visa to visit family a right of appeal to an independent tribunal to correct wrong assertions by entry clearance officers of the UK Border Agency which otherwise will lead to the refusal of their current and future applications to visit family. The importance of the right of appeal was emphasised by data disclosed by the Immigration Minister, Damian Green MP, in answer to a parliamentary question in January 2011. That data showed between 2004 and 2010 the success rate on appeal in family visit visa cases rose year on year from 19% in 2004 to 45% in 2010.[5]

Why is it proposed to remove the full right of appeal in these cases?
The Immigration Minister, in his recent evidence before the Home Affairs Select Committee,[6] spelled out the Government's 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),[7] 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] See *Family migration: a consultation*, July 2011, paragraph 7.5 available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary

[4] See *PM's speech on the fightback after the riots*, 15 August 2011, available at http://www.number10.gov.uk/news/pms-speech-on-the-fightback-after-the-riots/

[5] *Hansard* HC, 20 Jan 2011 : Column 974W. The data presented by Damian Green MP is for the years 2004 to 2009, and for months January to September 2010. The statistics of the Tribunals Service show that entry clearance appeals were successful in between 38% to 44% of appeals during the first three quarters of 2011. However, the Tribunals Service statistics are for all entry clearance appeals and cannot be directly compared with the data disclosed by the Minister which is specific to family visit entry clearance appeals. Tribunal Service statistics are available at: http://www.justice.gov.uk/statistics/tribunals/quarterly

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

[7] He did not, however, highlight that the numbers of appeals had fallen year on year since 2007, see *Hansard* HC, 20 Jan 2011 : Column 974W (and see fn. 5). The data presented by Damian Green MP in reply to that parliamentary question is for the years 2004 to 2009, and for months January to September 2010. The statistics of

> "*...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 reply 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.*"

Why these reasons for removing the full right of appeal are flawed:

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. Often, the real basis on which the application is refused is not revealed until the appeal hearing. 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. New evidence is not, as the Minister suggests, simply put forward to correct a mistake on the applicant's part. It is frequently put forward in response to a mistake on the part of the entry clearance officer.

As to the notion that not to appeal is better for an applicant, as was recognised at Second Reading,[8] if this appears to be so to the applicant in an individual case he or she does not have to exercise the right of appeal.

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.[9] He looked at entry clearance decisions where there is currently no full right of appeal – i.e. decisions subject to the same limitations the Bill would extend to family visit cases. 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[10] in which the removal of the full right of appeal in family visit cases was proposed.[11]

Ongoing consequences of refusal decisions:

Where an entry clearance officer wrongly impugns an applicant's integrity in the reasons for refusal, if the applicant is not able to clear his or her name, this may well be relied upon to refuse any future application (whether for a family visit visa or for some other type of visa; whether in an application to UK or another country). In some circumstances, the previous allegation by the entry clearance officer will require any future visa application to be refused for up to 10 years. This will be so e.g. where the entry clearance officer alleges the applicant has made a false statement in his or her application.[12]

The importance of a right of appeal to an independent tribunal:

---

the Tribunal Service are not directly comparable, but for 2010 and the first three quarters of 2011 appear to show a continuing fall. Tribunal Service statistics are available at: http://www.justice.gov.uk/statistics/tribunals/quarterly

[8] *Hansard* HL, 28 May 2012 : Column 985 (*per* Baroness Hamwee)

[9] 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

[10] *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

[11] 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

[12] Immigration Rules (HC 395) (as amended), paragraph 320(7B)

The reasons given by entry clearance officers for refusing a visa to visit family often explicitly or implicitly impugn the integrity of the applicant or his or her family members – e.g. where the visa is refused because the entry clearance officer does not accept that the applicant is genuinely seeking entry as a visitor or family visitor, or intends to leave the UK at the end of the visit. Refusals also include general reasons for refusal which may impugn the character of the applicant – e.g. where the visa is refused because the entry clearance officer alleges the applicant has made a false statement in his or her application. A false statement would require the application to be refused.[13] A right of appeal, at which family members in the UK can attend and give oral evidence, is vital to provide a proper opportunity to answer allegations as to the applicant's or the family members' integrity.

Inadequacy of internal review of entry clearance decisions:

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. It was introduced in 2008 to replace the full right of appeal against refusal of entry clearance in student and worker visa cases dealt with under the points-based system. 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,[14] 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[15] 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. He was explicit in finding that the internal review system "*is not working effectively*".[16]

The Immigration, Asylum and Nationality Act 2006 required, within three years, the Secretary of State to lay before Parliament a report on the effect of removing the full right of appeal in points-based system entry clearance cases. That report was laid in March 2011.[17] It was not an independent report. It asserts what is expected of entry clearance managers in conducting reviews, whereas the Chief Inspector's findings show that in many cases those expectations are not met. The report rehearsed reasons why it was said to be reasonable to replace the right of appeal with internal review in points-based system cases, and emphasis was placed on "*the context of the new more objective and transparent process for making decisions under the points-based system*".[18] While ILPA is not satisfied that the points-based system has resulted in an objective and transparent process as intended, it is significant that this has been the basis for the introduction of internal review in relation to decisions in that system. There is no suggestion that family visit visas are to be or could be decided according to criteria in relation to which scope for subjective decision-making was removed. The inadequacies of the internal review system would, therefore, be exacerbated if applied to family visit cases.

The restoration of the right of appeal in 2000:

As the Immigration Minister explained (see above), the right of appeal in these family visit visa cases was restored by the previous Government in 2000. That party had made the restoration of the right of appeal a manifesto commitment in 1997. Parliament debated the right of appeal in November 2000, and the debates in both Houses evidence strong feelings in Parliament and in communities. The Rt Hon Simon Hughes MP said:

> "*The Conservative Government... abolished the right of those who had applied for visas to enter this country to appeal against rejection. That caused widespread disapproval, dissatisfaction and anger.*

[13] Immigration Rules (HC 395) (as amended), paragraph 320(7A)
[14] HC 71-i, Q108-109, *op cit*
[15] *Entry Clearance Decision-Making*, *op cit*
[16] *Entry Clearance Decision-Making*, *op cit*, Foreword by the Chief Inspector
[17] *Report on Removal of full appeal rights against refusal of entry clearance decisions under the points-based system*, UK Border Agency, March 2011
[18] Paragraph 19 of *Report on Removal of full appeal rights*, *op cit*

Understandably, the Labour Opposition, like the Liberal Democrats, were committed to restoring the right of appeal..." (*Hansard* HC, 20 Nov 2000 : Column 109)

The importance of the right of appeal was emphasised in the debates. As Fiona Mactaggart MP and the Rt Hon Jack Straw MP (then Home Secretary) agreed, the right was a vital opportunity for someone, whose character was wrongly impugned in the refusal of his or her visa, to clear his or her name (*Hansard* HC, 20 Nov 2000 : Column 123). The Lord Judd, the Lord Dholakia and the late Lord Newton of Braintree were among those who emphasised the importance of the right for family members in the UK to be able to attend a hearing of an appeal by an independent tribunal so as to address implicit or explicit allegations as to the integrity of the would-be visitor or his or her family members (*Hansard* HL, 2 Nov 2000 : Columns 1206, 1216 & 1213). Sir Teddy Taylor MP highlighted how restrictions on appeal rights in these cases could be expected to discriminate against certain communities, particularly black and Asian communities (*Hansard* HC, 20 Nov 2000 : Column 132). He presented figures at the time showing that whereas one in 703 applications by Australians and one in 202 by US citizens were refused, one in five by Pakistani, Bangladeshi or Ghanaian citizens were refused.

Equality Act 2010 and race discrimination:

Comparable data to that obtained by Sir Teddy Taylor in 2000 is not available to ILPA. However, the Chief Inspector's report of his global review of entry clearance decisions and posts[19] provides relevant information. Whereas the inspection found the entry clearance officer had not considered the evidence properly in 33% of all entry clearance decisions sampled, this rose to 37% of decisions sampled for Africa and to 50% for the region covering the Gulf, Iran and Pakistan.[20] The poorest performing posts regarding use of evidence were Abu Dhabi, Lagos, Abuja, Moscow and New Dehli.[21] The same posts were the poorest performing (by volume) as regards failure to seek additional information.[22] Three of these posts (Abu Dhabi, Lagos and New Dehli) were also among the five poorest posts regarding retention of documentation on file.[23]

The Government has made clear its intention that a right of appeal is to be retained on race discrimination and/or human rights grounds against a refusal of a family visit visa. However, by the commencement of the Equality Act 2010, the specific race discrimination ground of appeal has been inadvertently removed, and if Clause 24 were enacted today there would be no appeal on race discrimination grounds (save where an appeal is exercised in Northern Ireland).[24] ILPA does not suggest that primary legislation is required to amend this omission, but urges peers to press Ministers to rectify this omission urgently. Although section 84(1)(e) of the Nationality, Immigration and Asylum Act 2002, which permits a ground of appeal that a decision is "*not in accordance with the law*", could include a ground of race discrimination on an appeal, the section 84(1)(e) grounds (unlike the specific race discrimination ground that had resided in section 84(1)(b)) are not available unless a full right of appeal is available. Hence, section 84(1)(e) would have no effect in a case to which Clause 24 applied.

Government's case for change is unsubstantiated:

The reasons advanced for change[25] are essentially those put forward in the UK Border Agency consultation document *Family migration: a consultation* in July 2011 in proposing changes to or restrictions on the right of appeal in family visit cases. In that consultation document, the UK Border Agency made assertions about the use of new evidence (including reference to the 63% figure quoted by the Minister)

---

[19] See fn 9
[20] *Entry Clearance Decision-Making*, *op cit*, figure 8, paragraph 4.22
[21] *Entry Clearance Decision-Making*, *op cit*, figure 13, paragraph 4.39
[22] *Entry Clearance Decision-Making*, *op cit*, figure 16, paragraph 4.44
[23] *Entry Clearance Decision-Making*, *op cit*, figure 9, paragraph 4.29
[24] The reference to the Race Relations Act 1976 was removed from the provision (section 84(1)(b)) in the Nationality, Immigration and Asylum Act 2002 on 5 April 2011 by the Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011, SI 2011/1060, and no substitute was included in its place.
[25] See fn 6 (and extract from uncorrected transcript set out above)

by reference to a sample of 363 determinations in family visit appeals which it had considered.[26] ILPA put the following questions to the UK Border Agency regarding this sample:

> "*Of the allowed appeals, was the new evidence produced, evidence that is clearly required on the application form or website.*"
> "*Of the allowed appeals, was any contact made by the Entry clearance officer making the decision with the applicant to request that the evidence be supplied?*"

The UK Border Agency's response to each of these questions was "*The information requested was not collated when the sampling was carried out.*" Without this information, the claims made by the UK Border Agency and the Minister, even in respect of the sample of 363 cases, regarding the need for and use of the right of appeal are unsubstantiated. ILPA is not aware of any new information available to or obtained by the UK Border Agency.

Post script:
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 entry clearance appeals. In seeking to address this complexity in the changes to be made by the current Bill, the draftsperson 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 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.

For further information please contact:
Steve Symonds, Legal Officer, (020-7490 1553) steve.symonds@ilpa.org.uk or
Alison Harvey, General Secretary (020-7251 8383) alison.harvey@ilpa.org.uk.

Two Annexes are appended:

- other inspection reports by the Chief Inspector of Borders and Immigration
- case studies

[26] See *Family migration: a consultation*, *op cit*, paragraph 1.22

ANNEX A – other inspection reports by the Chief Inspector

In addition to his December 2011 *Entry Clearance Decision-Making: a global review* report, to which this briefing refers, the Chief Inspector of Borders and Immigration has undertaken several reports into entry clearance decision-making at specific overseas posts. This Annex provides some relevant extracts.

From the Chief Inspector's Foreword to his most recent report on Amman – *An inspection of the UK Border Agency visa section in Amman, Jordan*, August-October 2010:
http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/An-inspection-of-UKBA-visa-section-in-Amman-Jordan.pdf

> "*My case file sampling identified serious concerns about the quality, consistency and fairness of decision making across all categories of visa applications considered in Amman. I found the visa section was, in some circumstances, refusing applications when applicants had adhered to guidance published by the UK Border Agency and submitted all the documents the Agency advised them to submit.*"
>
> "*I found visa section staff were using risk profiles inappropriately to make entry clearance decisions, rather than merely to inform their decision making. In a number of cases I also found Entry Clearance Officers had refused applications on the grounds that the documents submitted by applicants were not genuine, before the outcome of verification checks to confirm or disprove their suspicions.*"
>
> "*The absence of relevant supporting documents and caseworking notes made it almost impossible for me to understand some of the reasons for Entry Clearance Officers' decisions to issue or refuse applications.*"

From the Chief Inspector's Foreword to his most recent report on Istanbul – *A short-notice inspection of decision making quality in the Istanbul visa section*, November 2010:
http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/A-short-notice-inspection-of-Istanbul-visa-section.pdf

> "*I am concerned about the fairness and quality of decision making in respect of entry clearance work at this post. In Istanbul I found that key evidence provided by applicants was overlooked in deciding a number of cases. I also found that applicants were sometimes refused on the basis of requirements that would not be clear to them at the time of making an application. This lack of clarity in regards to evidential requirements has been a key feature of other recent overseas inspections, most significantly in Amman, and raises issues of procedural fairness.*"

From the Chief Inspector's Foreword to his most recent report on Abu Dhabi and Islamabad – *An inspection of entry clearance in Abu Dhabi and Islamabad*, January-May 2010:
http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/An-inspection-of-entry-clearance-in-Abu-Dhabi-and-Islamabad.pdf

> "*Most significant among my findings however, was the different approach taken by UK Border Agency staff towards customers from Abu Dhabi, Bahrain and Dubai (members of the Gulf Cooperation Council) and those from Pakistan. I found that staff were applying higher evidential requirements for entry to the UK to customers from Pakistan and this was not made clear to them.*"

ANNEX B – case studies

This first case study shows why it is often necessary for new evidence to be relied upon at an appeal. Firstly, it new evidence may be necessary to respond to an allegation raised in the refusal. Secondly, new evidence may be necessary to respond to a new matter, raised for the first time by the entry clearance officer at the appeal stage. ILPA's experience is, as in this case, that entry clearance officers often make no effort to seek new information or evidence from an applicant before a refusal and/or before making serious allegations against an applicant.

Case of Mr B

The entry clearance officer relied upon two allegations against the Mr B to refuse his family visit visa application. Firstly, the entry clearance officer alleged that Mr B had used deception to conceal a refusal of a visa to visit a third country. Secondly, the entry clearance officer alleged that Mr B had presented a false document relating to his claimed bank account in India. The first of these two allegations was not mentioned in the original refusal, but only raised by the entry clearance officer in the papers he submitted to resist Mr B's appeal. Mr B denied both allegations. One of his family members attended the hearing of his appeal, and gave oral evidence. Having inspected the documents submitted for the appeal, both by Mr B and by the entry clearance officer, and considered the evidence of Mr B's family member, the immigration judge allowed Mr B's appeal. There was simply no evidence sufficient to substantiate the allegations made, which had they been maintained would have required any future application to come to the UK (whether as a visitor or otherwise), within a period of 10 years, by Mr B to have been refused.

The following two case studies are examples where no new evidence was raised on the appeal but where the reasons for refusal were so poor, as demonstrated by the emphatic assessments of the immigration judges in the two appeals, that the applicants could have no confidence that a further review or application would have been treated any better. Indeed, it is questionable what could have been added in any new application.

Case of Mr Y

Mr Y was refused entry clearance to visit his son, daughter-in-law and grandchildren. Mr Y had visited the UK twice and visited several other countries, returning to Pakistan before his visa expired on each occasion. He provided extensive documentation for his application showing his settled familial and financial circumstances in Pakistan. The immigration judge wrote in the determination allowing the appeal, "*I am very surprised at this decision*" and, having reviewed the documentation submitted with the visa application, "*I am at a loss to know what further documents* [Mr Y] *could have provided in this matter.*"

Case of Mr & Mrs Z

Mr and Mrs Z were refused entry clearance to visit his brother and attend their niece's wedding. They had submitted extensive evidence with their visa application, including as to their familial and financial situation in Pakistan: Mr Z's business interests there and their four children, all in school in Pakistan (none of whom were intending to accompany Mr and Mrs Z on the visit). The entry clearance officer refused the application, asserting the intended visit was not genuine. The immigration judge considered the evidence submitted with the visa application, which she considered to be "*satisfactory and ample*". There was no reason to conclude that Mr and Mrs Z would not be returning to Pakistan after the visit.

This final case study provides example of the importance of a right of appeal before an independent tribunal where family members are able to attend and give oral evidence.

Case of Mr H

Mr H was refused entry clearance to visit his aunt. The entry clearance officer questioned how Mr H had come by funds in his bank account and Mr H's intentions to return back to India after his visit. No new evidence was relied on in the appeal by Mr H. Mr H's aunt attended the hearing and gave detailed, oral evidence, corroborating the family's financial situation in India and confirming that family members had visited in the past and returned after their visit. The immigration judge found the aunt to be credible, and doubts expressed by the entry clearance officer baseless. Mr H's appeal was allowed.