ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

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

Clause 25 (Restriction on right of appeal from within the United Kingdom)

FIRST PROPOSED AMENDMENT

Page 23, line 3, leave out clause 25.

Purpose
To ensure that a person who is outside the country when his/her leave is cut short by the UK Border Agency retains the right to return to the UK within the 10-day time limit for appeal and, if s/he does so, to exercise an appeal in country.

Briefing
This is ILPA's preferred amendment. Clause 25 is unjust and oppressive. It is contrary to the principles underpinning a fair trial.

Clause 25 would apply where the Secretary of State cancels or curtails a person's leave to be in the UK (section 82(2)(e) of the Nationality, Immigration and Asylum Act 2002) while that 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. Even where the person has returned to the UK and lodged an appeal before the certificate is issued, clause 25(4) means that when the Secretary of State issues the certificate the appeal will lapse and the person be excluded from any right of appeal until he or she has again left the UK.

That persons are outside the UK when their leave is cancelled is not an unhappy accident, it is a result of a policy of waiting until a person is outside the country to serve the decision to cancel their leave.

A person whose leave is cancelled is normally entitled to:

- an in-country appeal against the decision to take away their leave;
- the continuation of their leave on the same terms and conditions during the period within which an appeal can be brought (10 days) and, if they do appeal, while the appeal is pending.

The Home Office took the view that a person who was outside the country at the time when leave was cancelled was not entitled to an in-country appeal. The courts held, in *SSHD v MK (Tunisia)* [2011] EWCA Civ 33[1] that as a matter of statutory construction, a person's leave continues on the same terms and conditions during the 10 day period within which an in-country appeal can be

[1] On appeal from *R(Khemiri) v SSHD* [2010] EWHC 2363 Admin

brought and that they must be given the opportunity to return to the UK to lodge the appeal within this time limit. If a person does not take that opportunity they do not have an in-country right of appeal, but if they do, they have such a right and their leave continues until that appeal is finally determined. It is this ruling that Clause 25 would reverse.

Why should the Secretary of State use information she holds about a person's whereabouts to time cancelling their leave for when they are out of the country and thus dictate whether a person has an in-country right of appeal or not? That one party to litigation can control whether the other party has an in-country right of appeal offends against principles of fairness.

Why should one person have an in-country appeal and another, who has received the very same immigration decision, not do so, just because one of them happened to have left the UK for a few days at the time when the decision was served? There is no rational basis for the differential treatment.

The case of *MK* itself illustrates the oppressive nature of the clause. Mr MK was a recognised refugee in the UK who had lived in the UK for several years with his wife and daughters. A European Arrest Warrant was issued for his arrest in connection with terrorism-related activities. Extradition to Italy was sought. His challenge to extradition failed.[2] It was accepted in the course of the extradition proceedings that he was at risk of torture in Tunisia, his country of nationality. It was not accepted that there was a real risk that Italy would *refoule* him to Tunisia.

Mr MK's wife and daughters, his dependants, remained at home in the UK.

Mr MK was tried in Italy and acquitted of all charges save for one, which related to the procurement of a false travel document and all agree did not relate to terrorist activities. He was sentenced to 12 months imprisonment but, had already served that on remand. However, he was not released but held in immigration detention in Italy against his return to his country of nationality, Tunisia, because a request was immediately made by the Italian police for his expulsion there. What had been considered unthinkable by the court in the UK extradition hearings was happening.

Mr MK informed the Italian authorities that he was a refugee and the Italian authorities started to try to determine whether he could be returned to the UK, his country of refuge. Meanwhile the European Court of Human Rights intervened at Mr MK's request to provide an indication to Italy under Rule 39 of the Rules of Court that he should not be returned to Tunisia.

Seven days after the indication from the European Court of Human Rights, the Secretary of State wrote to Mr MK's solicitors in the UK that she had decided to revoke his refugee status and had also to decided to cancel his indefinite leave to remain on the ground that his exclusion from the UK would be conducive to the public good. Mr MK's solicitors lodged an appeal within the time limits applicable. It was argued by the Secretary of State that she was under no obligation to facilitate his return so that he could exercise an in-country right of appeal. The judge disagreed, concluding that, as a matter of statutory construction, the proper construction of section 3D of the Immigration Act 1971 was that leave was extended for the 10 days that would enable the individual wishing to do so to make arrangements to return to the UK to pursue an appeal against the cancellation.

---

[2] *R (Ignaoua et ors) v Judicial Authority of the Courts of Milan ; The Serious and Organised Crime Agency &the Secretary of State for the Home Department.* [2008] EWHC 2619 (Admin).

Mr MK's case is chilling, but it is far from as bad as it could be. Mr MK:

- knew of the decisions taken against him; they were not simply sitting on the mat undiscovered but deemed served on him as a matter of law, which provides that a decision is deemed served two days after service on a person's last known address. [3]
- had at all times the benefit of lawyers on the record ready to act, in the UK, overseas and at the level of European Court of Human Rights to protect him;
- had challenged his extradition in the UK prior to that extradition and thus had findings of fact as to the risk of torture in Tunisia;
- was extradited to a country that is a State party to the European Convention on Human Rights and benefited from an intervention by the European Court of Human Rights designed to prevent onward *refoulement* from Italy

Mr MK faced an appeal before the Special Immigration Appeals Commission and also had a claim that involved asylum matters, on both of which grounds, even after the coming into effect of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, he would continue to be eligible for legal aid.

It is not difficult to envisage cases to which Clause 25 applies in which the facts are very different and the risks increased.

In the *MK* case, the Secretary of State did not dispute that there are advantages to being present in the UK to pursue an appeal. The Court of Appeal in that case described the right to an in-country appeal as "valuable." It is difficult to pursue an appeal that turns on your character when you cannot appear in person before the court. It is difficult to find and work with legal representatives to bring that appeal if you are outside the UK, particularly if, as was the case for Mr MK, you are not in your country of nationality (Mr MK was a refugee from his country of nationality) but stranded in a third country. It can be costly. The effect of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will be that those whose cases come before the Special Immigration Appeals Commission, or who claim asylum will be eligible for legal aid for their appeal. Those whose cases are heard before ordinary tribunals and who make no claim for asylum, will not. It is difficult for dependant family members either stranded with you, or left behind in the UK with the basis of their own stay pulled out from under them.

If a person does return to the UK to appeal, they submit to the UK's powers. They can be prosecuted for any criminal offence they have committed. The Home Secretary loses none of her powers of administrative detention under the immigration acts. The person gains the advantage of continuing leave to be in the UK, but at a price. The only reason for wanting to be in the UK to challenge the decision is because a person thinks they have a chance of winning.

See further ILPA's evidence[4], before the decision of the Court of Appeal in *MK*, to the Joint Committee on Human Rights for its 2011 report *The Human Rights Implications of UK Extradition Policy*.[5]

---

[3] Asylum and Immigration (Procedure) Rules 2005 SI 2005/560 as amended. The decision is deemed served two days after posting to the person's last known address.

[4] ILPA's 21 January 2011 submission can be found at http://www.ilpa.org.uk/data/resources/14418/11.01.21-ILPA-to-JCHR-re-extradition.pdf

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

SECOND PROPOSED AMENDMENT: Refugees and Stateless persons

Page 23, after line 22, insert –

(4) This section does not apply if –
(a) the person concerned is stateless,
(b) the person concerned has previously made an asylum claim or a human rights claim and been granted leave on that basis, or
(c) the person concerned asserts in his or her grounds of appeal an asylum claim or a human rights claim.

Purpose
A probing amendment. To restrict clause 25 so that it does not apply to (a) stateless persons, (b) refugees and persons granted humanitarian protection, (c) people who challenge the cancellation of their leave on the basis (or including on the basis) that to cancel their leave would breach their rights under the 1951 UN Convention relating to the Status of Refugees or the European Convention on Human Rights. Thus retaining for these persons the right to return to the UK within the time limit for appeal and to exercise an appeal in-country.

Briefing
ILPA does not suggest that this amendment cures the fundamental inequality of arms and the injustice imposed by Clause 25 but wishes to highlight by this amendment the effect of Clause 25 on the stateless and those in need of international protection.

If a person loses their leave to be in the UK, they are likely to return to their country of origin, travelling on their national passport or to use that passport to obtain a visa for a third country.

Stateless persons have no country to which to go. They have no national passport. They may have a stateless person's travel document, although it is rare to see such documents issued by the UK. Deprived of their leave to be in the UK and outside the UK they will not be in the country of their nationality but trying to make their way in a third country.

Similarly with refugees and those who face breaches of their human rights in their country of origin. They cannot return to their country of origin. Refugees will have travel documents issued by the UK, as will many people who face breaches of their human rights in their country of origin. If the UK revokes their refugee status or humanitarian protection they will lose their entitlement to a travel document. They will be unable to return to their country of origin; they will be unable to obtain a document into which a visa for a third country might be put. In the *MK* case, the judgment in which clause 25 seeks to reverse, Italy did attempt to return Mr MK to Tunisia, although the UK courts, extraditing him to Italy, had acknowledged the risk that he would be tortured if returned there and the intervention of the European Court of Human Rights had been necessary to prevent *refoulement.*

Section 113 of the Nationality Immigration and Asylum Act 2002 defines an asylum claim and a human rights claim for the purposes of Part V of that Act in which part the proposed new section

97B is found. An asylum claim is defined by reference to the 1951 UN Convention Relating to the Status of Refugees. A human rights claim is defined as a claim that being required to leave the UK would involve a breach of a person's human rights. The amendment thus goes beyond cases in which a person faces a breach of their human rights on return to their country of origin and encompasses persons who contend that to force them to leave the UK would breach, for example, their rights under Article 8 of the European Convention on Human Rights. The amendment could be redrafted but we consider it appropriate to use this wider definition of a human rights claim because:

a) These are grave cases; a person who faces a breach of their human rights should be able to be present at the hearing of their case
b) It is likely in these cases there will be family members stranded in the UK.

THIRD AMENDMENT: No certificate where an appeal is pending

Page 23, leave out lines 23 to 24.

Purpose

A probing amendment. To restrict the Secretary of State's power to exclude an in country appeal to those cases where she exercises the power before the person brings his or her appeal.

Briefing

ILPA does not suggest that this amendment cures the fundamental inequality of arms and the injustice imposed by Clause 25 but wishes to highlight by this amendment the extra layer of confusion and injustice created by clause 25(4).

Clause 25(4) envisages a situation where the person's leave is cancelled but no certificate is issued. The person lodges an appeal and the appeal is pending. The Secretary of State issues the certificate. The appeal lapses. Because of the certificate the person cannot appeal while s/he remains in the UK. S/he has two options

a) Not to appeal
b) To leave the UK and lodge an appeal from abroad.

This in an iniquitous part of an iniquitous clause. It treats two people who have lodged in-country appeals differently simply because one of them was outside the UK at the time when his/her leave was cancelled and the other was not. It also creates tremendous procedural complexity.

As the law currently stands one can envisage scenarios where a person appeals from abroad, then returns to the UK and purports to lodge an appeal against the same decision in-country, which is then certified. Can the in-country appeal be lodged at all when an appeal against the decision is pending? If it can, and it is then certified, does the out of country appeal immediately revive or does the Tribunal have to act to revive it? Neither statute nor the procedure rules make provision for this scenario and it has the potential to create procedural difficulties for the Tribunals.

What of the scenario in which the first appeal to be lodged is the in-country appeal which is then certified and the person leaves the UK and appeals from outside the UK? What steps if any does the Tribunal need to take to deal with a second, separate appeal against the same decision? Does it need to make provision for a possible subsequent appeal when recording that the in-country appeal has lapsed?

What about time limits? The time limit for appealing for a person who is outside the UK is 28 days (The Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230 (L.1) as amended). Does this start to run from the date the decision is served (which the person may be unaware of) as per rule 7(2)b) of those rules, or from the date the person leaves the UK, as per rule 7(2)(a), or some combination of the two – for example 28 days from the time the person leaves the UK minus the number of days the person was outside the country before first returning? The rules simply do not envisage the scenario that is proposed to apply in these cases. If time runs from the date of the decision, than the Secretary of State could, by not certifying the in-country appeal until 28 days after the initial decision had been served, render the appeal out of time. In this case one party to an appeal would have the opportunity to dictate whether the other party had an automatic right of appeal. We find it difficult to contemplate that these complications have been thought through.

If my in-country appeal is certified and lapses and I contend that the mischief cannot be remedied by an out of country appeal, for example because it will be a breach of my human rights to be forced to leave the UK then I shall need to bring a judicial review against the certificate.

All to create a state of affairs in which a person who was outside the UK but has returned to the UK and appealed from within the UK is put in a different position from a person who was in the UK at the time when leave was refused and appeals from within the UK.

We identify one other scenario where certification of a pending appeal was permitted. This was under section 96 *Earlier right of appeal* of the Nationality Immigration and Asylum Act 2002 as originally enacted. The power to certify a pending appeal was removed when the section was replaced by operation of section 30 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. The change was regarded as uncontroversial by all parties.

It looks as though clause 25(4) was perhaps an afterthought, and not thought through. It is not needed, it is not fair and it will create confusion.

FOURTH AMENDMENT: Legal Aid

Page 23, after Clause 25, insert the following new clause

25A Amendment of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

(1) Part 1 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is amended as follows.

(2) After paragraph 30 insert –

"(30A) Immigration: civil legal services provided in relation to certain variations of leave

Civil legal services provided in relation to a decision under s 82(2(e) of the nationality Immigration and Asylum Act 2002 in cases where the Secretary of State seeks to rely on section 97B of that Act."

Purpose
A probing amendment. To provide for legal aid for advice and representation, including at any appeal, for a person who is a person who is outside the country when their leave to remain in the UK is cut short.

Briefing
ILPA does not suggest that the provision of legal aid cures the fundamental inequality of arms and the injustice imposed by Clause 25 but wishes to highlight by this amendment both the iniquity of the clause and the effect of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in immigration.

Persons stranded overseas, including in a third country, in the most difficult circumstances require help to appeal. Without a legal representative on the record they may not even know that their leave has been cancelled by means of a letter deemed served on them at their UK address, until they try to board a plane, train or boat to the UK and are not allowed to so.

Apprised of their right to appeal but unable to return to the UK for that appeal, or, if in the UK, forced to leave if they wish to appeal, the person will face a difficult task persuading a court it is not the case that his/her presence in the UK is no longer conducive to the public good. Those claiming asylum and those whose cases raise national security or evidential concerns such that their case will be transferred to the Special Immigration Appeals Commission will be eligible for legal aid even after the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is brought into force. Others trying to appeal the decision to cancel their leave will not.

If it is intended, as was said repeatedly during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, that legal aid be reserved for the most serious of cases, then there should be legal aid for these cases, subject to the usual means and merits tests.

ILPA's briefing for second reading of this bill can be found at
http://www.ilpa.org.uk/data/resources/14767/12.05.24-ILPA-Second-Reading-Briefing.pdf

For further information please contact:
Alison Harvey, General Secretary, on 0207 251 8383 Alison.Harvey@ilpa.org.uk or
Steve Symonds, Legal Officer on 0207 490 1553 Steve.Symonds@ilpa.org.uk (annual leave 11 to 15 June)