CRIME AND COURTS BILL (HL Bill 4)
Proposed Amendments

ILPA proposes amendments regarding:

1. clause 24 (Appeals against refusal of entry clearance to visit the UK)
2. clause 25 (Restriction on right of appeal from within the United Kingdom)
3. clause 26 (Powers of immigration officers)
4. the statutory immigration appeals regime

1. AMENDMENTS Re CLAUSE 24

Amendment 1a.

Page 22, line 20, leave out clause 24.

Purpose
To remove clause 24 and retain the full right of appeal in family visit visa cases.

Briefing
The intended effect of clause 24 is to remove the right of appeal against a refusal of a visa to visit family members, save where the appeal is brought on race discrimination or human rights grounds (but see Amendment 4c. in relation to race discrimination grounds). A detailed briefing on clause 24 is available at **http://tinyurl.com/bna9efs**

Amendment 1b.

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 the effect of clause 24, so as to retain the full appeal right of appeal in family visit cases where a visa is refused on general grounds.

Briefing

The Immigration Rules set out requirements in each of the categories (including that of family visitor) for which entry clearance (a visa), leave to enter or leave to remain may be granted. In addition to the requirements specific to each category, the Rules include general grounds for refusal which may permit or require refusal in respect of any application under the Rules. An applicant will ordinarily not be able to anticipate a refusal under the general grounds, particularly if the refusal on such grounds is inappropriate. Thus, where an entry clearance officer decides the applicant has made a false statement or submitted a false document, the application will be refused yet the applicant will ordinarily not have been able to anticipate any need to submit evidence to support the veracity of the good statement or document submitted in the application. A decision to refuse on these grounds is likely to have continuing implications, including requiring that any future application for a visa is to be refused for ten years. It is particularly important, therefore, that the applicant should retain a right of appeal against such a decision to clear his or her name of any wrong allegation by the entry clearance officer. Further information is provided in the detailed briefing on clause 24 available at **http://tinyurl.com/bna9efs**

2. AMENDMENTS Re CLAUSE 25

Amendment 2a.

Page 23, line 3, leave out clause 25.

Purpose
To ensure that a person who is outside the country when his or her leave is cut short by the Secretary of State retains the right to return to the UK within the time limit for appeal and, if so, to exercise an appeal in country.

Briefing
At issue are cases where a person's leave is cut short by the Secretary of State (section 82(2)(e)) leaving them without any leave to be in the UK, when they are outside the UK at the time of the refusal. Such people are entitled to an in-country right of appeal against refusal. The courts have had to consider what happens when they are outside the UK at the time of the refusal. This 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 cut short their leave. The courts have held that a person must be given the opportunity to return to the UK to lodge the appeal within the time limit for appealing. If they do not take that opportunity they will not have an in-country right of appeal, but if they do, they will. Clause 25 would mean that such people had no opportunity to return to the UK. They, and family members, could be stranded outside the UK. The case which led the courts to consider the problem illustrates it well: *MK (Tunisia) v Secretary of State for the Home Department* [2011] EWCA Civ 333. More information is available in the detailed briefing at
http://tinyurl.com/d27dbjd

Why should the Secretary of State, by dint of choosing the time at which she serves a decision to cut leave short, be allowed to 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.

Amendment 2b.

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

To restrict clause 25 so that it does not apply to stateless persons, refugees, and persons granted humanitarian protection or who are entitled to humanitarian protection, or more widely to those asserting asylum or human rights grounds of appeal. Thus retaining for these persons the right to return to the UK within the time limit for appeal and, if so, to exercise an appeal in country.

Briefing

ILPA opposes clause 25 in principle for reasons expanded upon in the detailed briefing available at http://tinyurl.com/d27dbjd Additionally, the practical implications for stateless persons, refugees and those entitled to humanitarian protection are especially severe as clause 25 will leave these persons (and their families) stranded outside of the country with no other country in which they are permitted to be or to enter, or no such country in which they may be or enter safely.

Amendment 2c.

Page 23, leave out lines 23 to 24.

Purpose

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

Currently, clause 25 would allow the Secretary of State to exercise her power to exclude an in country appeal even after that appeal had been initiated. Thus a person who had returned to the UK and brought such an appeal, could then lose that appeal right (it would lapse) leaving him or her (and any family members) in limbo in the UK, including where there is no other country to which the person is permitted to go, or to which he or she may go safely (e.g. because the person is stateless or a refugee). There is no justification for the Secretary of State to exercise her power in

this way. Further briefing is available from ILPA's detailed clause 25 briefing (see link provided re Amendments 2a & 2b, above).

Amendment 2d.

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. Further briefing is available from ILPA's detailed clause 25 briefing (see link provided re Amendments 2a & 2b, above).

3. AMENDMENTS Re CLAUSE 26

Amendment 3a.

Page 27, after line 8, insert –

(15) An order to bring section 26 into force shall not be made until –

(a) the Secretary of State has laid before parliament a report about training, supervision and regulation of immigration officers;

(b) the Secretary of State has confirmed that she is satisfied that the training and supervision provided to immigration officers is adequate to allow them to fulfil their duties; and

(c) the Secretary of State has confirmed that provisions of a code have been specified for the purposes of section 145(1) of the Immigration and Asylum Act 1999 (c.33) in relation to immigration officers exercising any of the powers to which that section refers.

Purpose

To provide opportunity to raise questions as to training, supervision and regulation etc. and to require the Secretary of State to take specific steps to address such matters before any further expansion of immigration officers' powers.

Briefing

Clause 26 and Schedule 14 intend far-reaching extension of the powers of certain immigration officers, including to engage in highly intrusive operations – e.g. in clause 26, subparagraph (1) relates to interference with property and wireless telegraphy, and subparagraph (2) relates to 'intrusive surveillance'.

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[1]: "*The conditions under which children are held and that detainees have to endure overnight are degrading and disgraceful.*" The facility at Heathrow is a short-term holding facility, i.e. one of those places in respect of which over 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[2]:

> "*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

[1] see Executive Summary, paragraph 2.1 at http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2012/heathrow-2011-2012.pdf

[2] *Hansard* HC, Borders, Citizenship and Immigration Bill Committee, First Sitting, 9 Jun 2009 : Column 22 (*per* Damian Green MP)

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.

Amendment 3b.

Page 27, line 8, insert –

(15) The Borders, Citizenship and Immigration Act 2009 is amended as follows –

(a) In section 23(1) substitute "the Secretary of State must" for "the Secretary of State may".

(b) After section 23(1)(d), insert –

"(e) the provision of services provided by another person pursuant to arrangements which are made by the Secretary of State and relating to the discharge of a function within subsections (a) to (d)."

Purpose
To replace the power in the Borders, Citizenship and Immigration Act 2009 to apply the Police and Criminal Evidence (PACE) Codes of Practice to the acts of customs officials and immigration officers with a duty to do so; and to ensure that private contractors exercising functions in connection with investigations or detention are subject to these Codes of Practice.

Briefing
The Amendment provides an opportunity to probe Ministers as to the current provisions for regulation of immigration and customs officials, and private contractors exercising related powers, and to seek to ensure that there is comprehensive and effective coverage of PACE in this area. A similar amendment was pursued in relation to the Borders, Citizenship and Immigration Bill, a briefing to which is available at: http://tinyurl.com/d37mvmc

4. NEW CLAUSES

Amendment 4a.

After clause 22, insert –

22A Immigration and nationality appeals from the Upper Tribunal

Section 13(6) of the Tribunals, Courts and Enforcement Act 2007 (c. 15) (right of appeal to court of appeal etc.) does not apply in relation to immigration and nationality appeals from the Upper Tribunal.

Purpose

To remove the additional and highly restrictive requirement to show an important point of principle or practice or some other compelling reason in immigration and nationality appeals from the Upper Tribunal to the Court of Appeal. This additional requirement is referred to as "the second-tier appeals test".

Briefing

The second-tier appeals test was introduced by transfer of the jurisdiction of the Asylum and Immigration Tribunal into the unified tribunal structure (the First-tier and Upper Tribunals) in 2010. During the passage of the Borders, Citizenship and Immigration Bill in 2009, peers voted through amendments to prevent the second-tier appeals test taking effect in immigration and nationality appeals. Among concerns expressed was the impact of the second-tier appeals test in potentially excluding appeals to the Court of Appeal where individuals faced removal in breach of the Refugee Convention and human rights as a result of errors of law by the tribunals. At the time, Ministers gave assurances in both Houses that these sort of cases would be the ones that could be expected to meet the test. Those assurances have proved to be misplaced following the judgment of the Court of Appeal in *PR (Sri Lanka) & Ors v Secretary of State for the Home Department* [2011] EWCA Civ 998. The Court of Appeal there considered the Ministerial assurances given in 2009, concluded that "*it would be wrong in principle*" to be constrained by these assurances and in applying the second-tier appeals test refused permission to appeal in each of the three asylum cases before the court. In one of those cases the appellant had been detained and tortured in Sri Lanka. Applying the test, the Court of Appeal concluded: "*The claimed risks are, unhappily, in no way exceptional in this jurisdiction, and not in themselves such as require the attention of the Court of Appeal.*" In another of the three cases, Sir Richard Buxton had identified an error of law in the failure of the tribunals below to correctly apply country guidance in respect of Zimbabwe asylum claims, but concluded that the test nonetheless precluded any appeal to the court. In the last of the three cases, Pitchford LJ had found the reasoning of the tribunals below to be "*obscure and contradictory*" and such as to give rise to a real prospect of success on the appeal if permission had been granted.

This Amendment adopts the wording of the Amendment originally tabled by the Lord Lester of Herne Hill QC, the Lord Pannick QC and the Lord Lloyd of Berwick, and subsequently adopted by the Lord Thomas of Gresford and the Lord Kingsland as part of a wider amendment concerning the Upper Tribunal. The assurances given in 2009 having proven misplaced it is appropriate for Parliament to revisit this matter.

More information on the second-tier appeals test is available from the information sheet at: **http://tinyurl.com/bp7zc6v**

Amendment 4b.

After clause 22, insert –

22A Immigration and nationality appeals from the Upper Tribunal

(1) Section 13(6) of the Tribunals, Courts and Enforcement Act 2007 (c.15) (right of appeal to the court of appeal etc.) does not apply in relation to immigration and nationality appeals from the Upper Tribunal where the grounds of appeal include a point of law relating to the Refugee Convention or the Human Rights Convention.

(2) In this section –

"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol

"the Human Rights Convention" has the same meaning as "the Convention" in the Human Rights Act 1998 (c.42)

Purpose
To remove the additional and highly restrictive requirement to show an important point of principle or practice or some other compelling reason in immigration and nationality appeals from the Upper Tribunal to the Court of Appeal, where the grounds of appeal include refugee or human rights grounds. This additional requirement is referred to as "the second-tier appeals test".

Briefing
Amendment 4b. is an alternative to Amendment 4a. Amendment 4b. is narrower in that it only removes the second-tier appeals test where the appeal to the Court of Appeal is on refugee or human rights grounds – i.e. those grounds specifically highlighted in the Ministerial assurances given in 2009.

Amendment 4c.

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 reintroduce the specific race discrimination ground of appeal in relation to immigration appeals throughout the UK.

Briefing
The Equality Act 2010 replaced previous equalities legislation, including the Race Relations Act 1976. The 1976 Act (as amended) had provided the basis for the specific race discrimination ground of appeal in immigration appeals. In commencing the Equality Act 2010, the Secretary of State omitted to substitute any replacement for the race discrimination ground of appeal that was removed from section 84(1)(b) of the Nationality, Immigration and Asylum Act 2002. That this was an omission has been confirmed by the Home Office to ILPA, and is implicitly confirmed by the Explanatory Notes to clause 24 which make reference to the race discrimination grounds at paragraph 373. It is separately confirmed by the news announcement (of 10 May 2012) on the UK Border Agency website which states that applicants "*will still be able to appeal on limited grounds of human rights or race discrimination.*" (see **http://tinyurl.com/cqmzmaw**)

ILPA has drawn the omission to the attention of the Home Office. We understand the Home Office is currently looking at how best to remedy the omission. The Amendment provides opportunity for peers to press Ministers to attend to the omission more speedily.

Amendment 4d.

After clause 24, insert –

24B Immigration appeals: asylum and humanitarian protection

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

(2) In section 83(1)(b) delete from "Kingdom" to end.

Purpose
To remove the restriction whereby an appeal against a refusal of asylum can only be brought where the person has been granted leave to enter or remain for more than 12 months.

Briefing
This Amendment would effect one simplification of the statutory immigration appeals regime. Currently a person refused asylum but granted limited leave to enter or remain for a period of no more than 12 months may not appeal against the refusal of asylum. This most often affects children who are granted discretionary leave within one year of their reaching 17½ years of age. While these children may

apply to extend their discretionary leave when approaching 17½ years of age, and to then appeal against any renewed refusal of asylum, there will be a delay of at least 12 months and likely much longer (refusals of further leave frequently are given after, and sometimes long after, a child has reached the age of majority). This delay may cause significant disadvantage to the child e.g. because:

- of the delay in opportunity to establish his or her refugee status (and the entitlements that accompany such status); and/or
- procedural protections available to the child are no longer available to him or her during proceedings after reaching the age of majority; and/or
- of the delay in opportunity to present oral or written evidence before a tribunal on appeal, where such evidence may become stale; and/or
- of any change in circumstances which may adversely affect the child's asylum claim.

Amendment 4e.

After clause 24, insert –

> **24C Appeal from within the United Kingdom: unfounded human rights or asylum claim**
>
> (1) The Nationality, Immigration and Asylum Act 2002 is amended as follows.
>
> (2) In section 94, delete subsection (8).

Purpose

To remove the statutory presumption that a country, other than the person's country of nationality, which the Secretary of State asserts is a safe country to which to remove an asylum-seeker is a country in which the person will not be persecuted and from which he or she will not be *refouled* in contravention of the Refugee Convention.

Briefing

ILPA is opposed in principle to section 94 of the Nationality, Immigration and Asylum Act 2002, which establishes a scheme whereby asylum-seekers may be precluded from a right of appeal against a refusal of asylum unless and until they have left the UK (including where this may mean returning to their home country or to another country which the Secretary of State asserts to be safe). However, Amendment 4e. is of more modest ambition. Section 94(8) provides for a statutory presumption such that where the Secretary of State asserts that a country (other than the person's home country) is safe, then it is to be presumed that in that country the asylum-seeker will not face persecution and will not face being returned to a country in which he or she does face persecution. The statutory presumption seeks to oust the jurisdiction of a court to consider the correctness of the Secretary of State's opinion as to the safety of such a country. The presumption is inappropriate.

In *NS* [2011] EUECJ C-411/10 (21 December 2011), the claimant asylum-seeker had sought judicial review of his third country return to Greece. Whereas the Administrative Court in England and Wales had been concerned as to the conditions in Greece, it considered itself bound by previous authority to uphold the UK Border Agency decision to return NS to Greece. The Court of Appeal referred the matter to the Court of Justice of the European Union. That Court concluded, in the context of European Union arrangements for safe third country returns within the EU (under what are often referred to as 'the Dublin Regulations'), that "*to require a conclusive presumption of compliance with fundamental rights,* [ ] *could be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Members. That would be the case, inter alia, with regard to a provision which laid down that certain States are 'safe countries' with regard to fundamental rights, if that provision had to be interpreted as constituting a conclusive presumption, not admitting of any evidence to the contrary...*" The presumption in section 94(8) seeks to be such a provision, and accordingly ought to be removed.

Amendment 4f.

After clause 24, insert –

24D Appeal in progress

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

(2) In section 99(1), delete "96(1) or (2)".

Purpose
To effect a modest simplification of the highly complex statutory immigration appeals regime by removing a redundant reference to sections 96(1) and 96(2) in section 99(1) of that Act.

Briefing
Where section 99(1) applies, any appeal proceedings are brought to a close without decision (the appeal shall lapse). The section purports to apply where a certificate is issued under sections 96(1) or (2), or 97 or 98 of the Act. Sections 97 and 98 relate to appeals which should not proceed before the Immigration and Asylum Chambers of the First-tier or Upper Tribunals, but which may be pursued before the Special Immigration Appeals Commission (e.g. because the appeal raises matters relating to national security).

Section 96(1) and 96(2), however, permit the Secretary of State or an immigration officer to exclude a right of appeal by certifying that the would-be appellant has previously had an opportunity to raise any current issues or complaints by way of an appeal previously and that there is no satisfactory reason for that not to have been done. There is no justification for the Secretary of State or immigration officer to simply void a right of appeal after it has been exercised in such cases, and indeed this

is reflected in section 96(7) which precludes such certification after a right of appeal has been exercised. The reference to section 96(1) or (2) in section 99(1), therefore, can have no effect and should be removed.