House of Lords Committee
Crime and Courts Bill

ILPA briefing re Government amendment 135

ILPA opposes the following Government amendment:

After Clause 19

LORD HENLEY
LORD MCNALLY

135

Insert the following new Clause—

"Transfer of immigration or nationality judicial review applications

(1) In section 31A of the Senior Courts Act 1981 (transfer from the High Court to the Upper Tribunal) –
  (a) In subsection (2) for ", 3 and 4" substitute "and 3"
  (b) Omit subsection (2A),
  (c) In subsection (3) , for ", 2 and 4" substitute "and 2" and
  (d) Omit subsections (7) and (8)
(2) In consequence of the amendments made by subsection (1), section 53(1) of the Borders, Citizenship and Immigration Act 2012 is repealed.

Purpose

The amendment would allow judicial reviews of immigration (including asylum) and nationality matters to be transferred from the High Court, where judicial reviews are currently heard, to the Upper Tribunal (Immigration and Asylum Chamber). Judicial review is the procedure whereby an administrative decision against which there is no right of appeal can be reviewed by a judge to determine whether it is lawful or not. ILPA is opposed to this amendment.

Briefing

To many members of the House this may feel like groundhog day. Parliament has made clear its views on whether judicial reviews should be transferred from the High Court into the tribunals once in 2007, during debates on the Tribunals, Courts and Enforcement Act 2007 and once in 2009, during debates on section 53 of the Borders, Citizenship and Immigration Act 2009. It has said no and it has said so powerfully. The reasons that militate against the Upper Tribunal being entrusted with this responsibility hold good.

The Tribunals, Courts and Enforcement Act 2007 established a new tribunal regime, which brought together several tribunal jurisdictions into one tribunal structure. It has two tiers –

a First-tier and the Upper Tribunal. The Act allowed for the transfer of certain judicial review applications from the High Court to the Upper Tribunal but, as a result of objections voiced in parliament, excluded immigration and nationality law judicial reviews from those that that could be transferred.

Parliament returned to the matter in 2009 during debates on what became the Borders, Immigration and Citizenship Act 2009 and again rejected a proposal that would permit the transfer of immigration and nationality judicial reviews. The compromise reached was that a limited class of judicial reviews, those that involved judicial review of a decision that a 'fresh claim' for asylum (a claim made after an earlier claim and any appeals against its refusal had been finally rejected).

Since 2009, the once separate Asylum and Immigration Tribunal has been transferred into the two-tier structure, with an Immigration and Asylum Chamber in the First-tier and in the Upper Tribunal. Meanwhile, on a case by case basis, the High Court has transferred a few judicial reviews against local authorities concerning the age of separated children seeking asylum to the Upper Tribunal, where they have ended up in the Immigration and Asylum Chamber. Age dispute judicial reviews can be transferred because they are not decisions about immigration or nationality under the terms of the Tribunals Courts and Enforcement Act 2007 and thus their transfer is not prohibited.

Judicial reviews in age assessment cases start in the administrative court but can be transferred to the Upper Tribunal on a case by case basis. As we understand it, referring to http://www.ait.gov.uk/Public/SearchResults.aspx , there are four reported cases to date.

Fresh claim judicial reviews are transferred as a class. As we understand it, there are no reported cases yet and we have only heard of one case that the tribunal was to hear. The Upper Tribunal (Immigration and Asylum Chamber) has as yet no body of experience of hearing judicial review cases. There is no evidence as to whether it is able to cope well or badly with them.

Meanwhile although there is power to transfer fresh claim judicial reviews from the Outer House of the Court of Session in Scotland to the Upper Tribunal (Immigration and Asylum Chamber) this power has not been exercised.

We can do no better than cite the comments of the late Lord Kingsland at Report stage in the House of Lords on the bill that became the Tribunals, Courts and Enforcement Act 2007[1]:

> "*…first, the Government have broken their promise to your Lordships' House not to introduce primary legislation permitting the transfer of judicial review matters in asylum and immigration cases until we have sufficient evidence that the system for judicial transfers in other classes of case are working well. Secondly, the Opposition and the noble Lord, Lord Thomas of Gresford, would be extremely unhappy to permit transfers unless we were satisfied that the transferred AIT single-tier regime to the Upper and Lower Tribunals did indeed have the effect of leading to much fairer and more timely decisions, thus reducing substantially the number of judicial review cases… Thirdly,… judicial review is a crucial component in the struggle to protect the individual. Many of these cases raise issues, at best, of the freedom of the individual and, at worst, of torture and death. It is vital that it*

[1] *Hansard*, HL 1 Apr 2009 : Columns 1125-26

remains open to someone in such cases to have the application heard by a High Court judge."

There is no such sufficient evidence yet. Powers to transfer judicial reviews into the Upper Tribunal (Immigration and Asylum Chamber) are being sought when the Upper Tribunal (Immigration and Asylum Chamber) has done only a handful of age assessment judicial reviews and has not built up any track record at all in dealing with fresh claim judicial reviews.

High Court judges have sat in the Upper Tribunal (Immigration and Asylum Chamber). But there are also tribunal judges in that chamber who are the former adjudicators and special adjudicators of the former Immigration Appellate Authority and their successors, who have never heard cases outside the immigration and asylum tribunal jurisdiction..' The provision would, therefore, allow for judicial reviews to be dealt with by a High Court judge sitting in the Upper Tribunal (Immigration and Asylum Chamber). However, it would also allow them to be dealt with by former adjudicators whose experience to date has been solel.y in immigration and asylum appeals at tribunal level.

In her response in Grand Committee on the Tribunals, Courts and Enforcement Bill, the Baroness Ashton of Upholland, speaking for the then Government, expressly accepted that judicial reviews in immigration cases were particularly sensitive. [2] Parliament's appreciation of the sensitivity of judicial reviews was succinctly summarised by the forceful observation of the Baroness Butler-Sloss in Grand Committee in 2006:

"*I support my noble and learned friend Lord Lloyd of Berwick in relation to the requirement to have someone of the level of a High Court judge to hear a judicial review in the tribunal. It would be invidious for there not to be a judge of that rank dealing with it. I support my noble and learned friend very strongly.*" [3]

Lord Lloyd of Berwick said at Second Reading of the Borders, Citizenship and Immigration Bill:

"*If the effect of repealing condition 4, which is what the clause purports to do, is that the administrative court would be bound to transfer judicial review applications in all immigration cases, I would be strongly opposed to it.*"[4]

As the Lord Lloyd explained:

"*…transfer of immigration cases would be mandatory if there were to be a direction by the Lord Chancellor and the Lord Chief Justice under Part 1 of Schedule 2 to the Constitutional Reform Act 2005…*"[5]

At Report stage in the House of Lords in 2009, in the debate on the Borders, Citizenship and Immigration Bill, the Lord Kingsland recounted:

"*The noble Baroness, Lady Ashton, stated, during the passage of the 2007 Act, that, before introducing further primary legislation to allow transfer of judicial review applications in respect of*

[2] *Hansard* Lords, Grand Committee 13 December 2006 : Columns GC68-70.
[3] *Hansard* Lords, Grand Committee 13 December 2006 : Column GC68.
[4] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1142
[5] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1142

asylum and immigration cases, the Government wanted to see how the new regime would work. The Government are in plain breach of that undertaking. [6]

The Lord West said in 2009 that: "*the senior judiciary are very supportive of the clause*" [7], which he said was shown by the responses of the President of the Queen's Bench Division, the Master of the Rolls and the Senior President of the Tribunals to the consultation on immigration appeals.[8] However, their respective responses do not address Lord Lloyd's concern. In respect of transfer of judicial reviews, the Master of the Rolls merely indicated that he supported the views of the President of the Queen's Bench Division. In his response, the President of the Queen's Bench Division stated that proposals for transfer of judicial reviews were welcome, but emphasised that:

> "*Some of them* [judicial reviews] *are plainly suited to the Administrative Court and should remain there…*"[9]

The Senior President of the Tribunals did not demur from that view.

By contrast, the Court of Session judges made clear that they did not welcome the proposal at this time. They said:

> "*…any decision as to a more general transfer of judicial review jurisdiction in this area* [immigration] *should be made only once the Upper Tribunal has gained extensive experience of implementing its proposed remit.*"[10]

No such extensive experience has been gained.

Others, including the Administrative Law Bar Association, the Glasgow Immigration Practitioners Group, the Law Society, the Refugee Legal Centre and Refugee Council, and individual lawyers, expressed views consistent with ILPA's response and that of the judges of the Court of Session.

As currently drafted, the effect of the amendment would be to:

- allow for the transfer of any immigration or nationality judicial review by decision of the High Court (or Northern Ireland High Court or Court of Session) in the individual case; and
- empower the Lord Chief Justice, with the agreement of the Lord Chancellor, to direct that all immigration and nationality judicial reviews, or any specified class of these judicial reviews, must be transferred.

As was recognised in 2006-07, immigration and asylum judicial reviews are particularly sensitive.[11] It remains the case in the experience of ILPA members that the Tribunal has not demonstrated the same ability to deal with the UK Border Agency's conduct as a litigant as has the high court. The Agency's failures to respond in a timely manner to directions of the

[6] *Hansard* HL, Report 1 Apr 2009 : Column 1125
[7] *Hansard*, HL Second Reading 11 Feb 2009 : Column 1211
[8] The UK Border Agency consultation *Immigration Appeals: fair decisions, faster justice*
[9] Aee individuals' responses available at the lin *op cit*
[10] See also see e.g. *Hansard*, HL Committee 4 Mar 2009 : Column 797 *et seq* (*per* the Lord Cameron of Lochbroom)
[11] *Hansard*, HL, Grand Committee 13 December 2006 : Columns GC68-70.

tribunal, to disclose relevant matters or adequately to plead its case are problems that continue to beset all too many cases.

We continue to see instances where the Upper Tribunal (Immigration and Asylum Chamber) deals with cases in ways which we anticipate that a higher court would not. In *SH (Afghanistan) v SSHD* [2011] EWCA Civ 1284 last November, the Court of Appeal bemoaned the way in which the Immigration and Asylum Chamber of the Upper Tribunal had handled a complex appeal

> *"… in refusing an adjournment … in my judgement Judge King fell into serious error. First, when considering whether the immigration judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair. …*
>
> *14…. Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand? It is plain from reading his decision as a whole that that was not the test applied by Judge King. His failure to apply that test was a significant error.*
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> *15. The next question which Judge King resolved was whether the report which had been obtained by the time of the hearing before him dated 22 October 2010 would have made any difference. The judge, on that issue, concluded that even if that report had been obtained, "it is reasonably likely" that Immigration Judge Froom would have reached the same decision. This was not the correct test. .. Tribunals, like courts, must set aside a determination reached by the adoption of an unfair procedure unless they are satisfied that it would be pointless to do so because the result would inevitably be the same. "*

We await the written determination of the Court of Appeal in *JG & CM (Zimbabwe)* but we know that in that case the Court of Appeal quashed the decision of the Upper Tribunal in *EM and Others (Returnees) Zimbabwe* CG [2011] UKUT 98(IAC) and we have had sight of the Court's statement of reasons attached to the Order. The Court of Appeal, granting permission for the appeal in this case ([2011] EWCA Civ 1704) had identified a failure on the part of the Home Office to disclose documents in the Upper Tribunal and that the Upper Tribunal's allowing the Home Office to put in anonymous evidence from a 'fact-finding mission' was open to challenge.

The statement of reasons from the Court of Appeal records that in granting permission to appeal the Court of Appeal held that it was arguable that the Upper Tribunal had acted unlawfully in agreeing to consider evidence from wholly anonymous sources (in following which approach it had expressly departed from jurisprudence of the European Court of Human Rights).

W***hat of the workload of the High Court and the Court of Appeal?***

It is within the gift of the Home Office substantially to reduce the workload of the judiciary at all levels, including the High Court. For example:

The Home Office could make good its commitments to Parliament in clearing the backlog of immigration and asylum cases ('the legacy'). The legacy was supposed to be cleared by July last year,

but as set out in evidence to the Home Affairs Committee[12] and at a meeting on 12 June with the Agency at which ILPA was represented, in addition to some 24,000 cases where the Agency states (in some cases erroneously) that persons cannot be found, there are a further 21,000 cases from the legacy where the whereabouts of the person is known but the case has yet to be resolved.

The Home Office could reduce the number of judicial reviews against removal directions by informing legal representatives of detention and removal directions immediately, giving more notice of removal and opportunity for individuals to seek and obtain good legal advice upon their immediate prospects and options. Currently, many individuals are detained with a mere 72 hours' notice of removal (the Court of Appeal in *R(Medical Justice) v SSHD* [2011] EWCA Civ 1710) and without opportunity to recover or obtain paperwork or obtain good legal advice. This leaves many vulnerable to those who may charge significant sums (often collected for the individual by friends and family) for incompetent or incomplete judicial review action.

The Home Office could immediately address the many of hundreds of Zimbabwean cases that have, particularly since 2005, contributed substantially to that workload by reviewing and where appropriate conceding in cases, many of which will include findings of fact justifying a grant of refugee status in the light of the country guidance determination in *RN(Zimbabwe)* [2008] UKAIT 00083[13] which has just been held not to have been overturned in *JG & CM (Zimbabwe)* (discussed above, full text of judgment awaited).

The inclusion of this provision in the Bill is premature. By its inclusion the Government reneges on the position it had accepted in response to the arguments of peers, led by the Lord Lloyd of Berwick, in 2007 during the passage of the Tribunals, Courts and Enforcement Bill.

In 2009, ILPA has made requests for the UK Border Agency to disclose information as to the numbers of immigration and asylum judicial reviews which are conceded by the Agency or in which the Agency has agreed to make a fresh decision without the need for the process to be seen all the way through. The Agency has informed ILPA that it was unable to retrieve this information because the costs in doing so would be too great.[14] Nonetheless, figures the Agency had disclosed indicated that very large numbers of immigration judicial reviews are withdrawn – in 2006, 1,185 cases; and in 2007, 1,532 cases. A withdrawal is consistent with the UK Border Agency conceding its decision was wrong or must be reconsidered[15]. ILPA's experience is that it is commonplace for the UK Border Agency to concede or make a fresh decision.

At Committee, Phil Woolas MP, then Borders and Immigration Minister, referred to 85 per cent of judicial reviews, which at different points he said were "*not progressed*" and "*were rejected on the*

[12] HC 71, uncorrected oral evidence of Minister for Immigration and officials of 15 May 2012 at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/uc71-i/uc7101.htm and written evidence of the UK Border Agency at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/writev/71/contents.htm

[13] http://www.bailii.org/uk/cases/UKIAT/2008/00083.rtf

[14] ILPA has most recently made such requests by letter of 24 April 2009, and received the response explained here by letter of 5 June 2009. As explained in ILPA's letter, the numbers of cases where the UK Border Agency concedes or agrees to make a fresh decision are key: "*The purpose of a claim for Judicial Review is to require the UK Border Agency to make a lawful decision, and whether that is achieved by a voluntary offer to settle or a fresh decision on the part of the UK Border Agency, or by an order of the court following a substantive hearing is… not material: either outcome constitutes a successful, and therefore clearly wholly justifiable claim for Judicial Review.*"

[15] In a letter of 26 June 2009 to the Lord Avebury, the Lord West of Spithead explained: "*There are a number of reasons why judicial reviews may be withdrawn for instance where the decision is flawed, where there has been inadequate reasoning or where the claimant has provided further information that requires consideration.*"

papers"[16]. ILPA wrote to Mr Woolas, copied to Committee members, because his statements to the Committee were unclear, appeared inconsistent and did not indicate what proportion of cases within the 85 per cent figure were withdrawn because the UK Border Agency accepted its decision was wrong or must be reconsidered.

In summary:

1. The reasons put forward by parliament in 2007 and 2009, that immigration and asylum judicial reviews were the most sensitive cases, and the new chambers' handling of judicial reviews required testing first, still remain good.
2. The answer to significant numbers of cases going to the High Court and Court of Appeal is to improve the decision-making at earlier stages, merely restricting access to these higher courts risks that reduced oversight of such decision-making merely encourages or allows for poor decision-making.
3. Decisions of the Court of Appeal on appeals from the Upper Tribunal (Immigration and Asylum Chamber) indicates that it continues to be the higher courts rather than the Immigration and Asylum Chamber of the Upper Tribunal that calls the UK Border Agency to account for its conduct as a litigant.
4. The volume of judicial reviews would be significantly reduced if the UK Border Agency followed rulings in individual cases. Currently, many individuals are required to bring their own judicial review because the UK Border Agency is or is proposing to treat them in a way that it has accepted to be wrong in another case.
5. Insufficient has been paid to the position of the devolved jurisdictions.
6. The inclusion of nationality cases within those judicial reviews which may be transferred to the Upper Tribunal does not make sense since the Immigration and Asylum Chamber has little experience of nationality law (there is no appeal against most nationality law decisions so expertise in this area is in the High Court), and the numbers of such cases are in any case very few.
7. The workload of the higher courts could be reduced there were a reduction in overly broad or enabling powers, contained within immigration and asylum legislation, in respect of which Parliament has little opportunity for effective scrutiny. Members from all sides of the House of Commons highlighted profound concerns at second reading there of the Borders Citizenship and Immigration Bill
8. The Government could do much to address the workload of the higher courts by addressing its practice of legislating for very broad powers, sometimes to be set out further in secondary legislation, and over which Parliament has so little opportunity for effective scrutiny. Profound concerns were highlighted by Members from all sides of the House of Commons at Second Reading[17], and this approach inevitably leads to recourse to the courts to clarify and restrain the exercise of power by the Executive.

For further information please get in touch with:

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[16] *Hansard*, HC Sixth Sitting 16 Jun 2009 : Columns 183 & 187

[17] e.g. *Hansard*, HC 2 Jun 2009 : Columns 182 (*per* Chris Grayling MP and John Gummer MP), 192 (*per* Chris Huhne MP) and 231-232 (*per* Damian Green MP); a similar complaint was also made by Neil Gerrard MP (Column 177)

Appendix – provisions to which reference is made

Senior Courts Act 1981 (transfer from the High Court to the Upper Tribunal) section 31A

Transfer of judicial review applications to Upper Tribunal.

(1)This section applies where an application is made to the High Court— .

(a)for judicial review, or .
(b) for permission to apply for judicial review. .

(2) If Conditions 1, 2, 3 and 4 are met, the High Court must by order transfer the application to the Upper Tribunal. .

(3) If Conditions 1, 2 and 4 are met, but Condition 3 is not, the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so. .

(4) Condition 1 is that the application does not seek anything other than— .

(a) relief under section 31(1)(a) and (b); .
(b) permission to apply for relief under section 31(1)(a) and (b); .
(c) an award under section 31(4); .
(d) interest; .
(e) costs. .

(5) Condition 2 is that the application does not call into question anything done by the Crown Court. .

(6) Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007. .

(7) Condition 4 is that the application does not call into question any decision made under— .

(a) the Immigration Acts, .

(b) the British Nationality Act 1981 (c. 61), .

(c) any instrument having effect under an enactment within paragraph (a) or (b), or .

(d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship.

Subsection 53 (1) of the Borders Citizenship and Immigration Act 2012

53 Transfer of certain immigration judicial review applications.

(1)In section 31A of the Supreme Court Act 1981 (c. 54) (England and Wales: transfer from the High Court to the Upper Tribunal)— .

(a) after subsection (2) insert— .

"(2A) If Conditions 1, 2, 3 and 5 are met, but Condition 4 is not, the High Court must by order transfer the application to the Upper Tribunal.", and .

(b) after subsection (7) insert— .

" (8)Condition 5 is that the application calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision)." .

(from 18 June)