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

Asylum and Human Rights: Non-suspensive Appeals

After Clause 24

LORD AVEBURY

148D

Insert the following new Clause—

"Appeal from within the United Kingdom: unfounded human rights or asylum claim

In the Nationality, Immigration and Asylum Act 2002, in section 94, omit subsection (8)."

Purpose:
To remove the presumption in the Nationality, Immigration and Asylum Act 2002 whereby a country to which the Secretary of State proposes to remove an asylum-seeker is treated as one in which the asylum-seeker will not be persecuted and from which he or she will not be sent to another country in contravention of the Refugee Convention. To more generally draw attention to the need to remove similar statutory presumptions of safety in immigration legislation.

Briefing:
Section 94 of the Nationality, Immigration and Asylum Act 2002 empowers the Secretary of State to prevent an asylum-seeker or person making a human rights claim from exercising a right of appeal before his or her departure (voluntary or enforced) from the UK. The provision is often referred to as the non-suspensive appeals provision because ordinarily where an asylum or human rights claim is made by a person in the UK, the power to remove the person from the UK is suspended while he or she may bring and/or is pursuing an appeal.

ILPA has long been opposed to the non-suspensive appeals provision. In July 2002, the Lord Archer of Sandwell asked "*How many basic principles can be brought into contempt in 65 lines?*" (*Hansard* HL, 23 Jul 2002 : Column 345) when then speaking to an amendment, supported by many peers, concerned with the introduction of non-suspensive appeals. Having noted that succeeding on an asylum or human rights appeal after one has been removed from the UK may simply be too late, he cautioned: "*Once the claimant has passed out of the jurisdiction of the United Kingdom, we have no control over what happens to him.*" He also highlighted the great difficulties presented in trying to exercise one's appeal from outside of the country, including in particular where "*the outcome may – usually does – depend on the assessment by the* [immigration judge] *of the applicant's evidence... and to a substantial degree on seeing and hearing the witness.*"

The amendment, however, constitutes a modest revision of section 94. It removes the presumption of safety contained in section 94(8), where the Secretary of State intends to remove the person to what she says is a safe third country (i.e. a country other than the person's country of origin, and where she says the person will not suffer any human rights abuse) and has issued a certificate under section 94(7). The presumption in section 94(8) states:

"*In determining whether a person in relation to whom a certificate has been issued under subsection (7) may be removed from the United Kingdom, the country specified in the certificate is to be regarded as –*
(a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion, and
(b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.

The presumption is intended to be irrebuttable. The presumption in section 94(8) may be applied, by the Secretary of State's certification, to any country to which she proposes to remove a person who has claimed asylum (other than to the person's country of origin). Similar statutory presumptions apply in respect of countries, which the Secretary of State may specify by order, by virtue of paragraphs 8(2) and 13(2) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Paragraph 3(2) of that Schedule provides a further, and wider (because it includes am additional presumption relating to human rights), statutory presumption in respect of Member States of the European Union as places:

"*(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,*
(b) from which a person will not be sent to another State in contravention of his [human] *rights, and*
(c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention."

The Secretary of State has relied upon such presumptions as providing complete and irrebuttable answer to judicial review claims seeking to assert that it is unsafe for the Secretary of State to remove an asylum-seeker to what is said to be a safe third country. In *Nasseri v Secretary of State for the Home Department* [2009] UKHL 23, the House of Lords concluded in agreement with the courts below that the presumption did preclude any intervention by the court to stop an individual's removal to Greece.

In 2011, the Court of Justice of the European Union considered questions referred to it by the Court of Appeal including as to whether it was compatible with European Union law for such an irrebuttable presumption to operate in respect of a third country return of an asylum-seeker to a Member State of the European Union (Greece). The Court concluded in relation to this question:

"*2.* ***European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.***"

Earlier that same year, the European Court of Human Rights had held that Belgium had violated an asylum-seeker's Article 3 (prohibition of torture) rights by returning him under European third country return arrangements to Greece by reason of the appalling conditions to which he had been exposed in Greece.[1]

These judgments of the Court of Justice of the European Union and the European Court of Human Rights separately show the presumptions, to which this briefing refers, including that directly addressed by the amendment, to be both unlawful and inappropriate. The Government should take the opportunity presented by this Bill to remove them.

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.

[1] See *MSS v Belgium & Greece* (2011) ECHR 108 (30696/09)