CRIME AND COURTS BILL (HL Bill 4)
HOUSE OF LORDS REPORT

Proposed Amendments

ILPA proposes the following amendments:

1. Clause 26 (Appeals against refusal of entry clearance to visit the UK)
   1.i Amendment to preserve a right of appeal against a refusal on general grounds. In family visit appeals (could usefully be extended to points-based more generally but I think now that will be for the Commons).

2. Clause 27 (Restriction on right of appeal from within the United Kingdom)
   2.i That clause 27 should not stand part of the Bill
   2.ii (alternative) That an exception be made to clause 27 for the stateless and those with asylum and human rights claims

3. The statutory immigration appeals regime (NEW CLAUSES after clauses 23 and 26)
   4.i and 4.ii Appeals from the Upper Tribunal to the Court of Appeal (removing the 'second-tier appeals test)
   4.iii Immigration Appeals: asylum and humanitarian protection (removing the ban on so called upgrade appeals for those given leave for less than one year – particularly affecting children and trafficked persons)
   4.iv Unfounded asylum or human rights claims. (post *MSS* and *NS* – removing presumption of safety of third countries)
   4.v Appeals not being treated as abandoned when leave granted.

We are studying this part of the amendment but at this stage consider that it is unlikely that we shall be providing a detailed briefing on it.

CLAUSE 26

Amendment 1a.

Page 23, line 12, leave out clause 26

Purpose
To retain a full right of appeal in family visit visa cases.

Amendment 1.i.

Page 23, after line 32, 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 26, so that a full appeal right of appeal in family visit cases where a visa is refused on "general grounds".

Briefing
Clause 26 removes 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

Lord Avebury opposed Clause 26 (then clause 24)'s standing part of the Bill and laid this amendment (as amendment 148A to then then clause 24) at Committee stage (4 July 2012 : Column 689 ff. ILPA's briefing for Committee stage is available at **http://tinyurl.com/bna9efs**

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 permit or require refusal of any application under the Rules. General grounds of refusal include matters such as making a false statement or submitting a false document.

An applicant will ordinarily not be able to anticipate a refusal under the general grounds, particularly if the refusal on such grounds is wrong. For example, 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 statement or document. 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.

The reason given for rejecting the amendment at Committee was:

> **"***Such an approach would, in effect, be rewarding criminality or dishonest behaviour, such as the use of deception, by affording greater appeal rights than would otherwise apply. Regardless of whether an application is refused, relying on a general ground of refusal the applicant is free to reapply setting out why the previous refusal was unjustified. All applications are assessed on their individual merits; an applicant will not automatically be re-refused before being given full consideration by an entry clearance officer. All refusals on general grounds are reviewed by entry clearance managers before being served."*

This is confused. An appeal right does not benefit a person who has used dishonest behaviour; they will not succeed. It benefits those wrongly accused and prevents such serious allegations being bandied around in circumstances where they are not justified and cannot be defended. Lord Avebury indicated that he would return to this matter on report (4 July 2012 col 703).

CLAUSE 27

Amendment 2.i.

Page 23, line 3, leave out clause 27.

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 27 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. 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.

The clause has been amended 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. But this does not address the fundamental injustice in the clause.

Lord Avebury opposed Clause 27 (then clause 25) standing part of the Bill at Committee stage (the debates on the clause start at 4 July 2012 col 713) . ILPA's detailed briefing for Committee stage is available at http://tinyurl.com/d27dbjd
The Lord Judd said

> *"I hope the Minister will forgive me for saying that I am profoundly worried about this and would like his assurance that he is equally worried and is looking to make sure that, in this area, it is justice and not administrative convenience-whatever the apparent logical reasons for this administrative convenience-that has pride of place."* (col 719)

The Minister was not worried, equally or otherwise. He said:

> *"Of course, any such decision by my right honourable friend should be open to challenge and review by the courts. However, the Government believe that, given the nature of these cases, it is-despite what the noble Lord, Lord Judd, was saying-wholly reasonable that judicial scrutiny of the decision should be*

carried out while the individual remains outside the United Kingdom." (col 719)

'Remains' is a word that reveals the doublespeak going on here. The person might only have departed the UK a couple days before, at which point the Home Office, watching them go, leap to serve the decision cancelling leave. The Minister said

> ***"****We believe that Clause 25 seeks to maintain the operational integrity of the Home Secretary's power to exclude an individual from the United Kingdom"* (col 721)

But this is not the exclusion of a person who has never had leave, or has never been to the UK, but of a person who has lived in the UK with lawful leave up to the point of their leave opportunistically being taken away while they are outside of the UK, however briefing. We repeat our contention that the clause is oppressive and unjust. It attempts to negate the right to a fair hearing and deprives a person of protection pending any hearing. Lord Avebury indicated that he would probably return to this matter on report and we urge all peers to do so.

Amendment 2.ii

Page 24, after line 17, 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 27 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 27 in principle for reasons expanded upon in the detailed briefing for Committee stage available at **http://tinyurl.com/d27dbjd.** The practical implications for stateless persons, refugees and those entitled to humanitarian protection are especially severe as clause 27 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. This amendment was laid at Committee stage in the name of Lord Avebury as amendment 148F. Lord Henley said in response

> *"…Amendment 148F could provide every individual refused under this provision with an in-country right of appeal, as they would merely need to raise human rights or asylum grounds in their appeal*". (4 July 2012, col 720).

It could indeed. The appeal would not succeed if there no were such grounds. But those with a good asylum or human rights claim would be able to present it on appeal.

The Government is proposing a hugely oppressive measure: to strip a person of their leave while they are outside the UK, potentially leaving them stranded, and requiring them to pursue an appeal from overseas, a very difficult task. In such circumstances it must accept the need to put in place safeguards, albeit that it may not be possible to ensure that no one other than those in dire need of the safeguards benefit. If everyone does get a right of appeal at least that will ensure that these most oppressive decisions were subject to proper scrutiny.

(An amendment to preserve legal aid for those affected by Clause 27 was laid at Committee stage by the Lord Avebury as amendment 149A). It was debated with the Stand Part, see our amendment 2.i above.

NEW CLAUSES

Amendment 4.i

After clause 23, insert –

> **23A 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 sorts 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.

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 This amendment was laid as amendment 149B in the name of the Lord Avebury at Committee stage, for the debate see 4 July 2012, col 722 ff.

Amendment 4.ii

After clause 23, insert –

23A 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.

This amendment was laid as amendment 149C in the name of the Lord Avebury at Committee stage, for the debate see 4 July 2012, col 722. The Baroness Northover, for the Government, acknowledged in response that

"There is no doubt that the class of cases dealt with by Amendment 149C can be both complex and of the utmost importance." (Col 725)

She contended that the second tier appeals test provided sufficient protection. Judgments such as *PR (Sri Lanka)*, discussed in ILPA's briefing where there was an error and it was acknowledged that the consequences of the error could be return to torture but the Court of Appeal held that because of the second appeals test it was powerless to intervene, show why the Baroness Northover's contention is simply correct. Lord Avebury indicated that he would probably return to the matter on report.

Amendment 4.iii

After clause 26, insert –

26B 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. This provision particularly affects children and trafficked persons.

Briefing
This Amendment would simplify one aspect 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.

Trafficked persons given leave for one year following a determination through the National Referral Mechanism that they have been trafficked are similarly affected.

This amendment was laid at report by the Lord Avebury as amendment 148C and debated 4 July 2012 col 707ff. Lord Henley said

> *"The 12-month restriction therefore means that some unaccompanied children will be refused asylum and granted less than 12 months' leave, which means that they do not get an appeal right under Section 83 of the 2002 Act. Those children may not have their asylum considered by a court for more than a year after they first claimed asylum. That is an unfortunate consequence of the otherwise very sensible 12-month restriction, and I can assure my noble kinsman that we will review our policies concerning the length of leave granted to children to ensure that there are no unintended consequences of the sort that he and the noble Baroness implied."* (col 110)

The amendment has exactly the unfortunate consequences described in the debate. Those involved in the debate simply described the effects of the clause. Yet the review, which could only have confirmed the 'unfortunate consequences" opted for inaction. In his letter of 20 November the Lord Taylor of Holbeach would neither amend the clause nor given a longer period of leave to separated children. He said that he would not amend the clause because this would undermine attempts to prevent multiple appeals. But the children and trafficked persons in question get no appeal at all until they face removal, something that, had their case been decidedly correctly at the outset, they should never have faced. Those who are recognised as refugees will not need any second appeal. As to the reasons why the Lord Taylor would not give children a year's leave, thus ensuring that they would be able to appeal, the reason is stated in the letter of 20 November to be

> *"The current arrangements affect only those young persons over the age of 16 ½ when they are refused asylum. Those young persons are on the cusp of adulthood…"*

A rash generalisation you might think, particularly when applied to children who have suffered in war, been bereaved and suffered persecution. And ILPA opposes adults, young or not, being kept out of the chance to challenge a wrongful refusal to recognise them as refugees. ILPA well recalls, when the UK implemented the Council of Europe Convention on Action against Trafficking in Human Beings, pleading that trafficked persons be given leave of a year and a day, or a year and five minutes as we suggested to officials, so that they could achieve certainty and security at the earliest possible stage.

The Minister continued

> *"Moreover none of these individuals are denied a right of appeal entirely"*

This is correct, but first they must face removal.

Let us not forget that a child or adult given discretionary leave does not enjoy the same level as protection as a child recognised a refugee, for example in terms of entitlement to education at home student rates. If a child or trafficked person is a refugee they should not be kept out of recognition as such. Report stage is an opportunity to come back and challenge the Minister on his failure to address the "unfortunate consequences" he identified.

Amendment 4.iv

After clause 26, insert –

26C Unfounded human rights or asylum claims

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

(2) In section 94, omit subsection (8).

(3) The Asylum and Immigration (Treatment of Claimants etc.) Act 2004 is amended as follows.

(4) In Schedule 3, omit: -

a. Paragraph 3(2)
b. Paragraph 6
c. Paragraph 8(2)
d. Paragraph 11
e. Paragraph 13(2)
f. Paragraph 16

Purpose

To remove the statutory presumptions 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 a person seeking asylum 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 and/or the European Convention on Human Rights.

Briefing

ILPA is opposed in principle to section 94 of the Nationality, Immigration and Asylum Act 2002, and Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc. Act 2004). The former establishes a scheme whereby persons seeking asylum may be precluded from a right of appeal (section 94) 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 (a third country) which the Secretary of State asserts to be safe. The latter limits what they can argue on a judicial review about the safety of a third country (Schedule 3).

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 for a Refugee convention reason and will not face being returned to a country in which he or she does face persecution for a Refguee Convention reason. 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.

The provisions of Schedule 3 that the amendment would delete require a court dealing with a judicial review relating to a removal to make presumptions of safety. For example, paragraph 3(2) states:

"3(2)A State to which this Part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place—.

(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 Convention rights, and.

(c)from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention

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 European Union (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 presumptions in section 94(8) and the paragraphs of Schedule 3 seek to be such provisions, and accordingly ought to be removed.

This is an expanded version of the amendment laid at Lord's Committee stage as amendment 148D in the name of the Lord Avebury, who quoted (at 4 July 2012 col 708) the late Lord Archer of Sandwell

"When Section 94 was first debated by your Lordships in July 2002, the late Lord Archer of Sandwell asked:

"How many basic principles can be brought into contempt in 65 lines?".

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 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".-[*Official Report*, 23/7/02; cols. 344-45.]"

At Committee stage the Minister rejected Lord Avebury's amendment, which addressed section 94 only, saying

> *"Amendment 148D is unnecessary because the courts are already able to consider whether the person's human rights may be breached by way of judicial review challenging the issue of that certificate. Once the person has been removed to the third country, an appeal may be brought and refugee convention issues can be considered. In light of that assurance, I hope that my noble friend will feel able to withdraw his amendments."* (4 July 2012, Col 711)

A challenge by way of judicial review is more limited than an appeal. An appeal after one has been removed is very difficult to pursue; the Minister could usefully be asked how many people appealed subsequent to their removal. Moreover, as described in this amendment, a challenge by judicial review is at the moment limited, in what has now been confirmed to be an unlawful manner, by further statutory presumptions. Lord Avebury indicated that he "might well" return to the matter on Report.

Amendment 4.v.

After clause 26, insert –

> **26g Appeal in progress**
>
> (1) The Nationality, Immigration and Asylum Act 2002 is amended as follows.
>
> (2) In section 104, omit "104(4A)-(4C)".

Purpose
To ensure that an appeal is not treated as abandoned when leave is granted.

Briefing
When a person who appeals to the Tribunal is granted leave, the appeal is treated as abandoned. The effect of this is that the Home Office can prevent points being litigated by granting leave to those bringing the cases. It should be a matter for the Tribunal whether or not the appeal is treated as abandoned, either following agreement between the parties or after hearing them. This is a new amendment.

NOTE ON GOVERNMENT AMENDMENTS

ILPA opposes the Government amendments: Clause 20 Page 17, line 44, at end insert— and new clause after clause 24, which was about the transfer of judicial reviews from the Court of Session to the tribunal.

As to the Government amendment new clause before clause 26 *Immigration cases: appeal rights; and facilitating combined appeals:*
ILPA is satisfied that ILPA is satisfied that the parts (1) and (2) of the new clause address the concerns raised at Committee by amendments 148B and 148D in the name of the Lord Avebury.

It appears to us that part (3) of the new clause addresses the problems identified by the Upper Tribunal in *Ahmadi (s. 47 decision: validity; Sapkota)* [2012] UKUT 00147 (IAC) (http://www.unhcr.org/refworld/pdfid/4fb11a8f2.pdf) and *Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures)* [2012] UKUT 00414 (IAC) (http://www.bailii.org/uk/cases/UKUT/IAC/2012/00414_ukut_iac_2012_ma_sj_srilanka.html) . In the former, Upper Tribunal judge Mr Lane said:

> *"It would clearly be possible for Parliament to amend s.47 of the 2006 Act, so as to enable the respondent to make simultaneous decisions… Unless and until that is done,…In practice,…the present usefulness of s.47 is highly questionable."*

We do not take issue with the amendment.