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

ILPA Briefing to amendments tabled

This briefing covers

- **Clause 20 (transfer of judicial review)**
- **Government amendments 106-108 (transfer of judicial review Scotland and Northern Ireland.**
- **Amendment 108ZA and 108A New clauses after Clause 20 (2nd appeals test)**
- **Amendment 113D New clause after Clause 24 (rights of appeal for those with 12 months leave or less)**
- **Amendment 113E New clause after Clause 24 (unfounded asylum and human rights claims)**
- **Amendment 113F New clause after clause 24 – appeal in progress (appeals treated as abandoned)**
- **Government amendment 118 – before clause 26 new clause *Immigration cases: appeal rights; and facilitating combined appeals***
- **Clause 26 and amendments 118A and 118B (family visitor appeals)**
- **Clause 27 amendments 118C and 118D (denial of in-country appeal rights)**

CLAUSE 20

Clause 20 and Government amendments 106, 107, 108: Clause 20 Page 17, line 44, at end insert—

Clause 20 provides for the transfer of judicial reviews from the High Court to the Upper Tribunal.

Amendments 106 to 108 provide for the transfer of judicial reviews in Scotland and Northern Ireland.

ILPA opposes clause 20's standing part of the Bill and opposes the amendments.

As to clause 20, the Joint Committee in Human Rights said in its legislative scrutiny report on the Bill[1] (available at http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/67/6706.htm#a13):

> *"75. We are very much aware that one of the main reasons for Parliament's opposition to such a transfer in 2009 has not been addressed: there has still been*

[1] Fifth report, published 20 November 2012.

> *no systematic review by the Government of the exercise by the Upper Tribunal of its judicial review jurisdiction generally, and there is therefore no evidence before Parliament of how the Upper Tribunal is performing that significant judicial role. We urge the Government to consider amending the Bill to insert additional safeguards ensuring that immigration and nationality cases in which human rights such as life, liberty or freedom from torture are at stake continue to be decided by high court judges."*

The Joint Committee discusses ILPA's arguments at length in its report.

There is only one reported decision of the Upper Tribunal in a fresh claim judicial review – this has been reported since Committee stage of this bill. That is *R (on the application of Neisi) v Secretary of State for the Home Department* (FCJR) [2012] UKUT 00367 (IAC). Our assumption is that all other disposals to date have been withdrawals or refusal of permission. If we are correct and there have been no disposals of cases that have gone to a substantive hearing (possibly no substantive hearings) then it is indeed difficult to assess how well the Upper Tribunal's hearing judicial reviews is going. We suggest that peers press Ministers on this point. One judgment does not representative the fulsome experience that Ministers suggested at Committee stage existed in the Upper Tribunal Immigration and Asylum Chamber.

The number of substantive age assessment judicial reviews heard in the Upper Tribunal is also still very small. As of 31 October 2012 there were eight reported determinations on the Upper Tribunal website bearing the designation "AAJR" (Age Assessment Judicial Review)).

The Government analysis for the Joint Committee of immigration judicial reviews that are withdrawn because the UK Border Agency conceded that its decision was wrong or must be reconsidered is not very illuminating and does not tackle the most obvious questions. There is no analysis of the proportion of cases falling into each of the categories set out. There is no elucidation of what "pragmatic reasons" for withdrawal means. This can cover a variety of matters as has been recognised in recent costs cases such as *R (Bahta & Ors) v Secretary of State for the Home Department* [2011] EWCA Civ 895 where it was stated:

> *I have serious misgivings about UKBA"s claim to avoid costs when a claim is settled for "purely pragmatic reasons". My reservations are increased by the claim, on the facts of the present cases, that the right to work was granted for pragmatic reasons. I am unimpressed by suggestions made in the present cases that permission to work was granted for reasons other than that the law required permission to work to be granted. There may be cases in which relief may be granted for reasons entirely unconnected with the claim made. Given the Secretary of State's duty to act fairly as between applicants, and the duty to apply rules and discretions fairly, a clearly expressed reason would be required in such cases. The expression "purely pragmatic" covers a multitude of possibilities. A clear explanation is required, and can expect to be analysed, so that the expression is not used as a device for avoiding an order for costs that ought to be made.*

One reason for the submission of new evidence after issuing proceedings, which the Government suggests is an explanation of why claimants succeed on judicial review,

is that the UK Border Agency has not allowed a person time to submit new evidence before their proposed removal.

In our experience one reason that cases are conceded is to pick off the strongest cases and ensure that "test" or "leading" cases are those with less compelling facts, i.e. that there are tactical reasons for conceding a case.

The stage at which the UK Border Agency reviews a case with a view to conceding it is a matter of concern. The Presenting Officer may be the first person to examine this question, or the submissions that lead to its being posed, and s/he only has the file very shortly before the hearing.

It is indeed correct that reconsideration often leads to a further adverse decision, including an adverse decision that becomes the subject of further challenge. It would be useful to obtain information on how many cases loop the loop in this fashion.

The response appears to suggest by that there is no routine analysis of cases lost or conceded in the higher courts. This is worthy of further investigation. If there is no analysis, how then can anyone be satisfied that lessons are learned and that public money is not being wasted? We have seen assertions, as in the debates on the transfer of judicial review over the years that many cases are unmeritorious. The response to this question suggests that these assertions are not made on the basis of evidence.

We question the statistics the Government provided to the Joint Committee about appeals to the Court of Appeal. These look wrong to us. We should estimate that a higher number of applications for permission to appeal have been granted. Possibilities that would explain the figures given include that only applications for permission to appeal decided by the Upper Tribunal (Immigration and Asylum Chamber) have been included, rather than applications decided by the Court of Appeal, both on paper and at an oral hearing.

In *AL Albania v SSHD* [2012] EWCA Civ 710, a decision on costs, Lord Justice Maurice Kay LJ said that it's 'often' the case that applications are conceded in one way or the other by the SSHD. At paragraph three of the judgment, he said:

> *...it is appropriate to refer to the pattern of such cases in this Court. In the most recent 12 month period, approximately 60% of appeals from the UT settled after the grant, almost always by this Court, of permission to appeal. In almost 40% of those settled appeals, the issue of costs was left to be determined by the Court. Dozens of cases falling into this category are presently awaiting determination following the handing down of this judgment. There has been a clear upward trend in relation to settlements in which the parties have been unable to agree costs.*

If there were 'dozens' of cases awaiting a costs decision, and on the assumption that there were others which had succeeded but where costs were not in issue given that Lord Justice Maurice Kay implies that some 60% did not involve disputes over costs, that would suggest that the total number of successful appeals was in three figures at least.

ILPA concurs with the Government in its response to the question of the Joint Committee that the number of nationality cases the Upper Tribunal has dealt with is tiny. There is only one circumstance in which a statutory right of appeal is provided in relation to a nationality decision. Some decisions to deprive a person of citizenship may be appealed to the First tier Tribunal Immigration and Asylum chamber.[2] However, while instances of deprivation of citizenship are increasing many of these cases go before the Special Immigration Appeals Commission not the First tier and Upper tribunals. As of March 2009 only one or two cases had been heard in the Asylum and Immigration Tribunal, predecessor to the current chambers.

There is no statutory right of appeal against a refusal to register, naturalise or recognise a person as a British national. Nationality law claims concerning challenges to the refusal to register or naturalise a person as a British national of a particular description are brought in the High Court. The number of cases in the High Court and Court of Appeal is tiny also. In 2007 there were only three cases concerning nationality law in the High Court and Court of Appeal that led to final judgments after a substantive hearing. In 2008 there were two. Of course more claims would have been issued but the figures would still have been very modest.

Challenges to decisions on whether a person is British by operation of law will very often not be judicial reviews at all, but applications for a declaration in the High Court. These private law claims are usually dealt with in the Chancery division. Even if judicial review claims concerning nationality were transferred to the Upper Tribunal a person would still be able to apply for a declaration in the High Court in private law proceedings. These are not challenges to decisions of the Secretary of State but efforts to obtain recognition from the Court about a status that a person holds by operation of law. These are constitutional matters and the role of the Courts in supervising question of a constitutional nature should not be abrogated without good reason. The Tribunal is simply not going to acquire the appropriate level of expertise. The High Court is able to deal with the nature and volume of nationality law cases coming before it. Nothing is broken; nothing needs to be fixed. ILPA has long counselled that it is better to leave nationality law claims, whether by public law claims for judicial review or as private law claims, in the High Court.[3]

One of ILPA's main concerns about the transfer of judicial reviews to the Upper Tribunal has been about the Home Office's conduct as a litigant and how the Tribunal as compared to the High Court has managed this. 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 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 :

[2] British Nationality Act 1981 section 40A.
[3] ILPA briefing, Borders Citizenship and Immigration Bill HL 15, March 2009, clause 50, transfer of judicial reviews (nationality) available at http://www.ilpa.org.uk/data/resources/12899/09.03.246.pdf

… 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.

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.

In *JG & CM (Zimbabwe)v SSHD* 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.

On the Appellants' application, the Tribunal had made an order for specific disclosure of assessments made by the Foreign and Commonwealth Office of the political situation in Zimbabwe Limited disclosure had been given in response to the order and the Appellants had questioned whether the Government had complied. The Tribunal had rejected their concerns in dismissing the appeal. Subsequent to the filing of the appeal to the Court of Appeal, in July 2011, the Treasury Solicitor wrote to the Court of Appeal notifying that during a disclosure search in an unlawful detention claim, documents had been identified which were relevant to the disclosure in the Tribunal, and that consideration was being given to making further disclosure "in accordance with [the Secretary of State's] ongoing duty of candour". There then followed substantial delay while the Secretary of State/foreign and Commonwealth Office missed repeated dates for disclosure. At the end of October, the Secretary of State informed the Court of Appeal that she considered the disclosure complete and a hearing on disclosure and permission was held.

At the permission stage Lord Justice Sullivan held:

8. Considering the grounds in the light of the position as it now stands, it seems to me that in broad terms there are two arguable grounds of appeal. The first is that centred on ground seven which is concerned with disclosure. It seems to

me that it is at least arguable on the material that we have now seen that there was a failure to make proper disclosure to the Tribunal…

9. The second point relates to the Tribunal's approach to the fact-finding mission, the FFM. It is arguable that the Tribunal's starting point in the light of the decision in Sufi should have been that substantial weight should not be attached to the FFM because it was based upon anonymous sources, that is to say not merely the individuals giving comments were anonymous but also the organisations that they represented were anonymous. There is clearly an issue as to whether the decision in Sufi goes simply to the question of weight or whether it requires a more principled approach as to the weight which may be given as a matter of law to anonymous evidence. The difference between the two approaches is perhaps illustrated in the case of AMM, a subsequent country guidance decision of the Tribunal.

Before the Court of Appeal the Appellants relied on the approach taken by the European Court of Human Rights in *Sufi* and *Elmi v UK* (8319/07 and 11449/07). Meanwhile in *AMM (conflict; humanitarian crisis; returnees; FGM) Somalia CG* [2011] UKUT 445 (IAC) the Tribunal did not take the *Sufi and Elmi* approach.
Another example of the Secretary of State's conduct as a litigant and the need for the higher courts to deal with this is more recent. On 23 October 2012 a charter flight was scheduled to leave for Sri Lanka at 3.30pm. ILPA was copied to a letter to the Administrative Court from Treasury Solicitors which was sent justice after 11am and stated

I am writing further to my letter of 17 October 2012 relating to the above mentioned charter flight to Sri Lanka.

At paragraph 11, that letter made reference to a Country of Information Service bulletin (dated October 2012) which has been published on the UK Border Agency website at:
http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificpolicybulletins/

The following amendments to that bulletin have been made:

The second sentence at 3.3.4 - "This is incorrect data even from the sample of 13 provided to date as their claims were not based upon any return incident" ***has been deleted.***

The penultimate sentence at 3.3.4 - "This shows that almost half of the asylum claims were not accepted ….." has been amended to "The status of almost half of the asylum claims is unclear…..

The third sentence at 13.6 - "It is noted that of the 13 determinations submitted to the Agency, three of the claimants did not base their asylum claim on mistreatment after a return to Sri Lanka from the UK and a third case was a voluntary return from Switzerland, whose alleged ill treatment occurred 5 months after return" ***has been deleted***

The revised version of this bulletin has been sent for publication on the UKBA website and decision makers in UKBA have been made aware of the changes. I would be grateful if this letter could be put before the Immediates/Duty Judge at your earliest convenience.

ILPA wrote that day to Mr Justice Ouseley, Lead judge of the Administrative Court

We are writing to follow following receipt of a copy of the enclosed letter which was sent from Ms McMahon of Treasury solicitors to Mr David Magee today. ILPA is copied to letters sent to the Administrative Court about charter flights.

The letter was sent at 11.22 am; four hours and eight minutes before the flight was scheduled to leave, at 15.30 hours. The letter draws attention to errors in the UK Border Agency information about Sri Lanka which go directly to the question of the safety of that country for those facing return. That information has been in existence since at least 17 October 2012 when reference was made to it in a letter giving notice of the charter flight.

The letter is not marked urgent and the only request made of Mr Magee is that it be put before judges "at your earliest convenience." It states that its contents have been brought to the attention of Home Office decision-makers but no indication is given that they have been asked to take any action or review cases on the basis of it.

The corrections made to the letter of 17 October 2012 are far from insignificant:

…

That the incorrect statements could have been included in the bulletin in the first place must cast doubt the reliability of all similar information.
ILPA is copied to letters sent to the Court from Treasury Solicitors so that we can alert representatives to their existence. Many of the emails enclosing the letters bear the legend

> *Please note that TSol will not respond to any queries that you may have in relation to the charter or individual passengers and these would need to be directed to UKBA in the usual way in writing by fax if necessary.*

We alerted members who are on a dedicated list to receive these updates to it by 11.30am. We also sent the message more widely than the dedicated list in view of the short time limits and the gravity of its contents. We are aware that representations made on the basis of the letter have resulted in persons being taken off the flight. But we cannot be sure that all representatives have seen the letter or had chance to act in the tiny window given. There is the most grave risk that the safety of return of persons on the charter flight has been wrongly assessed on the basis of false information.

We ask that the Administrative Court take up with TSols the question of the unreliability of the information submitted to it and copied to us.

As set out above, we have very few reported decisions of the Tribunal on judicial reviews to consider. But we do have concerns. For example in the recent age

assessment case of *R (on the application of JK) v Nottingham City Council* (AAJR) [2012] UKUT 00341(IAC) the claimant's brother Mohammed, now an adult, was a witness. The determination records:

> *Whilst we have concerns about Mohammed's age we are not satisfied that there has been anything approaching adequate evidence produced to sustain a finding that his age should be displaced.*

This approach leaves this young man with an uncomfortable shadow over him, and one that, as a witness rather than an appellant, he can do nothing to dispel. It is very unclear what the Tribunal is wishing to imply by the phrase above given that it goes on to say:

> *… that his oral evidence was almost totally lacking in credibility does not satisfy us that his date of birth is unreliable. This is particularly so given that he was age assessed ...when he arrived in the UK in November 2007 and found to be 15, that he has been under the care of Nottingham social services since then and there has been no intervention whatsoever to re-assess him despite, it can be assumed, there having been other professionals involved with him not least teachers, social workers, support workers, accommodation workers and health professionals. Had there been any doubt that he was the age he claimed to be, given he has remained under the care of the same social services department from arrival until now, it seems inconceivable that steps would not have been taken to re-assess him. This is particularly so given the financial constraints that social services departments are working under and the cost of supporting an individual.*

We recall 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:

> *…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 remains open to someone in such cases to have the application heard by a High Court judge.* *Hansard*, HL report 1 April 2009: Columns 1125-26

We advocate strongly that the Order transferring judicial review cases to the Tribunal should be extremely restrictive. The President of the Queen's Bench Division has emphasised that:

> "*Some of them* [judicial reviews] *are plainly suited to the Administrative Court and should remain there…*[4]

Nationality judicial reviews should not be transferred. Applications requiring urgent consideration should not be transferred. Applications raising points of general importance should not be transferred. A high court judge should certify that the case is suitable for transfer before it is transferred.

In the tribunal, the appeals should be heard by persons who also sit as high court judges. We recall that this was a suggestion made by 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.*[5]

As to amendments 106 to 108, we trust that Ministers will confirm that those concerning Scotland will be the subject of a debate on a Sewell motion in the Scots parliament.

Peers will recall that when the Bill that became the Borders, Citizenship and Immigration Act 2009 was being debated, it was highlighted in the House of Lords that the Court of Session judiciary had stated very clearly in their response to the Government consultation *Immigration Appeals: fair decisions, faster justice* that they regarded the proposed transfer as premature. The Scottish Government had expressed similar concerns and had asked the UK Government not to proceed with the change at the time.[6]

NEW CLAUSES AFTER CLAUSE 20 ("Second appeals test")

Amendment 108ZA in the name of the Lord Avebury

Insert the following new clause –

> **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

[4] Response of the President of the Queen's Bench division to the UK Border Agency consultation on immigration appeals [*Immigration Appeals: fair decisions, faster justice]* 2008.
[5] *Hansard* Lords, Grand Committee 13 December 2006 : Column GC68.
[6] See *Hansard*, HL 4 Mar 2009 : Columns 793- 803

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 108A in the name of the Lord Avebury

Insert the following new clause–

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.

AFTER CLAUSE 24 (appeals for those with less than 12 months leave)

Amendment 113D in the name of the Lord Avebury

Insert the following new clause–

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.

NEW CLAUSE AFTER CLAUSE 24 (unfounded human rights or asylum claims)

Amendment 113E in the name of the Lord Avebury

Insert the following new clause –

> **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.

NEW CLAUSE AFTER CLAUSE 24 (appeals treated as abandoned)

Amendment 113 F in the name of the Lord Avebury

Insert the following new clause –

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.

In the case of *R(Osman Omar) v SSHD* [2012] EWHC 3448 (Admin),[7] (discussed above) handed down on 30 November 2012, Mr Justice Beatson addressed this issue. He resisted attempts by the Secretary of State to argue that the claim was redundant in that the she had already granted the claimant further leave to remain. He ruled, in effect, that the Secretary of State cannot keep knocking cases out by settling them on the facts and refusing to litigate the point of principle. (She had previously done just that on the matter at issue in Mr Omar's case, for example, before Mr Justice Mitting J in the earlier case of *Francis* on the same point.)

Government amendment 118: new clause before clause 26 *Immigration cases: appeal rights; and facilitating combined appeals*

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.

CLAUSE 26 *Appeals against refusal of entry clearance to visit the UK*

[7] Available at http://www.bailii.org/ew/cases/EWHC/Admin/2012/3448.html

Amendment 118A in the name of the Lord Avebury

Page 23, line 32, at end 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".

Amendment 118B in the name of the Lord Avebury

Leave out clause 26

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

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).

It was also suggested by the Lord Henley that it was quicker and cheaper for a person to make a fresh application than to appeal. We make the following comments on this.

Making a fresh application is often quicker than appealing and now that fees have been imposed for appeals, it is often cheaper too. Many of those who appeal will also put in a fresh application in the hope of getting to the wedding, funeral etc. for which they wish to travel. However: A person who is refused a visa has to declare this, not only to the UK but to other countries. Thus it is a blot on a person's copybook that they want and need to remove if they are to travel in future.

If a person wins on appeal it is likely that the tribunal will make a costs order against the Secretary of State for the costs of the fee. So the appeal will be free in the end. In *R(Osman Omar) v SSHD* [2012] EWHC 3448 (Admin),[8] handed down on 30 November 2012, Mr Justice Beatson held the 2010 Fees Regulations (and by implication the current 2012 Fees Regulations) making provision for fees for appeals are unlawful, in so far as they do not allow for any waiver of the application fee for someone applying on the basis of Article 8 of the European Convention on Human Rights. The case is not about visits, but family visits may also engage Article 8.

If the refusal is due to disbelief that a person will return at the end of the visit, etc., then a fresh application is likely to yield the same result. It is only by appealing that the person will be able to attack the errors that will lead to the refusal of this and any subsequent application.

A system where wrong decisions can be appealed is a system where there is an incentive to get things right and where officials are subject to scrutiny. Those denied permission to be with family members at important times should be entitled to justice and the protection of the law.

The Joint Committee on Human Rights, in its scrutiny of the Bill, (*op cit.*) said

> *The removal of an existing right of appeal in relation to family visit visas, an area of such obvious importance to family life, is a measure which requires careful justification. We cannot currently support removal of this right while there are still*

[8] Available at http://www.bailii.org/ew/cases/EWHC/Admin/2012/3448.html

so many successful appeals. Notwithstanding our efforts to obtain such information, there is still no evidence before Parliament as to the proportion of appeals which succeed because new evidence is submitted on appeal as a result of an error by the applicant rather than the fault of the UK Border Agency. We ask the Government to make this information available to Parliament as a matter of urgency.

The Joint Committee discusses ILPA's arguments in detail. We suggested that although the percentage of successful appeals already appears to be extremely high, the figure for the number of appeals where the initial decision did not stand is even higher.

We considered that the Government's answer to the Joint Committee's question as to the proportion **of successful appeals in which new evidence was introduced because the applicant had made a mistake on their application** Did not tell the reader very much. A mistake may have been made because the UK Border Agency gave misleading guidance or rejected an application when evidence which was submitted sufficed to prove the point, but did not meet bureaucratic standards which since the decision in *Alvi v SSHD* [2012] UKSC 33 have been incorporated into the immigration rules by Statements of Changes in Immigration Rules Cm 8423 and HC 565.

To ascertain the true position in connection with family visit appeals, we asked the UK Border Agency for the following information in relation to the figures given is consultation paper *Family Migration a consultation*:

- *Of the allowed appeals, was the new evidence produced, evidence that is clearly required on the application form or website?* and
- *Of the allowed appeals, was any contact made by the Entry clearance officer making the decision with the applicant to request that the evidence be supplied?*

The Agency's answer was that:

- *The information requested was not collated when the sampling was carried out.*

In 2011, the Chief Inspector of the UK Border Agency (now of Borders and Immigration) carried out a global review of entry clearance posts and decisions.[9] He looked at entry clearance decisions where there is currently no full right of appeal – i.e. decisions subject to the same limitations the Bill would extend to family visit cases. Of the around 1,500 cases at which he looked, in 33% the entry clearance officer had not properly considered the evidence submitted and in a further 14% it was not possible from the file to assess whether the evidence submitted had been properly considered. In 16% of cases, applications had been refused on the basis of a failure "*to provide information which* [the applicant] *could not have been aware* [was required] *at the time of making their application.*" ILPA recognises these problems in family visit cases

[9] *Entry Clearance Decision-Making: A Global Review*, December 2011 at http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Entry-Clearance-Decision-Making_A-Global-Review.pdf

ILPA members' experience is that applicants want the visa to be granted first time, will make every effort in good faith to get it right first time if there is clear guidance as to how to do so and do not willingly submit an application that does not contain the necessary evidence because they can just go forward with an appeal if refused. Fresh applications are invariably decided more quickly than the months taken for appeals to be scheduled and the costs associated with a fresh application are likely to be less than those associated with an appeal. In our view applicants would use the fresh application route to submit "new evidence" rather than an appeal if they had confidence in the fairness of the entry clearance application process.

At the time of *Family immigration, a consultation* we asked the UK Border Agency

> *At paragraph 7.7, the consultation paper states that in a sample of allowed family visit visa appeal determinations ═new evidence produced at appeal was the only factor in the Tribunal's decision in 63 per cent of allowed appeals.' Please provide the following information:*
>
> *(1) Of those allowed appeals, was the new evidence produced evidence that is clearly required on the application form or website?*
>
> *(2) Of those allowed appeals, was any contact made by the ECO making the decision with the applicant to request that the evidence be supplied?*[10]

The UK Border Agency responded that "The information requested was not collated when this sampling was carried out."[11]

If a person has a right of appeal only on human rights and race discrimination grounds, the refusal states

> *Your right of appeal is limited to the grounds referred to in section 84(1)(c) of the Nationality, Immigration and Asylum Act 2002 (www.legislation.gov.uk)*"

How many refused family visitors will realise that this means that they can appeal is there human rights have been breached?

CLAUSE 27 (Restriction on right of appeal from within the United Kingdom)

Amendment 118C in the name of the Lord Avebury

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

[10] Letter from Wesley Gryk Solicitors to the UK Border Agency dated 7 September 2011
[11] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011

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.** We support amendment 118D whereby it would not stand part of the Bill. 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.

Amendment 118D in the name of the Lord Avebury

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 briefly. 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.