House of Commons Report Crime and Courts Bill (HC Bill 137)
ILPA Proposed Amendments

ILPA is a professional association the majority of whose members are immigration, asylum and nationality law practitioners. Academics and charities are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law and is represented on numerous Government consultative and advisory groups. ILPA proposes amendments to the following clauses of the Bill. For ease of use, we have set the amendments out on separate pages of this briefing.

Part 2 Courts and Justice
Administration of Justice

- Clause 20 - *The transfer of immigration or nationality judicial review applications* (including in Scotland and Northern Ireland)
- Clause 21 *Appeals from the Upper Tribunal to the Court of Session* (and a suggested new clause re these appeals in England and Wales)

Extradition

- Clause 35 *Extradition*

Part 3 Miscellaneous and General *Border Control*

- Clause 37 *Appeals against refusal of entry clearance to visit the UK* (Removal of rights of appeal in family visit cases)
- Clause 38 *Restriction on right of appeal from within the United Kingdom*
- After Clause 38 New clause by proposed by ILPA – Immigration Appeals and Humanitarian Protection – concerns denial of rights of appeal for those refused recognition as refugees but given other leave, including effect on children and trafficked persons.
- Clause 39 *Deportation on national security grounds: appeals*

Clause 36 Immigration cases: appeal rights and facilitating combined appeals is a tidying up clause and ILPA does not propose any amendments to it. During the passage of the Bill through the House of Lords ILPA made further proposals to address the complexity of existing immigration appeals provisions not dealt with in detail here. Nor have we dealt here with Clause 40 *Powers of Immigration Officers* a matter we have addressed at earlier stages of the Bill.

The Minister, the Lord Taylor of Holbeach, said in the debate on this bill on 12 December *"I agree with my noble friend that no area is more complex than the whole business of the Immigration Rules and the procedures surrounding them."*[1] From April 2013, unless corrective action is taken in the coming weeks or months, immigrants whose cases no longer fall within the scope of legal and who have no ability to pay for legal advice will be tackling these matters without legal advice and representation.

[1] Lord Taylor of Holbeach in response to Lord Lester of Herne Hill, Hansard, HL Report, 12 December 2012: Column 1087

Part 2 Courts and Justice *Administration of Justice*

Clauses 20 and 21 were not the subject of any debate in Committee. Scrutiny of these clauses in the House of Commons has been inadequate. ILPA opposes both clauses and also considers that the situation in Scotland and Northern Ireland is deserving of special scrutiny.

Clause 20 - *Transfer of immigration or nationality judicial review applications*

First proposed amendment

Page 18, line 4, leave out clause 20

Purpose

To retain the *status quo* whereby only asylum "fresh claim" judicial reviews can be transferred to the Upper Tribunal (Immigration and Asylum Chamber from the High Court in England and Wales). All other immigration and asylum judicial reviews would remain in the High Court.

Briefing

Parliament made clear its views on whether judicial reviews should be transferred into the tribunals in 2007, during debates on the Tribunals, Courts and Enforcement Act 2007 and in 2009, during debates on section 53 of the Borders, Citizenship and Immigration Act 2009. It said no and it said so powerfully. The reasons that militate against the Upper Tribunal being entrusted with this responsibility hold good.

The Joint Committee in Human Rights said in its legislative scrutiny report on the Bill[2]:

> *"75. … one of the main reasons for Parliament's opposition to such a transfer in 2009 has not been addressed: there has still been no systematic review by the Government of the exercise by the Upper Tribunal of its judicial review jurisdiction generally…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."*

This echoes the comments of the late Lord Kingsland QC on the bill that became the Tribunals, Courts and Enforcement Act 2007[3] which he concluded with:

> *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.*

To date there have been only a handful of reported Upper Tribunal (Immigration and Asylum Chamber) judicial reviews decision. The majority are age dispute judicial reviews, the first Fresh claim judicial review was reported since the House of Lords' Committee stage of this bill.[4] Our assumption is that the other disposals to date have been withdrawals or refusal of permission, making it difficult to assess how well the Upper Tribunal's hearing judicial reviews is going.

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[2] Fifth report, published 20 November 2012.(available at http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/67/6706.htm#a13)

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

[4] *R (on the application of Neisi) v Secretary of State for the Home Department* (FCJR) [2012] UKUT 00367 (IAC).

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. ILPA opposes the transfers and hence these clauses.

Alternative Proposed amendments

Page 18 line 11, leave out subsections (2) and (3)

Consequential amendments:

Page 18 line 25 delete "subsections (1) to (3) and replace with "subsection (1). Renumber accordingly.

Purpose

To retain the status quo whereby in Scotland and Northern Ireland, immigration and asylum judicial reviews must be heard in the courts and cannot be transferred to the Upper Tribunal (Immigration and Asylum Chamber).

Briefing

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.[5]

Subsections (2) and (3) were added at Lords Report on 4 December 2012. There has been no Sewel (Legislative Consent) motion, actual or suggested for clause 20 or 21. The only legislative consent motion for the bill predates the inclusion of these provisions.[6] The Lord Ahmad suggested that such a motion was not required because the provisions are only enabling[7] but this is not uncontroversial. They enable the Scots Executive, not the Scots parliament, who would be the ones to vote on a legislative consent motion. Lord Ahmad referred to **"**Having discussed the matter further with the judiciary and the devolved Administrations in Northern Ireland and Scotland …," but there have been no public discussions in Scotland and the Faculty of Advocates was not informed.

[5] See *Hansard*, HL 4 Mar 2009 : Columns 793- 803.
[6] http://www.scottish.parliament.uk/parliamentarybusiness/Bills/51212.aspx
[7] 4 Dec 2012 : Column 602.

Clause 21 *Appeals from the Upper Tribunal to the Court of Session* (and a suggested new clause)

Proposed amendment

Page 18 line 27 leave out clause 21.

Purpose
To retain the existing test for a grant of permission to appeal from the Upper Tribunal to the Scots' Court of Session rather than to introduce the more difficult test, the "second appeals test" that is in place in England and Wales.

Proposed new clause

Page 18 line 36 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 nationality appeals from the Upper Tribunal to the Court of Appeal. This additional requirement is referred to as "the second-tier appeals test".

Briefing
Clause 21 introduces a requirement to show an important point of principle or practice or some other compelling reason to be allowed to appeal from the Upper Tribunal to the Court of Session. This would mirror the requirement currently in place for England and Wales and known as the "second appeals test". The new clause below would remove the test for England and Wales and sets out in full the reasons for this and why the test should not be adopted in Scotland. The two amendments could usefully be debated together.

ILPA opposes the introduction of the second appeals text in Scotland and calls for its removal from the law of England and Wales. A new clause that would have achieved the latter was debated in the House of Lords. In debates in the House of Lords on a proposed amendment to the clause to protect refugees, the Baroness Northover, for the Government, acknowledged that

> *"There is no doubt that the class of cases dealt with by Amendment 149C can be both complex and of the utmost importance."* (4 July 2012, Col 725)

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.

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. An amendment originally tabled by the Lord Lester of Herne Hill QC, the Lord Pannick QC and the Lord Lloyd of Berwick was subsequently adopted by the Lord Thomas of Gresford and the Lord Kingsland QC as part of a wider amendment. Concerns were expressed that the test would exclude appeals where individuals faced removal in breach of the Refugee Convention and human rights as a result of errors of law by the tribunals. 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 proved to be misplaced. In *PR (Sri Lanka) & Ors v SSHD* [2011] EWCA Civ 998 the Court of Appeal concluded, having considered them, that "*it would be wrong in principle*" to be constrained by these assurances. It held the three asylum cases before the Court failed the second appeals test. In one of those cases the appellant had been detained and tortured in Sri Lanka. Applying the test, the Court 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.

The amendment in respect of England and Wales 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, despite some comfort in the subsequent case of *JD (Congo) et ors v SSHD* [2012] EWCA Civ 327, it is appropriate for Parliament to revisit this matter.

More information on the second-tier appeals test is available from ILPA's information sheet at: http://tinyurl.com/bp7zc6v This amendment was laid as amendment 149B in the name of the Lord Avebury at House of Lords' Committee stage, for the debate see 4 July 2012, col 722 ff.

Part 3 Miscellaneous and General

Border Control

Clause 35 Extradition and Schedule 20

Proposed amendment to Schedule 20

Page 311, line 32, leave out Part 2 Human Rights Issues

Purpose To preserve the current position, whereby the Secretary of State can consider human rights issues in an extradition case.

Briefing
This clause and schedule are concerned with extradition cases but extradition, when combined with the proposals in Clause 38 (Restriction on right of appeal from within the UK) can lead to the person extradited losing their immigration status in the United Kingdom, even where they are found not guilty of all charges.

Clause 35 and Schedule 20 were introduced in Commons Committee, just days before they were debated. Part II bars the Home Secretary from considering whether extradition is compatible with the European Convention on Human Rights. It sets a dangerous precedent, whereby the Home Secretary can act without regard to the Convention. The Minister said in Committee that the clause would work by preventing the Secretary of State from considering whether extradition is compatible with the European convention on human rights and transferring examination of such cases to the courts. But we have seen in recent months and weeks the Home Secretary castigate the courts for their approach to human rights matters. If the Secretary of State does not have to take such difficult decisions herself, does this not give her free rein to criticise the courts for doing that which, but for this get out of jail free card, in the form of a certificate that she need not consider the case that she herself issues, she too would have to do?

It the case that a decision by the Home Secretary in an extradition case can be challenged in the courts. But it is cheaper and more efficient to have an administrative decision made than to have a decision made by a court. The issues can be narrowed and an ensuing court case proceed more smoothly. Part 2 proposes that the High Court consider the appeal only if it appears to the High Court that the appeal is necessary to avoid real injustice and that the circumstances are exceptional and make it appropriate to consider the appeal. But how is the court to know whether it should consider the appeal at all if it does not have the benefit of consideration of the issues by the Secretary of State. The court will have only the Secretary of State's certificate and this bars her from considering human rights.

Home Secretaries should not be left free to criticise decisions that they themselves have declined, by way of issue of a certificate, to make. We have seen this approach in immigration cases in so called "automatic deportation" cases – the Secretary of State is bound to decide to deport and it is left to the court to consider the arguments for and against deportation.

***Appeals against refusal of entry clearance to visit the UK* (Removal of rights of appeal in family visit cases)**

Proposed amendment

Page 37, line 40, leave out clause 37

Purpose
To retain a full right of appeal against a refusal of a visa to visit a family member.

Alternative amendment

Page 38, line 17, after subsection 8 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 the clause 26, so that a full appeal right of appeal in family visit cases where a visa is refused on "general grounds". The Immigration Rules set out requirements in each of the categories, including that of family visitor for which a visa or leave may be granted. In addition to the requirements specific to each category, the Rules include general grounds for refusal which include matters such as making a false statement or submitting a false document.

Briefing
Clause 37 removes the right of appeal, save on human rights or race discrimination grounds, against the refusal of a visa to visit a family member. The effect is that the family members of British or settled people cannot challenge the wrongful refusal of a visa before the courts and those British or settled people may wrongfully be deprived of an opportunity to have family members visit them. It is as much about the rights of the UK-based family member, as that of the person refused a visa. ILPA opposes this clause.

The Joint Committee on Human Rights, in its scrutiny of the Bill, said

> *The removal of an existing right of appeal in relation to family visit visas…requires careful justification. We cannot currently support removal of this right while there are still 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.*

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.[8] He looked at entry clearance decisions where there is currently no right of appeal other than on human rights and race discrimination grounds. . Of the around 1,500 cases reviewed, in 33% the entry

[8] See *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

clearance officer had not properly considered the evidence submitted. 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 same problems in family visit cases.[9]

If the full right of appeal is withdrawn, it will normally only be possible to challenge refusals by judicial review or administrative review. The latter is a process internal to the UK Border Agency. Essentially, it involves a review by an entry clearance manager of the decision by the entry clearance officer. As David Winnick MP put it in Home Affairs Select Committee,[10] this means the UK Border Agency is effectively "*judge and jury*" in its own cause. ILPA has no confidence in the internal review system. The Chief Inspector in his global review[11] looked at 475 such internal reviews, and found that in 30% of cases the entry clearance manager failed to pick up on poor decision-making by the entry clearance officer.

In debates in the House of Lords Ministers suggested that it was quicker and cheaper for a person to make a fresh application than to appeal.[12] Making a fresh application is often quicker than appealing. 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. It is a blot on a person's copybook that they want need to remove if they are to travel in future. 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.

Lord Avebury opposed Clause 26 (then clause 24)'s standing part of the Bill and laid this amendment (as amendment 148A to 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 reason given for rejecting the amendment at Lords' 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. If a person wins on appeal, it is likely that the tribunal will make a costs

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[9] See ILPA's October 2011 response to *Family migration: a consultation* especially the response to Q32, available at http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf . For the July 2011 consultation paper, see http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/family-migration/consultation.pdf?view=Binary

[10] HC 71-i, Q108-109.

[11] *Entry Clearance Decision-Making, op. cit.*

[12] See also the oral evidence given by Damian Green MP, the then Minister, before the Home Affairs Committee, see the transcript at HC 71-i, Q103-Q113.

order against the Secretary of State for the costs of the fee. So a successful appeal will be free in the end.

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?*[13]

The UK Border Agency responded that "The information requested was not collated when this sampling was carried out."[14]

Where wrong decisions can be appealed there is an incentive to get things right and 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.

Second proposed amendment – general grounds

As to the second amendment, an applicant will ordinarily not be able to anticipate a refusal under the general grounds and the need to submit evidence to support the veracity of a statement or document, particularly if the refusal 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 mean that any future application for a visa is to be refused for ten years. 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. 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.

[13] Letter from Wesley Gryk Solicitors to the UK Border Agency dated 7 September 2011.
[14] Letter from the UK Border Agency to Wesley Gryk Solicitors dated 3 October 2011.

Clause 38 Restriction on right of appeal from within the United Kingdom

Proposed amendment

Page 38, line 18, leave out clause 38

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 s/he does so, to exercise an appeal in country.

Briefing

Clause 38 was amended in the House of Lords 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 and subsequent to the amendment being made, clause 38 was criticised in the House of Lords from all parts of the House, including by the Lord Avebury, the Lord Pannick, Baroness Butler Sloss, Baroness Smith of Basildon, Lord Lester and Lord Maclennan.

Where a person who has leave to enter or remain in the UK, leaves the UK and the Secretary of State cancels or curtails that leave while the person is outside of the UK the effect of the clause will be that if the Secretary of State certifies that the decision "*is or was taken wholly or partially on the ground that it is no longer conducive to the public good for the person to have leave to enter or remain in the United Kingdom*" the person will be precluded from exercising any right of appeal from within the UK.

Clause 38 is designed to reverse the effect of the judgment of the Court of Appeal in *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333.[15] MK is a refugee from Tunisia, who had been living in Manchester for several years with his wife and daughters. He was extradited to Italy in 2008, further to a European arrest warrant. While out of the UK, his leave was cancelled. He was acquitted of all charges in Italy save one, possession of a false document. Nonetheless, the Secretary of State sought to block his return to the UK. The Court of Appeal held that an appeal could be exercised in-country if the person returns to the UK within the short time-limit (10 days) for lodging an appeal in-country and opportunity should have been given to MK to do so. Meanwhile MK was facing onward *refoulement* from Italy to Tunisia, something the UK courts, in allowing his extradition to Italy had identified would not happen, which was significant in their decision to permit extradition in the first place as they had determined that if returned to Tunisia, MK would face torture.[16]

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:

[15] ILPA provided further detail of MK's case in submissions to the Joint Committee on Human Rights.
[16] See ILPA's evidence to the Joint Committee on Human Rights Enquiry into Extradition Policy of 21 January 2011, available at http://www.ilpa.org.uk/data/resources/14418/11.01.21-ILPA-to-JCHR-re-extradition.pdf

> *"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)

The suggestion that it is not reasonable to allow persons to return to the UK to challenge the decision to take away their leave. This assumes that the decision is correct.

'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.

The Lord Taylor made reference to 'high harm individuals."[17] But whether or not such persons are "high harm" or not is the very matter that will be considered in the proceedings. Those who have been tried and convicted of a serious criminal offence are likely to be in prison. The others, according to the tenets of our law, are innocent until proven guilty.

Since the clause was debated in Commons Committee there have been a number of newspaper reports on deprivation of citizenship while a person is outside the UK, following what happened to those persons subsequently. See

> The Independent *War on the enemy within, British terror suspects quietly stripped of citizenship, then killed by drones* 28 February 2013 http://www.independent.co.uk/news/uk/crime/british-terror-suspects-quietly-stripped-of-citizenship-then-killed-by-drones-8513858.html

The Rt Hon Simon Hughes MP is quoted in the article talking of the "legal and political limbo" in which these persons find themselves. See, for more detail:

> 26 February 2013 The Bureau Investigates Article *Medieval Exile: the 21 Britons stripped of their citizenship* http://www.thebureauinvestigates.com/2013/02/26/medieval-exile-the-21-britons-stripped-of-their-citizenship/
>
> 26 February 2013, *The Bureau Investigates article When being born British isn't enough* http://www.thebureauinvestigates.com/2013/02/27/when-being-born-british-isnt-enough/
>
> The Bureau Investigates article How the UK government has used its powers of banishment, 27 February 2013 http://www.thebureauinvestigates.com/2013/02/27/graphic-detail-how-uk-government-has-used-its-powers-of-banishment/

[17] 12 December 2012, col1109.

ILPA has made submissions to the UN High Commissioner for Human Rights under the rubric of her investigation into arbitrary deprivation of citizenship. ILPA's resources on this topic can be seen at http://www.ilpa.org.uk/resource/17485/various-resources-on-deprivation-of-citizenship-28-february-2013

Clause 38 assumes that it is possible to pursue a challenge from overseas. The Lord Maclennan described the "very grave disadvantage" to an appellant of trying to appeal from outside the UK.[18] A person may, as the Baroness Butler Sloss pointed out, be stateless. Her question as to "how on earth" such a person appeals from overseas is well put.[19]

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

ILPA is concerned at the way in which the debates on this clause proceeded in the House of Lords. There were a number of inaccuracies in what was said at Report stage. ILPA drew these to the attention of peers, many of whom voiced their concern at Lord's Third Reading.

At House of Lords' Report, the Lord Taylor of Holbeach speculated

> *"…it may be that the conduct that leads to the Home Secretary making this decision takes place while this individual is abroad. I think the notion that this is a premeditated trap is false. It is more to do with the possibility that the individual, while abroad, makes contact with someone, or evidence comes to light as to their true intent, or what they might do when they return to this country becomes apparent, and the Home Secretary wishes to deal with the problem.*[20]

This was phrased as speculation but what it describes is contrary to stated Home Office policy. It is stated Home Office policy in deprivation of citizenship cases to wait until a person is outside the country to deprive them of leave, or as the Baroness Smith of Basildon phrased it, to "lie in wait"[21] until a person leaves the country.

This has been repeatedly confirmed, including in meetings with ILPA and indeed before over 100 members of ILPA at ILPA's AGM on 27 November 2010 by Mr Tony Dalton MBE, then Assistant Director, Chief Caseworker, Nationality and European Casework UK Border Agency. ILPA is not aware of any case in which it has been some intervening act that has prompted the deprivation. That is not to say that this has never happened, but it is certainly not the norm. In many cases the notice is served immediately after the person has left the country: there is simply no time for new evidence to come to light or for the person to do anything.

ILPA dealt in detail with this in its evidence to the Joint Committee on Human Rights enquiry into extradition policy in January 2011.[22] Subsequent to that we have the decision of Mr

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[18] 12 December 2012, col1101.
[19] *Ibid*.
[20] 12 December 2012 col 1103 http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121212-0002.htm
[21] 12 December 12012, col 1098.
[22] ILPA submission to the Joint Committee on Human Rights Enquiry into extradition policy, 21 January 2011, available at http://www.ilpa.org.uk/data/resources/14418/11.01.21-ILPA-to-JCHR-re-extradition.pdf

Justice Mitting sitting in the Special Immigration Appeals Commission in the case of L1 where the matter at stake was deprivation of citizenship. He found:

> "*The Secretary of State's decision to deprive the Appellant of his citizenship was one which had clearly been contemplated before it was taken. The natural inference, which we draw, from the events described, is that she waited until he had left the United Kingdom before setting the process in train.*" (paragraph 12(i))

We also suggest that it is misleading to say, as was said to in reply to the Lord Woolf[23], that exclusion while a person is out of the country is done repeatedly. It was indeed done repeatedly, until it was declared unlawful as a matter of statutory construction in *MK's* case. If it is done repeatedly at the moment, then the law, which this provision aims to change, is being broken.

The Baroness Smith asked[24] what are the criteria for cancelling a person's leave when they are out of the country. As far as ILPA is aware there are no criteria additional to the criteria for cancelling any person's leave. The length of time the person has been out of country, the reason they are out of the country, and their conduct while out of the country are not, as far as ILPA is aware, the subject of specific criteria or scrutiny.

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. As described by the Lord Pannick and the Lord Lester in the debate, it is arbitrary and irrational that whether a person has an in-country right of appeal depends upon whether they are in the UK at the time when the case is certified. In response, the Lord Taylor said it would be "nonsensical"[25] to allow a person back into the UK. That, in summary, is to say that the rule of law is nonsensical.

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. ILPA's briefing for the House of Lords' Committee stage is available at **http://tinyurl.com/d27dbjd.**

[23] 12 December 2012 Col 1103.
[24] 12 December 2012 col 1098.
[25] *Ibid*. Col 1101.

After Clause 38

New clause by proposed by ILPA

Page 38 line 37, after clause 38 insert the following new clause

( ) **Immigration Appeals 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.

This amendment may be tabled to be inserted in the "Administration of Justice" section or in the "Border Control" section. The position does not affect is meaning.

Briefing
Persons who seek asylum and are refused asylum but given leave to enter or remain can only appeal against the refusal of asylum when they have been granted more than 12 months leave. Those granted 12 months leave or less are kept out of a right of appeal until they have no leave left and face removal or have been granted more than a year's leave. This particularly affects children aged 16 ½ or granted leave to aged 17 ½ on the basis that no arrangements can be made for their safety and welfare on return and persons granted one year's leave as a trafficked persons. When the UK ratified the Council of Europe Convention on Action against Trafficking in Human Beings[26], ILPA pleaded with officials to grant trafficked persons one year and one day, or one year and five minutes leave, to safeguard this right of appeal. This was refused.

In debates in the House of Lords, the 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.
The matter was given consideration but in a letter to Lord Avebury of 20 November 2012, copied to ILPA, Lord Henley said that he would neither amend the clause nor give a longer period of leave to separated children[27]. Not so. Those who were able to appeal and succeeded would not have a further appeal. The current situation is that once leave is

[26] CETS 197.
[27] 12 December 2012 col 899.

extended to more than one year, there is a right to an "upgrade" appeal, so anyone who is given further leave will be entitled to a second appeal eventually. The only persons who will have more than one appeal are those who appeal against refusal to recognise them as a refugee, lose, whom the Home Office decides at a later stage to remove. They will have an appeal against removal, as does anyone else facing removal. That appeal will no doubt build on the findings from the earlier appeal about whether they should be recognized as refugees. The costs can thus be exaggerated. The talk of "multiple fruitless appeals"[28] is inappropriate.

The Government acknowledges that the effect on certain groups is an undesirable situation, the Lord Henley stating on 4 July 2012, in col. 710, that it was an "unfortunate consequence" of the 12-month restriction.

Uncertainty and fears for the future, that might have been allayed or mitigated by a grant of five years leave as a refugee, are only part of the problem for those in this position. The period of uncertainty is likely to be substantially longer than a year, as subsequent applications and appeals take a long time to resolve. Those with only discretionary leave to remain (rather than leave as refugees) may have difficulty accessing further or higher education or accessing financial support for this.[29] Those awaiting a decision on their application for an extension of discretionary leave may have difficulties in accessing a range of entitlements because, while in law they continue to have discretionary leave, the document by which that leave was 'given' will show it to have expired.

Changes in circumstances (as regards the individual or his or her country of origin) may mean it is more difficult or not possible to succeed on appeal after a year or more has elapsed. In an asylum appeal, the issue for the immigration judge is not whether the person was a refugee when he or she claimed or was refused asylum, but is whether the person is now at risk of persecution. A child wrongly refused asylum when at risk of being recruited as a child soldier may be unable to establish his or her asylum claim by being denied a right of appeal until after he or she has ceased to be a child. A person may find it more difficult to recall events and give evidence in an appeal after time has elapsed.

In the case of children, provisions and guidance designed to protect a child's interests in immigration procedures, including appeals, will be unavailable during procedures taking place after the child has reached adulthood. These provisions and guidance include judicial guidance on dealing with child appellants and witnesses,[30] UK Border Agency guidance on dealing with children[31] and Legal Services Commission guidance on availability of legal aid.[32] The protections provided include that particular care is needed in seeking to take evidence from a child, that children are not to be detained and such that restrict the prospect that a child is left without legal representation at appeal.

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[28] *Ibid.* Col 898.

[29] See section on 'education' in Coram Children's Legal Centre, *Seeking Support: A Guide to the Rights and Entitlements of Separated Children*, Fourth Edition 2012.

[30] Practice Direction, First-tier and Upper Tribunal, Child, Vulnerable Adult and Sensitive Witnesses, 30 October 2008, see http://www.judiciary.gov.uk/Resources/JCO/Documents/Practice%20Directions/Tribunals/Childvulnerableadultandsensitivewitnesses.pdf

[31] Asylum Process Guidance and Enforcement Instructions and Guidance each contain various provisions specific to children and children's welfare.

[32] Paragraph 29.29.5, chapter 29, Decision-making guidance to the Funding Code, November 2010, see www.legalservices.gov.uk/docs/cls_main/Funding_Code_Chapter_29_Immigration_-_Nov_2010_(498kb).pdf

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.

As to the reasons why the Government 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.

Many MPs will have witnessed the effects of uncertainty and fear as to the future on adolescents, many will have witnessed young people unable to pursue their education, for example because their grades were not good enough. Many will have seen young people wrongly accused of lying, and felt their indignation at this and how much it troubles them. All these are effects when young people are wrongly refused asylum and are unable to act to put this right. To argue that the effects of the delay are not serious is simply not true.

Clause 39 Deportation on national security grounds: appeals

ILPA's preferred amendment

Page 38 line 38 leave out clause 39

Purpose: to maintain the status quo whereby there are in-country rights of appeal in deportation cases where questions of national security are raised .

First alternative page 39, line 31

Delete "include (particular)" and replace with "are"

Purpose: to ensure that the list on the face of the Act of reasons for issuing a certificate to bar or discontinue an in-country right of appeal (that the claim is clearly unfounded or that the country or territory is not one in which the individual would face a real risk of serious irreversible harm) is exhaustive and not merely illustrative.

Second alternative set of amendments

Page 39 line 14 Delete "or continue"

Page 39 line 22 Delete "or continue"

Page 39 line 26 delete "or not having been exhausted"

Page 39 line 29 at end insert

() A certificate may not be issued at an time after an appeal has been lodged.

Page 39 line 39 "or to continue an appeal so far as brought on non-human rights grounds?"

Page 39 line 45 delete "or not having been exhausted"

Purpose: to ensure that a certificate can be issued only to bar and not to discontinue an in-country appeal.

Third amendment

Page 39 line 48 at end insert

"( ) In subsection 3, remove the words "subsection (2) (c) (iii)" and replace with "(2)(c)"

Purpose
To give effect to the intention that there should be a right of appeal to the Special Immigration Appeals Commission, both in cases currently covered by section 97 and in cases of certificates introduced by this clause. To correct a drafting error. Subsection (2)(ii)(c) will not exist when the clause becomes law, it will be replaced by a unified subsection 2(c). Without this amendment all rights of appeal will be lost.

Briefing

This clause was introduced in Commons Committee[33] where it received little scrutiny. It takes away an appellant's right to have their substantive appeal against deportation heard in the UK where the Secretary of State certifies that removal prior to the appeal finally being determined would not breach the UK's obligations under the European Convention on Human Rights.

The grounds on which a certificate may be issued are stated to include the applicant's human rights claim is clearly unfounded, or that the applicant would not face a real risk of serious, irreversible harm if removed, but they are not limited to those grounds. Thus the suggestion that these two grounds are well-known legal tests, quite apart from the difficulties with each, does not exhaust the potential harm to be done by the clause.

The Minister, Damien Green MP, said in committee. "The Government take deportation action only ever when they consider it lawful to do so and would not deport if they thought that there was a real risk that the person would be tortured on return". The Minister stated in Committee that the test of "serious irreversible harm" is that used by the European Court of Human Rights in issuing directions under Rule 39 of its rules of procedure. This is correct, but the only reason the Court issues such directions is when it considers that a State party will act in way to cause such serious irreversible harm. It has issued numerous such certificates against the UK in Sri Lankan cases. We recall that in February the Secretary of State attempted to remove a plane full of Sri Lankans despite there being a pending "country guidance" case before the Upper Tribunal examining, inter alia, the question of whether a person with actual or perceived links to the LTTE, would face torture on return to Sri Lanka. The Secretary of State, as is documented, proffered one set of arguments before the Tribunal in the country guidance case and another in the letter presented to the Administrative Court, and copied to ILPA, purporting to justify the flight. The Secretary of State argued that it was possible and proper to rely on the old country guidance case albeit that in the subsequent and pending case the Home Office had acknowledged that it fell to be revisited. In these circumstances it is not possible to have confidence that the Home Office can be relied upon to determine whether a human rights claim is clearly unfounded or whether a person would face a real risk of serious, irreversible harm if removed.

The Minister, Damien Green MP, stated in Commons Committee that there would be a right to appeal against the decision. However, the clause as drafted does not include this right. Section 97(3) of the Nationality Immigration and Asylum Act 2002 provides for a right of appeal for a person to whom a certificate is issued under subsection 2(c)(iii) to appeal the Special Immigration Appeals Commission to have the certificate set aside but subsection 2(c)(iii) will no longer exist once the clause becomes law. It will be replaced by a unified section 2(c). The amendment should be uncontroversial – it corrects a drafting error.

The clause as drafted would permit a certificate to be issued when an appeal had been lodged, and indeed where the Special immigration Appeals Commission or higher court had already started to hear the appeal. This would allow one party to proceedings to pull the plug on those proceedings at any time and is contrary to the interests of justice and undermines the authority of the court.

[33] 12 February 2013, first sitting, col 434ff. Available at http://www.publications.parliament.uk/pa/cm201213/cmpublic/crimeandcourts/130212/am/130212s01.pdf

The difficulties of pursuing an appeal from outside the jurisdiction are well- documented. We recall the debate on what is now clause 38 of this bill where the Lord Maclennan described the "very grave disadvantage" to an appellant of trying to appeal from outside the UK[34] and the Baroness Butler Sloss echoed these remarks.[35] What may very well be in issue in these cases is whether the person is indeed a national security risk as the Government claim. In cases where the person is such a risk, the proposals appear to be another example of exporting risk.

For further information please get in touch with: Alison Harvey, General Secretary (020-7251 8383) alison.harvey@ilpa.org.uk or Sarah Myerscough, Legal Officer, (020-7490 1553) sarah.myersoucough@ilpa.org.uk

[34] 12 December 2012, col1101.
[35] *Ibid.*