IMMIGRATION BILL
ILPA BRIEFING FOR HOUSE OF COMMONS COMMITTEE STAGE

PART II APPEALS ETC clause 11

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Briefing to the rest of Part II will follow.

Clause 11 Right of appeal to First-tier Tribunal

AMENDMENT 24

Mr David Hanson
Helen Jones
Phil Wilson

Clause **11**, page **8**, line **20**, at beginning insert—
'(6) This section shall not come into force until a draft statutory instrument is laid before, and approved by resolution of, each House of Parliament.
(7) An order under subsection (3A) may not be made until—
(a) a report by the Independent Chief Inspector of Borders and Immigration on entry clearance decision-making in the UK Border Agency for entry clearance and managed migration; and
(b) the Secretary of State is satisfied that decision-making for entry clearance and managed migration is—
(i) efficient;
(ii) effective; and
(iii) fair.'.

Presumed purpose
A sunrise clause which we assume to be a probing amendment. By it, appeal rights could not be abolished until the quality of Home Office decision making in terms of its being efficient, effective and fair were vouched for by both the Chief Inspector and the Secretary of State. The report the clause requires of the Chief Inspector appears to be confined to entry clearance cases, although this is not wholly clear. Managed migration is understood to encompass all casework other than asylum.

Briefing
We assume that this is a probing amendment, given that terms such as "efficient" "effective" and "fair" may not permit of easy measurement, and that what it is designed to probe is the quality of Home Office decision-making. We recall the Home Secretary's March 2013 damning (and accurate) verdict on the UK Border Agency which, she said:

…struggles with the volume of its casework ... has been a troubled organisation since it was formed in 2008… UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry instead of automated data collection, and they often involve paper files … The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies …UKBA has been a troubled organisation for so many years. … it will take many years to clear the backlogs and fix the system, ..." [1]

We agree. We now experience a demoralised management and workforce floundering. Ms Sarah Rapson, interim Director General of UK Visas and Immigration, told the Home Affairs Select Committee in June "Is it [the organisation] ever going to be fixed?... I think I answered that question from you earlier. I don't think so."[2]

The Minister is his oral evidence focused on the Home Office's granting Home Office granted 87% of managed migration applications, thus refusing only 13% of applications. But this is immaterial to the question of whether appeal rights are required. Appeals exist for cases which the Home Office is refusing. What is of interest is how many decisions the Home Office gets wrong. The Home Office is losing approximately half of its managed migration appeals. One in two Home Office decisions that a court looks at are wrong. In other words, the results are no better than if the Home Office tossed a coin.

Administrative review is, as per ILPA's second reading briefing, a red herring. If a department has got a decision wrong then the decision should be looked at again, by someone capable of identifying the mistake. This is the case just as much to avoid a costly appeal as where there is no right of appeal.

In every case where there is an appeal, the file goes to a Presenting Officer, an official in a different part of the Home Office, at a more senior grade than that of Executive Officer, the current preferred grade for caseworkers, who will conduct the appeal. That official can say to his/her managers "the decision is wrong, we should not be fighting this appeal". Some cases are conceded. But even with this existing administrative review (for there is no science to this, it is simply a question of looking at the decision again), the Home Office is losing half its appeals.

As to time limits, all members of the Committee will be familiar with Home Office backlogs. It would be a rash assumption that time taken to do administrative reviews in entry clearance cases represents the time it will take when the massive number of in-country cases that would be affected by this Bill become subject to the administrative review procedure. Backlogs can and do have a tendency to build up in the Home Office. The Chief Inspector of Borders and Immigration has repeatedly drawn attention to delays in entry clearance administrative reviews. For example, in his August to October 2010 inspection of the visa section in Amman, published in March 2011, he found no administrative reviews being completed within the 28 day target. The average was 74 days, over 10 weeks[3]. The Agency moved quickly

[1] Hansard HC Deb 6 Mar 2013 : Column 1500.
[2] Oral evidence given on 11 June 2013, published as HC 232-I, response to question 6, see http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/uc232-i/uc23201.htm
[3] See the report at http://icinspector.independent.gov.uk/wp-content/uploads/2011/03/An-inspection-of-UKBA-visa-section-in-Amman-Jordan.pdf

following his inspection to address this; it had not done so without the independent scrutiny.

Administrative review is another name for the department doing its job. Table 8 in the Appeals Impact Assessment shows that 49% of "Managed Migration" (work and students) appeals are allowed, 50% of entry clearance appeals are allowed and 32% of appeals against deportation are allowed. At any stage before the decision on those appeals the former Agency could have reviewed, or did review, its own decision. The only conclusion to be drawn is that the former Agency continues to stand in need of independent oversight. The Appeals Impact Assessment itself tends to support this conclusion. It says that where a claim is made on the basis of Article 8 "…the refusal of that claim will have (sic.) a right to appeal unless the case in question relates to an overstayer, where there is no right of appeal . This is wrong; an overstayer has a right of appeal on the grounds of Article 8.

Administrative review is described in the impact assessment as "still being developed" and therefore not able to be costed. On the one hand, the process has been in development for years: it is the process endeavouring to make correct decisions. On the other, we understand that work on a specific model has hardly started. We are mindful of the lengthy debates that took place during the passage of the Immigration Asylum and Nationality Act 2006, when an "administrative review" was introduced for entry clearance cases from which appeal rights were removed. There were only tantalising glimpses of Administrative review throughout the passage of the Bill and parliamentarians chased detail at the expense of debates on the fundamental question of the loss of appeal rights.

It is said in the Appeals Impact Assessment that displacement onto judicial review cannot be quantified and therefore cannot be costed. But the "sensitivity analysis" in the assessment models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission, which would be an extraordinary increase. In 2011 there were 8,711 immigration and asylum judicial reviews and only 4,630 reached the stage of a decision on permission. Judicial reviews cost more than appeals, costs can be sought from the other party, and damages may be claimed. Moreover, the Ministry of Justice is currently conducting a consultation on judicial review and whenever we mention the Home Office sensitivity analysis, everyone involved in that review looks very surprised indeed.

The very high proportion of appeals, especially "managed migration" appeals that succeed prevent unlawful removal in cases that frequently have a profound impact on a person's life. In such circumstances, to characterise reducing the number of such appeals that are brought as a "non-monetised benefit" as does the Appeals Impact Assessment shows a scant disregard for whether a person can remain with their family, continue their education or career in the UK or is able to make the UK their home.

Examples of entry clearance administrative reviews

We append hereto an example of an Administrative Review which came in while we were preparing the second reading briefing for this review and an example of an Entry Clearance Manager's review in 2012 prior to an appeal in a family case. As to the second case, a summary is the first case study below.

Case of F
The only reason for the refusal was that the Entry Clearance Officer was not satisfied that the British man was divorced in a way recognised by British law. He was, and the divorce certificate was submitted with his wife's application. But he gave them the benefit of the doubt and put in another original copy with the appeal, asking for the case to be decided on the papers as it was so obvious. The attached is the review of the case. The appeal was allowed straightaway when an immigration judge looked at it.

In general the review part of the appeal process does not work, it often does not happen, and so leads to many unnecessary appeals, or cases withdrawn by HO on the day, and delays in families being together. I get really fed up that even when the legal reps have written good grounds or representations asking for a review, they are ignored, and it takes pressure from the MP's office to get the entry clearance officers to look at the case and sometimes change the decision, otherwise they will just send (insufficient) papers to the Tribunal. If genuine reviews did happen promptly it would also save time & effort & resources throughout all the appeals parts of the HO.

Case of M

It gives some idea of the attitude to reviews that when an appeal has been lodged against a refusal in the UK there is often a refusal to look at it. This email was sent in October 2012 in a case described by the caseworker as a pretty clear case of a person who retains rights under EU law following her divorce.

> *"I can confirm that your further representations regarding the refusal of this case have been passed to the correct unit for consideration. As an appeal has been lodged we have no legal requirement to respond to any further representations until they are brought as evidence at appeal.*
>
> *As Mrs ****'s application is with Her Majesty's Courts and Tribunals Service (HMCTS) an organisation independent of UK Visas and Immigration it will not be appropriate for us to intervene at this stage. Mrs ****'s Appeal hearing is set for February 2014."*

The person in question has been suspended from her work while all this is going on, although she has a son to support.

A
Student was required to show £7,200 for maintenance. He was out of the UK without current student leave so did not qualify for the lower 'established presence' sum of £1600. The university, an official financial sponsor, agreed to cover the full maintenance amount and provided evidence of this. The student's fees were £1654 and he had paid £300, so he had £1354 outstanding and provided evidence that he had funds to cover this sum.
Entry clearance was refused around February 2013 on the grounds he had to show £2954 in his bank account.
Administrative review outcome: refusal upheld. The administrative review stated that the student was required to show fees of £1354 plus £1600 for maintenance. The student, who was in the middle of study, has had to defer returning to study until January 2014.

B
Student applied to transfer his Tier 4 leave to a new passport. The university provided cover letters quoting the Entry Clearance guidance (ECB 17.1) which confirms that a new Certificate of Acceptance for Studies is not required as this is not a fresh application, but the application was refused on the grounds that he did not have a valid Certificate of Acceptance for Studies for Studies.
The student applied for Administrative Review but he needed to be back in the UK quickly to resume study so he waited for two weeks and then decided he had to submit a fresh application. The Administrative Review upheld the original decision on the grounds that the student did not have a valid Certificate of Acceptance for Studies.

C
A student in year four (writing up) of a PhD was refused entry clearance because of a rule change stating that anyone who had had a prison sentence of a year or more in the last 10 years should automatically be refused. This rule hadn't existed previously and he had successfully completed and paid for three years of a PhD without having broken the law in the UK. He could not challenge this through administrative review.

Free of charge reconsideration of incorrect refusals was a standard part of the service offered by the Home Office student Batch scheme. This service was withdrawn without warning on 21 February 2013.

A
A student's Tier 4 application last year was refused because the student had not enclosed evidence of having passed a secure English language test, although this was not listed on his Certificate of Acceptance for Studies. The university had carried out its own assessment of the student's English, in line with the Immigration Rules. The decision notice stated that this university (founded in 1829) was not permitted to carry out its own assessment of English as the university is "not a recognised institution". The adviser contacted the Home Office who conceded that the university is a recognised body but refused to reconsider the refusal, although this was at a time when the Batch scheme still routinely reconsidered refused applications. The student was forced to appeal to the tribunal. The hearing took five minutes, although the whole process took around seven months once the student actually received the new Biometric Residence Permit. The caseworker or casework manager in this case had the power to overturn this obvious error but refused to do so. It is not clear how administrative review would make any difference in such a case.

B
In summer 2012, a student applied for leave for a Master's course after having studied an undergraduate course in the UK, followed by two years of Tier 1 (Post-Study Work) leave. The application was refused because it was alleged that the five-year limit on degree-level study would be exceeded. The caseworker had incorrectly included the two years of Tier 1 (Post-Study Work) leave. Reconsideration was requested, but the casework team refused to overturn the refusal.

"28 day" cases
Some cases concern overstayers who can apply in the UK within 28 days of having become an overstayer, usually after having had a first application refused or after an appeal has been unsuccessful. These applications are regularly refused on the ground

that the applicant has overstayed for more than 28 days because the period is incorrectly calculated by the caseworker. These applicants have no right of appeal. In the case of one institution, reconsideration was refused in three cases. However, all refusals were later overturned following intervention in one case by the sponsor management unit, in another through the MP's involvement and in the final case after the threat of judicial review. Administrative review probably would not cover such cases anyway, but it illustrates the need for external intervention even when caseworkers can review decisions.

Misunderstanding of the caselaw
Even when accepting a request to reconsider a refusal, caseworkers have refused to overturn refusals when the application relied on a concession in guidance that has not been incorporated into the Rules. From correspondence we have seen on this subject, this appears to be based on a misunderstanding of the case of *Alvi v SSHD* [2012] UIKSC 33, but if no third party is involved with reviewing decisions it seems likely that this will continue if administrative review replaces appeals.

Validity
Reconsiderations, even when properly carried out, were unable to address the situation where an application was incorrectly rejected as invalid, and then a later application was refused. The tribunal has, in some cases, accepted jurisdiction and held that the Home Office was wrong in the first case to consider the first application invalid, thus providing a right of appeal against the second refusal. Administrative review does not appear to provide a means of challenging incorrect decisions on whether an application is valid. Rejection of applications usually results in the applicant who applied in time becoming an overstayer immediately. This continues to be a problem as applications have been rejected for alleged non-payment of the fee even when the application is made online and the applicant receives notification that the fee has been accepted. Caseworkers have denied receipt of photographs even when there is evidence that they were enclosed.

CLAUSE 11 STAND PART (AMENDMENT 23)

Mr David Hanson
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Page **8**, line **19**, leave out Clause 11.

A right of appeal against a range of immigration decisions was created by the Immigration Act 1971, following the recommendations of the *Report of the Committee on Immigration Appeals*[4]. The Committee recommended that there should be a right of appeal because of the 'basic principle' that:

> *however well administered the present [immigration] control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal…In many other fields of*

[4] August 1967, Cmnd. 3387

> *public law – such as that relating to national insurance – there are now well established methods of resolving disputes between a private individual and the administration under a procedure requiring a clear statement of the administration's case, an opportunity for the person affected to put his case in opposition and support it with evidence, and a decision by an authority independent of the Department interested in the matter. The safeguards provided by such a procedure serve not only to check any possible abuse of executive power but also to private individual a sense of protection against oppression and injustice, and of confidence in his dealings with the administration which are in themselves of great value. We believe that immigrants and their relatives and friends need the same kind of reassurance against their fears of arbitrary action on the part of the Immigration Service.*

More recently, in *Asifa Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443 Lady Justice Hale as she then was said of the right of appeal to the Immigration Appeal Tribunal that:

> *There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts. In certain types of dispute between private persons, tribunals are established because of their perceived advantages in procedure and personnel. In disputes between citizen and state they are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review. This was undoubtedly the motivation for grafting asylum cases onto the immigration appeals system in 1993. In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.*

In the same case, Lord Justice Roch LJ said of the right of appeal under the Immigration Act 1971 from the adjudicator to the Immigration Appeal Tribunal that it is "a basic or fundamental right, akin to the right of access to courts of law".

The importance of a right of appeal has grown with the increasingly complex nature of immigration law which has been the subject of frequent comment by senior judges. In *DP (United States of America) v Secretary of State for the Home Department* [2012] EWCA Civ 365, Longmore LJ said

> *the speed with which the law, practice and policy change in this field is such that litigants must feel they are in an absolute whirlwind and indeed judges of this court often feel that they are in a whirlwind in which it is very difficult to pause for the reflection which should accompany sound judgment*

Of even more significance is the outcomes of appeals. The proportions of all immigration appeals to the First Tier Tribunal that were allowed are as follows:[5]

[5] *Tribunal Statistics Quarterly (including Employment Tribunals and EAT): April to June 2013* Ministry of Justice, 12th September 2013, Table 2.5 'Number of First Tier Tribunal (Immigration and

2007/08	34%
2008/09	39%
2009/10	41%
2010/11	48%
2011/12	45%
2012/13 (April – June)	42%
2012/13 (annual total)	44%
2013/14 (April – June)	45%

These figures are even more striking when the proportion of allowed appeals in 'Managed Migration' cases are considered.[6] Managed Migration appeals are 'generated by people already in the UK who have been refused permission to extend their stay here (either permanently or temporarily). This appeal type will also cover occasions when an individual has their permission to be in the UK revoked'.[7] In order to have been able to appeal, these people must have been present in the UK lawfully, with leave to enter or remain, at the time the decisions refusing to extend their stays or revoking their permissions were made.

2007/08	34%
2008/09	43%
2009/10	52%
2010/11	56%
2011/12	51%
2012/13 (April – June)	48%
2012/13 (annual total)	49%
2013/14 (April-June)	52%

The rights of appeal which led to these outcomes are to be removed by the Immigration Bill. That is justified as[8]

Asylum) Appeals Determined at Hearing or on Paper, by Outcome Category and Case Type, 2007/08 to 2013/14

[6] *Tribunal Statistics Quarterly (including Employment Tribunals and EAT): April to June 2013* Ministry of Justice, 12th September 2013, Table 2.5 'Number of First Tier Tribunal (Immigration and Asylum) Appeals Determined at Hearing or on Paper, by Outcome Category and Case Type, 2007/08 to 2013/14

[7] *Annual Tribunals Statistics, 2011 – 12,* Ministry of Justice, 28 June 2012, 'Definitions'

[8] Immigration Bill Factsheet: appeals (clauses 11-13) Home Office, October 2013

> The Government want fair, fast and accurate immigration decisions. We recognise the importance of an appeal to an independent tribunal where a case touches on fundamental rights, and will preserve this in this Bill.
>
> But the immigration appeals system has become a never-ending game of snakes and ladders, with almost 70,000 appeals heard each year. There are 17 current rights of appeal, and when a case finally comes to a close, some applicants put in fresh applications and start all over again. This is not fair to applicants – who face delays and costs – and not fair to the public, who expect swift enforcement of immigration decisions.
>
> This Bill sorts out this mess. In future, 17 rights of appeal will be reduced to four. And foreign criminals wont be able to prevent deportation simply be dragging out the appeals process, as many such appeals will be heard only once the criminal is back in their home country. It cannot be right that criminals who should be deported can stay here and build up a further claim to a settled life in the UK.
>
> The appeals system is complex and costly. A *right* to appeal can be used to delay removal even when there is no arguable error in the decision…

The statistics cited above show this to be an inaccurate false characterisation of the appeals system. In more than 40% of all appeals and in more or less 50% of managed migration appeals, the appeals are decided against the Secretary of State. That is not evidence showing that appeals are a 'never-ending game of snakes and ladders' or that they are 'used to delay removal'. It is evidence showing that they are an important remedy in respect of decision making that is wrong in as many as half of the cases that are appealed.

The Government says that the appeals system causes delay by 'creating opportunities for individuals to exploit the potential for multiple appeals and making it more difficult and time-consuming to remove or deport individuals from the UK'.[9]

However, the right of appeal to the tribunal is generally a speedy remedy. The current average time for an appeal to be resolved is 12 weeks.[10] Abu Qatada's case was an exceptional case involving alleged breaches of fundamental rights (such as would retain a right of appeal under this Bill) against a changing factual background of high level negotiations.

Moreover, given that more or less half of the appeals succeed, they do not delay removal or deportation; they prevent what would be unlawful removal or deportation.

The assertion that multiple, sequential appeal rights are available to the same individual is true in only exceptional cases and the Secretary of State generally has the capacity to determine whether any subsequent appeal is in or out of country. In particular:

a. Immigration, Asylum and Nationality Act 2006, s. 47 – empowered the Secretary of State to make simultaneous variation and removal decisions;

[9] Impact Assessment of Reforming Immigration Appeal Rights, 15.7.2013, Home Office
[10] Immigration Bill Factsheet: appeals (clauses 11-13), Home Office, October 2013

b. Appeals against refusal to revoke a deportation order can be brought in country only if there was an asylum or human rights claim which was not certified as clearly unfounded;

The government's rationale for removing rights of appeal, save where 'a case touches on fundamental rights' grossly underestimates the significance of the decisions that are currently appealable. They frequently have a profound impact on an individual's future e.g.:

- as to whether s/he can start or continue education in the UK;
- as to whether s/he can live with partner and children in the UK or whether they have to live elsewhere;
- whether s/he can continue with her career in the UK.

As the 'Wilson Committee' said in 1967, long before human rights were justiciable in UK courts and tribunals: 'it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal'.

In what follows, we highlight additional specific problems with the clause.

Consent

Where an appeal on asylum or human rights grounds remains it is proposed that a new matter can only be raised before the Tribunal if the Secretary of State consents to this. The factsheet on appeals says that this will ensure that these matters are considered by the Secretary of State before they are considered by the Tribunal but the Bill does not appear to impose any obligation on the Secretary of State to consider a matter after having objected to the Tribunal's dealing with it. It is not fanciful to envisage persons being left in limbo: the Court of Appeal cases of *R (Mirza) v SSHD* [2011] EWCA Civ 159 and *R (Daley-Murdock) v SSHD* [2011] EWCA Civ 161 challenged the Secretary of State's practice of refusing applications but not making a decision (to remove) against which it would be possible to appeal finally to resolve the matter. See also our briefings on Bail in Part 1 of this Bill.

Drafting error?

As we read the Bill a drafting error means that as it is currently drafted it will not be possible to bring an appeal against a decision to refuse entry to the UK on human rights grounds, and thus it will not be possible to bring such an appeal at all if the Bill comes into force. This is because the new section 82 imports the definition of a human rights claim that is contained in section113 of the Nationality Immigration and Asylum Act 2002. This reads

> *"human rights claim" means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful under*

section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights."

If you read that definition into new 82(1)(b) (together with the definition of a protection claim) :the only appeal right on human rights grounds is in-country.

This looked to us like a mistake given that other parts of the Bill, e.g. clause 11(4) inserting new s 84, clause 12 inserting new section 92 (see e.g. new 92(3)(a)(b)(i)) and new section 120 inserted by Schedule 8 paragraph 40 do appear to envisage out of country appeals. We have raised it with the Bill team who have confirmed that it is the Government's intention that the Bill provide for an appeal against a refusal of entry (e.g. to join a spouse, partner or parent) on human rights grounds. And that they are looking at it. This amendment gives them a chance to report back.

Right of appeal against denial of a certificate of entitlement to a right of abode

British and Commonwealth citizens denied a certificate of entitlement to a right to a right of abode under section 10 of the Nationality Immigration and Asylum Act 2013 currently have a right of appeal. Such a certificate is the way in which a British citizen proves that they are a British citizen in cases of dispute.

This right of appeal has been swept away along with others, but its removal will prevent British citizens from vindicating their right to recognition as such.

Sections 1 and 2 of the Immigration Act 1971 as amended provide

1 General principles

(1)All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person. [rest of section omitted]

2 Statement of right of abode in United Kingdom..

2(1)A person is under this Act to have the right of abode in the United Kingdom if— .

(a)he is a British citizen; or .

(b)he is a Commonwealth citizen who— .

(i)immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and .

(ii)has not ceased to be a Commonwealth citizen in the meanwhile. .

(2)In relation to Commonwealth citizens who have the right of abode in the United Kingdom by virtue of subsection (1)(b) above, this Act, except this section and section 5(2), shall apply as if they were British citizens; and in

this Act (except as aforesaid) "British citizen" shall be construed accordingly.

We concentrate here on British citizens. Commonwealth citizens with a right of abode are a finite group of people, all of whom had such a right before 1983. Many will by now be British citizens. Their position is very similar to that of a person with indefinite leave to remain although a right of abode is better than indefinite leave to remain in that it is in no way affected by prolonged absence from the UK.

It may come as a surprise to members of the Committee to learn that their right to live in, and to come and go into and from, the United Kingdom without let or hindrance (save for e.g. the long queues at passport control with which all will be familiar) is a creature of Statute and could, at least in theory be amended by parliament and new conditions imposed. The Right of Abode is a peculiar British construct, a legacy of Empire and the Commonwealth Immigrants Acts of the 1960s which mean that British nationals other than British citizens do not have a right of abode in the UK.

Fascinating as all that is, what concerns us here is that if there is a dispute about whether or not you are British (which might, for example, be relevant to your eligibility to stand as an MP) then a way to go about proving it is to apply for a certificate entitlement to the right of abode. If that is refused, you will want to be able to challenge it by an appeal to an independent tribunal.

As to the second amendment, such a challenge could not be brought on protection grounds. It would be clumsy and cumbersome and to be required to frame it as a human rights challenge, a problem that applies more generally under this bill and is discussed in the group of amendments below. The "not in accordance with the law" ground of appeal borrows from the existing section 84 and would be a sensible ground on

Would you really want your ability to prove that you are a British to be in the hands of a department which, according to its own appeals impact assessment, loses some 50% of its appeals? Or would you prefer to be able to vindicate your rights before an independent and impartial tribunal?

The www.gov.uk Passports office briefing on the right of abode is available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118569/immigration-right-of-abode.pdf

Rights of appeal on grounds of a breach of EU law

The Government has said that it intends that a person still have a right of appeal on EEA grounds but that this matter is dealt with in the EEA regulations (Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). ILPA agrees that this could be done for appeals under the regulations although the regulations would need amendment as at the moment they refer back to grounds of appeal under the Act. However, it is also the case that a person appealing on protection or human rights grounds may also allege a breach of their rights under EEA law (for example a person has a child who is an EEA national and this falls to be considered in examining the lawfulness of removal). It would appear to be outwith the scope of

the regulations to deal with such a matter there. The Minister should be asked to give a view on this.

"Not in accordance with the law".

Adrian Berry, Chair of ILPA, concluded his oral evidence saying

> *"…if you get rid of certificates of entitlement for British citizens, which is one of the rights of appeal that you have got rid of, I fail to see how that affects foreign nationals. If you get rid of the appeal rights of the people who wish to come to work and study on leave to enter and leave to remain, I fail to see how that deals with the problem of illegal entrants or overstayers. You have hit the wrong target...What you have taken away are the rights of the ordinary Joes, who play by the rules and seek leave to enter and leave to remain, on ordinary administrative law points when they receive duff decisions. It is an extraordinary reversal of priorities from the intention to the outcome. "*

He had made the point earlier

> *These are people who seek to take advantage of the immigration routes that are prescribed for migration into the UK. If they are right, and they are coming here for work or study, it is public policy that they should be allowed to enter the UK.*

The current section 84 provides as one of the grounds of appeal "not in accordance with the law". It has been suggested that "Administrative Review " will deal with "caseworking errors" but all that administrative review means, whatever process is packed around it, is the Home Office looking again at its own decision. It has every incentive to do that now, to avoid the time and expense of an appeal, but according to the appeal's impact assessment but is losing 50% of its appeals.

In any event, it is a question of doing things the easy way or a hard way. If a mistake has been made on, for example, my application to extend my leave as a Tier 2 worker, I could say

> "Your decision is not in accordance with the law, you have made a mistake on my application".

Or I could say

> "You are not allowing me to remain as a Tier 2 worker. I have lived in the UK for three years. My home and family are here and I do an important job in the NHS, in an area where the UK has severe shortages. Your decision interferes with my private life under Article 8 of the European Convention on Human Rights. For that decision to be lawful you must show that as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. You cannot show that it is necessary or proportionate because under your own immigration rules you got the decision wrong… Your rules say I should be allowed to stay. You made a mistake and therefore refused me. The interference with my private life is not in accordance with the law, it is

unlawful, therefore I should be allowed to stay. Every claim will be refracted through the prism of human rights."

The relative length of the two paragraphs may well correlate to the relative length of the two hearings. In the second, the assertion of an error is refracted, quite properly but at length, through the prism of human rights .

Most of those refused will have no access to legal aid. See ILPA's evidence to the Joint Committee on Human Rights at http://www.ilpa.org.uk/resources.php/21039/ilpa-evidence-to-the-joint-committee-on-human-rights-enquiry-br-into-the-implications-for-access-to-

Under Part 1 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012, legal aid remains available for applications and appeals under the Refugee Convention and based on Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment or punishment) of the European Convention on Human Rights and related provisions. It is no longer available for other human rights appeals, including appeals on the grounds of a breach of Article 8, private and family life.

Under the residence test proposed in the Ministry of Justice consultation *Transforming Legal Aid*, legal aid will not be available for judicial review, other than for persons seeking asylum, for persons who are not lawfully present in the UK and have clocked up 12 months lawful residence in the UK at some time in the past. There is proposed in the Ministry of Justice document *Transforming Legal Aid: next steps* to be an exception for persons seeking asylum and limited exceptions for some, but not all, refugee, some but not all trafficked persons and some but not all survivors of domestic violence. The protections for trafficked persons and for survivors of domestic violence do not extend to judicial review. They are very limited. Children are not protected from the residence test.

Under this Bill, all appeals must be brought as asylum or human rights appeals. A person who has a wrong decision and on but who does not have a right of appeal on protection or human rights grounds will have no option other than not to challenge the decision before any independent decision-maker or to bring a judicial review. The Committee, having grappled with these clauses, will understand the complexity of the cases involved. The issues at stake are whether a person can join or remain with a spouse, partner or child or Legal aid should be available for such appeals.

There is no legal aid for immigration appeals, including those involving Article 8. The proposed residence test would mean many people are not eligible for judicial review.