ILPA Briefing for debate on the Special Immigration Appeals (Procedure) (Amendment) Rules 2013

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on the many Government and other consultative and advisory groups.

The draft rules, together with an explanatory memorandum can be found at: http://www.legislation.gov.uk/ukdsi/2013/9780111104989/contents[1]

Section 15 of the Justice and Security Act 2013 ("the 2013 Act") inserted sections 2C and 2D into the 1997 Act. It extends the use of closed material procedures in immigration cases by extending the remit of the Special Immigration Appeals Commission (SIAC) to two types of cases which come before the ordinary courts as judicial reviews, not as appeals. It extends the remit of the Commission to review on judicial review principles of:

- Exclusion cases: where the Secretary of State orders the exclusion from the UK of a non-European Economic Area national wholly or partly on the ground that the person's exclusion is "*conducive to the public good*" and there is no right of appeal against this, and
- Cases where the Secretary of State has refused British citizenship, by naturalisation or registration. There is no right of appeal in such cases.

These provisions allow the Secretary of State to certify that certain exclusion, naturalisation and citizenship decisions were based on information that should not be made public for reasons of national security, international relations or otherwise in the public interest. Where the Secretary of State has certified such decisions, sections 2C and 2D permit the individuals affected by the decision to apply to the Special Immigration Appeals Commission to set aside the decisions.

ILPA opposed the inclusion of section 15 in the Justice and Security Act 2013 and our briefing can be found at http://www.ilpa.org.uk/pages/briefings-on-the-justice-and-security-bill-2012-.html

The Special Immigration Appeals Commission Act 1997 gives power to the Lord Chancellor to make procedure rules for SIAC including rules that may:

> "*(a) make provisions enabling proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal,*

[1] The Explanatory Memorandum states that changes were made as a result of comments received. The Bar Council was asked to comment on the draft rules and its comments can be found at http://www.barcouncil.org.uk/media/230626/bc_response_to_moj_consultation_on_siac_regulations_27092013.pdf

(b) make provision enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him,
(c) make provision about the functions in proceedings before the Commission of [a special advocate]*, and*
(d) make provision enabling the Commission to give the appellant a summary of any evidence taken in his absence."

ILPA concurs with the Constitution Committee's analysis and conclusion[2]:

> *"The scheme of the Bill…is that it will fall exclusively to the Secretary of State to decide whether or not it is "appropriate" to claim PII and to decide between the PII route and applying to the court to adopt the CMP route. There are no criteria against which "appropriateness" is to be assessed. It is not the public interest in the fair administration of justice that is served by such a scheme, but the Secretary of State's necessarily partisan interest as a party to litigation. We do not consider this to be constitutionally appropriate."*

In cases before the Special Immigration Appeals Commission, the closed material procedure may be adopted on far wider grounds than those which, under the 2013 Act, apply in the civil hearings before the higher courts. In the higher courts, the sole ground is national security. And before the courts closed material procedures cannot be used in judicial review proceedings at all. In the Special Immigration Appeals Commission, the procedure rules (rule 4) include a general duty to ensure

> "*…that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.*"

We are concerned about the transitional provisions in the new rules. As we understand it a case could be progressing in the high court as a judicial review and suddenly the Secretary of State could certify it and attempt to whisk it into the Commission. We should like to know whether this is intended to be done and if so in how many current cases? We should like to know whether any cases have been delayed in the High Court just so that this procedure could be applied to them. Our concerns go beyond the giving of notice to the question of the fairness of suddenly thrusting a case into closed material procedures at all.

The SIAC rules are applied to these cases but it is important not to lose sight of the bizarre scheme described by the SIAC rules.

There is no requirement for the Secretary of State first to consider making a claim for public interest immunity. At the time when the Special Advocate may communicate with the individual and/or his or her legal representative, neither the Special Advocate, the individual not the legal representative have had sight of the undisclosed evidence. Once the Special Advocate is aware of that evidence, there is no opportunity for communication on the undisclosed evidence, no opportunity for wholly confidential communication and in practice often no communication at all between the Special Advocate and the individual and/or his or

[2] 16 Constitution Committee, Third Report, 13 June 2012, Justice and Security Bill, http://www.publications.parliament.uk/pa/ld201213/ldselect/ldconst/18/1803.htm

her legal representative. The court's ability to do justice is fundamentally impaired by this procedure. The individual is denied knowledge of the case being made against him or her, and denied the opportunity to challenge the evidence on which that case is based. Allegations against him or her contained in that evidence or case are unknown to the individual. Hence, inadequacies in that evidence or case cannot be identified, and evidence that would undermine or answer allegations cannot be put forward.

We recall the comments of the Joint Committee on Human Rights:

> *"After listening to the evidence of the Special Advocates, we found it hard not to reach for well worn descriptions of it as 'Kafkaesque' or like the Star Chamber. The Special Advocates agreed when it was put to them that, in the light of the concerns they had raised, 'the public should be left in absolutely no doubt that what is happening…has absolutely nothing to do with the traditions of adversarial justice as we have come to understand them in the British legal system.' Indeed, we were left with the very strong feeling that this is a process which is not just offensive to the basic principles of adversarial justice in which lawyers are steeped, but it is very much against the basic notions of fair play as the lay public would understand them. "*[3]

The dangers of the broader reasons for using closed material procedures were highlighted by the then Nicholas Blake QC[4], himself a special advocate at that time, giving evidence to the Joint Committee on Human Rights:

> *"Certainly, there are closed issues on safety on return and some concerns as to whether the public interest test—because this is not national security; this is about foreign relations and things which governments prefer not to have revealed. ..whether those are really closed issues and whether there are no means by which the appellant's team can understand the context in which these assurances are being negotiated and debated and issues of concern without being excluded from that discussion. I think that is a relevant concern and a live issue in certain cases… If you have a ton of reasons why there should be disclosure and you have a feather against, the feather beats the ton because the statute says nothing which transgresses the line is permitted and that is the point."*[5]

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[3] Joint Committee on Human Rights, HL Paper 157, HC 394, 30 July 2007. See also Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights* (Sixteenth report): Annual Renewal of Control Orders Legislation 2010, HL Paper 64/HC 395, 26 February 2010.

[4] was subsequently the President of the Upper Tribunal Immigration and Asylum Chamber and is a high court judge.

[5] Oral evidence before the Joint Committee on Human Rights, 11 March 2006, published as part of the Committee's 19th report of session 2006 to 2007, http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/7031204.htm See also his evidence to the Eminent Jurist's Panel on Terrorism, Counter-terrorism and human rights, available at http://ejp.icj.org/IMG/Blake_transcript.pdf