ILPA proposed amendments for the Immigration Bill (Part 2) House of Lords Committee 3 March 2014 ff

The Immigration Law Practitioners' Association (ILPA) is a charity and 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 numerous government committees, including Home Office, and other consultative and advisory groups and has provided briefing on immigration Bills to parliamentarians of all parties and none since its inception.

ILPA's briefings to date on this bill can be read at http://www.ilpa.org.uk/pages/immigration-bill-2013.html . For House of Lords' Committee ILPA is providing a separate paper on proposed amendments for each part of the Bill. ILPA is happy to provide further briefing to amendments tabled. All references are to HL Bill 84.

PART 2 APPEALS ETC. (PRIORITY)

Clause 11 Right of Appeal to the First Tier Tribunal (PRIORITY)

V, W, X. AMENDMENT S ALREADY LAID

ILPA supports Baroness Smith of Basildon and Lord Rosser in opposing Clause 11's standing part of the Bill.

ILPA does not support the amendment in the name of Baroness Smith of Basildon and Lord Rosser at page 10 line which would require parliament's consent to the clause coming into force following provision of a report of the Chief Inspector of Borders and Immigration and the Secretary of State's confirmation of her view that decision-making is efficient, effective and fair or new Clause *Right of Appeal: Impact Assessment* in the same names because these do not offer the protection of primary legislation. They are better than nothing, but very far short of enough.

Purpose of opposition to clause 11
To maintain the current position whereby decisions can be appealed as unlawful, rather than restrict appeals to appeals on the grounds of human rights and asylum only.

Briefing
The Bill removes rights of appeal on any grounds other than asylum and human rights. It denies any independent review to anyone else who makes an immigration application. Many of those arguing to be allowed to stay on the grounds of family life, rather than as persons in need of international protection, are likely, because of cuts to legal aid, to be tackling these cases unaided and the proposals are put forward against a backdrop of inequality of arms. The Government says that those denied a right of appeal can purchase an "Administrative

Review" instead. 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. 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 immigration 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.

Among rights of appeal removed are rights to challenge a decision on the grounds that it is not in accordance with the law, to challenge a decision vitiated by discrimination on the grounds of race and for British citizens to challenge a refusal to give them a document (Certificate of entitlement to a right of abode) that would confirm their citizenship.

The Joint Committee on Human Rights, in its legislative scrutiny report on the Bill, HL Paper 102, HC 395, has stated "…limiting rights of appeal to the extent that they are restricted in the Bill constitutes a serious threat to the practical ability to access the legal system to challenge unlawful immigration and asylum decisions" citing the broader context, including the loss of legal aid (paragraph 38). It has expressed the view that the Tribunal, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new power on appeal (paragraph 46).

Clause 12 Place from which appeal may be brought or continued

Y. PROPOSED AMENDMENT (PRIORITY)

Clause 12, page 11, line13, leave out lines 13 to 33

Purpose
To leave out subsection (3), the provision whereby a person facing deportation could be removed before their appeal was finally determined (either by a certificate's being issued before the appeal started or to stop an appeal in progress), including on the grounds that removal would not cause "serious irreversible harm". To delete from clause 12 new section 94A that it is proposed by the clause to insert into the Nationality Immigration and Asylum Act 2002.

Briefing
The section would allow the Secretary of State to certify the claim of a person facing deportation so that although the person had an outstanding human rights claim s/he could be. A certificate could be issued on the grounds that the person would not "before the appeals process is exhausted" suffer serious irreversible harm.

See the Joint Committee on Human Rights legislative Scrutiny Report HL Paper 102, HC 935 at paragraphs 48 to 53. The Committee states:

51. We asked the Government whether judicial review will provide a practical and effective means of challenging the Secretary of State's certification that an appeal can be heard out of-country, bearing in mind the proposed changes to the availability of legal aid, such as the proposed residence test, and the proposed changes to judicial review which will also restrict its availability.

52. The Government replied that it believes that judicial review will provide a practical and effective means of challenging the Secretary of State's certificate. It says that the cases affected by the new certification power will primarily be human rights claims made on the basis of Article 8 ECHR. The proposed residence test will not affect the effectiveness of judicial review as a means of challenging certification, because "it is already the case that individuals seeking to appeal on the basis of Article 8 are already unable in practice to access civil legal aid." …

53. ***We are not satisfied with the Government's reliance on the continued availability of judicial review to challenge the Secretary of State's certification that a human rights appeal can be heard out of country, having regard to the unavailability of civil legal aid to bring such a claim and the proposed reforms of judicial review.***

Z. PROPOSED NEW CLAUSE

After Clause 12

Amendment of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004

(1)Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 is amended as follows

(a) In paragraph 3, leave out subparagraph (2)
(b) In paragraph 8 leave out subparagraph (2)
(c) In paragraph 12 leave out subparagraph (2)

Purpose

To provide that the Secretary of State may not deem a country to be safe regardless of whether it is safe or not.

Briefing

All the subparagraphs to be deleted are in the same terms, viz

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

(a)where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
(b) from which a person will not be sent to another State in contravention of his Convention rights, and.
(c) from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention.

The question is the same in all three paragraphs but relates to removal to different countries. It is :

> ...for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed—.
>
> (a)from the United Kingdom, and.
>
> (b)to a State of which he is not a national or citizen..

Thus the provisions that the amendment would delete are provisions that deem a country to be safe, regardless of whether it is or not. The Court of Justice of the European Union has criticised deeming a country to be safe in NS v UK C-411/10 and C-493/10 (see http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0411:EN:HTML)

The court held:

> *2. European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.*
>
> *Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.*
>
> *Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.*
>
> *The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.*

Therefore the amendment removes "deemed safety" provisions from UK law.

CLAUSE 13 Review of certain deportation decisions by the Special Immigration Appeals Commission

AA. PROPOSED NOTICE (PRIORITY)

ILPA proposes that notice be given that Clause 13 should not stand part of the Bill.

Purpose
To retain the current position whereby challenges to deportation decisions certified as raising matters of national security are heard by way of judicial review in the High Court rather than by way of review by the Special Immigration Appeals Commission where, unlike judicial reviews, a closed material procedure could be used.

Briefing
Appeals in cases before the Special Immigration Appeals Commission are preserved but expressly limited to judicial review principles. The Explanatory Note makes clear that this is to avoid their being the subject of judicial review:

> *"It is more appropriate for judicial reviews in national security cases to be conducted by SIAC than in open court."*

Not so. There are no closed material procedures on judicial review. The starting point is to keep cases involving national security out of the High Court, where any judicial review would be heard in open court.

Giving a person a right of appeal rather than an opportunity to challenge the decision by way of judicial review would normally give them a wider challenge. This is because judicial review is a procedural remedy, which looks at the way in which a decision is taken and not at the substantive outcome whereas an appeal on merits of the decision looks at facts and law and at the substantive outcome.

By clause 13 that benefit of judicial review is removed, because the appeal before the tribunal is limited to principles that would be applied in judicial review proceedings. Before the Special Immigration Appeals Commission, the adoption of a closed material procedure is required (not allowed, but required) not only "in the interests of national security" but also, "in the interests of the relationship between the United Kingdom and another country." In addition the Secretary of State can certify that the information on which the decision was based should not be made public because this is "otherwise in the public interest." These additional reasons for using a closed material procedure are not reasons that can justify the interference with a fair trial that a closed material procedure represents.

CLAUSE 14 Article 8 of the ECHR: public interest considerations

BB. PROPOSED AMENDMENT

Clause 14 Page 12, line 26, leave out lines 29-31

Purpose
Omits the definition of the public interest question in subsection 117A

Briefing

The definition of the "public interest question" in section 117A(3) seems to be about weighing the private right against the public interest which is properly the task of the judiciary.

This is also a consequential amendment, in that in what follows we proposed removing those subsections that refer to the public interest question.

CC PROPOSED AMENDMENT

Clause 14, page 12, line 37 omit "enter or"

Purpose
To confine the statement that it is in the public interest that persons can speak English to cases where the person seeks leave to remain in the UK rather than to enter. A probing amendment.

Briefing
This amendment provides an opportunity to debate the merits of requiring persons to speak English before they come to the UK. English language tests may be expensive and inaccessible overseas. Persons may learn much more quickly in an English speaking country, surrounded by English speakers.

DD PROPOSED AMENDMENT

Clause 14, page 13, line 1 leave out "are financially independent" and insert "can maintain and support themselves without recourse to public funds as defined in rules laid before parliament under section 3(2) of the immigration Act 1971 (C.77)"

Purpose
To change the formulation in this clause so that instead of providing that it is in the public interest that persons are financially independent it provides that it is in the public interest that persons can maintain and support themselves without recourse to public funds, as defined in the immigration rules. A probing amendment.

Briefing
Provides an opportunity to debate the family immigration rules, and in particular the income threshold that must be met before a person can sponsor a spouse or partner to come to the United Kingdom. The income thresholds in the 9 July 2012 Statement of Changes in Immigration Rules HC 194 replaced the old test of being able to maintain and support oneself without recourse to public funds, which the courts had held to mean having access to the same funds and support as a person on income support would have.

The court in *MM v SSHD* [2013] EWHC 1900 found the income threshold to be unlawful in the particular cases before it, those of British citizen and refugee spouses and partners. Since then the Home Office has "paused" decision-making in cases that turn only on the income threshold and involve British citizen and refugee spouses and partners. Those people are waiting and have been waiting since mid-July. There is a risk of another backlog and it would be useful to hear about how that is to be avoided and when decision-making will start again.

There is of course scope for a wider debate on whether it is indeed always in the public interest that persons are financially independent etc. – for example a carer may not be, but their coming to the UK to care may save the UK State tens of thousands. This illustrates the dangers of the Clause 14 approach.

EE. PROPOSED AMENDMENT

Clause 14, page 13, line 1, leave out lines 5 to 11.

Purpose
Omits subsections (4) and (5) of new 117B (Article 8: public interest considerations application in all cases) which prescribe the weight to be given to private life with a partner.

Briefing
The subsections deleted involve the Secretary of State in defining, not the public interest, but the extent of the private life. The determination of an Article 8 claim is a fact sensitive exercise, there is no one size fits all rule. This can be seen by considering possible scenarios. What if a person does not know their situation is precarious- for example someone brought to the UK as a domestic worker who was not told her employer had not kept her paperwork up to date? Or someone who has lived most of their life in the UK not realising that their country of origin's becoming independent of the British Empire while they were in the UK has meant that they are no longer entitled to a British passport – a far from uncommon scenario amongst, for example, London-based communities originating from the Caribbean. What if the British partner is too ill to travel, or is caring for an elderly parent? These scenarios illustrate that the relative weight to be accorded to family life and the public interest will vary from case to case.

It is ILPA's understanding, although this could usefully be clarified, that it is intended that "precarious" should mean not only persons with no leave or with temporary admission but also persons with limited leave, including those who, if they chose to extend their leave, could eventually settle in the UK. Many such people will qualify for leave as a spouse or partner under the rules but not all – for example where the requirements of the rules as to English language competence, or cannot be met.

FF, GG, HH, II, JJ AMENDMENTS ALREADY LAID

ILPA supports the amendments to page 12 line 25, page 13 lines 15, 34 and 35 and page 14 to omit lines 3 to 7 in the name of Baroness Lister of Burtersett and Lord Roberts of Llandudno

Purpose
The amendment to page 12 line 25 requires the courts and tribunals considering the public interest first to establish the interests of any child affected by the decision subject to appeal before going on to consider any other public interest factors.

The amendments to page 13 line 15 and page 13 line 34, with the consequential amendment to page 14 remove the provision that precludes consideration of a relationship with a child who is not a British citizen or has not been in the UK for seven years. The definition of a qualifying child limits the term to British citizens or those who have been in the UK for

seven years. These are the definition of a qualifying child. This does not allow the circumstances of the child to be taken into account. ILPA supports these amendments.

The amendment to page 13 line 45 changes the test of the effect of a person's removal on a child (any child not just a "qualifying child" given the amendments above), from removal being barred where the effect would be "unduly harsh" to removal being barred where the effect would be disproportionate.

See further the briefing from the Refugee Children's consortium . ILPA is a member of the consortium.

KK PROPOSED AMENDMENT

Clause 14, page 13, line 23 leave out lines 23 to 43 and insert
"( ) The promotion of the best interests of children is in the public interest"

Purpose
Leaves out subsections 117C (3) to (7) The Bill already provides (in 117C(1) that the deportation of foreign criminals is in the public interest. The amendment would ensure that the Bill recognised that the promotion of the best interests of the child is not simply a matter of the rights to be interfered with in the public interest, but is itself in the public interest. Provision that attempt to quantify the strength of the private right to be weighed against the public interest are omitted as inimical to the fact-sensitive appraisal required under Article 8 of the European Convention on Human Rights.

Briefing
The UK has ratified the UN Convention on the Rights of the Child and its own Children Act 1989 makes the best interests of the child a primary consideration in decisions concerning children. The Home Office in carrying out its immigration functions is under a duty to safeguard and promote the welfare of children. All these are indications that the best interests of the child are a matter of public interest.

OTHER RELEVANT AMENDMENTS

ILPA proposes amendments to Schedule 9 to

- To retain section 87 of the Nationality Immigration and Asylum Act 2002 which gives a Tribunal judge power to make directions following a successful appeal and in particular to retain its application to appeals under s 40 of the British Nationality Act 1981 where it is used by an immigration judge hearing an appeal against deprivation of nationality to direct following a successful appeal that an order depriving a person of his/her British nationality is to be treated as having had no effect.
- To retain s 86(3) of the Nationality, Immigration and Asylum Act 2002 which states that the Tribunal must allow an appeal insofar as it thinks that a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules) and that a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently (**PRIORITY**)
- To remove the amendments effected by section 54 of the Crime and Courts Act 2013, the precursor to s 12 of this Act, which allows a person to be removed before

or in the course of their appeal where the Secretary of State certifies that this would not breach their human rights. The effect of the amendment would be that where a decision to make a deportation order was certified as having been made on national security grounds, the person may appeal to the Special Immigration Appeals Commission

- To remove the requirement that if P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them then P must serve a statement of additional reasons for remaining in the UK as soon as reasonably practical as this is not a reasonable burden to impose on a person likely to be unrepresented. (**PRIORITY)**
- To repeal section 55 of the Immigration Asylum and Nationality Act 2006 which provides for a certificate on national security grounds to be considered before deliberations on a substantive asylum appeal.

ILPA proposes an amendment to Clause 68 Commencement to provide that legal aid must be restored for matters within the Bill before the provisions relating to those matters can come into force. This includes the appeals provisions. (**PRIORITY)**

Separate briefing will be provided.

For further information please get in touch with Alison Harvey, Legal Director, alison.harvey@ilpa.org.uk, 0207 251 8383