ILPA Briefing for the Immigration Bill (Part 2)
House of Lords Report 1 April 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 . ILPA is happy to comment on or assist with ideas for other amendments and will provide further briefing on the final selection of amendments tabled. All references are to HL Bill 96. We include briefings to all amendments printed at the time of writing. Inclusion does not imply that ILPA supports the amendment; this should be clear from the briefing.

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PART 2 APPEALS

Clause 15 Right of Appeal to the Tribunal

AMENDMENT 10 Baroness Berridge, Lord Avebury

Purpose
To removes provisions that require the Secretary of State to give consent to a new matter's being raised before the Tribunal. Restore the authority of the Tribunal over its own proceedings so that it can hear all matters within its jurisdiction where it is satisfied that there was good reasons for not raising the matter before the Secretary of State.

Briefing
ILPA opposes Clause 15's standing part of the Bill but welcomes this probing amendment which is most relevant to that debate. The Joint Committee on Human Rights said

> *In our view, the Tribunal itself, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new matter raised on an appeal. We would expect the Tribunal, in the exercise of its inherent power to prevent abuse of its own process, to permit a new matter to be raised only if there were good reasons for not raising the matter before the Secretary of State.*
>
> *47. In view of the admitted novelty of new s. 85(5) and (6) of the Nationality, Immigration and Asylum Act 2002, inserted by clause 11 of the Bill, we recommend that the*

> *Government amends the Bill to achieve its purpose in a way which does not appear to make the scope of the tribunal's jurisdiction depend on the consent of one of the parties to the appeal before it, but leaves to the Tribunal the question of whether or not it may consider a new matter.*

The Lords Committee on the Constitution said

> *…concern remains about whether clause 11(5) is compatible with the right of access to court and the rule of law.[4] Given that the Secretary of State would be a party to any relevant appeal, there is also a concern as regards equality of arms and common law principles of natural justice.*
>
> *7. The phrase "unless the Secretary of State has given … consent" in clause 11(5) suggests that in the absence of such consent it would be unlawful for the Tribunal to consider the matter in question. Yet the purpose of the clause is not to grant to the Secretary of State a veto over matters that may be considered by the Tribunal, but merely to ensure that the Tribunal does not consider grounds or reasons which have not first been considered by the Secretary of State. On this view, clause 11(5) as currently drafted appears to go further than is required in order to meet the Government's stated purpose.*

The amendment does not any efficiency. It simply shifts the power from the tribunal judge to the Secretary of State. If a completely new matter is sprung on the Secretary of State it is always open to her to ask for an adjournment and if she does not, because of the pressure on Home Office Presenting Officers not to be the cause of adjournments etc., then she must take the consequences.

There is no evidence that the tribunal is treating Secretary of State unfairly or that the current process is inefficient. In some cases the new ground may be seen by Tribunal as unlikely to make any difference and the Tribunal will want to deal with whole case. There are two scenarios in which as case might currently go ahead on the day

1. The tribunal judge considers the matter simple and one that can be dealt with on the day and the Secretary of State does not ask for an adjournment or object
2. The tribunal judge considers the matter can be dealt with on the day and although the Secretary of State objects she has delayed or otherwise acted unreasonably in the case and delay is prejudicing the appellant.

In the Upper Tribunal, rule 17 of the Tribunal Procedure Rules prevents the Secretary of State from pulling a stop to an appeal by withdrawing her decision. There is no equivalent in the First tier Tribunal (yet). The independent Tribunal Procedure Committee has consulted on having such a rule in the First-tier Tribunal [1] and the Government amendment has all the hallmarks of a pre-emptive strike.

The Committee said

> *The Rule also allows the Tribunal to treat an appeal as withdrawn if the Respondent withdraws the decision to which the appeal relates. This is a change from the AIT rules, which require an appeal to be treated as withdrawn if the decision is withdrawn by the*

[1] See notes on Rule 17 at http://www.justice.gov.uk/downloads/about/moj/advisory-groups/tpc-iac-rules-2013-consultation.pdf

Respondent. The purpose of the change is to allow the Tribunal to continue to resolve an appeal where the original decision has been withdrawn, but has been replaced with one that the Appellant wishes to challenge on similar grounds to the existing appeal. In some cases, continuing to resolve the existing appeal will be more efficient for both parties and the tribunal than requiring a fresh appeal of the new decision.

At the moment the Secretary of State exercises considerable control over proceedings. ILPA said in its response to the consultation

ILPA supports the amendment of the withdrawal provisions so as to give the Tribunal discretion to continue to hear the appeal where the respondent withdraws her case. Rule 17(2) of the Asylum and Immigration Tribunal Rules which automatically withdraws the appeal in such circumstances is an unfair provision which gives the respondent control over the appeal. She can at any time prevent an appeal proceeding simply by withdrawing the decision under consideration. It is questionable whether this rule is intra vires, although the Court of Appeal in Chichvarkin [2011] EWCA Civ 91 dismissed, obiter and without detailed argument, the argument that it is ultra vires.

For example, the respondent can withdraw the decision if she wants to gather more evidence in support of her decision. This is a matter that would otherwise fall to be dealt with by an application for an adjournment. In R (Nikolay Glushkov) v (1) SSHD, (2) Asylum and Immigration Tribunal [2008] EWHC 2290 (Admin), Collins J made clear (in a passage later approved in Chichvarkin) that:

> "*It is clear beyond doubt, in my view, that the Secretary of State must not use the withdrawal power as a tactical exercise to avoid having to apply for an adjournment. She must only use it if she is genuinely of the view that she might change her mind on reconsidering the material that is put before her. It would be a wrongful exercise, and unfair to an appellant, if she were simply to use this power because she wanted more time to deal with the material that was put forward but had no intention of changing her mind as a result of it. I do not understand that the contrary would have been argued on behalf of the Secretary of State…*"
> (paragraph 18)

The Tribunal's rules should enable it to take appropriate measures to avoid the abuse of its own processes. Rule 17(2) of the Asylum and Immigration Tribunal Rules made it possible for the respondent to withdraw a decision for the illegitimate purpose of avoiding the need to apply for an adjournment. While she would be amenable to judicial review if she did so (if the appellant could secure funding to bring a judicial review, something that is likely to become more difficult if the Government implements the proposals in the Transforming Legal Aid consultation paper), the Tribunal's rules should enable it to prevent the respondent unilaterally terminating an appeal in such circumstances.

The respondent can withdraw the decision if she wants to put forward different reasons for her decision rather than seeking the leave of the Tribunal to argue these. She will often withdraw a decision stating that she wishes to 'reconsider' the case only to return, usually several months later, with the same decision, either for the same or broadly similar reasons, or with additional reasons. This wastes the time and money of the appellant and the Tribunal and gives the respondent unilateral control over the timing of the appeal. In one recent case, she withdrew the decision to amend the removal directions in a disputed nationality case only to issue a new decision several months later without having amended the removal directions and having added one or two paragraphs to the decision letter.

Rule 17(2) of the Asylum and Immigration Tribunal Rules also means that the respondent is the only party who is not subject to the obligation to decide appeals "as quickly as possible" Rules and the presumption against adjourning: if refused an adjournment, she can simply withdraw the decision. In all other Chambers of the First-tier Tribunal, a party may withdraw its case on appeal, but there is no provision for the appeal to be treated as thereby withdrawn.

(For what happens in the Upper Tribunal (Immigration and Asylum Chamber) which operates the procedure that the Tribunal Procedure Committee is proposing for First-tier Tribunal see the recent case of *SM (withdrawal of appealed decision: effect) Pakistan* [2014] UKUT 64 (IAC) (11 February 2014) http://www.bailii.org/uk/cases/UKUT/IAC/2014/[2014]_UKUT_64_iac.html)

None of this was mentioned in the very bland explanation of the clause given by the Lord Wallace of Tankerness at Committee state where all he had to say was that the change restores the role of primary decision-maker to the Secretary of State (col 1191).

If the clause becomes law and the Secretary of State does refuse consent to the Tribunal hearing a case, consider the possibilities:

i) I raise a new matter. The Secretary of State does not consent to the Tribunal's hearing it. The Tribunal can adjourn the appeal for the Secretary of State to consider the new matter or reconsider whether to consent and can adjourn during any judicial review of the failure/refusal to consent (just as the Tribunal can adjourn for any good reason).

ii) The Secretary of State considers my case. If she refuses it and does not certify it (for example as clearly unfounded) then section 85(1) of the Nationality Immigration and Asylum Act 2002 allows a new right of appeal that arises before a pending appeal is determined to be considered with it. As long as the initial appeal has not been heard, the matters can be listed together. So, either the initial appeal must wait for the second one to catch up, or there will be two appeals.

Thus there is no efficiency when the Secretary of State decides whether the matter should proceed at a hearing as compared to when the Secretary of State decides.

AMENDMENT 11 STAND PART Baroness Smith of Basildon, Lord Pannick, the Earl of Clancarty, The Lord Bishop of Leicester

Purpose

To remove Clause 15 from the Bill and thus retain rights and grounds of appeal as now and to ensure that the Tribunal, not the Secretary of State, remains the arbiter of whether it will hear a matter raised before it.

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. It hits hardest those lawfully in the UK making an in-time, wholly lawful, application to extend or

vary their leave, who receive a decision that is wrong. In the words of ILPA's chair Adrian Berry, giving evidence before the Public Bill Committee:

> *"…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."*[2]

For the avoidance of doubt we record that we agree with Lord Wallace of Tankerness response on Schedule 9 that leave will continue on the same terms and conditions through the period for appeal and while any appeal, including onward appeals, is pending although not, as now, while any judicial review is pending. We had misread the schedule and he has corrected us. However, if one can only appeal to the tribunal against a refusal of a protection or human rights claim or against revocation of protection status what of the student or worker who has made no protection or human rights claim at all? Have they no right of appeal at all, however erroneous the decision? This appears to be what was said by the Minister, Lord Wallace of Tankerness, in Committee

> *"…clause 11(2) reduces to four the number of decisions that can be appealed…the only y grounds on which an appeal can be brought reflect the decision under challenge(cols 1190 to 1191)."*

If that is correct then presumably they will have to make a fresh application out of time and because they make the application when they have no leave their leave will not continue while that application is dealt with, either at first instance or on appeal. Focus to date has been very much on the reduction of grounds of appeal, but the Bill also limits rights of appeal. A person can appeal against rejection of protection or a human rights claim, or where protection status is revoked.

- **Will a student or a worker only get a right of appeal if they phrase their initial application in terms of human rights (which they are, as a matter of law, perfectly well able to do in many cases)?**
- **How will they know that they need to do this?**
- **Will all family cases be treated as applications made on human rights grounds even if they mention only the immigration rules?**
- **Will any other cases automatically be treated as applications on human rights grounds?**

In 2006 the Labour government proposed no more in country appeals save on human rights and asylum grounds. It was faced with vigorous opposition including calls to respect for the rule of law but ultimately what changed its mind, while the bill was passing through the House of Lords, was the realisation that the change would be a massive own goal for any government. That is still the case

[2] See evidence session of 29 October 2013, at http://www.publications.parliament.uk/pa/cm201314/cmpublic/immigration/131029/pm/131029s01.htm

All ILPA's briefings on the bill that became the Immigration, Asylum and Nationality Bill 2006 can be read at http://www.ilpa.org.uk/pages/briefings-on-the-immigration-asylum-and-nationality-bill-2005.html

Baroness Anelay set out the case for retaining appeal rights

> *… The disruption they face if they are forced to leave the United Kingdom could cause administrative problems and give rise to successful human rights applications in the courts and to compensation claims….*
>
> *I turn specifically to the question of the impact of the changes on students. … I give as an example a Chinese PhD student who is wrongly refused leave to extend his stay by, let us say, three months to complete his work or attend a graduation ceremony. He would have to go home to Shanghai and then institute appeal proceedings from there. Where is the sense in that?*[3]
>
> *…The Government's argument that as other countries do not offer such rights of appeal, there is no problem for us in abolishing our own does not wash with me. If others choose to adopt a flawed system, that is their choice. We do not have to follow suit. There is a danger that if one takes away students' right of appeal when initial decisions are often flawed, the consequence may be that the quality of those initial decisions will become even more flawed and arbitrary. If no appeal is permitted, there is the clear danger that the person making that decision will be less likely to think that it is a priority to get the decision right.*

On 7 February 2006, on Report, Baroness Ashton of Upholland moved Amendment No.[4] 7 Feb 2006 : Column 522:

> ***Baroness Ashton*** *This group of amendments has been proposed in response to concerns and suggestions raised during Grand Committee in your Lordships' House and elsewhere. I am grateful to all noble Lords and to members of different stakeholder groups who have made representations to me. As noble Lords will see, these amendments will confirm in-country rights of appeal against variation decisions, as is the case under existing legislation.*
> *…*
>
> *Under these provisions, appellants will be able to contest variation and removal decisions at the same appeal, while continuing to remain in the UK with continuing leave. …First, the existing right of appeal against decisions to refuse to vary and to curtail leave will be retained by virtue of Amendment No. 1. …Amendments Nos. 4 and 5 are consequential to the package of provisions that we have introduced to ensure that in variation, curtailment and revocation cases there should, so far as is possible, be a single in-country right of appeal at which the enforcement decision can also be considered. As a result of the retention of variation and curtailment appeals by virtue of Amendment No. 1, it is no longer necessary to allow people to raise previous decisions as grounds for appealing against a removal decision.*
>
> *..Amendments Nos. 12 and 13 provide continuing leave for people who are bringing an appeal against refusal to vary, curtailment and revocation of indefinite leave. This means*

[3] 6 Dec 2005 : Column 522
[4] 7 February 2006, cols 719-722
http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo060207/text/60207-06.htm

that people will be able to exercise an in-country right of appeal and benefit from continuing leave during that appeal. …Amendment No. 13 is designed to ensure that the continuation of leave provisions provides an appropriate period of extended leave for applicants who are challenging decisions to curtail limited leave or to revoke indefinite leave to remain. …Clause 13 would ensure that someone who has complied with the terms of their leave would not be liable to prosecution under Section 24(1)(b)(i) of the Immigration Act 1971 as an overstayer. It was introduced in response to concerns that we were enforcing illegality on people by virtue of Clauses 1, 3 and 11. However, the amendments which have been tabled at this stage will provide for continuation of leave during any appeal against a variation, curtailment or revocation decision and, therefore, Clause 13 is no longer relevant.

…Finally, Amendment No. 42 creates a new power to make a decision to remove someone from the United Kingdom. The intention behind the amendment is to allow the enforcement decision to be made at the same time as the decision to revoke, curtail or refuse to vary leave. …During the single appeal against both decisions, appellants will have continuing leave and may remain in the United Kingdom. I hope noble Lords will welcome this group of amendments. I beg to move.

Baroness Anelay of St Johns: *My Lords, I welcome these amendments. They achieve the Government's original aim of a one-stop appeal process. They also meet the concerns we on these Benches expressed in Grand Committee that the appeal should be in-country …*
Lord Dholakia: *My Lords, I too thank the Minister. She has obviously listened to the arguments we put forward at Second Reading and in Committee.*

- **What of the person who has applied under the immigration rules on family life and on human rights grounds and brings an appeal on human rights grounds? What happens if they win?**
- **Do they have all the rights and entitlement of a spouse and are on a five year route to settlement, or do they instead get discretionary leave outside the rules and find themselves on a ten year route to settlement?**
- **If the answer is "it depends", on what does it depend?**

If a person wins their appeal but does not get leave on the same terms and conditions as they would have done had they succeeded under the rules, they may wish to bring a judicial review of the original decision or administrative review in an effort to get that leave?

The Secretary of State's proposal that she must consent to a new matter that is raised being heard by the Tribunal does not streamline any procedures or save time. It simply moves the power to decide whether the matter needs to go back to the Secretary of State or can be dealt with at the hearing from the Tribunal judge to the Secretary of State. It is open to abuse by the Secretary of State who could use it to manipulate which cases go ahead when. It is opposed by the Joint Committee on Human Rights (paragraph 46 of its report on the Bill). Sere our briefing to amendment 10.

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 clause cannot be reconciled with the rule of law or common law principles of fairness.

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. Similarly for those of modest means but who have too much money to qualify for legal aid, for example students. and the proposals are put forward against a backdrop of inequality of arms as the Joint Committee on Human Rights highlighted in its report (paragraph 38). It said

> *39.* ***We are concerned that the Bill's significant limitation of appeal rights against immigration and asylum decisions is not compatible with the common law right of access to a court or tribunal in relation to unlawful immigration decisions, and the right to an effective remedy, particularly in light of the following:***
>
> - ***the relatively high proportion of such appeals which currently succeed due to the well-documented shortcomings in the quality of decision-making by the UK Border Agency;***
> - ***the importance of appeals as a means of enforcing the children duty in s. 55 of the Borders, Citizenship and Immigration Act 2009;***
> - ***the lack of information about the proposed new system of administrative review; and***
> - ***the likely cumulative impact of proposed changes to legal aid and judicial review on the practical effectiveness of that remedy for those seeking to challenge the lawfulness of immigration decisions on grounds other than those covered by the surviving rights of appeal.***
>
> ***In our view, when viewed in this broader context, 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.***

Lord Wallace of Tankerness's mantra throughout the Committee stage debate was that the new clause would be "less costly" and streamlined (col 1190ff). It will not be streamlined. It is a question of doing things the easy way or a hard way. Every claim that proceeds to appeal will be refracted through the prism of human rights. Meanwhile a person may ask for an administrative review at the same time.

- **What will happen if a person applies for both administrative review and an appeal? Which will be stayed behind the other?**

This is also to ignore the costs to other departments, such as the courts, but also to ignore the costs of allowing UK Visas and Immigration to carry on unchecked with the behaviour that led the Home Secretary to abolish the UK Border Agency, which she said would take years to address. The Agency she described as "closed, secretive and defensive" has been subject to scrutiny by the courts, in case after case and yet remains the organisation of which she said

> *… the performance of what remains of UKBA is still not good enough. The agency 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, ..."[5]

Lord Wallace claimed that appeals were lodged to correct "simple caseworking errors (col 1190ff). It would be taking application fees under false pretences if when the UK border Agency/UK Visas and Immigration spotted a "simple caseworking error" it did not correct it at once. Yet, as detailed above, this is not happening pre appeal. In 2006 it was claimed that is was all right to get rid of rights of appeal because points-based cases were simply objective decisions with no element of subjectivity. That was not true then, when decisions often depended on whether evidence was accepted or believed to be false, a decision which very often requires a subjective judgement. It is not true now when the Government has reintroduced "genuineness" tests for everyone from students to entrepreneurs as well as interviews to make a subjective assessment of this.

Lord Wallace said that applicants would have errors considered "faster and more cheaply" (col 1191). But that describes only part of what an appellant wants. An appellant wants justice: a decision that is correct, that is fair. These decisions affect where people work, where they study, where they live. Without justice, they are no bargain.

It is in any event not accurate to suggest that a decision can generate multiple appeals and that the Secretary of State is powerless against this. There are powers to certify an appeal as clearly unfounded, in which case removal can proceed and any appeal must be pursued from outside the UK. There are powers to certify a matter as one which could and should have been raised at an earlier stage, with the same effect: no in-country right of appeal. The notion that the system presents "too many opportunities to frustrate removal" as Lord Wallace suggested (col 1194) is not accurate. If people are still in the UK years after their appeals have finally concluded, that is because the former UK Border Agency has taken no steps to remove them. If during that period they develop new ties to the UK, this will be a new matter, not stringing out an old one. It will also be unaffected by the Bill.

The clause is astonishing when viewed next to the Criminal Justice and Courts Bill currently before the House of Commons. It is somewhat bewildering for ILPA to be responding to a bill that aims to reduce the number of applications for judicial review[6] at the same time as working on a bill that will increase substantially the number of such applications. It is said in the Appeals Impact Assessment produced for this Bill Immigration Bill currently before parliament that displacement onto judicial review resulting from the abolition of appeal rights in immigration cases cannot be quantified and therefore costs cannot be estimated. 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. This appears to be an under estimate, since the calculation that produces it takes as its starting point the number of appeals allowed by the Immigration and Asylum Chamber of the First-tier Tribunal, rather than the total number of appeals started. Even with the erroneous basis of calculation, we should be looking at an extraordinary increase. In 2011 there were 8,711 immigration and asylum judicial reviews[7] *in toto* 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

[5] Hansard HC Deb 6 Mar 2013 : Column 1500.

[6] See the Ministerial foreword to *Judicial review – Proposals for further reform, the Government response.* Ministry of Justice, Cm 8811, February 2014.

[7] See *Unpacking JR statistics*, V. Bondy and M. Sunkin 30.4.13 for the Public Law Project, available at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf

damages may be claimed. Even as the Lord Chancellor protests that there are too many judicial reviews[8] the Home Office moves to increase the number.

After Clause 15

GOVERNMENT AMENDMENT 12 NEW CLAUSE *Report by Chief Inspector on Administrative Review* Lord Taylor of Holbeach

Purpose
To require the Secretary of State to ask the independent Chief Inspector of Borders and Immigration on the first year of administrative review and to lay that report before parliament.

AMENDMENT13 NEW CLAUSE *Right of appeal to the first-tier tribunal commencement* Baroness Smith of Basildon, Lord Rosser and Lord Stevenson of Balmacara

Purpose
Require parliament's consent to the clause coming into force following provision of a report of the independent Chief Inspector of Borders and Immigration on decision-making in entry clearance and managed migration cases and the Secretary of State's confirmation of her view that decision-making is efficient, effective and fair.

AMENDMENT 14 NEW CLAUSE *Administrative Review: rules* Baroness Hamwee Lord Avebury

Purpose
To require rules on administrative review to be laid before parliament and to require the Chief Inspector to report on them after the first year of operation. The latter reflects an undertaking the Minister has already given (col 1358).

Briefing
Of the three amendments ILPA prefers that of Lady Smith of Basildon, Amendment 14, because, unlike the other two, it does not require parliament to swallow the report whatever it says but would allow parliament to vote not to commence Clause 15 if a report were not satisfactory. None of them are any substitute for omitting from the Bill an ill-conceived clause.

The irony of amendments 12 and 14 does not escape us. Not for parliament a report by the Home Secretary. Oh no, the report must be independent. Yet a review from within the department is perfectly good enough for the person who faces a decision that will affect their future. Dress administrative review up as you will, it is a decision by the very same body you want someone to scrutinise and to keep up to the mark.

[8] *Judicial Review: proposals for further reform*, Ministry of Justice 6 September 2013.

Amendments 12 and 14 do no more than Lord Wallace promised at Committee stage – ask the Chief Inspector commissioned within 12 months (col 1196 and col 1358).

Baroness Hamwee suggested in Committee (col 1351) that

> *I suppose we could really know if administrative review is working well only if it were possible to run it as a sort of shadow to the appeals process – but we cannot, to my mind, run two systems in parallel*

Lord Wallace of Tankerness replied

> *She quite properly said that there might be certain attractions in having two systems running in parallel although I suspect that would be a bureaucratic nightmare and would not properly serve the interests of anyone, least of all the applicants.* (col 1358)

We disagree, and we disagree because we are aware that the Home Office has done this before, most recently in asylum and assured us that the applicants would have known nothing about it. It is possible because only one system has effect in the world. The other runs as a shadow system, and can thus be tested, before it affects any case in the real world. So any case would proceed to appeal in the normal way, but meanwhile a dummy file would proceed through an administrative review. The outcome of the two would then be compared, and one could observe whether administrative review were producing the same results as appeals. If the Government is resistant to this, peers should seek to ascertain whether this is evidence of a lack of confidence that administrative review would come up to the mark.

Administrative review is no more than should be happening now. Purchase of an internal "Administrative Review" adds nothing to current procedures, however it is dressed up. How much more incentive to reconsider a decision when you are about to have to defend it before an independent tribunal. It is indeed at this stage reviewed by a Presenting Officer, in a separate part of the Home Office to the decision maker and of a higher rank. If the Presenting Officer disagrees with the original decision maker they do not have to go back to that decision-maker, they can raise the matter with their own line manager and decide how to proceed on appeal. Nothing the Government has offered by way of Administrative Review offers any more than this. Indeed it offers considerably less, since the Presenting Officer knows that the decision will be scrutinised by the Tribunal. Still Table 8 in the Appeals Impact Assessment shows that 49% of "Managed Migration" (work students and family) appeals are allowed, 50% of entry clearance appeals are allowed and 32% of appeals against deportation are allowed. To think that administrative review could suffice is to ignore the fundamental principles of administrative justice.

Lord Wallace suggested in Committee that these rates should be viewed against a backdrop of the Home Office only refusing 10% of cases (col 1196). But why? What has that got to do with the Home Office being wrong in nearly one in two "managed migration" cases?

The *Report of the Committee on Immigration Appeals*[9] 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*

[9] August 1967, Cmnd. 3387

should be vested in officers of the executive, from whose findings there is no appeal…In many other fields of 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.

In *Asifa Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443 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".

For Lord Wallace the definition of independent, as far as administrative review is concerned, although not reports of the Chief Inspector, simply means not in the same management chain and in a geographically separate location (col 1357). It is a managerial, bureaucratic definition of independence that owes nothing to the rule of law. Had parliament any confidence in the process it would say "Oh no, Home Secretary, do not trouble the Chief Inspector who, after all, has rather a lot to do. You do the report, that will be fine by us." You are separate from these people and in a different management chain. You are at a higher grade as well. We want no more". But we do want more; as the Committee on Tribunals so correctly identified, one must get outside the department to have justice and the rule of law. .

Clause 16 Place from which appeal may be brought or continued

AMENDMENT17 The Earl of Sandwich

Purpose
Provides that an appeal must be brought from within the UK where it is in the best interests of the appellant's child that it be so brought.

Briefing
Under Clause 17 as drafted, the interests of the child are nowhere mentioned. New section 94B provides that a person cannot be removed before their appeal has begun or while it is in progress this would be unlawful under section 6 of Human Rights Act. It further provides that one example of certification would be a case where the appellant would not face serious irreversible harm if removed. But no mention is made of the question of whether any other person would suffer serious irreversible harm. It would thus be necessary to show a breach of the State's obligations under the Human Rights Act as a result of effect of the decision on a child.

- **Does the Minister believe that where an action is contrary to the best interests of a child it is always a breach of the duties of the public authority taking that action under the Human Rights Act 1998?**

- **If so, will he accept the amendment?**
- **If not, can he explain what would happen where the removal of the appellant was not in the best interests of the child either because the child would leave with the appellant or because the child would stay behind without the appellant?**

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.***

The Minister, Lord Wallace of Tankerness could find little to say to defend the clause. It would affect "only a very small cohort of cases" "the vast majority of whom will be convicted criminals" (col 1366). The Minister did not add that following the amendment of the clause in Commons Committee, the conviction need no longer have resulted in a sentence of 12 months imprisonment; indeed it need not have resulted in any term of imprisonment at all. The statement that the amendment would have affected less than 2% of all appeals in the Tribunal last year (col 1366) is not meaningful: appeals include large numbers of family visit appeals, of appeals against refusal of a visa, of work or student appeals. That deportation appeals do not make up a significant part of the cohort should come as no surprise save to those who make inflammatory statements about foreign criminals.

The Minister spoke of "the rare cases where the Government seek to deport family members" (col 1366). We find this a surprising assertion. The figure of interest is the percentage of cases where a family member could be deported (i.e. a family member exists and is a person subject to immigration control) in which a family member is deported. We should be surprised if that were rare at all.

- **In what percentage of cases where a person facing deportation has a family member subject to immigration control is that family member**

served notice of a decision to deport as a family member of the person being deported?

It is not at issue in this clause, for the clause does not include a power to deport a family member while an appeal is ongoing (although many may be forced to leave with the principal) but it would be helpful to understand the assertion nonetheless.

We are equally surprised by the Minister's assertion that there would be no liability to pay compensation if the appeal were successful (col 1367). We cited in our briefing on clause 15 Stand Part Baroness Anelay of St Johns in 2006

> *The disruption they face if they are forced to leave the United Kingdom could cause administrative problems and give rise to successful human rights applications in the courts and to compensation claims….*

Whether compensation would be available will depend upon the facts of the case.

The Minister suggested that exceptional funding would result in legal aid being available to avoid a breach of a person's human rights (col 1369). In the period April to December 2013, according to Ministry of Justice statistics, 187 applications were made for exceptional funding in the immigration category and three were granted, a success rate of 1.6%, against which backdrop it is getting harder to find legal representatives to make the applications.

See the Ministry of Justice statistical release at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/289183/exceptional-case-funding-statistics-apr-13-dec_13.pdf - it has taken a year's very hard work and the intervention of Ministry of Justice statisticians (see https://www.gov.uk/government/publications/exceptional-case-funding-in-legal-aid-statistics)

> *Although narrowing the scope of legal aid, we intend to provide a safety net. The exceptional funding scheme established in the Bill will provide funding for an excluded case where failure to do so would amount to a breach of a person's right to legal aid under the Human Rights Act or European Union law.* Lord McNally[10]

Heavy reliance was placed during the passage of the bill that became the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on exceptional funding as the means by which access to justice would be preserved. Exceptional funding under section 10 of the Act has proven no answer at all. Only 270 applications for exceptional funding had been made as of 1 July 2013. That would extrapolate to 1080 in the course of a year, far below the original estimate of 70,000. By 6 September, the number of applications had increased only to 624, which extrapolates to some 1497.

An application for exceptional funding involves completing three forms[11]: the usual "means" and "merits" forums and the exceptional cases form[12] which runs to 14 pages plus an 11-page *Exceptional Cases Funding – Provider Information Pack*[13].

[10] HL Report, 21 Nov 2011: Column 821. See also HL Report 5 Mar 2012 : Column 1570.
[11] Form CIV ECF 1.See http://www.justice.gov.uk/legal-aid/funding/exceptional-cases-funding
[12] Available at http://www.justice.gov.uk/downloads/forms/legal-aid/civil-forms/ecf1.pdf
[13] Available at http://www.justice.gov.uk/downloads/legal-aid/funding-code/ecf-provider-pack.pdf

Whether excluded cases receive exceptional funding under section 10 of the Act is related to the question of Article 6's having been held not to cover immigration proceedings[14]. The Lord Chancellor's Exceptional Funding guidance does contemplate exceptional funding where not to fund would be a breach of Articles 8 (and by extrapolation other articles) or 13 but says of immigration:

> *59. Proceedings relating to the immigration status of immigrants and decisions relating to the entry, stay and deportation of immigrants do not involve the determination of civil rights and obligations [footnote: Maaouia v France (2001) 33 EHRR 42; Eskelinen v Finland (2007) 45 EHRR 43 13.]*
>
> *60. The Lord Chancellor does not consider that there is anything in the current case law that would put the State under a legal obligation to provide legal aid in immigration proceedings… to meet the procedural requirements of Article 8 ECHR.*

Case A (from meeting with Exceptional Cases Team of 1 July)

Applicant lacked capacity in the technical sense. There was no one to instruct the litigation friend. The official solicitor had given instructions for an application for exceptional funding to be made. This was refused. The refusal of funding suggested that the applicant (and official solicitor) read the exceptional funding guidance with care.

Case of N

Appellant is a seven year old child with autism. Born in the UK and has lived all his life here. He is here with mother, neither have any status. Her appeal was dismissed but solicitors managed to pursue his appeal to the Upper Tribunal Immigration and Asylum Chamber before the Legal Aid, Sentencing and Punishment of Offenders act 2013 came into force (at which point it would not have received funding. The appeal was dismissed by the Upper Tribunal but permission was granted permission to appeal to the Court of Appeal. The case was then remitted to the Upper Tribunal but by then there was no legal aid for the case. The application for exceptional funding was refused. The not for profit organisation dealing with the case applied for a review. The Tribunal refused an adjournment and suggested that the not for profit represent for free or that he pays privately (his mother is in receipt of asylum support). On the eve of the hearing, the Home Office granted leave. Meanwhile the Legal Aid Agency reviewed its decision on exceptional funding and upheld the refusal.

Case of O

A 17 year old, in care in the UK since he was a young child and facing deportation. In the end this case was funded by the local authority subsequent to a letter threatening judicial review if they did not fund.

Case of G

Family reunification case. Child in care. Applying to be reunited with a child she had had when very young as a result of rape. Application for exceptional funding refused. Such cases involve commissioning and arranging DNA tests. The child remains overseas, no application having yet been made to bring them to the UK.

[14] *Maouiaa v France* Application 39652/98 [2000] ECHR 455 (5 October 2000).

Case of C

C is a schizophrenic, detained in an immigration removal centre. He has two British citizen children with whom he has supervised contact. He faces deportation. Exceptional funding refused. Subsequently counsel was instructed through the Bar Pro Bono Unit and discretionary leave granted.

The amendment could be used to ask the Minister to give more information both about overall numbers and about how many of those would have a criminal conviction and of which type.

Finally, Lord Wallace suggested that he could not comment on the effect of the Criminal Justice and Courts Bill, with its changes to the availability of judicial review, on the clause, because that Bill is currently before parliament and could be amended (col 1369). That is not acceptable as an excuse. The Government has put forward that Bill and has purported to set out its effects in impact assessments and explanatory notes. It should be able to explain its inter-relationship with this Bill.

Those who were not worried about this clause at Committee should become so having seen the manner in which it was defended.