

## ILPA proposed amendments appeals

### Clause 31 Appeals within the United Kingdom: certification of human rights claims

#### PROPOSED AMENDMENT/STAND PART

Page 34, line 3, leave out clause 31

#### Purpose

To remove provisions that would extend the deport first/appeal later" provisions of the Immigration Act 2014 as "remove first/appeal later" in all immigration appeals and maintain the current position.

#### Briefing

The Immigration Act 2014 contained a power to certify the appeals of "foreign criminals", as defined, before these appeals began or while they were in train so that, other than in cases based on fear of persecution or ill-treatment abroad, the "foreign criminal" could be removed before the appeal was determined if to do so would not breach human rights and rights under EU law and in particular would not cause "serious irreversible harm." Now it is proposed to extend these powers beyond "foreign criminals" those whose presence in the UK is deemed "not conducive to the public good" to anyone appealing an immigration decision. Rights of appeal are now restricted to appeals against refusals of protection and human rights claims.

Where an application for family reunion with a spouse, partner, child or elderly relative etc. is made under the immigration rules and refused, this will be treated as a refusal of a human rights claim and will be treated as giving rise to a right of appeal. Such cases will include persons refused because they are held not to meet the income thresholds for family reunion under the immigration rules. The All Party Parliamentary Group on Migration produced a report on the family immigration rules in June 2013.<sup>1</sup> Problems it highlighted included problems in satisfying the minimum income requirement and with the way in which this was calculated, in particular

- Prospective non-EEA partner earnings should be considered for inclusion in the rules, for example in circumstances where the non-EEA partner has a firm offer of employment or self-employment in the UK, or where there is reasonable expectation that the non-EEA partner will gain employment or self-employment after entering the UK;
  - The rules relating to income from cash savings and from self-employment should be reviewed;
  - Third party support, particularly that provided by a close family member such as a parent, should be considered for inclusion in the rules.
5. The current evidential requirements in Appendix FM-SE should be reviewed, in order to ensure that they are clear and easy for applicants to understand.

<sup>1</sup> [http://www.appgmigration.org.uk/sites/default/files/APPG\\_family\\_migration\\_inquiry\\_report-Jun-2013.pdf](http://www.appgmigration.org.uk/sites/default/files/APPG_family_migration_inquiry_report-Jun-2013.pdf)

The All Party Parliamentary Group also highlighted failure to support children to live with their parents in the UK where their best interests require this and expressed concern at cases involving adult dependant relatives, in particular

7. Government should review the rules affecting adult dependents. Consideration should be given to amending the rules to ensure that:

- Where the UK sponsor can demonstrate their ability to provide full financial support to an adult dependent relative in the UK, or where the relative themselves has the means to financially support themselves, they are able to do so;
- An adult dependent relative can be eligible for sponsorship where they are in need of support from the UK sponsor, but before they become fully physically dependent.

Others affecting cases will involve those relying on Article 8 of the European Convention on Human Rights in their appeal, the right to private and family life. Such cases include cases where a person has lived in the UK since childhood or where leaving the UK would mean leaving British or settled family members who cannot follow them to their destination.

The power of one party to a case to send the other party from the jurisdiction so that they cannot appear before the court or tribunal and may struggle to present their case at all is inimical to the notion of equality of arms. If the proposed residence test for legal aid, currently under challenge in the courts, is brought into effect it will mean that being outside the jurisdiction automatically disqualifies a person from legal aid. Those paying privately, and the Legal Aid Agency while legal aid is still available, will be forced to expend considerable sums instructing lawyers and marshalling evidence from overseas. Appeals will not be pursued or will be pursued inadequately.

The Home Office does not get these decisions right all of the time. Success rates are set out below<sup>2</sup>:

	Determined at hearing / papers	All Deport		Asylum		Managed		Entry		Family				
		&Others		Migration		Clearance		Visits						
		Allowed/Granted %	Dismissed/Refused %	44%	30%	49%	50%	43%	32%	56%	70%	51%	50%	57%
2012/13	Determined at hearing / papers	68,187	10,106	21,669	12,815	22,525	1,072							
2013/14	Determined at hearing / Determined at hearing /	67,471	9,897	28,720	14,291	12,766	1,797							

<sup>2</sup>For full table see Table 2.5a in the zip file at <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2015> In immigration judicial reviews, Professor Robert Thomas, of the University of Manchester School of Law, who has conducted detailed research into the immigration and asylum chambers of the tribunals over many years, has taken account of reviews won by claimants and those conceded by the Home Office and has concluded “It is estimated here that the true success rate of immigration challenges is nearer to 30 per cent than the less than one per cent figure that arises from the Government’s preferred and misleading metric.” Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis [2015] P.L. October, Thomson Reuters (Professional).

papers

	Allowed/Granted %	44%	29%	49%	48%	43%	37%
	Dismissed/Refused %	56%	71%	51%	52%	57%	63%
2014/15 <sup>r</sup>	Determined at hearing / papers	66,262	9,137	38,084	11,631	5,314	2,096
	Allowed/Granted %	40%	31%	42%	42%	37%	33%
	Dismissed/Refused %	60%	69%	58%	58%	63%	67%

The separation of a family until the appeal is finally determined, is for a lengthy, and unknown, period. We are currently seeing cases before the Immigration and Asylum Chamber of the First-tier Tribunal listed for June 2016, in some instances July. This is before onward appeals are considered. The President of the First-tier Tribunal issued a message about the challenge of listing and ILPA understands that delays are likely to increase in the foreseeable future. It is ILPA's understanding that volumes of appeals, and of judicial reviews, have exceeded those predicted at the time of the passage of the Immigration Act 2014. Parliamentarians should ask what steps are being taken to ensure that the Tribunal deal with the volume of work before it and whether payments are being made from the Home Office to Her Majesty's Courts and Tribunals Service to mitigate the effect of Home Office legislation on courts and Tribunals.

## **NEW CLAUSE AFTER CLAUSE 31**

### **PROPOSED NEW CLAUSE**

Page 34 line 19, after Clause 31 insert the following new clause

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

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

- (1) In paragraph 3, leave out subparagraph (2)
- (2) In paragraph 8 leave out subparagraph (2)
- (3) 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://eur-lex.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.

## **NEW CLAUSE AFTER CLAUSE 31**

### **PROPOSED NEW CLAUSE**

Page 34 line 19, after Clause 31 insert the following new clause

( ) **Amendment of the Nationality, Immigration and Asylum Act 2002**

(1) The Nationality, Immigration and Asylum Act 2002 is amended as follows:

(a) In section 82(1) *Right of Appeal to the Tribunal* insert

“(d) the Secretary of State has refused P a certificate of entitlement under section 10 of this Act”

(b) In section 84 *Grounds of Appeal* after subsection 84(3) nsert

(4 )An appeal brought under section 82(1)(d) (refusal of a certificate of entitlement to a right of abode) must be brought on the ground that the decision is not otherwise in accordance with the law;

### **Purpose**

First amendment: To provide a right of appeal for 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. Such a certificate is the way in which a British citizen proves that they are a British citizen in cases of dispute.

To provide a ground of appeal if a person does bring such an appeal.

### **Briefing**

This right of appeal was swept away along with others in 2014. Its removal prevents British citizens from vindicating their right to recognition as British citizens in the event of dispute.

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

#### I 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 want to be able to challenge it by an appeal to an independent tribunal.

The “not in accordance with the law” ground of appeal borrows from the pre 2014 section 84.. If a mistake has been made one my application for a certificate of entitlement to a right of abode I could, if the amendment were accepted 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 in the UK. I have lived in the UK for 10 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 laws 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. “The current rules on appeals demand that the claim be refracted through the prism of human rights.

The [www.gov.uk](http://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](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/118569/immigration-right-of-abode.pdf)

The format used in these amendments could be adapted to bring back other rights of appeal lost in 2014 and ILPA would be happy to assist with drafting these.

## **Clause 32 Continuation of Leave repeals**

### **PROPOSED AMENDMENT/STAND PART**

Page 32 line 20 leave out Clause 32

#### **Briefing**

The provisions revoked are provisions that provide for the leave of a person facing revocation of leave to continue on the same terms and conditions until an appeal or administrative review of that leave have been completed. Leave can be revoked if a person no longer meets the requirements for leave or breaches a condition. For example, if you are here as a spouse and you split up with your partner. Or if you are here as a student with permission to work for 20 hours in term time and you work for 22 per week and are caught. Leave is wrongfully revoked if it is thought that you do not meet the conditions of leave when you do or if you are thought to have broken a condition of your leave but have not.

The Explanatory Notes to the Bill contend that the provisions revoked “have no continuing purpose”. This currently true, but the reasons why it is true should be challenged.

During the passage of the Immigration Act 2014 examples were given of where those losing rights of appeal would instead be given an administrative review. These included where leave is revoked.<sup>3</sup> This example disappeared when the Explanatory Notes to the Bill became the Explanatory Notes to the Act. The subsequent Immigration Rules on administrative review<sup>4</sup> do not provide for administrative review where a person’s leave is curtailed or revoked. Such a person has no right of appeal and no administrative review. Such persons are thus unable to continue to work, rent property etc. from the moment of the Home Office decision, however erroneous that decision may be. They, their families and their employers suffer as a result.

## **Clause 32 Continuation of Leave repeals**

### **PROPOSED AMENDMENT/STAND PART**

Page 32 line 20 leave out Clause 32

#### **Briefing**

<sup>3</sup> Explanatory Notes to Bill 206-EN 2013-2014 at para. 73 “...an administrative review may be sought when a person’s leave is curtailed or is revoked” see <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0110/en/14110en.htm> and see HL Bill 84-EN 2013-14, para. 77 <http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0084/en/14084en.htm>

<sup>4</sup> Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/449633/20150803\\_Immigration\\_Rules\\_-\\_Appendix\\_AR.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449633/20150803_Immigration_Rules_-_Appendix_AR.pdf) (rights to administrative review set out at 3.2, 4.2 and 2).

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<sup>5</sup> Explanatory Notes to Bill 206-EN 2013-2014 at para. 73 “...an administrative review may be sought when a person’s leave is curtailed or is revoked” see <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0110/en/14110en.htm> and see HL Bill 84-EN 2013-14, para. 77 <http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0084/en/14084en.htm>

<sup>6</sup> Available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/449633/20150803\\_Immigration\\_Rules\\_-\\_Appendix\\_AR.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449633/20150803_Immigration_Rules_-_Appendix_AR.pdf) (rights to administrative review set out at 3.2, 4.2 and 2).