ILPA briefing to amendments tabled for House of Lords Committee Stage of the Immigration Bill: Part Four: Appeals

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

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Part Four of the Immigration Bill, clauses 34 to 36, deals with appeals.

AMENDMENT 226A New Clause after Clause 33 *Return of Asylum Seekers: countries deemed safe in the names of Baroness Hamwee and Lord Paddick*

Purpose

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

Briefing

ILPA supports this amendment. 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 both paragraphs but relates to removal to different countries: in paragraph 8 to EEA countries, in paragraph 12 to non-EEA 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[1].

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.

AMENDMENT 226B NEW CLAUSE *Exception from deportation for unaccompanied minors upon reaching the age of 18*

Presumed purpose: provides that a person who entered the UK as an unaccompanied minor cannot be deported from the United Kingdom.

Briefing

This amendment is concerned with something very different from the provisions of the Bill. Clause 34 of the Bill is concerned very specifically with cases which are not deportation cases, as deportation cases were dealt with in the 2014 Act. The Bill is concerned with cases of

[1] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0411:EN:HTML

administrative removal. Where a person has no leave to be in the UK they are expected to depart voluntarily. If they do not, the Secretary of State can take steps to remove them. This is an administrative measure. It should be contrasted with deportation where the Secretary of State deems that the person's presence in the UK is not 'conducive to the public good'.

The Immigration Act 1971 provides

> 3(5) A person who is not a British citizen is liable to deportation from the United Kingdom if—
>
> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported.
>
> (6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.

Deportation is an order for expulsion from the UK and a prohibition on return while the order remains in force. A deportation order can be made where a Court has made a recommendation following a conviction of a criminal offence.

- On the ground that a person's presence is 'not conducive to the public good'.
- As a family member of a person being deported.

The Secretary of State must make a deportation order in the case of 'foreign criminals,' as defined in the UK Borders Act 2007, who fulfil criteria relating to age, length of sentence and deportation not being contrary to the 1951 Refugee Convention, the European Convention on Human Rights or European Community law. Such cases are known as 'automatic' deportation cases. The people to whom they apply cannot usually appeal from within the UK against the deportation order unless on asylum or grounds.

It is possible for a criminal court to decide not to make any recommendation for deportation and for the Home Office to then decide to give Notice of Intention to make a Deportation Order on the grounds that the person's presence is not conducive to the public good. Similarly it is possible for the Secretary of State to decide to deport a person who has no criminal conviction and it is possible for her to decline to follow the recommendation of a court.

A person cannot return to the UK while a deportation order is in force, but can apply to have it revoked. Home Office guidance sets out that it will not normally revoke an order until 10 years have elapsed but some persons will get a revocation before this, for example those deported as family members.

A person facing deportation will usually decide to take with them their children, including their British citizen children who cannot be deported because they are not subject to immigration

control. Nothing in the amendment affects that. Nor does anything in the amendment affect the existing powers to remove a person who has no leave to be in the UK.

A deportation order could be made at any stage in a person's life. They might be a young person, or have lived most of a very long life in the UK. The amendment puts forward the proposition that if a person made the UK their home as an unaccompanied child, then their conduct and character should be the UK's problem, to be dealt with under the UK's laws and procedures. Unaccompanied children do not normally choose to come to the UK, they are either brought or sent. Some have no contact with family at all and do not recover such contact at any stage in their lives. In other cases, family members mean them harm. ILPA considers that those who have come to the UK as separated children and been given leave should not face banishment.

(For **AMENDMENT 226C NEW CLAUSE *Registration with police: requirement for review* i**n the names of **Baroness Hamwee and Lord Paddick** see ILPA's briefing at http://www.ilpa.org.uk/resources.php/31768/ilpa-briefing-to-amendments-tabled-for-house-of-lords-committee-stage-of-the-immigration-bill-part-t **)**

CLAUSE 34 STAND PART in the names of Lord Rosser, Lord Kennedy of Southwark, Lord Alton of Liverpool and Lord Ramsbotham and Amendment 227 in the names of Lord Rosser, Lord Kennedy of Southwark, Lord Alton of Liverpool and Baroness Lister of Burtersett

Purpose

Clause 34 Stand part: this would retain the status quo whereby the only persons who can be removed from the UK while their appeal is pending are those facing deportation on character grounds and not persons facing administrative removal.

Amendment 227: would require the Secretary of State to obtain a "multi-agency best interests assessment" of any children whose human rights may be affected by the decision to certify the case.

Briefing

The Immigration Act 2014 contained a power to certify deportation cases 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 person 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 to anyone appealing an immigration, as opposed to a protection, decision.

The 2014 Act deals with deportation cases, where the person's presence in the UK is not considered conducive to the public good. This Bill is not concerned with anyone whose presence in the UK is not considered conducive to the public good; it is concerned with people to whose presence there is no inherent objection, but who have not been granted leave. 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, or a child refused where there is a dispute over whether the parent in the UK has sole responsibility for them. It will affect young people who were given leave to remain as unaccompanied minors and now, at 17 ½, do not wish to pursue an application for asylum or humanitarian protection but do wish to contend that it would be a breach of their rights to private and family life to be made to leave the UK. It could affect children or adults. It could affect persons considered to be trafficked who have not applied for asylum but have applied not to need leave in the UK for the purposes of their recovery. It will affect all the family members of those removed, including British citizens.

A worker who marries a British citizen, applies to remain with that person and is wrongly refused will face removal from the UK, with loss of job, partners separated and parents separated from children, until the appeal is finally determined. In the meantime, for example, the parent remaining in the UK has to give up their job to care for the child and thus the family income is further reduced and they cannot meet the requirements of the Immigration Rules at the date of the decision.[2]

Others whose cases will be affected include 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 Solicitor General confirmed in the Public Bill Committee that the power could be used against an unaccompanied child[3].

ILPA supports Lord Rosser, Lord Kennedy of Southwark, Lord Alton of Liverpool and Lord Ramsbotham in their opposition to Clause 34 standing part of the Bill.

As to amendment 227, its ambit is less clear and its remit restricted in that it will not assist those, including young persons leaving care, whose case does not affect a child. In the cases affected by it, it may help to protect against removal and indeed may result in the Home Office deciding not to exercise its power to certify the case on the grounds of the cost of the "multi-agency best interests assessment". It thus improves the clause. It does not, we suggest, improve it enough. The effects of family separation on children have been detailed, in the context of the family immigration rules, by the report of the Children's Commissioner *Skype families*[4] The All Party Parliamentary Group on Migration produced a report on the family immigration rules in June 2013.[5] This too gives an insight into the effects of separation.

[2] The material date, see Nationality, Immigration and Asylum Act 2002, s 85(4).
[3] Col 382.
[4] http://www.childrenscommissioner.gov.uk/sites/default/files/publications/SkypeFamilies-CCO.pdf
[5] http://www.appgmigration.org.uk/sites/default/files/APPG_family_migration_inquiry_report-Jun-2013.pdf

- **The Bill contains no guarantee whatsoever as to the maximum time for which a person can be made to remain outside the UK.**

People will be removed from the UK for the duration of their appeal, remaining outside the UK if they lose, returning to the UK if they win. Cases are currently being listed for July 2016 and later. 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.

A separation will be for some eight or more months if the person wins before the First-tier Tribunal and the Home Office does not appeal. The problem is, the Home Office usually does appeal if it loses, as the Upper Tribunal pointed out in the case of *Greenwood (No. 2) (para 398 considered)* [2015] UKUT 00629 (IAC)]:

> *18. The Upper Tribunal has the impression that the Secretary of State, as a matter of routine, applies for permission to appeal in every deportation appeal in which the appellant succeeds before the FtT. […]*
>
> *19. If there is indeed a practice of this kind it must be disapproved. To slavishly apply for permission to appeal to the Upper Tribunal in <u>every</u> deportation appeal resolved in favour of the appellant, if this be the practice, is not a proper or legitimate invocation of this Tribunal's jurisdiction. ... Inundation of the Upper Tribunal with permission to appeal applications in every case belonging to a given category cannot be considered harmonious with the Parliamentary intention. Moreover, it is unfair to other tribunal users and undermines the important values of legal certainty and finality, which are two of the cornerstones of our legal system.*

If permission to appeal is granted, the separation lasts even longer. It is not at all fanciful to assume a couple years of separation in the majority of ultimately successful cases. These successful cases will be cases where the Home Office gets it wrong.

The Anti-Trafficking Legal Project provided an example in its evidence to the Public Bill Committee from the reported case of *EK (Article 4 ECHR: Anti-Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC)[6]

> *The decision to remove was made in July 2010. The case was unsuccessful before the First Tier Tribunal and was won before the Upper Tribunal on Article 4 (prohibition on trafficking and slavery) in June 2013. This gives an idea of the time a person could spend outside the UK as a result of the Bill. The appellant suffered from serious physical and mental health problems requiring ongoing specialist care. In that case a parallel asylum claim was running, so the appeal would have been heard within the UK on that basis. But that will not always be the case. It was not the asylum case which succeeded.*

[6] www.bailii.org/uk/cases/UKUT/IAC/2013/00313_ukut_iac_2013_ek_tanzania.html

Quality of initial decisions

Sir Keir Starmer QC MP commented in the Public Bill Committee

> *The Solicitor General kindly gave us the statistic of a 42% success rate for appeals, which he puts forward as evidence that there is no obvious detriment in appeal after removal, but let us start by focusing on that figure: 42% of those removed won their appeal. So 42% of the families—if a family is involved—who suffered the human distress that I have described, whether or not there was a breach of the law, succeeded on appeal. That is an alarmingly high success rate in those circumstances…*

The Home Office does not get these decisions right all of the time. Success rates are set out below[7]:

		All Deport &Others	Asylum	Managed Migration		Entry Clearance	Family Visits
2012/13	Determined at hearing / papers	68,187	10,106	21,669	12,815	22,525	1,072
	Allowed/Granted %	44%	30%	49%	50%	43%	32%
	Dismissed/Refused %	56%	70%	51%	50%	57%	68%
2013/14	Determined at hearing / papers	67,471	9,897	28,720	14,291	12,766	1,797
	Allowed/Granted %	44%	29%	49%	48%	43%	37%
	Dismissed/Refused %	56%	71%	51%	52%	57%	63%
2014/15[r]	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 All Party Parliamentary Group on Migration produced a report on the family immigration rules in June 2013.[8] Problems it highlighted included problems in satisfying the minimum income requirement and with the way in which this was calculated, in particular

[7]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).

[8] http://www.appgmigration.org.uk/sites/default/files/APPG_family_migration_inquiry_report-Jun-2013.pdf

- *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.

Judges have been critical of out of country appeals. Lord Justice Sedley in *R (BA (Nigeria)) v Secretary of State for the Home Department* [2009] EWCA Civ 119, [2009] QB 686, at paragraph 21 said

> "*… especially but not only where credibility is in issue, the pursuit of an appeal from outside the United Kingdom has a degree of unreality about it. Such appeals have been known to succeed, but in the rarest of cases. The reason why the Home Office is insistent on removal pending appeal wherever the law permits it is that in the great majority of cases it is the end of the appeal.*"

Lord Justice Sullivan said in *R (E (Russia))* [2012] EWCA Civ 357, [2012] 1 WLR 3198,

> "*I endorse the view expressed by Collins J (a former President of the Immigration and Asylum Tribunal) in MK at first instance … that common sense indicates that a claimant who has to pursue an appeal while he is out of the country faces considerable disadvantages ….* "

The Rule of Law

In the summary for his present for the Bingham Centre for Rule of Law event on 20 October 2015, Upper Tribunal judge Hugo Storey wrote

> *"…there are at least 3 potential areas of difficulty:*
>
> *(i) The problem of defective primary decision-making (prompting the question of whether implementation should be linked to parliamentary guarantees about sufficient quality of primary decision making);*
>
> *(ii) The very wide scope of the amended s.94B … (all persons who make a human rights claim). … …;*
>
> *(iii) Kiarie and Byndloss is premised on there being a speedy disposal of out of country appeals so that disruption is "short-term", but present figures indicate that there may be delays from 6 months to over a year in a significant number of cases. The timeless axiom "Justice delayed is justice denied" would appear to require careful parliamentary attention in relation to any extension of the policy of non-suspensive appeals and raises, inter alia, the question of whether, if such extension becomes law, the Bill should not also ensure a guarantee of speedy disposal (by an adequately resourced judiciary) of out of country appeals.*

R(Kiarie) v The Secretary of State for the Home Department [2015] EWCA Civ 1020

The Government points to the decision in *R(Kiarie) v The Secretary of State for the Home Department* [2015] EWCA Civ 1020, the "Kiarie and Byndloss case" as support for its view that an out of country appeal is adequate. That was a case under the 2014 Act. Although the Court held that the Home Office policy instructions did not reflect the provisions in the statute and that the decisions in the cases were procedurally unfair, it held that the problems in presenting a case and getting legal help for an out of country appeal did not make limiting people to such an appeal unlawful. The Court said

> *64. First, I accept that an out of country appeal will be less advantageous to the appellant than an in country appeal. But article 8 does not require the appellant to have access to the best possible appellate procedure or even to the most advantageous procedure available. It requires access to a procedure that meets the essential requirements of effectiveness and fairness. …*

It is important that the Court said

> *"… the Secretary of State is entitled in my view to proceed on the basis that an out of country appeal will meet the procedural requirements of article 8 in the generality of criminal deportation cases. "*

In a criminal deportation case it is asserted that the person's presence in the UK is not conducive to the public good. The person may have a criminal conviction. Article 8 involves a balancing exercise; the individual right and the public interest. That the Secretary of State is entitled to proceed on the basis that an out of country appeal will meet the procedural requirements of Article 8 in the generality of criminal deportation cases does not mean that it will meet those requirements in the generality of the cases covered by Clause 34.

It is also important to look at why the court in Kiarie and Byndloss found as it did. It said

> *65. …If particular procedures are needed in order to enable an appellant to present his case properly or for his credibility to be properly assessed, there is sufficient flexibility within the system to ensure that those procedures are put in place. That applies most obviously to the provision of facilities for video conferencing or other forms of two-way electronic communication or, if truly necessary, the issue of a witness summons so as to put pressure on the Secretary of State to allow the appellant's attendance to give oral evidence in person.*

If a person is removed, they must pursue their appeal, which deals with the substantive questions of whether the Immigration Rules have been followed and whether permanent separation from close family members or from the UK would breach their rights to private and family life, from overseas. For EU nationals, the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) make provision for them to be brought back to the UK (to detention) to be present at their appeal. There is no such provision for non-EU nationals and it seems extremely unlikely that they would be granted, for example, a visit visa.

- **No provision has been made for the court or Home Office to take responsibility for the costs or, insofar as they can (i.e. at the UK end) for the logistics, of video-conferencing.**

The representatives of *Kiarie* and *Byndloss* pointed to the limited availability and use of video conferencing facilities within the tribunal system and in locations overseas, as well as the cost and difficulty for an appellant seeking to give evidence by video link. An appellant without legal aid will have to pay for video-conferencing themselves. Colin Yeo, a barrister who gave evidence to the Public Bill Committee, said on his blog

> *The fact is that it will be virtually impossible for a litigant in person to make arrangements for video link evidence, never mind bear the cost of such arrangements. It is, after all, virtually impossible to do this from the UK*[9]

Practice Directions on the Civil Procedure Rules say:

> "[video conferencing] *is, however, inevitably not as ideal as having the witness physically present in court. …*".

The Upper Tribunal said in *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 443 (IAC) :

> *… It must also be for the party seeking to call evidence by electronic link to make the arrangements at the distant end, and to pay any expenses. Further, no party ought to expect to be allowed adjournments simply because of delay in making such arrangements.*
>
> *20. … it is for the Tribunal to decide whether to allow evidence to be given by electronic link, and to give the appropriate directions. …If specific directions are given, they will be given in order to secure the interests of the parties and of justice, and it is therefore very unlikely that the Tribunal will allow the evidence to be given by electronic link if the directions have not been complied with.*

Video links will be beyond the means of many appellants and the technology will not always be available. We have experience of the use of video links for bail hearings; it is very difficult for person, particularly one following the proceedings through an interpreter, to follow proceedings through a video link and when matters such as a person's intentions or truthfulness is at stake, this is difficult to judge through a link.

- **No provision has been made for legal aid for these cases**

The Court in the Kiarie and Byndloss case said

> *66. There are difficulties for any appellant, particularly an unrepresented defendant, in preparing evidence for an appeal and presenting it to the tribunal, but I do not accept that those difficulties will be so much greater where the appeal is brought out of country as to amount to a denial of effective participation in the decision-making process or to render the procedure unfair. In these days of electronic communications, an out of country appellant does not face serious obstacles to the preparation or submission of witness statements or the obtaining of relevant documents for the purposes of an appeal. He can instruct a lawyer in the United Kingdom if he has the funds to do so. If he does not have the funds to instruct a lawyer but the case is so*

[9] https://www.freemovement.org.uk/court-of-appeal-gives-judgment-on-the-deport-first-appeal-later-regime/

complex that an appeal cannot properly be presented without the assistance of a lawyer, he will be entitled to legal aid under the exceptional funding provisions considered in R (Gudanaviciene) v Director of Legal Aid Casework (paragraphs 47-51 above). "

Exceptional case funding

An application for exceptional case funding is time-consuming (and costly) to make and there have been huge difficulties with obtaining exceptional case funding, with the challenge to the way it is operating, *Gudanaviciene* et *ors v Director of Legal Aid Casework* [2014] EWCA Civ 1622. on the way to the Supreme Court.

Within the first nine months of the exceptional funding scheme a total of 1,151 applications (909 new applications and 242 applications for review of a refusal) were received. One hundred and eighty seven were in immigration. Thirty-five resulted in grants, three of these in immigration, a success rate in immigration of 1.6%, lower than the overall average of 3.2%[10]. As of 1 July 2013, a mere six grants of exceptional funding had been made of which one was in immigration. None had been made to persons who were unrepresented. As of 6 September 2013, that figure was 11 grants, with no details of how many were in immigration. Also of concern, 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].

ILPA members comment:

> *"…we cannot afford to take the time to fill in the application- and client cannot afford to pay our fees for the drafting and submission of an exceptional funding application. Exceptional funding applications require time and legal knowledge. Clients do not have the necessary legal knowledge. Exceptional funding applications have to be done properly. …an exceptional funding application requires several hours of work. We cannot do them on a pro bono basis. …Our fees for making an exceptional funding application will not be much lower than the fees charged for a visa/leave to remain application. In view of the low rate of grant of exceptional funding applications why would a client run the risk of nearly doubling their costs (which will only be refunded if successful)?"*
>
> *"It takes me much longer than two hours to do an exceptional funding application, plus factor in the amount of time spent seeking a review"*
>
> *"…In our case we have done everything at risk* [while waiting for an exceptional funding decision] *including our client's substantive application; I could not allow a client to suffer delay especially when it is refugee family reunion or a really compelling Article 8 case"*

[10] Ad hoc statistical release: Legal Aid Exceptional Case Funding application and determination statistics - April 2013 to December 2013, Ministry of Justice Statistical release, 13 March 2014.
[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

"... I have not attempted to make any applications for exceptional funding, as the whole process seems pointless, given how hard you have to work to make a successful application, and for so little reward, the fixed fee. It is not financially viable."

A look at the sorts of cases refused exceptional funding indicates how strait is the gate through which applicants must pass. We present below cases refused exceptional funding.

Ms Gudanaviciene (one of the test cases)
The judge said:

The reasons for refusal set out in the 26 July 2013 letter [from the Legal Aid Agency] are in my view thoroughly unsatisfactory. It is said that the issues are not complex and the tribunal 'will take account of the relevant case law and legislation, including EU law and the facts of the case'. …it is difficult to follow how without assistance the claimant can be expected to obtain the necessary evidence, let alone make representations on the issue. … The suggestions in the refusal letter … are little short of absurd.

IS (one of the test cases)
IS is blind and lacks legal capacity, i.e. he does not have sufficient understanding of his situation to conduct his case or to instruct a legal representative to do so. The Official Solicitor was willing to assist IS, but needed a legal representative with whom to work. IS has also made a claim against the local authority in relation to homelessness. The case was that he was unable to look after himself and lived a flat infested with rodents and cockroaches and survived by begging.

Case A
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 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.

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.

Trafficking cases
Both cases had been referred to the Home Office as the "competent authority" under the National Referral Mechanism to determine whether there were reasonable grounds for thinking that the applicants had been trafficked. No reasonable grounds decision has been made in either case – delays continue for many months. Therefore applications for exceptional funding were made as advice would not wait. Both applications were refused. The reason given was that the case is outside the scope of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Not everyone will be able to afford a lawyer. A person can have too much money to be eligible for legal aid but not enough to afford a lawyer.

If the Government's residence test for legal aid, itself currently the subject of a challenge to the Supreme Court, is implemented then no one outside the UK will be eligible for legal aid. On 25 November 2015 the Court of Appeal gave judgment in *Public Law Project v The Lord Chancellor &* Anor [2015] EWCA Civ 1193 (25 November 2015)[14] holding that draft regulations on a "residence test" limiting legal aid to persons within the jurisdiction, lawfully resident and who have been lawfully resident for 12 months in the past, are lawful. The case is now under appeal to the Supreme Court. If a residence test were introduced it would mean that for those without the requisite leave there would be no legal aid to challenge the certification of the case prior to removal. There is already no legal aid for article 8 appeals and indeed the Solicitor General argued in the Public Bill Committee that because of this the residence test would not affect those pursuing appeals from overseas.

Legal aid for challenges prior to removal

Colin Yeo, a barrister who gave evidence to the Public Bill Committee, described a case under the 2014 Act on his blog:

> *I was refused one injunction against a section 94B removal to a country the client had not visited since the age of six, which was over 20 years previously. The appeal rested on evidence about previous employment over many years and contact with his children, for whom he had previously had to obtain a court order for contact against a hostile ex partner. The reason the injunction was refused was that the solicitors and I should be prepared to prepare and present the appeal pro bono, a suggestion that I really, genuinely never thought I would hear from a salaried judge. The client was removed and despite having a good case … he was unable to remain in contact with his lawyers and he never pursued an appeal.*

The only way to challenge being forced to leave the UK before the appeal has been heard is by judicial review. Many applicants under the immigration rules will not meet the eligibility requirements for legal aid for that judicial review. They may struggle to afford to pay for a judicial review where fees are £60 to lodge an application, £215 for an oral renewal (where permission is refused on the papers), and then £215 for a hearing and will rise to £135 for an

[14] *http://www.bailii.org/ew/cases/EWCA/Civ/2015/1193.html*

application and £680 for a hearing or an oral renewal[15], added to which there is the risk of paying the other sides costs.

Changes to the legal aid system mean that work done on an application for permission to bring a judicial review is "at risk". Lawyers are paid if they win. If they lose, they can apply to the Legal Aid Agency for a discretionary payment. The House of Lords Committee on the Constitution highlights in its report[16] on the Bill that this impedes access to justice. Lawyers are limited in the amount of "at risk" work they can carry at any one time and therefore it is difficult for persons to find lawyers willing to represent them. The Committee writes:

> *47. … This issue was raised with the Solicitor-General by the Public Bill Committee on the Immigration Bill. He subsequently wrote to the Chairs of the Committee indicating that legal aid is in principle available in respect of judicial-review challenges to certification decisions, provided that the case has "sufficient merit" and provided that the individual financial-means test is satisfied. The Solicitor-General also stated in his letter that "the judicial review must be of specific benefit to the individual and cannot be on a repeat immigration matter that was previously determined within one year".[*
>
> *48. However, the in-principle availability of legal aid in this area notwithstanding, the practical extent to which it is likely to be available in respect of judicial-review challenges to certification decisions is far from clear. This is particularly so in the light of restrictions on the availability of legal aid in circumstances in which a case does not proceed beyond the permission stage, i.e. the first stage of a judicial-review claim. Restrictions imposed in 2013[17]were quashed as unlawful by the High Court in 2015[18],the struck-down provisions being subsequently replaced by somewhat less restrictive ones[19].*
>
> *49. The upshot is that, through a combination of (a) certification of substantive human-rights claims and (b) the fact that opportunities for seeking judicial review of certification decisions may in practice be constrained by the limited availability of legal aid, individuals' scope for mounting effective human rights challenges in respect of immigration decisions may be significantly attenuated.*

If the Government's proposed residence test for legal aid becomes law, even the most impecunious will not be eligible for legal aid. Thus the Solicitor General's comment in the Public Bill Committee that

> *Of course, they will be able to challenge the decision to certify; we must not overlook that important point. The decision to certify is an administrative decision that can be challenged by judicial review. [20]*

may be correct in theory but not in practice.

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[15] See the Ministry of Justice consultation 2015 consultation *Court fees proposals for reform* at https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/supporting_documents/courtfeesconsultation.pdf

[16] http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7502.htm

[17] Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014.

[18] *R (Ben Hoare Bell Solicitors) v Lord Chancellor* (2015) EWHC 523 (Admin).

[19] Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 (SI 2015/898).

[20] Col 382.

No provision has been made for legal aid for those striving to pursue an immigration appeal from overseas; they will be treated in the same way as immigration cases in-country. No exceptions to the residence test have been proposed for judicial reviews of these cases prior to removal.

- **The practical difficulties in pursuing an appeal from overseas**

The Anti-Trafficking Legal Unit said in its evidence to the Public Bill Committee

> *"Our client group would be unlikely to have the resources or familiarity with modern technology to allow us to take instructions by skype or keep in regular contact with them. As many clients who fall into exploitation have little or no education they could not be expected to maintain any written communication with us or to draft any documents needed for an appeal themselves. Victims of trafficking are often submissive, frightened of authority figures and find it hard to establish relationships of trust. Face to face relationships are essential when working with individuals who have been subject to abuse and exploitation, especially to maintain hard won confidence and trust, which can easily be eroded if someone feels insecure again."*

They described a case

> ***Case study 5***
> *Our client was trafficked to the UK for the purposes of labour exploitation. The client was subjected to both physical and verbal abuse. The client was refused legal aid on the basis that he had not demonstrated that he could not obtain advice and assistance on a no-win-no fee basis. The client had limited English and was traumatized … as a result of his experiences, his ability to locate an advisor able to act on a no-win-no fee basis and pay disbursements as and when they fell due was therefore extremely limited. The client returned to his country of origin whilst efforts continued to obtain legal aid. Only after 6 months of written representations was the Legal Aid Agency willing to concede that the client was entitled to legal advice and assistance. However, without the client being present in the UK pursuing a complaint was not possible. The client's means in his home country were such that he became homeless and therefore unable to access a telephone or computer by which to make contact and provide instructions to pursue his matter."*

The Home Office approach

The current Home Office guidance is concerned with cases in the deportation context, so it is not straightforward to read it across to these cases, but it nonetheless fails to inspire confidence.[21] Some of the statements do not appear to pertain to the criminal context. For example

> *"3.15 It will not normally be enough for the evidence to demonstrate a real risk of harm which would be either serious or irreversible – it needs to be both serious and irreversible."*
> *"…in the following scenarios where a person is deported before his or her appeal is determined, it is unlikely, in the absence of additional factors, that there would be a real risk of serious*

[21] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/337253/Article_8_ECHR_Guidance_-_v5_0_-Version__2_.pdf

irreversible harm, or that removal pending appeal would otherwise breach the ECHR, while an out-of-country appeal is pursued (case owners must note that this is an indicative list and not prescriptive or exhaustive):

• a person will be separated from his or her partner for several months while appealing against the refusal of a human rights claim;

• there is no current subsisting family relationship with a child and although a family court case is in progress to obtain access there is no evidence that the case could not be pursued while the person is abroad;

• a child or partner is undergoing treatment for a medical condition in the UK that can be satisfactorily managed through medication or other treatment and does not require the person liable to deportation to act as a carer;

• a person has strong private life ties to a community that will be disrupted by deportation (e.g. a job, a mortgage, a prominent role in a community organisation etc.)."

"3.26 The following are examples of representations that will not, without more, amount to personal circumstances which mean that the powers of the Tribunal will be insufficient to secure a fair and effective appeal:

• a desire to participate in the proceedings, including to give oral evidence or to attend the appeal;

• an inability to communicate with ease with family members or legal representatives to prepare the appeal;

• the cost, availability or reliability of internet or telephone use in the country to which the person is to be removed;

• complexity of legal proceedings and inability to afford legal representation;

• the cost, availability or reliability of video-link, for the purpose of participating in and / or giving oral evidence at the appeal, in the country to which the person is to be removed;

• the person is disabled to the extent that he or she cannot instruct legal representatives or liaise with family members or others who will give evidence in the appeal but the person has family members or others who can assist him or her in the country to which he or she is to be removed.

"Case owners must carefully assess the quality of any evidence provided in relation to a child's best interests. Original, documentary evidence from official or independent sources will be given more weight in the decision-making process than unsubstantiated assertions about a child's best interests or copies of documents."

What happens if you win?

Nothing on the face of the 2014 Act or this Bill requires the Secretary of State to bring the person who wins their appeal back within any time frame or to defray the costs of this return.

Nothing in the Bill makes provision for compensation for those who have lost jobs, tenancies or other benefits, or for compensation for a wrong, unreasonable and irrational decision by the Home Office.

Clause 35 Continuation of leave: repeals

CLAUSE 35 STAND PART in the names of Baroness Hamwee and Lord Paddick.

Purpose To maintain 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 revocation has been completed.

Briefing
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. [22] This example disappeared when the Explanatory Notes to the Bill became the Explanatory Notes to the Act. The subsequent Immigration Rules on administrative review[23] 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.

Challenged on this matter in the Public Bill Committee, the Solicitor General said

> *"…we do not think that administrative review should be available where a person has their immigration leave cancelled or revoked. There are a number of circumstances where it would not be appropriate. One example would be where a migrant worked in breach of their immigration conditions and had their leave cancelled. Another example would be a person whose conduct or behaviour has made it undesirable for them to remain here—people who facilitate sham marriages, for example.* "[24]

Anne McLaughlin MP of the Scottish National Party challenged him to tailor the clause to cases in which it would not be appropriate/ He suggested that the Home Office's error correction

[22] 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
[23] Available at 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).
[24] 5 November 2015, Col 403.

policy could be used in such cases. It was pointed out by Sir Keir Starmer MP that not all errors will be picked up in this manner.

The Solicitor General ended his remarks on the clause, with considerable chutzpah for a man bringing this Bill to parliament

> *…let us not forget that the clause is all about tidying up legislation. … Bearing in mind the need for members of the public and legal representatives to be able to navigate their way through immigration law as clearly and effectively as possible, it is right for us to clear the decks and remove superfluous clauses and provisions so that immigration law reaches a state of clarity and simplicity, which we would all desire. "*

If only.