

ILPA BRIEFING
House of Commons – Report, July 2009**Borders, Citizenship and Immigration Bill – Bill 115****TRANSFER OF JUDICIAL REVIEWS &
APPEALS TO THE COURT OF APPEAL****Clause 54**

The Government has not shown good reason for the powers it seeks. Powers to transfer judicial reviews into the new Tribunals Service are being sought before the Tribunals Service has been or could be shown to be capable of handling these cases. It will already be dealing with new appeals when the work of the Asylum and Immigration Tribunal moves to the Upper Tribunal of the Tribunals Service. The power to restrict appeals from the Tribunals Service to the Court of Appeal in immigration cases is sought despite the general acceptance that these include cases of particular sensitivity and could include any judicial reviews that are transferred from the High Court to the Upper Tribunal.

BACKGROUND

References in this briefing to immigration law include immigration and asylum law; and exclude nationality law.

The Upper Tribunal is the second tier of the new two-tier Tribunals Service, which began operating in November 2008. It does not currently include the Asylum and Immigration Tribunal (AIT), which is the tribunal that deals with immigration appeals. The Government intends that the AIT will be incorporated into the Tribunal Service from early 2010¹. Proposals on transfer of judicial reviews from the High Court to the Upper Tribunal and for restrictions on appeals to the Court of Appeal will not apply unless and until that incorporation takes place².

Clause 54 is in precisely the same terms as that which was originally included in this Bill and rejected by the House of Lords. It provides power to transfer immigration and nationality judicial reviews from the High Court to the Upper Tribunal. Peers had voted to remove the original clause and replace it with a provision that limited the scope of transfer of judicial review powers and confined the power of the Lord Chancellor to restrict appeals from the Upper Tribunal to the Court of Appeal to non-immigration law matters.

Both matters (transfer of judicial reviews, restricting appeals to the Court of Appeal) derive from provisions of the Tribunals, Courts and Enforcement Act 2007. This Act established the Tribunals Service. When it received Royal Assent, immigration and nationality law matters were excluded from its remit. The new regime has replaced many pre-existing tribunals, but the Asylum and Immigration Tribunal (itself only introduced in April 2005³) has to date remained outside of this regime. The Government now intends that the work of this tribunal will be taken into the

¹ The Government announced its intention in May 2009 in its response to the *Immigration Appeals* consultation which it launched in August 2008.

² see *Hansard*, HL Committee 4 Mar 2009 : Column 802 (*per* the Lord West of Spithead)

³ The AIT was brought in under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to replace the two-tier appeal system of the Immigration Appeal Authority and Immigration Appeal Tribunal.

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Tribunals Service from early 2010. The Government announced this intention in May 2009 in its response to the consultation it initiated in August 2008⁴.

In 2007, the Government accepted that the power to allow for the transfer of applications for judicial review in immigration and nationality cases should be expressly excluded by the legislation because of their complexity and sensitivity. At Report stage in the House of Lords, the Lord Kingsland recounted:

*“The noble Baroness, Lady Ashton, stated, during the passage of the 2007 Act, that, before introducing further primary legislation to allow transfer of judicial review applications in respect of asylum and immigration cases, the Government wanted to see how the new regime would work. The Government are in plain breach of that undertaking. This Bill was introduced, containing Clause [54], almost simultaneously with the opening of the Upper Tribunal for business. The Government have had no time to consider the appropriateness of allowing the transfer of judicial review cases from the administrative court to the Upper Tribunal.”*⁵

TRANSFER OF JUDICIAL REVIEWS

Judicial review is the means whereby the actions or inactions of public bodies, such as the UK Border Agency or the Secretary of State, may be challenged on the ground that the relevant public body is not acting in accordance with the law. This may be done where there is no other legal avenue (e.g. a statutory appeal) whereby the public body may be held to account. Currently, judicial review applications are made in England and Wales to the High Court (where they are dealt with in the Administrative Court of the High Court)⁶.

Clause 54 would allow for increase in the workload of the Tribunals Service (particularly that part dealing with immigration and asylum appeals) by transfer of immigration and nationality judicial reviews from the High Court to the Upper Tribunal in two distinct situations:

- A class (or classes) of these cases could be transferred *en bloc* such that any application within the class was automatically transferred without consideration by the High Court. A class could be large or small. Potentially, immigration and nationality could be designated as the class, thereby effectively transferring all of these applications.
- The High Court could transfer any individual judicial review application which came before it.

High Court judges are members of the Upper Tribunal, along with others of the tribunal’s judiciary (such as senior immigration judges). If the Government’s amendments were accepted, these judicial reviews could be dealt with by those immigration judiciary members of the Upper Tribunal.

Government’s reasons for this clause

The Government’s stated reason for its position is that there are too many judicial review applications going to the High Court. It and the UK Border Agency have sought to suggest that many of these applications are without any merit, by highlighting that many do not progress all the way through the judicial review process to an ultimately successful conclusion.

However, ILPA has made requests for the UK Border Agency to disclose information as to the numbers of these cases which are conceded by the Agency or in which the Agency has agreed to make a fresh decision without the need for the process to be seen all the way through. The Agency has informed ILPA that it is unable to retrieve this information because the costs in doing

⁴ The August 2008 consultation on *Immigration Appeals* and the Government’s and others’ responses to it are available at:

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/>

⁵ *Hansard* HL, Report 1 Apr 2009 : Column 1125

⁶ In Scotland, judicial reviews are brought before the Court of Session; and in Northern Ireland before the High Court of Northern Ireland.

so would be too great⁷. Nonetheless, figures the agency has disclosed indicate that very large numbers of immigration judicial reviews are withdrawn – in 2006, 1,185 cases; and in 2007, 1,532 cases. A withdrawal would be consistent with the UK Border Agency conceding its decision was wrong or must be reconsidered⁸. ILPA’s experience is that it is commonplace for the UK Border Agency to concede or make a fresh decision.

At Committee, Phil Woolas MP, Borders and Immigration Minister, referred to 85 per cent of judicial reviews, which at different points he said were “*not progressed*” and “*were rejected on the papers*”⁹. (confusing sentence – can we say what he used the figure of 85% for? Why not, Phil Woolas said 85% of applicant’s judicial reviews were not followed through?) ILPA has written to the Minister (copied to Committee Members) because his statements to the Committee were unclear, appeared inconsistent and did not indicate what proportion of cases within the 85 per cent figure were withdrawn because the UK Border Agency accepted its decision was wrong or must be reconsidered.

Opposition to this clause

The primary concerns regarding clause 54 were reiterated by the Lord Kingsland at Report stage in the House of Lords¹⁰:

“...first, the Government have broken their promise to your Lordships’ House not to introduce primary legislation permitting the transfer of judicial review matters in asylum and immigration cases until we have sufficient evidence that the system for judicial transfers in other classes of case are working well. Secondly, the Opposition and the noble Lord, Lord Thomas of Gresford, would be extremely unhappy to permit transfers unless we were satisfied that the transferred AIT single-tier regime to the Upper and Lower Tribunals did indeed have the effect of leading to much fairer and more timely decisions, thus reducing substantially the number of judicial review cases... Thirdly,... judicial review is a crucial component in the struggle to protect the individual. Many of these cases raise issues, at best, of the freedom of the individual and, at worst, of torture and death. It is vital that it remains open to someone in such cases to have the application heard by a High Court judge.”

Additional objections arise from the failure to engage adequately with the devolved jurisdictions¹¹, and in particular Scotland where the Court of Session judiciary has not welcomed the proposals for transfer of judicial reviews¹²; and the decision to include nationality law cases among those that may be transferred despite the fact that nationality law is almost exclusively litigated in the High Court (and the numbers of cases are very small)¹³.

⁷ ILPA has most recently made such requests by letter of 24 April 2009, and received the response explained here by letter of 5 June 2009. As explained in our letter, the numbers of cases where the UK Border Agency concedes or agrees to make a fresh decision are key: “*The purpose of a claim for Judicial Review is to require the UK Border Agency to make a lawful decision, and whether that is achieved by a voluntary offer to settle or a fresh decision on the part of the UK Border Agency, or by an order of the court following a substantive hearing is... not material: either outcome constitutes a successful, and therefore clearly wholly justifiable claim for Judicial Review.*”

⁸ In a letter of 26 June 2009 to the Lord Avebury, the Lord West of Spithead explains: “*There are a number of reasons why judicial reviews may be withdrawn for instance where the decision is flawed, where there has been inadequate reasoning or where the claimant has provided further information that requires consideration.*”

⁹ *Hansard*, HC Sixth Sitting 16 Jun 2009 : Columns 183 & 187

¹⁰ *Hansard*, HL 1 Apr 2009 : Columns 1125-26

¹¹ see e.g. *Hansard*, HL Committee 4 Mar 2009 : Column 797 *et seq* (*per* the Lord Cameron of Lochbroom)

¹² The response of the Court of Session to the Government’s consultation indicated clearly that the judges considered the proposal to be premature in two respects – (i) because it was necessary to see how the Upper Tribunal was handling its already enlarged workload first; and (ii) because ongoing reviews on the administration of justice in Scotland needed to be completed and considered.

¹³ see e.g. *Hansard*, HL Committee 4 Mar 2009 : Column 799 (*per* the Lord Pannick)

APPEALS TO THE COURT OF APPEAL

Currently, where the full appeal process of the Asylum and Immigration Tribunal (AIT) has been followed to conclusion, there may be an appeal to the Court of Appeal if that Court is satisfied there is an arguable error of law in the decision of the AIT and a real prospect of success. The Court of Appeal has a similar jurisdiction to consider the decision of the High Court on a judicial review.

If and when the AIT is incorporated into the Tribunals Service, the Tribunals, Courts and Enforcement Act 2007 will permit the Lord Chancellor to impose further restrictions on appeals from the Upper Tribunal to the Court of Appeal. In addition to showing an arguable error of law with a real prospect of success, further compelling reason or point of principle or practice would need to be shown for the Court of Appeal to consider the appeal. This restriction could also be applied in respect of any judicial review transferred from the High Court to the Upper Tribunal.

Legality of restricting these appeals

Sir Richard Buxton, a recently retired Court of Appeal judge, has given a legal opinion questioning the human rights compatibility of such further restrictions¹⁴. The Joint Committee on Human Rights agrees with his opinion¹⁵. The Lord Lloyd of Berwick, a retired judge of the House of Lords appellate committee, and the Lord Pannick QC, a leading public lawyer, both support the Committee's position¹⁶.

Government's reasons for maintaining the power to restrict these appeals

In the House of Lords, the Lord West of Spithead said the power to restrict appeals to the Court of Appeal should be retained because of "*the burden on the Court of Appeal*"¹⁷. However the number of appeals to the Court of Appeal reflects the number of decisions of the AIT which are arguably wrong in law. There may be many reasons for that (including the quality of representation by both sides before the AIT and the adequacy of legal aid funding), but ultimately it is a comment upon the relative quality of decision-making in the AIT. Nonetheless, the Government seeks to reduce the oversight provided by the Court of Appeal; and in respect of those tribunal decisions, which no longer receive the scrutiny of the Court of Appeal despite being arguably wrong in law, to provide no scrutiny at all.

CONCLUDING OBSERVATIONS

The following points remain unanswered by the Government:

1. The reasons accepted by the Government when including the statutory bar against transfer of immigration and nationality judicial reviews in 2007 (these were the most sensitive cases, and the new Tribunals Service required testing first) still remain good.
2. The answer to significant numbers of cases going to the High Court and Court of Appeal is to improve the decision-making at earlier stages – merely restricting access to these higher courts risks that reduced oversight of such decision-making merely encourages or allows for poor decision-making.
3. The need for continued scrutiny of the higher courts has been demonstrated in recent months by e.g. the HSMP litigation¹⁸ (to which Committee members have referred in earlier debates), by the operation by the UK Border Agency of secret and unlawful policies on

¹⁴ Sir Richard Buxton's legal opinion was provided to the Joint Council for the Welfare of Immigrants (JCWI), and in turn to the Joint Committee on Human Rights – see the Committee's Ninth Report of Session 2008-09, HL Paper 62 HC 375 (*Legislative Scrutiny: Borders, Citizenship and Immigration Bill*), paragraph 1.30

¹⁵ see paragraph 1.32, Committee's Ninth Report of Session 2008-09 *op cit*

¹⁶ *Hansard*, HL 1 Apr 2009 : Columns 1122 and 1127

¹⁷ *Hansard*, HL 1 Apr 2009 : Column 1130

¹⁸ *HSMP Forum Ltd cases* [2009] EWHC 711 (Admin) and [2008] EWHC 664 (Admin); cf. *AA & Ors (Highly skilled migrants: legitimate expectation) Pakistan* [2008] UKAIT 0003, where the AIT rejected similar arguments by the appellants.

detention¹⁹, removal and withholding notice of removal from lawyers²⁰, and most recently by the refusal of the UK Border Agency to respect decisions of the European Court of Human Rights to grant injunctions against removal to Somalia in the face of outstanding litigation challenging the safety of any such removals²¹.

4. The volume of judicial reviews would be significantly reduced if the UK Border Agency followed rulings in individual cases. Currently, many individuals are required to bring their own judicial review because the UK Border Agency is or is proposing to treat them in a way that it has accepted to be wrong in another case.
5. The Government's proposals on judicial review and access to the higher courts have failed to engage adequately with the devolved jurisdictions.
6. The inclusion of nationality cases within those judicial reviews which may be transferred to the Upper Tribunal is particularly nonsensical since the tribunals judiciary have very little experience of nationality law (there is no appeal against most nationality law decisions so expertise in this area is in the High Court), and the numbers of such cases are in any case very few.
7. The workload of the higher courts could be reduced if the Government would cease legislating for overly broad or enabling powers, in respect of which Parliament has little opportunity for effective scrutiny. Members from all sides of the House of Commons highlighted profound concerns at Second Reading²²; and this approach inevitably leads to recourse to the courts to clarify and restrain the exercise of power by the Executive.
8. Despite the decision that the Tribunals Service Procedure Rules Committee will, when the AIT is incorporated, have responsibility for the rules governing immigration appeals²³, the influence the UK Border Agency continues to have over the development of the tribunal system, which regulates the decisions of that agency, undermines the integrity of that system.

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¹⁹ *Abdi & Ors* [2008] EWHC 3166 (Admin)

²⁰ *N* [2009] EWHC 873 (Admin); and see

²¹ *Abdi v SSHD* [2009] EWHC 1324 (Admin), see para. 73

²² e.g. *Hansard*, HC 2 Jun 2009 : Columns 182 (*per* Chris Grayling MP and John Gummer MP), 192 (*per* Chris Huhne MP) and 231-232 (*per* Damian Green MP); a similar complaint was also made by Neil Gerrard MP (Column 177)

²³ see *Hansard*, HL Committee 4 Mar 2009 : Column 802 (*per* the Lord West of Spithead)