

ILPA BRIEFING
House of Commons - Committee
June 2009**Borders, Citizenship and Immigration Bill – Bill 86****TRANSFER OF JUDICIAL REVIEWS &
APPEALS TO THE COURT OF APPEAL****Clause 55****Government Amendments – New Clause 4 and Nos. 32, 33, 35 & 38****The Clause and the Amendments**

Clause 55 (*Fresh claim applications*) was inserted into the Bill by the House of Lords, at which time peers also rejected the original clause which the Government now seeks to return to by way of New Clause 4.

Clause 55 relates to two distinct matters. New Clause 4 relates to the first of these matters. The two distinct matters are:

- The transfer of applications for judicial review from the High Court to the Upper Tribunal (the upper tier of the new Tribunal Service).
- The restriction on appeal rights against decisions of the Upper Tribunal to the Court of Appeal.

Background

Both matters derive from provisions of the Tribunals, Courts and Enforcement Act 2007. The 2007 Act established a new tribunal regime for the UK, bringing a range of distinct tribunal systems together in one regime (the Tribunal Service). The new regime became operational in November 2008. It is divided into two tiers – the First Tier and the Upper Tribunal. With some exceptions, appeals dealt with by this new regime are considered by the First Tier, against which an appeal can be made on error of law grounds to the Upper Tribunal. When the 2007 Act 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 2005¹) has to date remained outside of this regime. The Government now intends that this tribunal will be taken into and replaced by the new regime from early 2010. The Government announced this intention in May 2009 in its response to the consultation it initiated in August 2008².

In 2007, the Government accepted that the power to allow for the transfer of applications for judicial review in immigration and nationality law cases should be expressly excluded by

¹ 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

² 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/>

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the legislation because of the complexity and sensitivity of these particular judicial reviews and the need to first ensure that the tribunal regime was functioning sufficiently well to justify their inclusion. As was recounted by the Lord Kingsland during the Report stage debate in the House of Lords:

“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 52 [now New Clause 4 on the Amendments’ paper], 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.”³

Clause 55(1) to (3) and New Clause 4 – transfer of judicial reviews

These subsections of clause 55 and the Government’s Amendment, New Clause 4, relate to judicial review applications in immigration (including asylum) and nationality cases. 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).

In returning to New Clause 4, the Government would allow for the increase in the workload of the Tribunal Service (particularly that part dealing with immigration and asylum appeals) by the transfer from the High Court to the Upper Tribunal of judicial review applications in immigration and nationality cases 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 several others of the tribunal’s judiciary (such as senior immigration judges). If the Government’s Amendments were accepted, therefore, these judicial review applications could be dealt with by those immigration judiciary members of the Upper Tribunal.

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 applications 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 so would be too great⁴. In ILPA’s experience, it is commonplace for the UK Border Agency to concede or make a fresh decision.

³ *Hansard* HL, Report 1 Apr 2009 : Column 1125

⁴ 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:

Subsections (1) to (3) of clause 55 represent a compromise position supported by both Opposition front benches in the House of Lords. These subsections aim to restrict (at this time and without further legislation) the transfer of judicial review applications to fresh claim applications. A fresh claim is where someone, who has been refused asylum, makes further representations which show a realistic prospect of successfully claiming asylum on the basis of new material. If the UK Border Agency decides that there is no new material or it provides no realistic prospect of success, it may refuse to treat the further submissions as a fresh claim; and it is applications for judicial review of such decisions which are fresh claim applications. The compromise was explained by the Lord Kingsland at Report stage⁵. It reflects the identification by the Lord Chief Justice of fresh claim applications as of particular concern to the High Court judiciary. However, at that time, the Lord Kingsland reiterated the primary concerns regarding the Government's proposal:

*"...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."*⁶

Clause 55(4) – appeals to the Court of Appeal

Subsection (4) of clause 55 merits independent consideration. It concerns the right of appeal against decisions of the Upper Tribunal to the Court of Appeal. The Government, by its Amendments, seeks to remove subsection (4) along with the remainder of the clause from the Bill.

Currently, where the full appeal process of the Asylum and Immigration Tribunal (AIT) has been followed to conclusion, an appeal lies to the Court of Appeal on grounds of error of law. If the Court of Appeal is satisfied that there is an arguable error of law in the decision of the AIT showing a real prospect of success, it may hear the appeal. Subsection (4) seeks to preserve this approach. Without subsection (4), the Tribunals, Courts and Enforcement Act 2007 would permit the Lord Chancellor to impose further restrictions on appeals to the Court of Appeal. In addition to showing an arguable error of law with a real prospect of success, an appellant would need to show further compelling reason or point of principle or practice before the Court of Appeal could hear the appeal.

Sir Richard Buxton, a recently retired Court of Appeal judge, has given a legal opinion questioning the human rights compatibility of such further restrictions⁷. The Joint

"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."

⁵ Hansard, HL Report 1 Apr 2009 : Column 1127

⁶ Hansard, HL 1 Apr 2009 : Columns 1125-26

⁷ 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 on Human Rights agrees with his opinion and supports subsection (4)⁸. The Lord Lloyd of Berwick, a retired judge of the House of Lords appellate committee, and the Lord Pannick both support subsection (4)⁹.

The Lord West of Spithead, in opposing subsection (4), said that the power to restrict appeals to the Court of Appeal should be retained because of “*the burden on the Court of Appeal*”¹⁰. The Government’s position, then, is simply that it considers there to be too many appeals going to the Court of Appeal. This can only be because there are too many appeals in which the decision of the AIT is 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 in these cases), but ultimately it is a comment upon the relative quality of decision-making in the AIT. The Government’s response is to seek to reduce the oversight of the Court of Appeal; and in respect of those tribunal decisions, which are no longer to receive the scrutiny of the Court of Appeal despite being arguably wrong in law, to provide no scrutiny at all. If the Government’s Amendments are accepted, this could also apply to decisions of the tribunal made on the judicial review applications which it intends should be transferred from the High Court to the Upper Tribunal (see above).

General observations

ILPA supports the retention of subsection (4) of clause 55. ILPA is opposed to the inclusion of provision in this Bill for the removal of the statutory bar in the 2007 Act, which bar precludes the transfer of judicial review applications in immigration and nationality cases. As regards fresh claim applications, we consider that the better (more timely and cost-efficient) way of dealing with this workload of the High Court would be to provide for a statutory right of appeal against the decision of the UK Border Agency that further representations did not constitute a fresh claim. We have more fully explained our opposition in our Briefing for Second Reading in the House of Lords on what was then clause 50 (see appended¹¹). We note the following further points (which are more fully developed in that earlier Briefing):

- The reasons accepted by the Government when including the statutory bar in 2007 still remain good.
- 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.
- The influence the UK Border Agency has over the development of the appeals system, which regulates the decisions of that agency, undermines the integrity of that system.
- The need for continued scrutiny of the higher courts has again been demonstrated in recent months by e.g. the HSMP litigation¹² (to which Committee members have referred in earlier debates) and by the operation by the UK Border Agency of secret

Committee’s Ninth Report of Session 2008-09, HL Paper 62 HC 375 (*Legislative Scrutiny: Borders, Citizenship and Immigration Bill*), paragraph 1.30

⁸ see paragraph 1.32, Committee’s Ninth Report of Session 2008-09 *op cit*

⁹ *Hansard*, HL 1 Apr 2009 : Columns 1122 and 1127

¹⁰ *Hansard*, HL 1 Apr 2009 : Column 1130

¹¹ ILPA’s March 2009 Briefing on what was then clause 52 and the Amendments moved at Report stage in the House of Lords is also available in the Briefings section at

www.ilpa.org.uk

¹² *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 appellant.

and unlawful policies on detention¹³, removal and withholding notice of removal from lawyers¹⁴.

- The Government's proposals on judicial review and access to the higher courts have failed to engage adequately with the devolved jurisdictions.

Moreover, the Government could do much to address the workload of the higher courts by addressing its practice of legislating for very broad powers, sometimes to be set out further in secondary legislation, and over which Parliament has so little opportunity for effective scrutiny. Profound concerns were highlighted by Members from all sides of the House of Commons at Second Reading¹⁵, and this approach inevitably leads to recourse to the courts to clarify and restrain the exercise of power by the Executive.

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¹³ *Abdi & Ors* [2008] EWHC 3166 (Admin)

¹⁴ *N* [2009] EWHC 873 (Admin); and see

¹⁵ 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)