



Asylum and Immigration (Treatment of Claimants, etc.) Bill

Clause 14

**JUSTICE Briefing for the House of Lords Second Reading
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Introduction

1. JUSTICE is an independent all-party law reform and human rights organisation. It is the British section of the International Commission of Jurists.
2. This briefing concerns clause 14 (previously clause 11) of the Asylum and Immigration (Treatment of Claimants, etc) Bill. Clause 14 has two parts, each with a distinct purpose:
 - **The ouster of judicial review.** Clause 14 would abolish of all existing rights of appeal, including the right of judicial review and statutory review by the higher courts. Clause 14 explicitly forbids any challenge on the grounds of lack of jurisdiction, irregularity, error of law, breach of natural justice or any other matter.¹ The only exception to this is for challenges against certificates which disallow an in-country right of appeal (i.e. safe country and unfounded claim certificates) or if a person is alleging that a member of the Tribunal has acted in bad faith, for which ‘significant evidence’ of dishonesty, corruption or bias has to be adduced.² Clause 14 also seeks to prevent judicial scrutiny of the Home Secretary’s removal decisions.³
 - **The abolition of the second tier of immigration appeals.** Clause 14 would merge the existing two tiers of immigration and asylum appeals into a single tribunal, renamed the Asylum and Immigration Tribunal (‘AIT’). It would replace an appeal to the second tier with the option of requesting the AIT to review its own decision, on grounds limited to a ‘clear’ error of law.⁴ The review would be by way of written submissions only (save in exceptional circumstances) and only one such review is allowed per applicant. In place of judicial review, the President of the AIT will have the power – though no obligation – to refer points of law to the Court of Appeal.⁵ The Court will not be able to make a binding decision. Instead it will only be able to give an advisory opinion to the AIT, which the AIT is not bound to follow. No appeal to the House of Lords is available from an opinion given by the Court of Appeal under these provisions.
3. Judicial review of administrative decisions is a central element of the rule of law. As such, JUSTICE considers that clause 14 raises matters of constitutional importance, independent of any disagreement over asylum policy. The ouster of judicial review and the abolition of the

¹ New section 108A(3).

² New section 108A(4).

³ New section 108A (2)(e).

⁴ New section 105A.

⁵ New section 108B.

second tier of immigration appeals seems to us a wholly disproportionate and unnecessary response to perceived problems with existing immigration and asylum procedures. Instead of addressing apparent abuses of process, clause 14 seeks to remove the process itself. As such, it sets a grave precedent for any other area of administrative decision-making which the executive may find it expedient to protect from legal challenge.

Ouster of Judicial Review

4. Clause 14 is a clause without precedent. It represents the first attempt by any government to exclude *comprehensively and exhaustively* the inherent jurisdiction of the higher courts to review decisions of the executive and administrative tribunals created by the executive.
5. The principled objections to the ouster of judicial review by clause 14 are that:
 - a necessary constitutional check on the exercise of state power will be eroded;
 - the common law right of access to the courts will be breached;
 - an inferior tribunal will determine the scope of its own jurisdiction;
 - the higher courts will be precluded from participating in the development of a significant and substantial body of administrative law; and
 - the right to an effective remedy under Article 13 ECHR will be breached;
6. The practical objections to ouster under clause 14 include:
 - a loss of coherence and consistency in administrative decision-making;
 - a substantial increase in the number of cases that are wrongly decided; and
 - the lack of any significant problem with existing High Court procedures.

A necessary constitutional check

7. By ensuring that all executive and administrative actions are subject to scrutiny, judicial review maintains the principle that no decision-maker or administrative body is above the law. As Lord Hoffman noted in the *Alconbury* decision in 2001, ‘the principles of judicial review give

effect to the rule of law'.⁶ Judicial review assigns to the courts the constitutional function of ensuring that decisions of the executive and administrative tribunals conform to the law. In particular, the courts are under a duty to ensure that legal rights are not abused by the unlawful exercise of governmental power. As the Master of the Rolls said in 1899:⁷

I know of no duty of the Court which is more important to observe, and no power of the Court which it is more important to enforce, than its power of keeping public bodies within their rights.

8. Following scrutiny of the Bill, the Joint Committee on Human Rights noted that the ouster contemplated by clause 14 'has not been justified by any argument advanced by the Government'. It considered that there was 'a real danger that this would violate the rule of law in breach of international law, the Human Rights Act 1998, and the fundamental principles of our common law'.⁸

Breach of the common law right of access to the courts

9. The right of access to the courts is a fundamental principle of the common law and the logical corollary of the duty upon judges contained their judicial oath, to 'do right to all manner of people'.⁹ It is exemplified in Magna Carta's famous pronouncement: 'To no one will we deny or delay right or justice'.¹⁰ The courts have long held that access to their jurisdiction is a basic right.¹¹ That right derives from the ancient idea that those who are subject to the King's law

⁶ *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23.

⁷ *Roberts v Gwyrfai District Council* [1899] 2 Ch 608 at 614 per Lindley MR. See also *R v Hull University Visitor ex parte Page* [1993] AC 682 at 701 per Lord Browne-Wilkinson: 'The fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully'.

⁸ Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants, etc.) Bill*, Fifth Report of Session 2003-04, HL 35, HC 304, para.71.

⁹ See e.g. *R v Ministry of Defence ex p Smith* [1996] QB 517 at 556D-E per Sir Thomas Bingham MR: 'The courts must not shrink from their fundamental duty to do right by all manner of people'.

¹⁰ Magna Carta 1215, clause 40.

¹¹ See e.g. *Raymond v Honey* [1983] 1 AC 1, Lord Wilberforce at 13 described the right of access to the courts as a 'constitutional right'. As noted in *R v The Lord Chancellor, ex p Witham* (High Court, 7 March 1997) per Laws J: 'I cannot think that the right of access to justice is in some way a lesser right than that of free expression; the circumstances in which free speech might justifiably be curtailed in my view run wider than any in which the citizen might properly be prevented by the State from seeking redress from the Queen's courts. Indeed, the right to a fair trial, which of necessity imports the right of access to the court, is as near to an absolute right as any which I can envisage'. Laws referred to the proposition that: 'the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right'.

are entitled to seek redress in the King's courts.¹² More recently, as the former Lord Chancellor, Lord Irvine of Lairg noted in 1999:¹³

English courts attach great importance to the citizen's right of access to justice; and judges have now come to speak of this as a constitutional right.

10. Since the 1969 decision of the House of Lords in *Anisminic*,¹⁴ the courts have made clear that they will interpret any statutory provision seeking to prevent access to courts in the strictest terms possible. The basis for this rule is the bedrock assumption that Parliament would not intend to undermine the fundamental duty of the courts to ensure the rule of law, nor seek to undermine the fundamental right of those subject to the law to have access to the courts.
11. Principles of statutory construction have no purchase, though, where the language of an enactment is clear and the intention of Parliament plain. Clause 14 is drafted in terms that make the ouster of judicial review explicit and leave no room for the courts to doubt Parliament's intention in this regard.
12. Such ouster would undermine the enduring balance of the UK constitutional settlement between the Courts and Parliament. The duty to ensure the rule of law and protect fundamental rights would likely oblige the courts to revisit the assertion of Sir Edward Coke in *Dr Bonham's Case* from 1608.¹⁵

In many cases the common law will controul acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void.

Parliament should consider carefully whether it is wise to invite such a fundamental constitutional development for the sake of managing targets at the Home Office.

¹² See e.g. *In re Boaler* [1915] 1 KB 21: "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King". In *ex parte Leech* (1994) at 198: Steyn LJ said 'It is a principle of our law that every citizen has a right of unimpeded access to a court'.

¹³ Paul Sieghart Memorial Lecture 1999.

¹⁴ *Anisminic* [1969] 2 AC 147.

¹⁵ (1610) 8 Co. Rep. 113b

Inferior tribunals determining the scope of their own jurisdiction

13. Ouster of judicial review under clause 14 will result in an inferior tribunal exercising supervisory jurisdiction over itself. As Lord Denning observed:¹⁶

If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.

14. In JUSTICE's view, the discretion given to the President of the Tribunal to refer cases to the Court of Appeal for an advisory opinion is a wholly inadequate substitute for judicial review. First, there is no obligation on the President to do so. Secondly, the Tribunal would not be bound to follow the opinion of the Court of Appeal in any event. For an administrative tribunal to make decisions secure in the knowledge that it is not subject to oversight or review, we think can only have a pernicious effect.

15. The government has put forward no reasons as to why an administrative tribunal should be entrusted with such an unprecedented licence to police its own jurisdiction, nor why it is appropriate to create an island of administrative decision-making that is protected from review by the higher courts. As Chief Justice Scrutton held in 1922:¹⁷

There must be no Alsatia in England where the King's writ does not run.

16. Considering clause 14, the Commons Constitutional Affairs Committee found 'no reason why the President of the Asylum and Immigration Tribunal should have the sole right to decide whether an appeal lies to a higher court or why the Court of Appeal should not be trusted with the discretion to take over particular cases if it saw fit'.¹⁸ The Committee concluded that the restrictions imposed by clause 14 are 'without precedent' and that oversight must be retained both as a matter of constitutional principle and to ensure justice.¹⁹

Exclusion of the higher courts from the development of immigration and asylum law

17. For as long as there have been laws relating to immigration and asylum, the higher courts have been involved in their application. The precedents established thereby have defined not only UK law, but contributed to the development of jurisprudence throughout the common law world, and in the proceedings of such international institutions as the UN Human Rights

¹⁶ *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586.

¹⁷ *Czarnikow v Roth Schmidt & Co* [1922] 2 KB 478 at 488.

¹⁸ Constitutional Affairs Committee, *Asylum and Immigration Appeals*, Second Report of Session 2003-04, HC 211-I, para.54.

¹⁹ *Ibid.*, para. 70.

Committee. The government has given no coherent case for circumscribing the power of the Court of Appeal and the House of Lords to hand down binding decisions in relation to immigration and asylum cases.

The right to an effective remedy under Article 13 ECHR

18. In the explanatory notes published with the Bill on 27 November 2003, the Government addressed the question of compliance with Article 13 ECHR in relation to the removal of appeal rights. It has claimed that Article 13 does not require the provision of multiple tiers of appeal and that the single tier Tribunal would provide an effective remedy as required by Article 13.²⁰

19. However, Article 13 ECHR requires there to be an effective remedy by an independent national authority for anyone who believes that his or her rights have been violated. In the past, the government has relied upon the possibility of judicial review from the decisions of an administrative tribunal in order to meet this requirement. However, the Bill explicitly restricts remedies for violations of Conventions rights by excluding the jurisdiction of the ordinary courts.²¹ The effect is that there would be no remedy if it were alleged that the proposed new Tribunal has itself acted incompatibly with a person's Convention rights.

20. Reporting on the Bill, the Joint Committee on Human Rights expressed grave concern about the apparent restriction the clause would impose on the remedies available under the Human Rights Act 1998. It considered that clause 14(7), by limiting the scope of the Human Rights Act's scheme of remedies in particular areas of administration and decision-making, 'would set a dangerous precedent'.²²

Loss of coherence and consistency in administrative decision-making

21. A right of parties to appeal to the Court of Appeal is also in the interest of consistency in administrative decision-making. Decisions of the higher courts provide authoritative guidance to decision-makers and establish standards which must be applied in similar cases. Clause 14 would instead make an already-overloaded adjudicator system the sole arbiter of difficult questions of both fact and law at the same time as it is subject to ever-increasing political pressure to process cases speedily.

²⁰ Explanatory notes to the Bill, para.138.

²¹ New section 108A(5) which would subject to the ouster section 7(1) of the Human Rights Act 1998 (c.42) (claim that public authority has infringed Convention right).

A substantial increase in the number of cases that are wrongly decided

22. JUSTICE believes that this clause 14 will give rise to a substantial increase in the number of immigration and asylum cases that are wrongly decided. At present many asylum cases wrongly decided by adjudicators are corrected by the IAT and the higher courts.²³ In asylum cases, such errors may include issues of torture and matters of life or death. The internal review of the Tribunal's decisions proposed by clause 14 is not a sufficient safeguard against error. Review will only succeed if the Tribunal is 'satisfied that the decision would have been different but for a clear error of law by the Tribunal'. However, JUSTICE doubts whether even the most exacting and scrupulous of administrative tribunals would be able to judge its own flaws. Instead, the proportion of immigration and asylum cases that are currently successful by way of judicial review would become the likely proportion of wrongly-decided cases under the new Tribunal whose errors would go unacknowledged and unaddressed. The consequence of making decision of the single tier tribunal immune from review by any court of law will be an inevitable lowering of standards.

Current High Court procedures are effective

23. The Government maintains that the ouster is necessary to prevent delay and abuse of the asylum appeal system. It provides no evidence for this assertion, however. While some failed asylum seekers undoubtedly rely on the courts to frustrate removal, current High Court procedures have been shown to be very effective in stopping such dilatory appeals at the outset.²⁴ The two-stage leave procedure introduced by the Bowman Report has meant that permission is required in order to proceed to full judicial review. Applications for permission are dealt with in the first instance on the papers. This allows the High Court to screen out those applications that are without merit swiftly and efficiently.

24. As such, there is no evidence to show that the higher courts in general have been overrun by baseless asylum claims. Instead, the current volume of asylum decisions reflects (i) the complexity of current immigration law; (ii) the appropriate degree of scrutiny that the courts must give to cases that involve fundamental human rights; and (iii) the constant flow of fresh immigration measures, each of which must be interpreted and applied by the courts.

²² Joint Committee on Human Rights, *Scrutiny of Bill: Progress Report*, Third Report of Session 2003-04, HL 23, HC 252, paras.1.23 to 1.28.

²³ About 60% of appeals to the IAT result in the decision of adjudicators being reversed or reconsidered. *Hansard*, 11 December 2003, Col.592W.

²⁴ Data for 2003 show that, to the end of November 2003, 252 were granted permission out of 1,396 applications to judicially review a decision of the immigration appellate authority. *Hansard*, 11 December 2003, Col. 592W.

25. We also note that the ouster has been introduced at a time when the statutory review process introduced by the Nationality, Immigration and Asylum Act 2002 is barely 8 months old. While the statutory review procedure does not offer the same degree of judicial protection as judicial review – as a considerably tighter time-limit applies (14 days as against 3 months for judicial review) and oral argument is specifically excluded – the relatively high number of statutory review applications allowed by the administrative court (15% on average in the period November 2003-January 2004)²⁵ provides further support for the argument that a degree of judicial scrutiny is needed.

26. We therefore support the Constitutional Affairs Committee's recommendation that 'no change should be made until there has been more experience of the impact' of the statutory review process.²⁶

Abolition of the current two-tier system

27. JUSTICE is similarly concerned with government proposals to remove the second tier of appeal. This is due to the significant flaws in Home Office decision-making which continue to be a fruitful basis for legal challenge. No amount of tinkering with the appellate system, whether removing a second tier of appeals or access to judicial review, can remedy this basic source of error.

28. Home Office standards have been repeatedly criticised, most recently by the House of Commons Home Affairs Committee in its report on the asylum and immigration system, which found that 'the real flaws in the system appear to be at the stage of initial decision-making, not that of appeal'.²⁷ In respect of proposed reforms to the appeals process, it recommended that 'the implementation of the new asylum appeals system should be *contingent* on a significant improvement in initial decision making having been demonstrated'.²⁸

29. In its recent submission to the Constitutional Affairs Committee the Council of Tribunals noted that the proposals for a single tier were fundamentally at odds with the recommendations of the Leggatt Report²⁹ – a comprehensive review of the tribunal system which called for a standardised system of administrative tribunals with a unified second-tier cutting across

²⁵ See Sir Andrew Collins evidence to the Constitutional Affairs Committee, *Asylum and Immigration Appeals*, Second Report of Session 2003-04, HC 211-II (Q141).

²⁶ Recommendation 12 at page 41.

²⁷ Home Affairs Committee, *Asylum and Immigration (Treatment of Claimants, etc.) Bill*, First Report of Session 2003-04, para.43.

²⁸ *Ibid*, p.22.

²⁹ Sir Andrew Leggatt's report on the tribunal system, *Tribunals for Users - One System, One Service*, March 2001, Part I, Ch.3, para.3.8. The report made a far-reaching set of recommendations for the structural reform of tribunals.

different subject areas. It is useful to contrast the hastiness of the Home Office proposals in this case, as against the careful and measured review conducted by Sir Andrew Leggatt in this area. Indeed, it seems reasonable to ask why a two tier appeal system could ever be appropriate if – in an area of administrative decision-making which deals with large numbers of applicants and is daily concerned with life or death decisions – a single tier is all that is thought necessary.

Conclusion

30. JUSTICE believes clause 14 is unnecessary and creates a dangerous precedent. The ouster of judicial review and the abolition of the second tier of immigration appeals is an attempt to prevent those courts from interfering with Home Office decision-making. In place of the second tier and the higher courts, the government seeks to set up a second-class legal system for immigrants and asylum seekers, one that is immune from judicial scrutiny and, indeed, the normal checks and balances of the UK constitutional framework. JUSTICE considers that access to the higher courts is the fundamental right of all persons who are subject to the laws of the UK. On this basis, JUSTICE supports amendments to delete the provisions in clause 14.