



Inquiry into Asylum and Immigration Appeals Constitutional Affairs Committee

**Further evidence on clause 10 Asylum and Immigration
(Treatment of Claimants, etc.) Bill**

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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. We welcome the Committee's call for further evidence following the publication of the Asylum and Immigration (Treatment of Claimants, etc.) Bill. As the Committee will be aware, clause 10 of the Bill contains not only far-reaching measures in respect of asylum and immigration appeals but raises also wider constitutional issues. We have argued against the provisions contained in clause 10 of the Bill in our briefing for Commons Second Reading.¹ Below we set out for the Committee's benefit our position on clause 10 of the Bill as detailed in our briefing.

Clause 10 summary

3. Clause 10 merges the current two tiers of asylum appeal into a single tribunal, renamed Asylum and Immigration Tribunal ('AIT'), and provides for the exclusivity and finality of decisions made by the new Tribunal by abolishing *all* existing rights of appeal to, and judicial or statutory review by, the higher courts. It explicitly forbids challenge on the grounds of lack of jurisdiction, irregularity, error of law, breach of natural justice or any other matter.² The clause also seeks to protect decisions by the Home Secretary in connection with a person's removal from any judicial scrutiny.³
4. A review of a decision made by the IAT, on grounds limited to serious points of law, can be conducted by the Tribunal itself if requested to do so by a party to the appeal.⁴ Such a review can only be carried out once and will be by reference to written submissions only.
5. A new procedure empowers the President of the AIT to refer points of law to the Court of Appeal.⁵ However the Court cannot make a decision on the point – it can

¹ *Asylum and Immigration (Treatment of Claimants etc.) Bill Clause 10*, JUSTICE Briefing for Commons Second Reading, December 2003.

² New s108A, subsection 3.

³ New s108A, subsection 2(e).

⁴ New s105A.

⁵ New s108B.

only give its opinion to the AIT. No appeal to the House of Lords is available from an opinion given by the Court of Appeal under these provisions.

Abolition of the current two-tier system

6. The Home Office and Department for Constitutional Affairs have claimed that reforms to the asylum appeals process are necessary to stop failed asylum seekers abusing the current appeals system and thereby delaying their removal.⁶
7. In our view, most instances of delay in the asylum process are the result of Home Office inefficiency. In particular these are due to:
 - *Significant delays in decision-making*: despite some recent improvements, there continue to be a large number of asylum claims involving *significant delay* between initial claim and interview, and between interview and decision by the Secretary of State;⁷
 - *High error rate*: the significant rate of error in Home Office refusal letters continues 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.⁸ Home Office standards have been repeatedly criticised, most notably by the Council on Tribunals in its evidence to

⁶ See Home Office/DCA statements accompanying the publication of the new Asylum Bill. Home Secretary, David Blunkett: "New proposals will significantly reduce the scope for claimants to string out the appeals system solely to delay removal at the expense of the taxpayer – with limits on legal aid and a new single tier of appeal."
Secretary of State for Constitutional Affairs, Lord Falconer: " By introducing the single tier tribunal with one appeal, and no access to the higher courts apart from very limited circumstances, we will take a huge step towards stopping failed asylum seekers who have no chance of success from using the appeals system to delay the inevitable". Home Office press notice 326/2003 of 27 November 2003.

⁷ For a recent case commenting on Home Office delay in determining claims see *Shala v SSHD* [2003] EWCA Civ 233. A Kosovan Albanian applied for asylum on arrival in June 1997 yet the Home Office did not determine his application until July 2001. As the Court of Appeal noted, the difficulties arose because "the relevant procedures were designed to take months ... yet have in practice ... taken the Home Office several years".

⁸ For example, the recent report of the Independent Race Monitor on asylum casework showed concern about cases in which all the significant factual details given by the claimant are not believed simply on the assumption of credibility without any other indicated facts. This does not help adjudicators understanding the issues of contest between the claimant and the Home Office and places extra burdens on the adjudication process. See Independent Race Monitor, *Annual Report April 2002-March 2003*, para.30.

this Committee's current inquiry. The Council identified the need for 'better quality decision making at first instance' as one factor that would improve both the efficiency and fairness of the current asylum appeals system.⁹

- *Failure to remove as a matter of policy*: large numbers of asylum seekers are simply not removed as a matter of Home Office policy despite having exhausted their appeals, and despite the fact that the Home Office has substantial powers under existing legislation to effect their removal. This is either because there exists no safe, practicable route for their return (e.g. Somalia or Iraq), or because the Home Office is otherwise unwilling to enforce removal (e.g. Zimbabwe).
- *Failure to attend adjudicator hearings*: at present, the Home Office is not represented in approximately 30% of first-tier cases because it does not send a Presenting Officer to attend the hearing. The absence of proper Home Office representation in adversarial proceedings places an inevitably greater strain on the second-tier proceedings, the Immigration Appeal Tribunal.¹⁰ Over 10% of applications for leave to appeal are made by the Home Office itself against first-tier decisions allowing asylum or human rights claims. It is difficult to reconcile this figure with the apparent view of the Home Office that only first-tier review is needed in order to reach correct outcomes.

8. In addition, we do not agree that the present two-tier appeals system provides incentives to spin out the process and delay removal. On the contrary, it is our view that the existing second-tier works effectively and performs an essential role. This is borne out by the fact that:

- *Access to the Immigration Appeals Tribunal (IAT) is by means of a leave procedure*: this means that the IAT will only grant permission to appeal if there is a reasonable argument relating to the quality of the first-tier decision. In cases where there is no obvious defect, and where it is apparent the claimant is seeking

⁹ Evidence to the Constitutional Affairs Committee inquiry on Asylum and Immigration Appeals, April 2003. The Council also identified 'speedier and better preparation of appeal paper by the Home Office, and the presence of well-briefed Home Office Presenting Officers at every hearing', as likely to increase 'the efficiency of the [Immigration Appellate Authority] and enhance fairness at the same time'.

¹⁰ See evidence by Mr Justice Ouseley, President of IAT, to the CAC inquiry, April 2003: "There is a growing trend for the Home Office to bring appeals in cases where it was not represented before the adjudicator."

merely to delay eventual removal, the IAT will summarily refuse permission within a matter of days.

- *Statistics show that the IAT retains value:* at present, up to 1 in 3 applications for leave to appeal are being granted. The relatively high rate of successful leave applications suggests that review by the IAT is necessary to monitor the effectiveness of first-tier decision-making (a lower rate of successful leave applications would suggest less need for a second tier).
- *The IAT plays a vital role in addressing the sources of first-tier error:* while 16% of appeals to the IAT are currently allowed,¹¹ a further 44% of tribunal appeals are remitted back to the first-tier adjudicators for reconsideration because of errors of law. In total, *about 60% of appeals to the IAT result in the decision of the first-tier being reversed or reconsidered.* This shows a substantial number of errors that currently occur at the first tier of appeals – mistakes, we have noted, that occur as a consequence of the complexity of immigration law, the failure of the Home Office to attend hearings, and the constant introduction of fresh immigration rules and legislation. The abolition of the current second-tier of appeals will do nothing to address these sources of first-tier error. Instead, the approximately 60% of cases in which errors currently occur would simply go uncorrected and unaddressed.¹²

9. Within the proposed single-tier system, the single AIT judge will not have the benefit of second-tier review to correct errors of law or procedure. Rather, the Home Office proposes an internal party-led review of the Tribunal's decisions, conducted by reference to written submissions only and restricted to decisions based on an erroneous construction or application of a provision of an Act - a considerably narrower ground than the current second-tier appeals on point of law. This would preclude, for instance, interpretation of immigration rules, issues of natural justice and procedures fairness.

¹¹ *Hansard*, 11 December 2003, Col. 592W.

¹² We note in this context the misleading claim made recently by the Home Office Minister, Beverley Hughes, that only 3% of initial adjudicators' decisions are overturned by the second-tier tribunal (Evidence taken before the Home Affairs Committee on Wednesday 19 November 2003, Q860). This figure is obtained by reference to those who apply for leave to appeal to the Tribunal, rather than by reference to those whose leave to appeal is granted.

10. Ironically, the absence of a second tier would mean that the judges of the proposed single tier AIT would have to review applications without the benefit of the second-tier's leave procedure (which currently screens out approximately two thirds of cases). As such, the amount of time spent by single AIT judges reviewing internal appeals is likely to be a significant drain on time and resources.
11. Lastly, we note that the decision to introduce a single-tier appeal system in the field of asylum and immigration is wholly at odds with the recommendations of the Leggatt Report,¹³ a comprehensive review of the tribunal system which called for a standardised system of administrative tribunals with a unified second-tier cutting across 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. It can reasonably be asked why a two tier appeal system is ever to be considered appropriate if, in a jurisdiction which deals with large numbers and is daily concerned with life or death decisions, a single tier is all that is thought necessary.

Removal of the higher courts' jurisdiction

12. The attempt to remove the higher courts' powers to scrutinise decisions of the executive or the IAT is unprecedented and a matter of great constitutional significance. The consequence of this provision will be that:
- the long-standing and widespread constitutional right to the supervisory jurisdiction of the courts to maintain the quality of inferior tribunals is breached;
 - an inferior tribunal will be isolated from the requirements of natural justice and will effectively determine the scope of their own jurisdiction - a proposition that Lord Denning described as "the end of the rule of law";¹⁴
 - the legality of decision-making by the executive is subject to review only by tribunals the executive itself has established, whose procedural rules it dictates, and whose decisions are unaccountable before any court of law. This

¹³ 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.

¹⁴ *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586.

may well prove to be challengeable under the European Convention of Human Rights.

Our view is that such a wholesale exclusion of the courts is unprincipled, unjustified and will encourage second-rate decision-making. It is a totally disproportionate and unnecessary response to the failures perceived by the Government in the current working of its asylum policy.

13. The right of access to the courts is effectively a fundamental constitutional right and has been so regarded throughout the common law world and beyond.¹⁵ The courts have indicated since a major 1969 decision of the House of Lords¹⁶ that they will interpret any statutory provision seeking to prevent access to courts in the strictest terms possible. Senior judges are particularly likely to oppose any attempt to deprive them of their supervisory role in asylum cases where the consequences of error can be literally fatal. Furthermore, higher courts have a significant role in determining points of law as guidance in its application by the lower judiciary: it is often through the higher courts that protection principles and the finer points of refugee law are authoritatively articulated.

14. The Secretary of State has declared the Bill as compatible with the Human Rights Act. We question this. The key requirement of any tribunal under the Convention is that it should be 'independent and impartial'. Clause 10 removes judicial supervision of the tribunal and provides no redress to an applicant who alleges that it has acted unlawfully. The effect is that a tribunal could come to a completely outrageous decision, unwarranted by the facts, and would effectively be unchallengeable. The implication of the Government's position is that it is not concerned that such a decision would be contrary to its interests but this clause will bind all parties. Neither

¹⁵ See e.g. s27(2) of the New Zealand Bill of Rights Act 1990 ('Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination'); *Krishnapillai v. Canada (C.A.)* [2002] 3 FC 74, applying ss 7 and 15 of the Canadian Charter of Rights and Freedoms 1982; Article 34 of the South African Constitution ('right of access to the courts'); Article 34(3) Constitution of Ireland; the decision of the US Supreme Court in *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491 52 L.Ed.2d 72 (1977) and the judgment of Chief Justice Marshall in *Marbury v Madison* (1803):

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

¹⁶ *Anisminic* [1969] 2 AC 147.

the Government nor the applicant will be able to challenge a totally erroneous decision by way of judicial review. In addition, removing the ability of the courts to review the decisions of inferior tribunals would prevent them from providing a remedy for breaches of the Convention by inferior Tribunals, contrary to Article 13.

15. 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 outset¹⁷. 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.
16. 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.
17. Any alleged abuse of judicial review should be controllable by the current requirements of leave, costs and the legal aid. The ouster of judicial review or appeal from contentious decisions of the immigration tribunal is an attempt to prevent the higher courts with their greater experience, resources, and access to the highest calibre of advocates from developing and declaring the law in a way amenable to the Home Office. This raises serious questions because it is implicitly an attack on the independence of the judiciary. An already overloaded adjudicator system is to be sole arbiter of difficult questions both of fact and law at a time when it will be under immense executive pressures to process cases speedily. The consequence of shoddy decision-making is unavoidable. This provision, if enacted, is likely to prove a disaster; will predictably lead to judicial challenge – possibly to the European Court of Human Rights in Strasbourg; and will undoubtedly not stand the test of time.

¹⁷ 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.