



House of Lords Select Committee on the Constitution findings on the Immigration Bill

- **The Select Committee brings three clauses of the Immigration Bill to the attention of the house.**

Clause 11

- Current Legislation lists 14 different immigration decisions in respect of which there is a right of appeal. These include refusals of entry, refusals to vary leave to enter and remain, and decisions to remove and deport. Clause 11 (2) will replace this variety of appeal rights with a right to appeal where the Secretary of State has either refused a protection or a human rights claim made by a migrant or revoked a protection status. Clause 11 (4) provides that the only grounds on which the appeal rights in clause 11 (2) may be exercised are human rights grounds.
- According to the Lords report, Clause 11 constitutes a significant streamlining of appeal rights in respect of immigration decisions. The Lords question whether clause 11 undermines the common law right of access to justice. The Joint Committee on Human Rights concluded that it did indeed do so. This is the clause that the Committee suggests is the most legally problematic.
- The report notes that it is disturbing that such a high proportion of immigration appeals succeed as this implies that something is wrong with initial judgements (in 2012-13, 50% of entry clearance appeals succeeded, as did 49% of managed migration appeals and 32% of deportation appeals.) The Lords state that because of this poor record, it is questionable whether an administrative review will be sufficient to fix the problem.
- **Comment. The suggestion that Clause 11 may “undermine the common law right of access to justice” is an emotional rather than a legal statement. Such a right may be identified e.g. in Magna Carta but it is not comparable to rights set out in the European Convention on Human Rights (ECHR) . The Human Rights Act 1998 made the provisions of the ECHR justiciable in the UK courts and the higher courts are empowered by that Act to rule as to whether particular statutes or items of subordinate legislation are compatible with Articles of the ECHR. However, Parliament can and frequently does pass legislation which makes changes to the common law and such legislation cannot be impugned on the ground that it undermines the common law right of access to justice. So far as immigration appeals are concerned, there was no appeal against Home Office adverse immigration or asylum decisions before 1969 and in recent years the former right of appeal against refusal of visitors’ visas was abolished.**

In expressing concern about the high percentage of successful immigration appeals their Lordships are making the implicit assumption that the appeals system is perfect and that the decisions of immigration judges on those appeals cannot be faulted. Having been a part time immigration judge myself for 10 years I would not share that assumption. I have from time to time referred to my own experience in hearing asylum appeals. Out of 600 which I heard I allowed only 30, around 5%, whereas

the overall record showed that around 20% were allowed. Very few of my decisions were overturned on appeal to a higher level. There are now several hundred immigration judges of varying levels of intellectual calibre and with differing approaches to their tasks. I frequently came across colleagues who were swayed in their decisions by a sympathetic attitude towards appellants and who were aware that the Home Office would rarely if ever appeal against the allowing of an appeal against one of its own decisions. Another factor to be appreciated is that the Home Office frequently fails to provide a Home Office Presenting Officer (HOPO) to conduct cases before the tribunal. HOPOs are not legally qualified, though many of them do an excellent job of presenting the Home Office's case, and this means that the Home Office's case may not always be put as fully or as forcibly as desirable.

Clause 11 (5)

- his clause provides that the Tribunal may not consider a 'new matter' on appeal unless the Secretary of State consents: according to the bill's explanatory notes, this is to prevent appellants from raising new grounds before the Tribunal until the Secretary of State has had a chance to consider them.
- The Select Committee has doubts about whether Clause 11 (5) is compatible with the right of access to court and the rule of law. They are also concerned that as the Secretary of State would be a party to any relevant appeal, that there is an issue around whether there would be equality of arms and common law principles of natural justice.
- The Committee takes particular issue with the phrase 'unless the Secretary of State has given...consent'. This suggests that in the absence of such consent it would be unlawful for the tribunal to consider the matter in question. It believes that the purpose of the clause is not to grant the Secretary of State a veto over matters that may be considered by the tribunal, but merely to ensure that the tribunal does not consider grounds or reasons which have not first been considered by the Secretary of State. It is the Committee's view that the clause therefore goes further than is required in order to meet the Government's stated purpose.
- **Comment. It always used to be the rule that in immigration appeals additional facts could not be introduced. Asylum appeals were different as what had to be assessed was whether the appellant had a well-founded fear of persecution for a Convention reason if he were to be returned to his country of origin. Clearly the situation in that country could change in the interval between the original decision and the hearing of the appeal, so evidence of such change was and still is allowed. The admission of new evidence at the appeal stage is a concession in favour of the appellant which was brought in by section 85(4) of the Nationality, Immigration and Asylum Act 2002. It is not unreasonable that there should be conditions limiting the scope of the concession.**
- **I make the same point in relation to Clause 11(5) that I have already made above in relation to the rest of Clause 11. An Act of Parliament cannot be impugned on the ground that it is not compatible with the right of access to the courts and the rule of law. This may be a moral or political objection but not a legal one.**

Clause 14

- Clause 14 has come about in response to the Home Office's feeling that court and tribunal rulings are preventing them from deporting people because of article 8 considerations. Indeed, the Home Secretary made a speech to the Conservative Party Conference in October 2011 in which she said that the courts were 'misinterpreting' their powers under the Human Rights Act to prevent her deporting foreign criminals from the UK on the basis that such deportations were a disproportionate interference with the right to a family life under article 8 of the European Convention on Human Rights. The Home Secretary amended the Immigration rules in 2012 accordingly.
- Clause 14 sets out in primary legislation what should be the public interest factors in immigration decisions that engage article 8 (private and family life) considerations. Clause 14 contains specific provisions concerning foreign criminals. The clause advises that 'little weight should be given to a private life or to a relationship

formed by a person at any time when the person is in the UK unlawfully.' The same goes for when a person's immigration status is 'precarious'. The clause goes on to state that 'the deportation of foreign criminals is in the public interest' and that the more serious the offence committed, the greater the public interest in deportation.

- The JCHR noted there 'there is nothing inherently incompatible with the Convention in Parliament spelling out...its detailed understanding of the requirements of relevant Convention rights in particular contexts.' It went on to say that the 'the provisions in the bill which seek to guide courts and tribunals in their determination of article 8 claims in immigration cases do not purport to go so far as to determine individual applications in advance or to oust the court's jurisdiction.'
- However, the JCHR also criticised the provision purporting to tell courts and tribunals that 'little weight' should be given to certain considerations stating that appears to be a significant legislative trespass into the judicial function. According to the Lords, the courts will continue to be bound under section 3 of the Human Rights Act and will give effect to clause 14 in a manner compatible with Convention rights.
- **Comment. Migration Watch supports the intentions underlying Clause 14. The intention is to limit the damage caused by the application of the right to family life etc. in Article 8 of the ECHR by allowing it to become a serious impediment in the way of deporting foreign criminals. Accordingly the use of the expression "little weight" even though it may go further than usual in seeking to limit the discretion of judges in applying Article 8, is justifiable.**

Clause 60

- Clause 60 of the bill would amend section 40 of the British Nationality Act 1981 ("BNA") such that the Secretary of State would be empowered to deprive someone of their citizenship, even if that would make them stateless, as long as two conditions are met: that the person is a naturalised British citizen and that the deprivation is conducive to the public good because the person has conducted himself in a manner which is "seriously prejudicial to the vital interests of the United Kingdom ..."
- In 1966 the UK ratified the UN Convention on the Reduction of Statelessness ("the 1961 Convention"). Article 8(1) of this Convention. This prohibits a state from depriving a person of his nationality if such were to cause him to be stateless. There are two exceptions. The first is if the nationality had been obtained by misrepresentation or fraud. The second applies if domestic law at the time of ratification permitted deprivation on grounds of conduct seriously prejudicial to the vital interests of the state.
- The explanatory notes to the bill state that the amendment of BNA s. 40 by clause 60 would return the law to how it was in 1966, when the UK ratified the 1961 Convention. BNA s. 40, as it is currently in force (having been amended on several occasions), goes "further than [is] necessary in order to honour the UK's existing international obligations"
- The Select Committee believe that Clause 60 is compatible with the UK's international law obligations. However, the Lords recommend that the House may wish to scrutinise the provision carefully because it was introduced into the bill only at the report stage in the House of Commons and therefore was not subject to the scrutiny of the public bill committee.
- **As the Select Committee concludes that Clause 60 is compatible with the United Kingdom's international law obligations, Migration Watch has no comment.**

10th March 2014