



THE BORDERS, CITIZENSHIP AND IMMIGRATION BILL

PARLIAMENTARY BRIEFING- CLAUSE 50 & AMENDMENTS 111A-111F

House of Lords - Committee stage

JCWI supports peers who oppose clause 50, and supports tabled amendments 11A-111F. JCWI has the following concerns about clause 50:

1. The risk of limitation on access to higher courts in judicial review proceedings

The Home Office's present proposals set out in its Consultation Paper¹ seek to limit rights of appeal from the Upper Tribunal to the Court of Appeal. Section 13(6) of the Tribunals Courts and Enforcement Act 2007 ("TCEA 2007") empowers the Lord Chancellor by order to provide for permission to appeal from the Upper Tribunal to the Court of Appeal in cases where *(i) the proposed appeal raises some important point of principle or practice, or (ii) there is some other compelling reason for the appeal to be heard*. Currently leave to appeal will be granted where the contemplated appeal would have a *real prospect of success* without the need to show an important point of law of principle or practice or compelling reason for the appeal to be heard

If the above provision is brought to bear not only upon "*tribunal*" work but also upon judicial review work transferred from the Administrative Court, then it would bar recourse to the Court of Appeal even where there has been a fairly clear error of law by the Upper Tribunal in a Refugee Convention case (invoking the United Kingdom's duty to protect from persecution) or in a serious human rights case (invoking the right to life or freedom from torture or inhuman or degrading treatment under ECHR). The interpretation of a test such as that proposed is illuminated by a past decision of the Court of Appeal in *Uphill v BRB (Residuary) Ltd*² Dyson LJ indicated that "*it is unlikely that*

1. Consultation: *Immigration Appeals Fair Decisions: Faster Justice*, UK Borders Agency, 21 August 200834.

2. Para.24 *Uphill v BRB (Residuary) Ltd* [2005] 1 WLR 2070

*the court will find that there is a compelling reason” for granting permission unless it considers “that the prospects of success are **very** high”.² He continued by saying that “the fact that the prospects of success are very high will not necessarily be sufficient to provide a compelling reason”, albeit he did accept that there might be cases where there is a compelling reason notwithstanding a slightly lower prospect of success, especially in cases involving procedural irregularity.*

It is far from clear that the test at section 13(6) TCEA 2007 will accommodate cases which do not raise an important point of law, principle or practice and therefore effectively protect refugees and those facing serious human rights violations on return. With appeals procedures not ensuring this, the risk of critical injustice would be greatly magnified in the event that the same eligibility test is imposed in the judicial review cases

2. The risk that cases will not be heard by members of the judiciary possessing appropriate expertise

It is essential that there is (i) some appropriate mechanism in place to identify the kinds of cases suitable for hearing by a High Court Judge possessing administrative and constitutional law expertise and (ii) to ensure that where administrative and constitutional law expertise is necessary, such cases are dealt with by a High Court judge.

Whilst the Tribunal at its upper levels possesses (or will possess with transfer of personnel from the present Asylum and Immigration Tribunal) valuable knowledge of immigration and asylum law and practice, this does not extend to expert knowledge of constitutional or administrative law, of civil liberties, or of judicial review law and practice. This expertise is important because:

- (i) Immigration and asylum cases often tend to be those in which precedents of wider application in constitutional and administrative law are established and;
- (ii) The procedures in question are the means by which the adherence of the United Kingdom to its international obligations under the 1951 Refugee Convention and the European Convention on Human Rights and Fundamental Freedoms (“ECHR”), including the right to life (art 2 ECHR), the prohibition on torture or inhuman or degrading treatment and punishment (art 3 ECHR); and the right to liberty and security of person (art 4 ECHR) is sought to be ensured.

In its current form, clause 50 would empower the Lord Chief Justice with the agreement of the Lord Chancellor, to direct that all/any specified class of immigration and nationality judicial review must be transferred to the Upper Tribunal.³ This is problematic as potentially inconsistent with the existence of a reasonable process of selection separating those cases which are suitable for transfer to the Upper Tribunal from those which are not. The difficulty is

magnified by absence of clarity as to how many High Court judges would sit in the Upper Tribunal and how and at what level it would be decided within the Tribunal whether any particular case should be heard by a High Court judge.

3. Assurances/clarification sought

If this provision is to remain part of this Bill in its current format we seek an assurance that the section 13(6) TCEA 2007 power to limit the ability to appeal to the Court of Appeal in statutory appeals cases is not reproduced in relation to any judicial review case raising:

- Refugee Convention issues;
- Human rights issues arising under the European Convention on Human Rights;
- Fundamental rights issues arising under EU law.

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