



House of Commons
Constitutional Affairs
Committee

Asylum and Immigration Appeals

Second Report of Session 2003–04

Volume I



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Report

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The Constitutional Affairs Committee

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Summary

On the 27 November 2003, the Government introduced the Asylum and Immigration (Treatment of Claimants, etc) Bill. If enacted, its proposed changes will be the third major set of reforms on this issue in the last few years. Its most recent predecessor is the Nationality, Immigration and Asylum Act 2002.

When we announced this inquiry in February 2003, one of our main aims was to consider the effects of the 2002 Act and whether it had produced efficiency savings and improved the quality of the appeal process. We also intended to examine the efficiency and fairness of the system of asylum and immigration appeals. We visited India and Turkey to address issues arising out of family visitor appeals and other matters relating to immigration appeals.

Proposals for the appeals system have been constantly updated since the inquiry was announced. We have taken account of the new developments contained in the latest Bill, and the major concerns which have been raised about them.

The new proposals do too little to address the failings at the initial decision making level and the low level of Home Office representation at initial appeals, which must add to the delays in the system. We think it unlikely that the abolition of a tier of appeal can by itself increase “end to end” speed and achieve improvements in the quality of judicial decisions. We doubt whether many of the proposals contained in the new Bill are necessary to deal with the current issues relating to asylum and immigration appeals.

We accept that there is a need for mechanisms to ensure that appellants are unable to abuse the appeals system and to string out asylum claims simply in order to remain in the country. It is not clear how serious this problem is, or whether abolishing the second tier of appeals will prevent abuse. We support efforts to remove poor quality, unqualified, immigration advisors from the system and prevent them from advertising for custom. Nonetheless, we believe that the current reforms have been drafted mainly to deal with the issue of asylum, without properly addressing concerns relating to immigration appeals which are equally affected by them. There has not been sufficient time to monitor the effects of the reforms contained in the 2002 Act and the impact that they might have had on cost and delay.

We are concerned about the measures intended to restrict the jurisdiction of the courts and the fact that under the proposed Bill the President of the new Tribunal will have sole responsibility for allowing references to the Court of Appeal.

- We recommend that judicial oversight of the new tribunal is maintained as a matter of principle; and we do not believe that measures to restrict such oversight should be introduced at the same time as the appeal system is itself compressed.
- The right of appeal to the House of Lords should be retained.
- We recommend that the removal of a formal tier of appeal should not be undertaken until it can be shown that there has been a significant improvement in initial decision making and that the rise in the number of successful first tier appeals has been

substantially reversed.

- We welcome further restrictions and penalties being imposed on unqualified legal advisors.
- The adversarial process the system operates most fairly when both sides are represented competently. It is wrong in principle and inefficient in practice to deny Legal Help to those who need it in asylum and immigration cases.
- The proposals appear to have been drafted in order to deal with concerns relating to asylum appeals, without proper consideration of the system as a whole. The position of those who are making immigration applications, such as for family visits, may be prejudiced by many of the proposed changes. It is unclear what the impact will be on immigration appeals, which appear to have been overlooked.
- We are deeply concerned at the current disparity in success rates between oral appeals and appeals which have been decided only on the basis of the papers in relation to family visitors. This indicates that there may be substantial injustice done to those who decide not to opt for an oral appeal.

1 Introduction

1. On 28 February 2003, we announced that we would be holding an inquiry into the immigration and asylum appeals process.

2. We have received written submissions from a large number of witnesses, both before the introduction of the Asylum and Immigration (Treatment of Claimants etc.) Bill on how the system was working at that time and also once the Bill had been introduced on the proposals contained within the Bill. We took oral evidence at four meetings, from the witnesses listed on page 44.

3. The aim of the inquiry was:

- To consider the effects of the Nationality, Immigration and Asylum Act 2002 and whether it has produced any significant efficiency savings and/or improved the quality of the appeals process;
- To examine the proposed structural changes to immigration and asylum appeals, including the extent to which the efficiency of the Immigration Appellate Authority can be improved without any corresponding improvement in the quality of Home Office decision-making;
- To consider the costs and benefits of compressing the appellate structure into a single tier and to examine the implications of excluding further appeals to the higher appellate courts and of excluding judicial review as proposed by the Asylum and Immigration (Treatment of Claimants, etc.) Bill;
- To study the extent to which “non-suspensive” (i.e. out of country) appeals provide an adequate right of appeal and to study the quality of legal advice and representation which is provided to those claiming asylum or seeking to challenge an immigration decision; and
- To examine the system of immigration appeals and in particular family visitor appeals. In that context, the Committee undertook a visit to India and Turkey.

4. Originally, we had intended to examine the costs to public funds of supporting new appeals structures, such as the Asylum Support Adjudicators, and of supporting the extension of legal aid. This matter was overtaken in part by the Government’s subsequent proposals relating to appeal structures in the Asylum and Immigration (Treatment of Claimants, etc.) Bill. We reported specifically on Legal Aid and asylum in our Fourth Report last Session.¹

5. We are most grateful to all our witnesses. We travelled to India and Turkey in the course of the inquiry. We thank all those who assisted us there. We also wish to thank our specialist advisers, Chris Randall, a solicitor at Bates, Wells and Braithwaites and Dr Robert Thomas, a law lecturer at the University of Manchester.

¹ Fourth Report of Session 2002–03, *Immigration and Asylum: the Government’s proposed changes to publicly funded immigration and asylum work*, HC 1171

2 Recent Developments

6. There have been a number of significant developments since the inquiry was first announced on 28 February 2003.

The Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003/04

7. On 27 November 2003, the Government introduced the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003/04, which makes provision (amongst other things):

- To establish a single tier of appeal, to be known as the Asylum and Immigration Tribunal (clause 11 and schedule 1);
- To place further restrictions on rights of appeal against removal to countries that are designated as ‘safe’ (clause 13 and schedule 3);
- To introduce additional powers for the regulation of immigration advice (clauses 17-20); and
- To introduce an “ouster” clause (clause 11) removing the jurisdiction of the courts.²

The Home Affairs Committee produced a short report on the Bill in time for the Second Reading debate on 17 December.³

Home Secretary’s announcement of an asylum amnesty

8. On 24 October 2003, the Home Secretary announced that, in order to clear the backlog of asylum cases “in the most cost-effective way”, up to 15,000 asylum applicants “who sought asylum in the UK before 2 October 2000” would be granted permission to stay in the UK. If a significant proportion of these have some or all of their appeals outstanding, this will reduce the backlog significantly and, in turn, reduce legal aid expenditure.

Changes to publicly funded immigration and asylum work

9. On 5 June 2003, the DCA issued a consultation paper on proposed changes to publicly funded immigration and asylum work. We conducted the inquiry to examine these proposals referred to above (paragraph 4), reporting on 28 October.⁴ The Government made its final announcement on 27 November 2003 (see section 8 below).

Nationality, Immigration and Asylum Act 2002: commencement of Part 5

10. The 2002 Act received Royal Assent on 7 November 2002. When the Committee first announced its inquiry on 28 February 2003, the majority of provisions were not yet in force. As a result, many of those who submitted written evidence said that it was too early

² Paras 47–71 below

³ Home Affairs Committee, First Report of Session 2003–4, *Asylum and Immigration (Treatment of Claimants etc) Bill*, HC 109

⁴ Fourth Report of Session 2002–3, HC 1171

to comment on the operation of the Act. Part 5 of the Act, which relates to appeals and which introduced a new system of statutory review, entered into force on 1st April 2003.

3 The quality of initial decision making

Quality of initial decision-making and representation by the Home Office at appeals

11. The issue of poor decision-making by the Home Office has been raised in a number of the written submissions. Typical comments on Home Office decision-making included:

“Poor quality decision making is prominent throughout the system.”⁵

“We are...convinced that reforms to improve the efficiency of the appellate procedure will not be successful unless they are accompanied by similar improvements to the initial decision-making process...Good quality initial decision-making would also reduce the number of appeals.”⁶

“The problems of appeals begin with the initial decision. The quality of decisions is very variable. Some decision letters are very good, some are not. Standard word processed paragraphs appear with regularity whether they are relevant to the facts of the instant case or not...The standard of initial Home Office decisions has undoubtedly improved in the last four years but still has a long way to go. The quality of initial decisions by Entry Clearance Officers in visit and other immigration cases remains poor.”⁷

“...a second tier appeal is essential in view of the poor quality of Home Office decision-making at the initial stage...The poor quality of initial decisions means that the hearing carried out before a special adjudicator is often the first proper factual assessment of the case. As a result, the IAT appeal becomes the first appeal level. If the IAT second tier appeal is removed, it is absolutely essential that improvements to Home Office initial decision-making are made concurrently.”⁸

12. In our report on the *Government’s Proposed Changes to Publicly Funded Asylum and Immigration Work*, we stated that there was “also widespread concern about the low level of Home Office representation at appeals—around 35%—which can result in unnecessary appeals to the Immigration Appeal Tribunal.”⁹

13. JUSTICE, in a memorandum sent to us, was strongly critical of this, stating that at present the Home Office is not in attendance at approximately 30% of first-tier cases because it does not send a Presenting Officer to attend the hearing¹⁰. In evidence, Mr Justice Ouseley said that this figure could be as high as 40% of first tier cases. JUSTICE claims that the absence of proper Home Office representation in adversarial proceedings inevitably places a greater strain on the Immigration Appeal Tribunal. It indicates that:

5 Ev 112

6 Ev 149, para 33

7 Ev 200

8 Law Society evidence to the Home Affairs Committee, First Report of 2003–4, HC 109, Ev 28

9 Fourth Report of Session 2002–03, HC 1171

10 Ev 150

“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 the correct outcome”.¹¹

14. The Home Affairs Committee, in its report into the Asylum and Immigration (Treatment of Claimants, etc.) Bill also highlighted this problem, when it concluded that:

“The real flaw in the system appear to be at the stage of initial decision-making, not that of appeal. We recommend that the implementation of the new asylum appeals system should be contingent on a significant improvement in initial decision making having been demonstrated”.¹²

15. There are significant flaws in Home Office practice at the stage of initial decision making. This causes us great concern, not only because of the proposed removal of a tier of appeal contained in the new Asylum and Immigration (Treatment of Claimants, etc.)Bill, but also in relation to any additional restrictions placed upon the supervisory jurisdiction of the courts.

11 *ibid*

12 First Report of 2003–4, HC 109, para 43

4 Current appeal procedures

16. Any non-national (subject to special rules in relation to EU nationals) who wishes to enter or to remain in the United Kingdom needs leave to do so. If such leave is refused, there is generally a right of appeal to an adjudicator. The adjudicator will hear evidence from the appellant and any witnesses and will decide whether, on the facts, the claim is made out. The losing party may seek permission from the Immigration Appeal Tribunal (IAT) to appeal to it on a point of law. Permission applications are dealt with by a vice-President of the IAT on paper. If permission is refused, there is a right to apply to the Administrative Court on the ground of error of law for a statutory review. Such an application is dealt with on the papers by a single judge. He can decide either to grant permission to appeal, in which case the substantive appeal will be dealt with by the IAT, or to refuse the application. In either event, his decision is final. This method of review is an innovation brought in under the Nationality, Immigration and Asylum Act 2002 and aims to remove many claims for judicial review from the Administrative Court. It is accomplished in a matter of days, but satisfies the current requirement for the possibility of a review by a superior court.

17. Where the IAT hears an appeal, it will sit with a minimum of two members, one of whom will be a legally qualified vice-president or part time member. Some appeals will, if the point arising is of some importance, be heard by at least two legally qualified members. Very important cases can be starred by the Tribunal, to indicate their importance. Adjudicators are bound by starred decisions of the IAT and the IAT should follow an earlier starred decision unless it is satisfied that the decision is clearly wrong.¹³

18. These cases will be heard by three legally qualified members and chaired by the President or Deputy President. Mr Justice Collins, the former President of the Immigration Appeal Tribunal and current judge in charge of the Administrative Court List, has commented that “Starring is important. Any tribunal system, particularly one which hears a large number of cases and so has a large number of divisions, must apply consistent principles and approaches to cases”.¹⁴

19. An appeal to the Court of Appeal may only be brought with the permission of the Immigration Appeal Tribunal or, if refused, the permission of the Court of Appeal itself. Such permission will only be granted by the Court of Appeal if it considers that the ‘appeal would have a real prospect of success’ or ‘there is some other compelling reason why the appeal should be heard’.¹⁵

20. The Court of Appeal has acknowledged that as far as immigration appeals are concerned, “properly reasoned well structured judgements of the IAT will normally mark the end of the road unless there is some uncertainty about the applicable law”.¹⁶

13 *Sepet and another v Secretary of State for the Home Department* [2001] EWCA Civ 681, per Laws LJ

14 ‘Immigration and Asylum’, article in *Middle Templar*, a publication by the Honourable Society of the Middle Temple, Trinity 2003

15 Civil Procedure Rules r 52.3

16 *Koller v Secretary of State for the Home Department* [2001] 1 EWCA 1267

The need for further legislation

21. In his first letter to the Committee, Mr Justice Ouseley, the President of the IAT, said:

“Nobody yet has any real knowledge of the operation of the system in existence at present. The proposed changes will be the third major set of reforms on this issue in the last few years. The most recent predecessor is the Nationality, Immigration and Asylum Act 2002. From the point of view of the judicial process, one of the most important reforms introduced by that Act is the introduction of a speedy and inexpensive process of Statutory Review of the refusals of permission to appeal to the Immigration Appeal Tribunal... First indications of the operation of the new process are encouraging, but nobody can say any more than that.”¹⁷

22. The Law Reform Committee of the Bar Council echoed this view, noting that there has been no sudden crisis or change of circumstances since the enactment of the 2002 Act and adding that the new appeals provisions have only had a life of seven months. They also agree that:

“In particular the provisions for statutory review of the IAT ought to have an impact on its functioning. It would therefore be premature to judge the final effectiveness of the 2002 appeal provisions: further fall off in appeals and appeals expenditure can reasonably be predicted as the provisions begin to bite”.¹⁸

Adversarial or inquisitorial procedures?

23. Migration Watch, the Immigration Advisory Service and the Council of Immigration Judges suggested that the system for asylum appeals would be improved if conducted under a more inquisitorial procedure. A non-adversarial system is used in Canada.¹⁹

24. Migration Watch stated that:

“Although the procedures followed in immigration and asylum appeals are similar to those followed in civil litigation, the objective of such appeals is very different. In civil litigation the court is holding the ring between two parties in dispute and must obviously stay aloof from active participation, other than to the extent necessary for a proper understanding. Immigration appeals are concerned with the rights and duties of individuals as against the state and the obligations of the United Kingdom towards foreign nationals who wish to visit, seek asylum or otherwise spend greater or lesser periods of time in the United Kingdom and enjoy the same benefits as its citizens and other permanent residents. The adjudicator should be concerned to make sure that he elicits the truth in the course of proceedings before him, so that justice is done to the appellant and if the conclusion is that the appeal is allowed, with the consequence that the appellant is allowed to remain on a lawful basis, that conclusion is arrived at on a proper basis. [...] the ruling that proceedings before adjudicators are adversarial is based wholly on binding decisions of the Tribunal and is not

17 Ev 75, Annex 1, para 2

18 Ev 205, para 6

19 In Canada the matter only becomes adversarial if the Minister intends to intervene

statutory, so if the change to the inquisitorial system [...] is to be implemented it should be enacted in statutory form so as to put the matter beyond doubt.”²⁰

25. Migration Watch also suggested that the adversarial nature of proceedings places a number of restrictions on adjudicators, which inhibit the task of ‘eliciting the truth’. For example, the shortage of Home Office presenting officers: “means that there is no one to cross-examine the appellant, and in view of the readiness of so many appellants to resort to telling untruths, that is a serious deficiency.” Migration Watch say that, although “the Tribunal has issued guidelines which allow adjudicators a little more latitude in asking questions of the appellant in this situation... an adjudicator so placed is in an unenviable plight.”²¹

26. The Immigration Advisory Service stated:

“IAS advocates the introduction of a less adversarial system in which resources are ‘front-loaded’ into the initial application stage, making appeals less necessary and more credible. A claim for asylum should trigger an open-minded investigation into the claim, not the setting out of two opposing views and selection of one or the other. An examination of the Canadian model is instructive.”²²

27. The Council of Immigration Judges argued that whilst case law requires adjudicators to give “anxious scrutiny” to the cases before them, it is often difficult to do so within an adversarial system. In its written submission, the Council recommends a more interventionist role for the adjudicator:

“In asylum law and to some extent in immigration cases where the appellant is not represented and a relative (usually a sponsor) appears, the adjudicator cannot give anxious scrutiny or even decide a non asylum case without taking a more active approach to the issues. The quality of representation is often poor on both sides. The Immigration Appeal Tribunal has sought to constrain the approach of adjudicators in cases where the Home Office is not represented (an all too common occurrence) to asking questions for clarification only, seeking the assistance of the representative for the appellant in asking questions on issues that trouble the adjudicator and not “descending into the arena” by conducting such a hearing in an inquisitorial manner. This is needlessly restrictive. Provided that the adjudicator is fair the conduct of the hearing should be left to the adjudicator.”²³

The Council of Immigration Judges also indicated that it would like to see statutory authority for the adoption of a more ‘interventionist procedure’ in asylum and immigration appeals, to allow Tribunal members to adopt a form of procedure without being unduly restricted to an adversarial approach.²⁴

20 Ev 60

21 *ibid*

22 Ev 107

23 Ev 199, para 4

24 Ev 203

28. This suggestion was taken up in oral evidence by Charles Blake and His Honour Judge Hodge, the Chief Adjudicator, who indicated that where Home Office presenting officers were not present, it might be better if the judge, or adjudicator, were able to take a more “interventionist or active approach” than is currently seen in adversarial proceedings. In particular, it was noted that an adversarial approach is the norm in British legal proceedings because there is an expectation that there will be two sides, each represented, which does not always occur in asylum appeals.²⁵

29. Other members of the Judiciary, who were not in favour of a move away from the traditional adversarial system, nonetheless indicated that such a move could have a positive impact where the Home Office presenting officer failed to attend. In oral evidence, Mr Justice Collins noted that:

“You could make an adjudicator more inquisitorial, I do not doubt, and that might have advantages, but so long as you have the Home Office properly represented it should not be necessary. It is only where you do not have the Home Office represented that the adjudicator is in real difficulty.”²⁶

30. If the Home Office remains unable to ensure that Presenting Officers are present at appeals before the new Asylum and Immigration Tribunal, the judge in charge of proceedings should have the discretion to take a more actively inquisitorial approach in order to ensure that justice is done and that proceedings are conducted with necessary fairness. Such a change may have to be implemented by statute to ensure certainty.

25 Qq 40–42

26 Q 165

5 Proposal for a new Asylum and Immigration Tribunal

Background

31. As we noted above, the current appeal system is composed of two-tiers: adjudicators of the Immigration Appellate Authority (IAA) and the Immigration Appeal Tribunal (IAT). The purpose of adjudicators is to hear appeals against initial decisions on both the facts and the law. The purpose of the Tribunal is: (a) to consider individual applications for leave to appeal against adjudicators' decisions; (b) to determine appeals granted leave only on matters of law; and (c) to establish legal precedents which must be followed by adjudicators.

32. The proposal to consolidate the current two tier system into a single tier was first mooted by the Government in 1998 during an internal review of the appeals system.²⁷ At that time, however, it was rejected in favour of a proposal to enhance the IAT by “changing its status and powers so that it produces an effective lead to the lower tier”.²⁸ Although improvements have been made to the IAT,²⁹ the proposal was never fully implemented. For example, the Government dropped its plan to elevate the Tribunal to the status of a superior court of record³⁰ and the IAT continues to have lay members. In Spring 2003, the Home Secretary made a number of public statements in which he revived the idea of a single tier of appeal.

33. In May 2000, Sir Andrew Leggatt was appointed to conduct a review of the tribunals system to report by March 2001. The report recommended the creation of unified tribunals service with a two tier structure. It recommended that the tribunals should be grouped by subject-matter into Divisions, each with a first-tier tribunal and a corresponding second-tier appellate Division. The report stated that:

“The aim for the new appellate Division will be to develop, by its general expertise and the selective identification of binding precedents, a coherent approach to the law. In this... it will be comparable in authority to the High Court so far as Tribunals are concerned.”³¹

34. On 27 October, the Home Office and DCA issued a consultation paper on a number of proposals for legislative reform of asylum and immigration, including the proposal to create a single tier. The consultation period ended on 17 November and the proposals were

27 Home Office and Lord Chancellor's Department consultation paper, *Review of Appeals*, July 1998, para 5.2

28 Home Office, *Fairer, Faster, Firmer—A Modern Approach to Asylum and Immigration*, Cm 4018, 1998, para 7.18

29 A High Court judge is now appointed to the Presidency; there is now a system for selecting, or “starring”, decisions by the IAT which should normally be treated as binding on the whole IAA; and there have been improvements in section and circulation of training material

30 The status is formally equivalent to the High Court and, as such, the proposal would have had the effect of removing the jurisdiction of the High Court to judicially review IAT decisions. The Employment Appeal Tribunal and the Transport Tribunal are already superior courts of record

31 Report of the Review of Tribunals by Sir Andrew Leggatt, *Tribunals for Users: One System, One Service*, March 2001, para 6.32

brought forward in the Asylum and Immigration (Treatment of Claimants, etc.) Bill, which received its Second Reading on 17 December.

The Government's proposals

35. The new proposals include the following changes:

The Tribunal (clause 11(1))

- There shall be an Asylum and Immigration Tribunal to replace the existing adjudicators and the Immigration Appeal Tribunal.

Right of appeal to the Tribunal (clause 11(2),(3))

- Rights of appeal to the new Tribunal will be the same as the existing rights of appeal to an adjudicator.

Membership of the Tribunal (schedule 1)

- Members of the new Tribunal must be legally qualified of seven years standing (although the Lord Chancellor may appoint someone which in his opinion has "legal experience" which makes him suitable for appointment).
- The Tribunal will have a President and one or more Deputies (appointed by the Lord Chancellor from the membership of the Tribunal).

36. The Government set out its case for a single tier in the consultation document issued on 27 October 2003:

"The Government is determined, through incremental change to safeguard the appeals system from misuse and protect the credibility of the process. The Government is also concerned to ensure that community relations are not adversely affected by what may be seen in many quarters as continuing evasion and exploitation of immigration and asylum controls at significant cost to the taxpayer.

The changes made in the Nationality, Immigration and Asylum Act 2002 are already showing real improvements in the appeals process. However, more still needs to be done to improve the system. That is why we are proposing to move to a single tier of appeal. Such a change would continue to safeguard the right of appeal and provide an effective remedy for those whose application has been refused by IND or an Entry Clearance Officer.

... The current appeals system is still too long and complicated. It provides people with opportunities to abuse the system in order to cause delay or abscond. We therefore propose to replace the current structure with a single appeal to a new single-tier Tribunal, the Asylum & Immigration Tribunal (AIT), headed by a President."³²

37. The Government's reference to "unfounded appeals" echoes an earlier comment made by Mr Justice Ouseley in his submission to this inquiry:

"...there is judicial concern about the extent to which some solicitors or representatives make money from hopeless cases or those which they mismanage."³³

38. The Government has already made proposals to limit the use of public funding and to improve the regulation of immigration advice in order to address concerns about bad advisers who milk the system. We examined these proposals in detail in the last Session.³⁴

39. The proposal for a single tier will radically affect the immigration appeal system and has wide-ranging implications for the appeal system and the higher courts. The Government has in the past expressed concern that the Tribunal has not provided a consistent body of decisions and that it remits too many appeals back to adjudicators to be reheard, thereby lengthening the appeal process. Although the Court of Appeal has also criticised the Tribunal, it has also acknowledged that it provides expert appellate knowledge.

40. In the explanatory notes published with the Bill on 27 November 2003, the Government addressed the question of compliance with human rights legislation. It stated that:

"Clause [11] raises issues under article 13 of the [European Convention on Human Rights (ECHR)] in relation to the removal of appeal rights. People may also wish to challenge whether their substantive Convention rights under articles 3 and 8 will be jeopardised by the absence of a further tier of appellate rights. However, article 13 does not require the provision of multiple tiers of appeal. What it requires is access to an independent national authority with powers to provide effective redress. The single tier Tribunal will meet this test. It is wholly independent of the initial decision-making body. The single tier tribunal will provide an effective remedy as article 13 requires and will safeguard appellant's Convention rights including those referred to in articles 3 and 8."³⁵

41. In a letter to the Committee, Mr Justice Ouseley, indicated that in his view:

"... it is unlikely in the extreme that the abolition of a tier of appeal can, without more, deliver both increases in end to end speed and improvements in the quality of judicial decisions."³⁶

42. In its memorandum, JUSTICE argued that the IAT played a vital role in addressing the sources of first tier error. It pointed out that 16% of appeals determined by the IAT are allowed³⁷ and a further 44% of tribunal appeals are remitted back to the first-tier adjudicators for reconsideration because of errors of law. Thus, in total 60% of appeals to

33 Ev 73

34 Fourth Report of Session 2002–03, HC 1171

35 Explanatory Notes to the Bill, para 138

36 Ev 76, para 8

37 HC Deb, 11 December 2003, Col 592W

the IAT result in the decision of the first-tier being reversed or reconsidered. It claimed that 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 occur would simply go uncorrected and unaddressed.”³⁸

43. Equally, in its submission to the Committee, ILPA notes that:

“Applications for permission to appeal are also made by the Home Office if they are of the view that an appeal has been allowed in error. The Home Office is increasingly appealing against positive adjudicator decisions. This surely demonstrates that both parties are of the view that Adjudicators need to be supervised by a higher court”.³⁹

This suggests that the Home Office may be hindered when presenting officers fail to attend and that without a properly structured appellate system, spurious claimants might be wrongly granted refugee status.

44. On the available evidence, we believe that the abolition of a tier of appeal cannot, in the absence of a more fundamental reform, deliver both increases in “end to end” speed and improvements in the quality of judicial decisions.

45. We are concerned that the limited system of review proposed is insufficient to guarantee that an appellant will receive a just determination of his application.

46. Accordingly, we recommend that the removal of a formal tier of appeal should not be undertaken until it can be shown that there has been a significant improvement in initial decision making and the rise in the number of successful first tier appeals has been substantially reversed.

38 Ev 151, para 8

39 Ev 124

6 Jurisdiction of the Courts

“Judicial review is the exercise of the court’s inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law”.⁴⁰

“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.”⁴¹

Review of Tribunal decisions (clause 11(6))

47. Under the proposed clause 11(6)⁴², the tribunal will have jurisdiction to review its own decisions, if requested to do so by a party to the appeal. Initially the review was to be conducted entirely in writing without oral hearing. However, this clause was subsequently amended, to provide that “If in the course of a review that Tribunal forms the opinion that the exceptional nature of the case makes it impossible properly to determine the review without an oral hearing, the Tribunal may hold an oral hearing”. This would imply that the majority of cases would still be conducted as paper exercises. There is no definition of what would constitute “the exceptional nature of the case”. The Minister said that

“That has got to be a determination that the senior judges in the IAT themselves make... What we have said is that if something comes up that is exceptional, if, for example, there is a change of circumstances or something like that, then the tribunal at review stage should be able to hear that matter orally if it sees fit”.⁴³

We regard this as unacceptably vague. It gives no guidance to practitioners or others about the circumstances in which it is reasonable to apply for an oral hearing. This in itself will cause delay as the case law is developed. **We recommend that the Bill should make clear the general circumstances in which the tribunal will hear an oral review.**

48. On a review of its decision, the Tribunal may uphold its original decision or, in limited circumstances, it may change its decision.. The Tribunal may only change its decision if there is an error of law.⁴⁴ The Tribunal will be able to review a decision once only.

Power to refer points of law to the higher appellate courts (clause 11(7))

49. The President of the Tribunal will have power to refer a point of law to an appellate court if:

- it is of considerable complexity or importance; or
- it relates to an earlier decision of the appellate court which is binding on the Tribunal.

40 R v HM the Queen in Council, ex parte Vijayatunga [1988] QB 322, per Simon Brown J, now Lord Brown of Eaton under Heywood

41 R v Medical Appeal Tribunal, ex parte Gilmore [1957] 1 QB 574, 586, per Denning LJ

42 Originally Clause 10 of the Bill

43 Q 311

44 Explanatory Notes to the Bill, para 39, as amended

This power of referral may only be exercised while the Tribunal proceedings are still pending and once a matter has been referred the Tribunal must await the appellate court's opinion before reaching its final decision. The opinion of the appellate court may not be appealed to the House of Lords.

Exclusion of judicial review and further appeal to higher courts (clause 11(5), (7))

50. There will be no further appeal from the Tribunal, and no statutory or judicial review of the Tribunal's decisions by the higher courts with two exceptions:

The following are *not* excluded from judicial review:

- any challenge to the lawfulness of the Secretary of State's decision to certify the case under various provisions (e.g. to certify that an asylum claim or human rights claim is clearly unfounded)
- Any challenge that a member of the Tribunal has acted in bad faith

51. The Bill makes four important changes to the law:

- The Asylum and Immigration Tribunal will decide its own appeals;
- The President of the Asylum and Immigration Tribunal has the sole right to decide whether to make a reference to a higher court;
- The jurisdiction of the House of Lords is expressly excluded;
- Judicial Review and Statutory Review are excluded in all but a few cases.

52. There is a clear objection in principle to tribunals exercising a supervisory jurisdiction over themselves. We doubt whether this arrangement is either fair or able to be viewed as fair by those affected by the new Tribunal's decisions. In looking at these arrangements we bear in mind that they affect not just asylum cases but also visitor appeals involving family members of UK citizens.

53. Mr Justice Collins thought that the appeals system will leave too much power in the hands of the President of the new tribunal, as "however fair minded the President may be, there is always a temptation in the belief that one is right not to let the Court of Appeal interfere."⁴⁵

54. We see 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. The procedural basis for deciding what cases the Court of Appeal should take need not be lengthy and could be carried out efficiently as a paper exercise.

55. The decision to exclude the jurisdiction of the Appellate Committee of the House of Lords involves more than a mere shortening of the avenues of appeal. The function of the House of Lords is different from the Court of Appeal, which is more of an error correcting

court. The Appellate Committee of the House of Lords deals with wide legal principles. Examples of this in the asylum context are the cases of Adan⁴⁶ and Horvath⁴⁷ whereby the House of Lords determined that: there was only one true legal definition of a refugee within the meaning of the Convention; and that the United Kingdom was obliged to provide protection to persons suffering from persecution by non-state agents, contrary to the policy adopted by France and Germany. Although the Court of Appeal could continue to settle important points of law we suspect that in practice it will not be an adequate substitute for the House of Lords when it comes to deciding the basic principles and application of Treaty obligations. In addition, the House of Lords is able to correct precedents which should no longer bind inferior courts; the Court of Appeal is not able to depart from its own precedents in the same way.

56. Mr Justice Collins said:

“I see no conceivable justification for [expressly removing immigration cases from the jurisdiction of the Appellate Committee of the House of Lords]. Since only cases raising points of real importance can be certified by the President so as to go to the Court of Appeal, it is difficult to understand the reason why they cannot go further. There are a number of authoritative decisions of the House of Lords and, as asylum is international, it is surely essential that our highest court should be giving the really important decisions.”⁴⁸

57. The Minister said in evidence to us that “We are also saying, and it came up in the Bill Committee, that there should be access to the higher courts in terms of the President being able to refer up to the Court of Appeal or to the House of Lords”.⁴⁹ In reply to a specific question from the Chairman, he said that this matter was under discussion and that he was “minded to allow appeals” to the House of Lords.⁵⁰

58. The argument for removing the jurisdiction of the House of Lords cannot rest securely on the principle of removing scope for unmeritorious appeals, since few cases proceed to the highest court. The House of Lords should retain its usual overall jurisdiction in immigration cases.

59. The provision in Clause 11 of the Bill to exclude the possibility of further appeal from the Tribunal and statutory or judicial review of the Tribunal’s decisions by the higher courts (the “ouster” clause)⁵¹ is one of the most controversial provisions of the Bill. This

46 [2001] 1 All ER 593

47 [2000] 2 All ER 577. This case featured the persecution of a Slovakian citizen of Roma origin by local skinheads. The court concluded that where a state was not willing, or able to fulfil its obligations to protect its citizens, then this could amount to persecution, even though it was not the state itself that was persecuting an individual. The court held that this obligation only arose where a person’s own state was unable or unwilling to discharge its own duty to protect its own nationals. A practical standard had to be applied, and that standard did not require a State to eliminate ‘all risks’ to its citizens. The issue was one of the sufficiency of State protection. France and Germany did not recognise such non-state persecution and would return refugees to their country of origin if the alleged persecution was not conducted by the State

48 Ev 250

49 Q 288

50 Q 295

51 An “ouster” clause is one which seeks to exclude the jurisdiction of the courts, especially through judicial review

provoked some of the most strongly worded evidence which we received in the course of the inquiry.

60. Review by the courts protects and applies the law. Although there have been attempts in the past to limit the jurisdiction of the courts the clause has been interpreted as being especially severe. In a legal opinion by Michael Fordham, received by the Committee as an annexe to the submissions of the Refugee Legal Centre, it is suggested that for Parliament to purport to exclude judicial review strikes at ‘a constitutional right (access to law), but furthermore at a constitutional protection (judicial review) supported by a constitutional imperative’, namely the rule of law.⁵²

61. The effect of Clause 11 on the jurisdiction of the courts has been criticised by several leading counsel, including Hugh Tomlinson QC and Boon Temple who said:

“In practice, this [clause] will prevent the courts from reviewing any deportation and removal decision and any decision of the new tribunal. There can be no challenge for "lack of jurisdiction", "error of law" or "breach of natural justice". This means that if, for example, the tribunal fails to hear argument from both sides or misreads a statute, there is no comeback. If the tribunal does something it has no power to do, it is just too bad. The tribunal will be able to do whatever it wants. It will be the ultimate unaccountable public body. In the past, governments have often been tempted to try to avoid judicial scrutiny of their decisions. In almost every other country in the world, this would be forbidden by the constitution. In Britain, the unwritten constitution requires restraint on the part of parliament and the government. For nearly 40 years, governments of both parties have held back. They have accepted that the rule of law requires that the courts must have the final say as to whether the law has been broken. This bill tries to turn the clock back”.⁵³

62. Nicholas Blake QC, who appeared on behalf of the Bar Council, in a note on the clause published by Matrix Chambers and supported by many figures from that Chambers⁵⁴ wrote:

“Our concern is that the proposed clause 10 to the Bill [now clause 11] contains the most draconian ouster clause ever seen in Parliamentary legislative practice. It has been introduced without allowing any time for the bedding down of the new appellate regime under the 2002 Act that restricted judicial review of refusals of leave to appeal by the Immigration Appeal Tribunal from decisions of adjudicators. It has been introduced without any public consultation or debate. The short “consultation” announced by the Home Office and Department of Constitutional Affairs in October, was unspecific as to what was intended. It is a clause that will operate far beyond asylum decisions, and provides a precedent for exempting the executive and administrative tribunals from seeking to understand, apply or be governed by the law. This is a matter of great constitutional consequence. It is happening at a time of constitutional turmoil where the common law principles of division of responsibility

52 Ev 260

53 ‘And don’t bother coming back’, *The Guardian*, 16 December 2003

54 Including Rabinder Singh QC, Rhodri Thompson QC, Ben Emerson QC, Tim Owen QC, Professor Andrew Choo and Professor Aileen McColgan

between the executive and courts are being torn up, and no new written constitution is replacing traditional values and beliefs. This is a time when traditional institutions that have served to provide some measure of balance in the law making activities of the executive and Parliament—the role of the office of Lord Chancellor and the significant revising work performed by the House of Lords—have either been removed or are under threat by the pronouncements of the present government, without sufficient guarantees that their replacements will respect basic principles of judicial independence and democratic accountability. Historical experience suggests that it is easier to erode established safeguards than to provide new effective ones”.⁵⁵

63. He went on to state that:

“Access to independent courts is an integral part of democracy. Inferior tribunals are not courts and cannot be transmuted into them by a legislative magic wand. They have an expert and valuable role to perform but like the executive itself, their decisions must be subject to the scrutiny of the higher courts at the instigation of the losing party. The full system of binding precedent means that no case can be arbitrarily cut off by statute from review by the next level, condemning inferior courts to apply precedents that may need re-examination. Constitutional government should recognise this principle in the laws it promotes. This form of ouster clause undermines the principle and threatens the entire basis of our constitutional arrangement. This is why the debate on ouster clauses is of significance and far broader than asylum”.⁵⁶

64. Mr Justice Ouseley indicated that:

“What is not, I believe, genuinely controversial is that so extensive an ouster clause is without precedent: it seeks to oust the High Court’s supervisory role not just over the decisions of a lower Tribunal, even those made unfairly or without jurisdiction; it also seeks to oust the High Court’s control over the legality of certain executive acts and decisions, and to do so in an area where life and liberty may be at stake. Such an ouster clause is unprecedented because, and again this is not controversial, the United Kingdom’s conventional constitutional framework, albeit unwritten, is predicated on the allocation of different, but equally necessary functions to Parliament, the Courts and the executive. To the Courts is allocated the necessary task of reviewing the lawfulness of the decisions of lower Tribunals and the lawfulness of the executive’s acts and decisions. An unwritten constitution only works on the basis of an acceptance by each component of the differing and important roles of the others. The ouster clause is inconsistent with those constitutional conventions. As a matter of constitutional principle, higher judicial oversight of lower Tribunals and even more so of executive decisions should be retained.”⁵⁷

65. The Council for Tribunals concurred with this view, writing that it was:

55 Briefing note on clause [11] of the Asylum and Immigration (Treatment of Claimants etc) Bill by Matrix Chambers, www.matrixlaw.co.uk

56 *ibid*

57 Ev 74

“...particularly concerned about the provisions in clause [11] of the Bill excluding any further scope for further challenges to the decision of the Tribunal either by way of appeal to a higher court, (as is usual in the case of tribunals) or by judicial review. It is of the highest constitutional importance that the lawfulness of decisions of public authorities should be capable of being tested in the courts... In respect of tribunals under its supervision, the Council has consistently advocated an avenue of appeal to the courts on points of law. In the Council’s view, it is entirely wrong that decisions of tribunals should be immune from further legal challenge”.⁵⁸

66. The courts have always viewed with suspicion attempts to remove their inherent rights to jurisdiction over particular areas. There is some considerable doubt that the clause will be quite as effective as the Government supposes. In his written submission, Mr Justice Collins indicated that there would be difficulties in prohibiting the supervisory jurisdiction of judicial review because of the House of Lords decision in *Anisminic*.⁵⁹ In that case the respondent had argued that the courts were precluded from exercising supervisory jurisdiction because s 4(4) of the Foreign Compensation Act 1950 provided that the determination by the Foreign Compensation Commission of any application “shall not be called into question in any court of law”. The court took a narrow interpretation of the word ‘jurisdiction’, determining that it was only in circumstances where a tribunal made a decision on a question remitted to it without committing any of a variety of errors listed⁶⁰ that it would have been entitled to decide a question wrongly and the matter would then be non-justiciable. This approach was upheld in *Fayed*.⁶¹

67. Mr Justice Collins added that when removal of a failed appellant is attempted:

“...an application for judicial review will follow, on the basis that the appellant’s claim has never been properly considered and the decision to remove is erroneous in law. Thus there will be even greater expense and greater delay. It is inevitable that in asylum cases, the court will be concerned to ensure that full and proper consideration has been given.”⁶²

68. We were surprised at the Minister’s comments in evidence to us that the ouster will not apply to executive decisions:

“Of course, we are not ousting judicial review from decisions made by the Home Secretary, from executive decisions. It would be quite wrong for us to say that you could not challenge a circumstance or a decision made by the Home Secretary”.⁶³

This does not square with the provision in clause 11(7).⁶⁴ We assume that the Minister will bring forward an amendment on the basis of his statement to the Committee.

58 Ev 117, para 3

59 *Anisminic Ltd v Foreign Compensation Commission and another* [1969] 1 All ER 208

60 For example where it had acted in bad faith, had reached a decision that it had no power to act, so that it failed to deal with the question remitted to it, failed to take account of something which it was required to take into account, or based its decision on some matter which, under the provisions setting it up, it had no right to take into account, although this is not an exhaustive list

61 [1997] 1 All ER 228

62 Ev 249

63 Q 289

69. We are deeply concerned that the provisions of the new ouster clause are intended to prevent the courts from reviewing any deportation or removal decision; this may include cases involving serious error, for example where the wrong person has been identified for removal.

70. An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake.

71. The system of statutory review under the 2002 Act, which was invented to abridge the previous system of judicial review, has only been operating for a matter of months. It appears to be working. No change should be made to this system until there has been more experience of its impact.

7 Non-suspensive appeals

72. Appeals which are exercisable from within the UK generally have a suspensive effect: they suspend any requirement to leave the UK and/or the power to remove. This contrasts with those appeals which can *only* be exercised from outside the UK, i.e. after removal, and are therefore described as “non-suspensive”. (Non-suspensive appeals are also referred to as “out-of-country” appeals). Asylum seekers whose claims are certified to be “clearly unfounded” by the Home Office may only appeal against that decision after removal from UK—generally to the country in which they claim to fear persecution.⁶⁵

73. The majority of appellants have the right to remain in the country until their appeal process is concluded. In recent years, however, the category of non-suspensive appeals has been gradually expanded. For example, the Asylum and Immigration Act 1996 removed the in-country right of appeal for certain ‘safe third country’ cases (involving EU member states and certain ‘designated’ states). Similar provisions were passed in the Immigration and Asylum Act 1999.

74. The Nationality Immigration and Asylum Act 2002 has added to the categories of non-suspensive appeal by establishing a new category of ‘clearly unfounded’ claims. This means that any appeal against a decision on an asylum/human rights claim must now be made outside the UK, if the Secretary of State has certified that the claim is clearly unfounded.⁶⁶ Claims from those entitled to live in particular states will be automatically certified, unless the Secretary of State is satisfied that the case is not clearly unfounded. The ten EU accession states were listed in the 2002 Act for this purpose.

75. The 2002 Act also provided an affirmative order-making power under which a State or part of a State may be added to the list if the following conditions are met:

- there is in general no serious risk of persecution of persons entitled to reside in that State or part of a state, and
- removal to that State or part of a state of persons entitled to reside there will not in general contravene the United Kingdom’s obligations under the Human Rights Convention.⁶⁷

76. The Asylum and Immigration (Treatment of Claimants, etc.) Bill proposes to amend this provision to extend the order-making power. If implemented, the Secretary of State will be able to add a State (or part of a State) if it is considered to be ‘safe’ for *a particular category of person* to reside there, even if it is not ‘safe’ for others to do so. Such groups may be categorised by reference to a number of factors listed in the Bill, including gender, race, religion, nationality etc.⁶⁸

65 S 94 Nationality, Immigration and Asylum Act 2002

66 *ibid*

67 Albania, Bulgaria, Serbia and Montenegro, Jamaica, Macedonia, Moldova, Romania, Bangladesh, Bolivia, Brazil, Ecuador, Sri Lanka, South Africa and Ukraine have been added to the list under this provision

68 Clause 12

Concerns

77. The provision in the Bill for adding to non-suspensive appeals does not square with the 1998 statement from the Government:

“The Government considers that the in-country right of appeal should continue for all asylum cases (except certain third country cases). Given the nature of the asylum claim a right of appeal after removal is not an effective remedy. A proposal to return a person to a country in which he claimed to have a well-founded fear of persecution without a right of appeal would almost certainly be inconsistent with our international obligations.”⁶⁹

78. In its Annual Report of 2001/02, the Council on Tribunals stated that the introduction of non-suspensive appeals was “capable of leading to unfairness and injustice”. The Council highlighted some of the “considerable practical problems” that may result:

“The requirement to conduct appeals from abroad will make it more difficult for adjudicators to assess the evidence of appellants. It will also make it more difficult for appellants to have face-to-face discussions with their advisers and to present their cases satisfactorily. Costs will inevitably be greater. And there could be serious problems with regard to the status and safety of tribunal users in the countries from which they are appealing.”⁷⁰

These problems are, of course, experienced by applicants in immigration or family visits applications made in the home country of the applicants.

79. Mr Justice Richards has also described non-suspensive (out-of-country) appeals as “plainly a very serious disadvantage as compared with an in-country appeal.”⁷¹ As many asylum appeals turn on questions of credibility, it is particularly disadvantageous for the applicant to be absent from the oral hearing. Research into the relative success rates of oral as opposed to paper based appeal in family visitor cases has shown that oral appeals have a higher rate of success, particularly when the sponsor is available to give oral evidence.⁷²

Success rate

80. In its memorandum to this inquiry, the DCA stated:

“As of 17 April 2003, provisional IAA figures show that 56 out-of-country appeals had been lodged with the IAA. 42 of those have so far been dismissed and one withdrawn. None has been successful.”⁷³

81. We recommend that the Government investigate the fairness of the non-suspensive appeal system, given the extremely low success rate of appellants’ appeals under that system.

69 Home Office and Lord Chancellor’s Department consultation paper, *Review of Appeals*, July 1998, para 5.2

70 Council on Tribunals, *Annual Report 2001/02*, pp 30–31

71 *R (Razgar) v Secretary of State for the Home Department* [2002] EWHC Admin 2554 at para 1

72 H. Crawley and others, *Family Visitor Appeals: An Evaluation of the Decision to Appeal and Disparities in Success Rates by Appeal Type* (London, Home Office, 2003)

73 Ev 141

82. We note that the 2002 Act makes provision for an independent monitor of non-suspensive appeals. The appointment of this person was announced on Wednesday 11 February.⁷⁴ We recommend that the list of countries, from which the Secretary of State can certify claims as clearly unfounded, should not be extended until after the independent monitor has been consulted.

74 In a written statement by the Minister for Citizenship and Immigration (Ms Beverley Hughes), HC Deb, 11 February 2004, col 69WS

8 Public Funding and legal advice

83. The tribunal system was initially intended to be accessible without the need for legal representation. Until 2000, legal aid was not available for representation before the immigration appellate authorities (IAA). In August 1999 the Lord Chancellor's Department announced that legal aid would be extended, subject to a new 'merits test' to cover representation before the IAA from January 2000. At the same time, legal aid for asylum and immigration cases generally was made subject to tighter regulation through contracting. This has restricted legal aid work to specialised firms and organisations working under contract with the Legal Services Commission.⁷⁵

84. Asylum and immigration legal aid costs have risen from £81.3 million in 2000/1 to £174.2 million in 2002/3. On 5 June 2003, the Department issued a consultation paper on proposed changes to publicly funded immigration and asylum work.⁷⁶ We reported on these proposals on 28 October.⁷⁷ The Government made its final announcement on 27 November, stating that it would:

- introduce a financial threshold of five hours for the initial decision-making process, which can only be exceeded with prior authority of the Legal Services Commission (LSC);
- ensure that no legal aid work is undertaken in any appeal cases without prior approval from the LSC, which will set financial thresholds in individual cases which pass a merits test for legal aid—it has since been made clear that the merits test itself will not change;
- introduce accreditation for all lawyers and case-workers doing legally aided asylum work;
- introduce a Unique Client Number to reduce unnecessary changes of solicitor;
- the LSC will have power to vary the financial threshold up or down for individual firms whose track record justifies this;
- the LSC will also continue to allow top quality firms with a good track record on appeal cases to proceed without prior authority on appeal cases, up to a set financial threshold, although any autonomy would have to be earned.

85. The Government stated that “these proposals are estimated to save around £30m in 2004–05 against what [it] would be spending were [it] not to introduce prior authorisation”.

*The future of Legal Help*⁷⁸

86. In its announcement of 27 November 2003, the Government also stated that:

75 LCD Press Notice, 31 August 1999

76 *Asylum Legal Aid, the way forward*, DCA consultation paper, June 2003

77 Fourth Report of Session 2002–03, HC 1171

78 Legal Help refers to publicly funded initial legal advice which is given before detailed preparation for any case is undertaken

“consideration is being given as to whether legal aid is needed at the initial stage in all cases. The Government will make a further announcement on any further changes in due course.”

87. In a memorandum (dated 24 October) to the Committee’s inquiry into the public funding proposals, the Department stated:

“Officials are examining a number of inter-related issues. These include the possibility of making changes to the current process to maximise effectiveness, efficiency and economy. Officials will also examine the role that legal aid plays in achieving high quality decision-making processes. In principle we want to explore a system where further improvements in decision-making by the Home Office will allow a reduction in Legal Help. This involves re-thinking the levels of legal aid in the context of Home Office decision-making.

This work may lead to changes in the way that legal aid for asylum seekers is delivered. If the Government concludes that such changes are desirable, there may need to be changes to the scope of legal aid. That requires regulations under the Access to Justice Act 1999 subject to the affirmative procedure. Consequential change to contracts would also require consultation with the professions and a period of notice. This work is not yet concluded, but the Committee should be aware that the Government’s proposals on the control of legal aid before the appeal stage may be further amended as a result of this work.”⁷⁹

88. Home Office administration and the quality of its decision-making was widely and rightly attacked in the consultation responses. It is hard to over-emphasise how far Home Office procedures would have to improve to reach a standard where they could command such confidence that Legal Help to applicants could be cut, even if it were in principle thought to be a good idea. In fact, the principle clearly points in the other direction. This is for a number of reasons:-

- The powers of the Home Office are already very substantial. To reduce Legal Help at the initial stage in such a contentious, difficult and important field would be quite wrong. The Council on Tribunals has suggested in the context of appeals that the balance has swung too far towards the executive. This proposal is to take a giant leap further in that direction.
- Good quality legal representation assists the Home Office in reaching the correct decision early on [‘front-loading’ or ‘right first time’]. This proposal seems to adopt the view that legal advice provides no help to decision-makers at all.
- Negative initial decisions will lead to more out of country appeals under these proposals. Such applicants might never receive legal advice before their removal. There will be no opportunity for the unrepresented *bona fide* applicant to receive legal assistance to put right those matters which have gone wrong in their application, before they are once again in the country from which they fled.

89. In its submission to this inquiry in Spring 2003, the Council on Tribunals stated that it would “have serious misgivings about any moves to curtail the availability of publicly funded advice and representation in the field of asylum and immigration”.⁸⁰

90. Evidence suggests that it will be a long time before Home Office decision making is of sufficient quality to justify the proposed reduction in pre-decision legal aid (Legal Help). It is wrong in principle and inefficient in practice to deny Legal Help to those who need it in asylum and immigration cases.

91. The loss of Legal Help is likely to prove a false economy, leading to greater expense on appeals. Properly directed, good quality legal advice is beneficial to all parties.

Quality of legal advice

92. In his submission to this inquiry, Mr Justice Ouseley (the President of the IAT) commented that:

“much of the advice and representation on the claimant’s side is of poorish quality and there is considerable mismanagement of cases. But many do a good and committed job often against considerable disadvantages. The Home Office Presenting Officers are variable, and include some, particularly at the IAT level who are very good. There is growing trend for the Home Office to bring appeals in cases where it was not represented before the Adjudicator. It certainly makes life difficult at both tiers where the Home Office has not been represented before the Adjudicator. Incidentally, there do not appear to be the numbers of experienced HOPOs around that I am told there once were.”⁸¹

93. His Honour Judge Hodge (the Chief Adjudicator) stated:

“Appeal hearings are best conducted and the system operates most fairly when both sides are represented. There remain too many occasions when Home Office Presenting Officers are not available because of staff shortages. Taken overall the quality of representation available to appellants has been improving, particularly as the [Office of the Immigration Service Commissioner] regime and the Legal Services Commission Contracts system have come into play. A likely result of any significant restriction in the representation available before adjudicators will be longer hearings and fewer cases will be able to be decided.”⁸²

94. The Council of Immigration Judges have also commented that the quality of representation, on both sides, is variable:

“New Presenting Officers have been recruited but there appears to be a difficulty in retaining them. In satellite courts (sub hearing centres to main IAA centres) counsel have habitually been instructed for the Home Office until now but the signs are that the necessary funds have run out and the practice may be discontinued. This will not assist adjudicators to complete three to four cases each day they sit. The public

80 Ev 116, para 15

81 Ev 74

82 Ev 72

interest in fair but expeditious hearings requires that the Home Office be represented in as many appeals as possible.

Representation for appellants can also be very variable in quality. The Legal Services Commission does not appear to have the resources to verify the quality of representation by solicitors and counsel to the degree and extent necessary to ensure that the quality of preparation of appeals is maintained. The late instruction of counsel is a frequent occurrence. This often leaves counsel unable to comply with their duty to the adjudicator and to their client in terms of being able to bring out all relevant oral and written evidence.”⁸³

95. The Council on Tribunals also expressed its concern that “instances of poor standards persist” and that “provision is somewhat patchy and inclined to be concentrated in particular geographical areas”.

96. Nonetheless, in oral evidence Judge Hodge and Charles Blake stated that it was fair to say that the quality of legal representation was “slowly getting better” for litigants⁸⁴. They also added that good quality representation from either side made a great difference. Moreover, Judge Hodge indicated that under the current system, legal representation was the best way to achieve fairness was for both sides stating that:

“If as a result of the changes, that means the number of appellants without representation gets larger we will, of course, manage because that is what we do, but it will have knock-on effects in terms of the speed with which the process takes place. I certainly think when the person is unrepresented the hearings generally take longer and there are very big practical problems in our jurisdiction because very few of the appellants speak English”.⁸⁵

97. On 5 June, the Government consulted on proposals to introduce a new system of accreditation for all lawyers and case workers doing legally aided asylum work. This will be separate from that administered by the Office of the Immigration Service Commission and that already run by the Law Society. The new scheme will be administered by the Law Society. There was overwhelming support for this proposal in the consultation responses.

98. The Asylum and Immigration (Treatment of Claimants) Bill 2003/04 also contains provisions to:

- Empower the Immigration Services Commission to raid the premises of illegal immigration advisers
- Require designated professional bodies, such as the Law Society, to comply with requests for information from the Immigration Services Commissioner
- Establish a new criminal offence of advertising or offering immigration advice when unqualified.⁸⁶

83 Ev 200, para 6 and 7

84 Q 59

85 Q 58

86 Clauses 16–19

99. We support the removal of poor quality, backstreet immigration advisors from the system. We would welcome the implementation of robust rules and procedures to ensure that solicitors and other legal representatives are properly accredited. Under the adversarial process the system operates most fairly when both sides are represented.

9 Immigration appeals

100. Discussion of the future of the Immigration Appellate structure has been dominated by concern about the treatment of asylum cases. These are by no means the only types of case to be affected. The proposals in the Bill will affect other sorts of immigration appeal. These include appeals against the decisions of Entry Clearance Officers (ECOs) in British posts around the world, such as appeals against refusals of applications for entry clearance as visitors, students, for family reunion and for various categories of worker. There are also appeals against various types of immigration refusals by the Home Office to extend leave to remain of those already in the UK.

101. All these appeals are heard in the UK by the Immigration Appellate Authority (IAA). In entry clearance cases Notice of Appeal is lodged with the post abroad for transmission once the appeal papers have been prepared by the ECO to the Home Office and thence to the IAA. In in-country cases, Notice of Appeal is lodged directly with the Home Office where the appeal papers are prepared before the case is passed to the IAA.

102. In oral evidence we were informed of concerns about the way the new Bill will impact upon immigration appeals. Mr Justice Collins stated that:

“...This new Bill is designed with asylum cases in mind, but of course it covers all the other ones... families who want to visit their families here, or marriage cases, or whatever are finding themselves kept out for longer than they should be in certain cases and, of course, they will suffer from these proposals as well.”⁸⁷

The structure of non-asylum appeals

103. Before 1993, all rejected applicants for entry clearance as visitors had a right of appeal to the IAA. However, in 1993 legislation withdrew that right of appeal. In 1999, a right of appeal was reinstated but only for those visitors who wished to visit a family member in the UK.⁸⁸

104. Family visitor appeals have been a continuing issue of concern over the last decade and the system has been subject to successive and controversial reforms. The issue was a matter of interest to the Committee, which visited India and Turkey between 2–8 November 2003 and examined the procedures at British posts abroad in detail.

105. Visitors to the United Kingdom who are visa nationals are obliged to obtain entry clearance from a British Embassy, High Commission or consulate before travelling to the United Kingdom. The applicant has to be outside the UK at the time that he applies. The Immigration Rules provide that:

- Applicants must be generally seeking entry for a period of not more than six months, and confirm that they intend to leave at the end of their visit;
- Whilst they are in the UK they cannot take up employment, paid or unpaid; and

87 Q 163

88 “Family Member” is defined by reg. 2(2) of the Immigration Appeals (Family Visitor) (No. 2) Regulations 2000

- They must be able to maintain and accommodate themselves and any dependants without working or recourse to public funds and can meet the costs of their onward journey.

106. Even if a visitor fulfils these criteria, they may be refused entry for various other reasons, for example where they have been convicted of an offence which if committed in the UK would be punishable by a sentence of more than 12 months' imprisonment or if the immigration authorities believe that refusal is justified on the grounds that the person's admission is "not conducive to the public good". The ECO at post assesses the application and decides whether or not to issue a visa. The intentions of the applicant are paramount and the ECO does not usually have the benefit of meeting the sponsor.

107. The Entry Clearance Manager (ECM) is expected to review all visa refusals within 24 hours of the refusal. This includes applications to visit a family member. The ECM may decide to ask the ECO to overturn their decision to refuse the visa. If so, the applicant will be contacted and a visa issued. If not, the refusal stands. The committee heard in evidence that the numbers of decisions overturned by ECMs is very low. **In India we learnt that the ECM review was often regarded as a "rubber stamp". This process could, however, deal with some cases effectively without delay or expensive appeals. We recommend that UKvisas give further consideration to developing its use.**

108. Family Visitor Appeals can be lodged by individuals refused entry clearance to visit a family relative in the United Kingdom. The Immigration and Asylum Act 1999 restored appeal rights for family visitors. Although the new appeal right was initially subject to a fee, the Home Secretary subsequently abolished that requirement, on the basis that it was "not working and because of administrative incompetence".⁸⁹ The time limit for appealing is 28 days and the notice of appeal has to be lodged at the British post which made the decision.

109. The ECO will prepare an appeal bundle, containing the justification for the decision and relevant supporting documents. The Committee heard concerns about delays in processing these papers at posts abroad. Once prepared, the papers are forwarded to the Home Office in London. After this, following some checks, they are transmitted to the IAA for listing for hearing. Several ECOs told us in India and Turkey that it was frustrating to have an appeal allowed against their decision solely—it seemed—because the Home Office Presenting Officer did not appear at the appeal.

110. It was suggested in evidence that the growing backlog of immigration appeals, including visitor appeals, can be blamed on the fact that the Home Office is in charge of selecting which cases are brought forward to the IAA for hearing.⁹⁰ Until recently the Home Office has been selecting asylum cases, in an attempt to reduce the high-profile asylum backlog. As a result there have been very considerable delays in the listing of entry clearance and other immigration appeals. Many appellants in immigration matters, including family visit appellants abroad, have been waiting months or even years for their appeals unaware that the queuing system has been weighted heavily against them. We discovered that the delays, once appeals reached the IAA, were rather short. **It is ironic in a**

89 HC Deb, 24 April 2002, cols 356–357

90 Q 250

system where appellants are accused of delaying tactics that in immigration appeals the main cause of delay has been the Government.

111. The structure for in-country immigration refusals is broadly similar to the Entry Clearance Officer system, except that appeals are directly to the Home Office. In the case of in-country non-asylum appeals, similar criticisms can be levelled about the way that the appeals system has been weighted in favour of asylum appeals and against other appellants. Since the appeal is suspensive, there is an incentive on the migrant who wishes to delay removal to lodge an appeal. Where an appeal is dismissed by an adjudicator, an application may be made to the IAT for leave to appeal, as with asylum cases.

112. The imposition of Human Rights appeals onto the existing appellate structure has also slowed down the passage of appeals, particularly where there was an extant appeal at the time of coming into force of the Human Rights Act 1998 in October 2000. Matters were complicated by the position taken by the Home Office in the case of *Pardeepan*⁹¹ which was heard shortly after the coming into force of the Human Rights Act. In this case the Home Office effectively conceded that there would be successive asylum and human rights appeals for those who had received a decision before the coming into force of the Act. This was an own goal, since it created a second round of appeals for a considerable number of migrants.

Family Visitor Appeals

113. During the course of the visit, we learnt that there had been a substantial growth in applications to enter the United Kingdom from India. In 1999, 176,044 applications were made to enter the UK. By 2003, this figure had increased to 270,000, which equated to an increase of 13% per annum. Reasons for this increase were said to include economic development in India, an opening up of air routes and the fact that members of the Indian community in the UK were becoming more successful and increasingly wanted members of their extended family to come and visit them. In conjunction with the increase in applications, there had also been a big leap in the number of refusals for family visit applications in the period August to February 200/03. These peaked at a refusal rate of over 60% in New Delhi between October and December 2002. Following a meeting with Entry Clearance Managers, the Committee was informed that family visit visas were rarely refused if a close family member was involved.

114. An increase appeared to be anticipated by the Department. In answer to questions put by Mr Simon Hughes MP in June 2001, the Parliamentary Secretary (Ms Rosie Winterton MP) indicated that the Immigration Appellate Authority expected to deal with approximately 8,860 family visit visa appeals during 2001–02 and 10,000 cases in 2002–03. Of those cases, it expected that 60% of cases would be heard orally, whilst 40% would be determined on the papers alone. In fact, the Immigration Appellate Authority received 9,856 visitor appeals in 2002–03; 8,825 visitor appeals were decided at the adjudicator tier, of which 44% were oral cases and 56% were paper cases.⁹²

91 (2000) INLR 447

92 *Immigration Appellate Authority Business Plan 2002–03*

115. Citizens Advice concluded that:

“...the 40% increase in the number of family visitor appeals in the five months from 1 September 2002 (compared to the rate of appeals in the preceding eight months) can be largely or wholly attributed to the apparent but as yet unexplained increase (of some 35%, overall) in the rate of refusal of family visitor visa applications in the five months from 1 August 2002, especially at certain posts. And we note that, over a full year, a 40% increase in the rate of family visitor appeals seen in early 2002 represents an additional 2,700 appeals, at an additional cost to the IAA alone of some £830,000”.⁹³

Universal file number

116. In the course of our visit, we also realised that a universal file number would substantially improve the system for immigration appeals by ensuring that the IAA, Home Office and ECO all knew who was in possession of the case. In oral evidence, the Immigration Advisory service suggested that such a system could be a way to “facilitate good administration,” but that this would not in itself resolve delays, since these were inherent in a situation where files moved between so many organisations.⁹⁴

117. We recommend the adoption of a universal file number for each applicant in asylum and immigration cases. This number should be used to trace cases from initial application (both in-country and out of country) to final determination.

Oral or written appeals?

118. During our visit to Mumbai, officials acknowledged that oral appeals were more likely to be successful than written ones (over 70% of oral appeals, as compared to 40% of written appeals were successful). We were also told that since the fees for appeals had been abolished, unsurprisingly there had been a rise in the number of appeals.

119. In evidence to the Committee, Citizens Advice “warmly welcomed the new right of appeal against a refusal of entry clearance to visit family members in the UK, established on 2 October 2000 under s.60 of the Immigration & Asylum Act 1999”. However, it went on to express certain concerns about the Immigration process, complaining in particular about:

- the quality of entry clearance officers’ decision-making, given an overall success rate on appeal to the IAA of some 50%;⁹⁵

93 Assumes that 45% of the additional 2,700 appeals would be oral appeals (between 1 October 2002 and 31 March 2003, 46.2% of all appeals were oral appeals). In 2000, the Lord Chancellor’s Department stated that the cost to the IAA of an oral family visitor appeal was £500, and that of a paper-only appeal £150 (Statistics provided by Citizens Advice)

94 Q 234

95 Between 1 October 2001 and 30 September 2002 (i.e. the second full year of the appeal mechanism’s operation), the overall success rate at adjudicator level was 55.2%. Between 1 October 2002 and 31 March 2003, it was 49.9%. (Court Service monthly statistics provided to Citizens Advice)

- a marked and deeply worrying—but as yet unexplained—disparity between the success rate at oral hearings (70%) and in those appeals determined on the papers only (40%);⁹⁶ and
- inordinate delay in the issuing of some visas following a successful appeal.

It stated that:

“In common with other organisations, we have consistently maintained that an oral hearing offers the best chance of justice in appeals of this kind, where the credibility of both the appellant and his/her UK-based relatives is often at issue. At an oral hearing, the IAA adjudicator can assess the credibility of the appellant’s relatives (although not, for obvious reasons, that of the appellant) to a degree that is simply not possible in paper-only appeals. And, of course, in oral appeals the appellant’s case may benefit from its oral presentation to the adjudicator by a skilled legal representative”.

120. It has been suggested that the differential success rates are caused by the presence of the sponsor at oral appeals, legal representation and that some adjudicators merely give pro forma determinations in paper appeals that just rubber stamp the ECO’s decision.

The availability of Legal advice and representation

121. Although the appellant is not a resident of England or Wales it may be possible for them to receive Community Legal Service (CLS) funding (previously called legal aid) to assist in bringing an appeal. The appellant is usually the client for these purposes. However, in practice, it is the sponsor who usually receives the advice and attends the appeal due to their residence in England or Wales. The sponsor may also be able to receive limited advice on their own position under CLS funding.

122. There is a financial eligibility test to qualify for CLS funding that bases eligibility on the resources available to the appellant. If the sponsor has made specific resources available to the appellant, probably to fund the visit, these may be taken into account for the purpose of assessing eligibility. The legal service provider approached for advice or representation will calculate whether the appellant qualifies for assistance, using this test. If the sponsor is requesting advice for their own purposes then their resources are assessed for financial eligibility. There is also a “sufficient benefit” merits test.

123. CLS funding is available at two levels: if all that is required is advice on the application then the legal service provider can offer Legal Help. If the appellant wishes to have assistance as to whether to appeal, how to make an appeal, and in actually bringing the appeal then they will require Controlled Legal Representation (CLR). A grant of CLR is subject to passing a means and merits test and a cost benefits test. The legal service provider must believe that the prospects of success of the appeal are more than 50% and that the likely benefits to be gained from the proceedings justify the likely costs. If the

⁹⁶ Between 1 October 2001 and 30 September 2002, the success rate in appeals determined at an oral hearing was 69.1%, whilst in appeals determined on the papers only it was 40.9%. Between 1 October 2002 and 31 March 2003, the success rate in oral appeals was 64.7%, whilst in appeals determined on the papers only it was 38.7%. (Court Service monthly statistics provided to Citizens Advice)

merits of the case are unclear or borderline CLR can still be granted but only in the following circumstances:

- the case is of overwhelming importance to the client; or
- the case raises significant human rights issues; or
- the case has significant wider public interest.

124. In a study undertaken by the Home Office⁹⁷ it was suggested that the availability of such advice and representation proved relevant, indicating that:

“Stakeholders consider that the ability to have legal representation is an important feature of oral appeals and might explain their higher rate of success. By way of justification, stakeholders point to a previous research study which concluded that the presence or absence of legal representation has a significant impact on the outcome of administrative appeals such as immigration appeals”.⁹⁸

125. The research took a small sample of 64 oral appeals. Of those cases 46 proceeded with legal representation, and 18 without. Of the 46 appeals, 82.6% were successful. Of the 18 appeals without legal representation, only 66.7% were allowed. The small sample group must place some questions on the reliability of the information, but nonetheless, it is suggested that the value of legal advice is that a fully prepared case may be presented to the adjudicator, and at the oral hearing, the representative can then draw out the relevant facts and information from the sponsor, and argue in favour of the appellant. The research further suggests that paper appeals overwhelmingly proceed without the appellant or sponsor having first had recourse to legal advice. These statistics, in relation to family visitor appeals, support the contention (raised above) that the removal of oral rights of appeal and restrictions on legal representation would have a negative impact on the success rates of appellants in the asylum and immigration fields generally.

126. We are concerned at the current disparity in success rates between oral appeals and appeals which have been decided only on the basis of the papers in relation to family visitors. This may indicate that there is substantial injustice done to those who decide not to opt for an oral appeal.

127. In order to safeguard the independence of the appeal process, we recommend that notice of appeal should not be lodged with the Home Office, but with the Immigration Appellate Authority.

128. We further recommend that control of bringing forward asylum and immigration cases for hearing should be a matter for the Immigration Appellate Authority, rather than the Home Office.

97 Home Office Online Report, *Family Visitor Appeals: an evaluation of the decision to appeal and disparities in success rates by appeal types*, by Verity Gelthorpe, Robert Thomas, Daniel Howard and Heaven Crawley, June 2003

98 The prior study referred to was H Genn and Y Genn *The effectiveness of representation at tribunals*, LCD, 1989

10 Conclusion

129. During the course of our inquiry, it became apparent that not enough time has been taken to assess the impact of the proposals implemented by the Nationality, Immigration and Asylum Act 2002, in particular relating to the system of statutory review. It is difficult to see how the effectiveness of the system of statutory review could have been properly considered, when it had only been in operation for nine months.

130. We doubt whether many of the proposals contained in the new Bill are necessary to deal with the current issues relating to asylum and immigration appeals. Those problems identified tended to revolve around delays in the system and the ability of applicants to string out asylum claims and abuse the appeals system simply to remain in the country for as long as possible. It is difficult to see how the Bill will resolve these matters.

131. None of the evidence provided to us suggested that the abolition of a tier of appeal would hasten the process of removals where appropriate. Indeed, it was argued that the establishment of the new single tier tribunal might cause further delays, since the new 'immigration judges' would have to ensure that their decision was right first time in the absence of an adequate appeal mechanism.

132. The proposals appear to have been drafted in order to deal with concerns relating to asylum appeals, without proper consideration of the system as a whole. The position of those who are making immigration applications, such as for family visits, may be prejudiced by many of the proposed changes. It is unclear what the impact will be on immigration appeals, which appear to have been overlooked.

133. In evidence to us, the Minister made two important concessions in relation to the jurisdiction of the House of Lords on immigration and asylum appeals; and the ouster of judicial review of executive actions.⁹⁹ We trust that these will be implemented in the Bill.

134. None of the proposals appears to address key longstanding concerns about the asylum and immigration system, arising from poor initial Home Office decision making and the failure to removed failed appellants.

99 Paras 57 and 68 above

Conclusions and recommendations

Quality of initial decision making

1. There are significant flaws in Home Office practice at the stage of initial decision making. This causes us great concern, not only because of the proposed removal of a tier of appeal contained in the new Asylum and Immigration (Treatment of Claimants, etc.) Bill, but also in relation to any additional restrictions placed upon the supervisory jurisdiction of the courts. (Paragraph 15)
2. If the Home Office remains unable to ensure that Presenting Officers are present at appeals before the new Asylum and Immigration Tribunal, the judge in charge of proceedings should have the discretion to take a more actively inquisitorial approach in order to ensure that justice is done and that proceedings are conducted with necessary fairness. Such a change may have to be implemented by statute to ensure certainty. (Paragraph 30)

Proposal for a new asylum and immigration tribunal

3. On the available evidence, we believe that the abolition of a tier of appeal cannot, in the absence of a more fundamental reform, deliver both increases in “end to end” speed and improvements in the quality of judicial decisions. (Paragraph 44)
4. We are concerned that the limited system of review proposed is insufficient to guarantee that an appellant will receive a just determination of his application. (Paragraph 45)
5. Accordingly, we recommend that the removal of a formal tier of appeal should not be undertaken until it can be shown that there has been a significant improvement in initial decision making and the rise in the number of successful first tier appeals has been substantially reversed. (Paragraph 46)

Review of tribunal decisions

6. We recommend that the Bill should make clear the general circumstances in which the tribunal will hear an oral review. (Paragraph 47)
7. There is a clear objection in principle to tribunals exercising a supervisory jurisdiction over themselves. We doubt whether this arrangement is either fair or able to be viewed as fair by those affected by the new Tribunal’s decisions. In looking at these arrangements we bear in mind that they affect not just asylum cases but also visitor appeals involving family members of UK citizens. (Paragraph 52)

Jurisdiction of the courts

8. We see 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. The procedural basis for deciding what cases the Court of Appeal should take need not be lengthy and could be carried out efficiently as a paper exercise. (Paragraph 54)

9. The argument for removing the jurisdiction of the House of Lords cannot rest securely on the principle of removing scope for unmeritorious appeals, since few cases proceed to the highest court. The House of Lords should retain its usual overall jurisdiction in immigration cases. (Paragraph 58)

Exclusion of judicial review

10. We are deeply concerned that the provisions of the new ouster clause are intended to prevent the courts from reviewing any deportation or removal decision; this may include cases involving serious error, for example where the wrong person has been identified for removal. (Paragraph 69)
11. An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake. (Paragraph 70)
12. The system of statutory review under the 2002 Act, which was invented to abridge the previous system of judicial review, has only been operating for a matter of months. It appears to be working. No change should be made to this system until there has been more experience of its impact. (Paragraph 71)

Non suspensive appeals

13. We recommend that the Government investigate the fairness of the non-suspensive appeal system, given the extremely low success rate of appellants' appeals under that system. (Paragraph 81)
14. We note that the 2002 Act makes provision for an independent monitor of non-suspensive appeals. The appointment of this person was announced on Wednesday 11 February. We recommend that the list of countries, from which the Secretary of State can certify claims as clearly unfounded, should not be extended until after the independent monitor has been consulted. (Paragraph 82)

Public funding and legal advice

15. Evidence suggests that it will be a long time before Home Office decision making is of sufficient quality to justify the proposed reduction in pre-decision legal aid (Legal Help). It is wrong in principle and inefficient in practice to deny Legal Help to those who need it in asylum and immigration cases. (Paragraph 90)
16. The loss of Legal Help is likely to prove a false economy, leading to greater expense on appeals. Properly directed, good quality legal advice is beneficial to all parties. (Paragraph 91)
17. We support the removal of poor quality, backstreet immigration advisors from the system. We would welcome the implementation of robust rules and procedures to ensure that solicitors and other legal representatives are properly accredited. Under the adversarial process the system operates most fairly when both sides are represented. (Paragraph 99)

Immigration appeals

18. In India we learnt that the ECM review was often regarded as a “rubber stamp”. This process could, however, deal with some cases effectively without delay or expensive appeals. We recommend that UKvisas give further consideration to developing its use. (Paragraph 107)
19. It is ironic in a system where appellants are accused of delaying tactics that in immigration appeals the main cause of delay has been the Government. (Paragraph 110)

Universal file number

20. We recommend the adoption of a universal file number for each applicant in asylum and immigration cases. This number should be used to trace cases from initial application (both in-country and out of country) to final determination. (Paragraph 117)

Family visitor appeals

21. We are concerned at the current disparity in success rates between oral appeals and appeals which have been decided only on the basis of the papers in relation to family visitors. This may indicate that there is substantial injustice done to those who decide not to opt for an oral appeal. (Paragraph 126)
22. In order to safeguard the independence of the appeal process, we recommend that notice of appeal should not be lodged with the Home Office, but with the Immigration Appellate Authority. (Paragraph 127)
23. We further recommend that control of bringing forward asylum and immigration cases for hearing should be a matter for the Immigration Appellate Authority, rather than the Home Office. (Paragraph 128)

Formal minutes

Tuesday 24 February 2004

Members present:

Mr A J Beith, in the Chair

Peter Bottomley
Ross Cranston
Mrs Ann Cryer

Mr Clive Soley
Keith Vaz

The Committee deliberated.

[Adjourned till Tuesday 24 February at 3.30pm]

Members present:

Mr A J Beith, in the Chair

Peter Bottomley
Ross Cranston

Mrs Ann Cryer
Keith Vaz

The Committee deliberated.

Draft Report [Asylum and Immigration Appeals], proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 134 read and agreed to.

Conclusions and recommendations read and agreed to.

Summary read and agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence be reported to the House.

[Adjourned till Tuesday 2 March at 9.00am]

Witnesses

(See Volume II)

Tuesday 13 January 2004

His Honour Judge Henry Hodge OBE, Chief Adjudicator, Immigration Appellate Authority, **Rt Hon Lord Newton of Braintree OBE**, a Member of the House of Lords, Chairman, Council on Tribunals and **Charles Blake**, Council of Immigration Judges Ev 1

Tuesday 20 January 2004

The Honourable Mr Justice Ouseley, **Miss Kate Eshun** and **Naresh Kumar**, The Association of the Members of the Immigration Appeal Tribunal Ev 16

Laurie Fransman QC, Immigration Law Practitioners' Association, **Alison Stanley**, The Law Society, **Nick Oakeshott**, Refugee Legal Centre, **Stephen Irwin QC** and **Nicholas Blake QC**, The Bar Council of England and Wales Ev 24

Tuesday 3 February 2004

The Honourable Mr Justice Collins, former President, Immigration Appeal Tribunal Ev 31

Eric Metcalfe, JUSTICE, **Harry Mitchell QC**, Migration Watch and **David Rhys Jones**, Medical Foundation for the Care of Victims of Torture Ev 35

Richard Dunstan and **Ms Teresa Perchard**, Citizens Advice Bureau and **Colin Yeo**, Immigration Advisory Service Ev 41

Tuesday 10 February 2004

David Lammy, a Member of the House, Parliamentary Under-Secretary of State, Department for Constitutional Affairs and **John Scampion CBE**, Immigration Service Commissioner Ev 47

List of written evidence

(See Volume II)

Migration Watch	Ev 57
His Honour Judge Henry Hodge OBE, Office of the Chief Adjudicator, Immigration Appellate Authority	Ev 71
The Honourable Mr Justice Ouseley, President, Immigration Appeal Tribunal	Ev 72
Citizens Advice	Ev 80
The Children's Society	Ev 92
Wackenhut	Ev 95
Refugee Council	Ev 96
Asylum Welcome	Ev 97
Refugee Children's Consortium	Ev 101
Immigration Advisory Service	Ev 104
Joint Council for the Welfare of Immigrants (JCWI)	Ev 110
Council on Tribunals	Ev 114
Immigration Law Practitioners' Association	Ev 117
Lord Chancellor's Department	Ev 130
Medical Foundation for the Care of Victims of Torture	Ev 143
JUSTICE	Ev 145
Refugee Action	Ev 153
The Law Society	Ev 155
Zimbabwe Association	Ev 157
Legal Services Commission	Ev 158
Asylum Aid	Ev 166
Bail for Immigration Detainees (BID)	Ev 171
Refugee Legal Centre	Ev 175
Legal Action Group	Ev 195
Council of Immigration Judges	Ev 198
Law Reform Committee of the Bar Council	Ev 203
Association of Members of the Immigration Appeal Tribunal(AMIAT)	Ev 207
The Revd Anne Hollinghurst, Cathedral Chaplain & Chaplain to the University of Derby and The Revd Canon David Truby, Canon Pastor of Derby Cathedral	Ev 211
Ben Hoare Bell Solicitors	Ev 212
Tamil Welfare Association of Newham (TWAN)	Ev 214
Office of the Immigration Services Commissioner	Ev 215
Department for Constitutional Affairs	Ev 226
UKvisas	Ev 229
AVID Association of Visitors to Immigration Detainees	Ev 234
Liberty	Ev 235
Anver Jeevanjee, Member of the Immigration Appeals Tribunal	Ev 239
Tooks Court Chambers	Ev 242
Brian Thomson, Liverpool Law School, University of Liverpool	Ev 245
Group of London Immigration Adjudicators	Ev 246

The Honourable Mr Justice Collins, former President, Immigration Appeal Tribunal	Ev 248
Migration Watch	Ev 250
Immigration Law Practitioners' Association	Ev 251
The Law Society	Ev 252
Refugee Legal Centre	Ev 256

Reports from the Constitutional Affairs Committee

The First, Second and Third Reports were published by the Committee under its previous name, Committee on the Lord Chancellor's Department

Session 2002–03

First Report	Courts Bill <i>Government response</i>	HC 526 <i>Cm 5889</i>
Second Report	Judicial Appointments: lessons from the Scottish experience <i>No Government response expected</i>	HC 902
Third Report	Children and Family Court Advisory and Support Service (CAFCASS) <i>Government response</i>	HC 614 <i>Cm 6004</i>
Fourth Report	Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work <i>Government response (Second Special Report, Session 2003–4)</i>	HC 1171 <i>HC 299</i>

Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
First Report	Judicial appointments and a Supreme Court (court of final appeal)	HC 48