

Second Reading Briefing

Immigration and Asylum Bill

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Introduction

The Law Society of Scotland is the professional body for over 13,500 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society. Our Immigration and Asylum sub-committee welcomes the opportunity to consider and comment on the Immigration and Asylum Bill in advance of Second Reading on 13 July 2026. The sub-committee has the following comments to put forward for consideration.

General comments

The creation of the Independent Immigration Appeals Authority (IIAA) may intend to reduce the backlogs in Immigration and Asylum cases but this should not be achieved by sacrificing the rule of law or compliance with ECHR and the Human Rights Act 1998.

We are concerned that the appointment of Judges without legal qualifications or experience would undermine the credibility of the new appeals body and refer to the decision in the European Court of Human Rights case *Guðmundur Andri Ástráðsson v. Iceland* [GC] - 26374/18 which held that "technical competence" is one of the main criteria on which judicial selection should be based. We note that the Grand Chamber also held that failure to select judges by way of strict adherence to the correct legal criteria would also result in breaches of ECHR Article 6.

Following this judgment, failure to select the most technically competent available (or reasonably available) judges could compromise compliance with ECHR Article 6. We note that in addition to deciding on cases relating to fundamental human rights, judges in the FTT(IAC) must also frequently consider significant legal complexity. If judges are appointed to the new IIAA who lack the requisite technical, legal competence to determine such issues, then there is a clear risk that miscarriages of justice will result.

Related to this is also a likelihood of a higher volume of appeals having to be heard by the Upper Tribunal and having to be remitted by the Upper Tribunal (i.e. to be reheard by the FTT/IIAA). This is likely to increase (rather than reduce) the backlog of immigration appeals.

We are unaware of lay justices determining cases of comparable gravity (adjudicating cases concerning ECHR Articles 2 and 3, for example) in any other courts or Tribunals in Scotland. A Justice of the Peace is a lay magistrate who sits in Scotland. In court justices have access to advice on the law and procedure from qualified lawyers, who fulfil the role of legal advisers or clerk of court. Similarly, the Legal Assessor is a legal

adviser to the General teaching Council (Scotland) hearings:
<https://www.legislation.gov.uk/ssi/2011/215/schedule/4/made>.

If the IIAA were to follow a similar practice it would be likely to enhance the new body's credibility and to help ensure compliance with ECHR Article 6.

In the current context we note that Part 2 of the Tribunals, Courts and Enforcement Act 2007, read alongside Part 5 of the Nationality, Immigration and Asylum Act 2002, guarantee that an immigration appeal in the UK will be heard by a legally qualified Tribunal Judge. We note the amendments to those acts which will enable non-legally qualified judges to hear such appeals. In relation to the same point, we note that whilst existing legislative arrangements might have allowed appointment of non legally qualified adjudicators, this has very rarely happened in practice.

It is unclear what the division of labour will be between adjudicators and senior adjudicators (who will be legally qualified). It is unclear whether the adjudicators will be expected to at least have a degree in law or an understanding in human rights. Such adjudicators will have similarity with the Magistrate model (as found in the law of England and Wales). However, given the sensitivity and high stakes nature of asylum decisions, adjudicators with at least a degree in law would be preferable. The Government must be clear about the qualifications, length and nature of the training for adjudicators. Clear guidance should be introduced so that highly sensitive cases are only dealt with by senior adjudicators with substantive legal experience.

We have specific comments on clauses in the bill which follow. We intend to produce a number of amendments to give effect to these comments and other developing issues.

PART 1

THE INDEPENDENT IMMIGRATION APPEALS AUTHORITY

1 The Independent Immigration Appeals Authority

We note that the IIAA is established under clause 1 of the bill. We also note that its primary function is to decide—

- (a) appeals against decisions of the Secretary of State relating to protection claims and human rights claims
- (b) certain applications for immigration bail
- (c) appeals against decisions of the Secretary of State relating to deprivation of citizenship
- (d) appeals against decisions of the Secretary of State under the Immigration (European Economic Area) Regulations 2016 as they continue to have effect following revocation, and
- (e) appeals under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (S.I. 2020/61).

The proposed transfer of the areas of work covered by clause 1(2)(a)-(e) from the jurisdiction of the First Tier Tribunal to the IIAA fails to take into account that the Tribunal has been established since 2010 and has discharged its duties as a Tribunal

by upholding the Rule of Law, Human Rights and its statutory functions. Indeed, the Scottish Refugee Council has described the Tribunal as an “essential Corrective mechanism” (see Scottish Refugee Council)).

We commend the proposition that the IIAA must exercise its primary function with a view to ensuring that justice is done (clause 1(4)). We consider that important that doing justice is for the IIAA, it must also uphold the constitutional principle of the Rule of Law and promote compliance with Human Rights specifically the ECHR.

In terms of Clause 1(5)(a) we take the view that the IIAA should also act with impartiality.

In respect of Clause 1(6) we take that view that as the IIAA will encompass a UK wide jurisdiction the ministerial obligation to uphold the independence of the IIAA and, in particular, not to seek to influence particular decisions should extend to the Scottish, Welsh and Northern Ireland Administrations.

We consider the Clause 1(8) limitation of grounds of challenge of the IIAA decisions to be problematic. This provision essentially ousts the jurisdiction of the courts in connection with Judicial Review of the actions of the IIAA. The Government should explain on what basis such an ouster provision is necessary.

2 Membership of the IIAA

We have concerns that Clause 2 will mean that the IIAA will lack independence from Government. In particular we note the role of the Secretary of State. The Secretary of State appoints the non-executive members and also appoints the first Chief Executive and the first Chief Appeals Officer. The non-executive members have crucial roles in the appointment of the IIAA adjudicators and should be totally independent of Government. Why does the Lord Chancellor or the Judicial Appointments Commission not play a role in these important appointments?

As stated in the general comments section we are concerned at the appointment of Judges without legal qualifications or experience. The definition of "law-related activity" in the Tribunals, Courts and Enforcement Act 2007 section 52 is too broad. It encompasses persons who: assist those involved in proceedings for the resolution of issues arising under the law; draft documents intended to affect persons' rights or obligations; and conduct any activity that is of a broadly similar nature to an activity within any of Section 52 (a) to (h). This means that the Chief Executive can appoint IIAA Senior Adjudicators whose experience is in such "law-related activities" which do not provide the knowledge or experience which properly equip a person to adjudicate serious matters such as those covered in Immigration appeals.

Clause 2(6) states that "An IIAA adjudicator may be appointed either as a senior adjudicator or as an executive adjudicator." There is no definition of an "executive adjudicator". What is the difference between the two roles?

3 Powers and duties of IIAA members

Clause 3(7) prescribes is no timescale for the Secretary of State to lay in Parliament the representations made by the Chief Executive concerning IIAA members, or the administration of justice by the IIAA. In our view there should be a timescale of 30 days for the Secretary of State to fulfil this obligation.

4 IIAA Procedure Rules

Clause 4 (5) provides that "When exercising the power to make IIAA Procedure Rules, the IIAA Procedure Rules Board must have regard to the desirability of securing the objectives set out in section 1(4) and (5)". We draw attention to the modification which we have suggested to Clause 1(4) and (5).

It is satisfactory that the Procedure rules are subject to consultation and also to approval by Parliament. However, in terms of clause 4 (8) the statutory instrument containing the Procedure Rules is subject to annulment in pursuance of a resolution of either House of Parliament. We take the view that the rules should be subject to super-affirmative procedure so that they are subject to enhanced scrutiny and approval by both Houses of Parliament.

5 The IIAA Procedure Rules Board

We have no comments to make.

6 Power of IIAA to review its own decisions

Clause 6 provides that:

- (1) The IIAA may review a decision made by it— (a) on its own initiative, or (b) on an application by a party to the proceedings concerned.
- (2) A review under this section must be carried out by an IIAA adjudicator.

Clause 6(3) provides that: Where an IIAA adjudicator reviews a decision, they may do any of the following— (a) correct errors in the decision or in a record of the decision; (b) amend reasons given for the decision; (c) re-make the decision. In our view the fact that the adjudicator can make such changes to the earlier decision made by an IIAA adjudicator appears to fail to comply with the requirements of Article 6 ECHR that the decision should be made by an "independent and impartial" Tribunal.

7 Right of appeal to Upper Tribunal

We have no comments to make.

8 Regulations about time periods

We take the view that the pre-legislative consultation by the Secretary of State on the regulations under this clause should be with a wider group of stakeholders.

9 Expedition of cases on request by Secretary of State

We have no comments to make.

10 Charging power in respect of wasted resources

We consider that clause 10 is problematic, unnecessary and unacceptable. The IIAA is to be given powers to charge a person exercising rights of audience or rights to conduct litigation if that person is found to have acted improperly, unreasonably or negligently. Under current statutory and common law powers professional regulators have sufficient powers to deal with matters of professional discipline such as improper or unreasonable conduct and it is in the public interest that such powers rest with the regulators. It is inappropriate that the determination of negligence should be included in the clause when that is properly the province of the civil courts. Furthermore, we note that any amounts charged under this clause are to be paid to the Consolidated Fund rather than to the client who may have suffered as a result of any alleged negligence or improper or unreasonable conduct. This appears to be more in the nature of a tax rather than compensation for an affected party. Similar provisions are contained in section 80 of the Nationality and Borders Act 2022. Clause 10 needs to be reconsidered.

11 – 16

We have no comments to make on clauses 11-16.

PART 2

ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

17 Sponsor claims

We have no comments to make.

18 Family life

The recent Chişinău declaration notes that there are significant, complex migration-related challenges in various Council of Europe states and that failure to address these adequately may weaken public confidence in the system.

We support the fact that the declaration underlines that states have the undeniable sovereign right to control the entry and residence of foreign nationals, and that it is both an obligation and a necessity for states to protect their borders in compliance with the Convention.

The declaration also focusses on protections guaranteed under Article 8 (right to respect for private and family life) of the Convention:

<https://www.coe.int/en/web/portal/-/council-of-europe-foreign-ministers-adopt-political-declaration-on-the-echr-and-migration> .

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Clauses 18, 19 and 20 seek to amend Part 5A of the Nationality, Immigration and Asylum Act 2002 particularly sections 117A, 117B and 117C. The European Court of Human Rights (ECtHR) has laid out substantial guidance https://ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng on the criteria to be applied in cases involving the expulsion of foreign national offenders. The relevant criteria to assess compatibility with Article 8 of the Convention is found in *Üner v. the Netherlands [GC], 2006, §§ 54-60*. These criteria already allow for states to take into account all the “family life” and “public interest considerations” mentioned in the clauses 18, 19 and 20. We note that the weight to be attached to each criterion will vary according to the specific circumstances of the case *Maslov v. Austria [GC], 2008, § 70* of the Guide.

We draw attention to the terms of paragraph 98 in the Guide “98. Where foreigners do not qualify as “settled migrants”, because their presence in the territory of the respondent State was from the outset precarious, unlawful or based on breaches of immigration law, their removal from the respondent State will likely breach Article 8 only in exceptional circumstances (see, for example, *Butt v. Norway, 2012, and Alleleh and Others v. Norway, 2022, § 90*).”

Can the Government explain what added value the amendments in clauses 18, 19 and 20 will bring beyond the ample guidance provided in ECtHR judgments.

19 Public interest considerations

See our comments above.

20 Cases involving foreign criminals and others liable to deportation

See our comments above.

PART 3

PROTECTION STATUS AND ASYLUM

21 Core protection: regulations about protection status and protection claims

Clause 21(1) provides the Secretary of State with a power to make regulations which can amend any enactment (meaning an enactment whenever passed or made, and includes this Act, subordinate legislation, an enactment comprised in, or in an instrument made under an Act of the Scottish Parliament and legislation from the other devolved legislatures); in respect of protection claims or protection status.

This is an extremely wide Henry VIII clause. We accept that framework legislation is a necessary aspect of law-making today especially where Government policy is in the course of development and the subject matter of the legislation concerned is technical in nature. However, Government should act with restraint when planning to use such a mechanism and should be more open to the use of enhanced supplementary materials to explain what the bill intends to do. In our view, Henry VIII powers should only be enacted in extremis. The Government should explain why it believes taking this power is necessary, especially in connection with legislation from the devolved legislatures.

We accept that immigration and asylum policy are reserved matters for the UK Parliament however, the application of the regulation making power is so wide that it could impact on devolved matters. Using subordinate legislation to legislate with regard to devolved matters disappplies the Legislative Consent Convention. What consultation has the Government undertaken with the Scottish Government in framing this wide regulation making provision?

The Government should also explain how regulations by the Secretary of State on protection claims will impact the absolute protection of Article 3:

<https://www.unhcr.org/media/1951-refugee-convention-and-1967-protocol-relating-status-refugees>

We take the view that the Government should be guided by the principles outlined by the Scottish Human Rights Commission in its [joint statement](#) with the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission:

“We urge the UK Government to commit to no reduction in rights protections. The principle of universality is fundamental to human rights: rights that can be removed from some people are no longer rights for everyone. The erosion of anyone's rights puts us all at risk; it signals that these shared standards are not guaranteed and that any of our rights could be subject to debate.

The ECHR already provides governments with the flexibility to pursue legitimate aims - including managing borders and maintaining public safety - whilst ensuring that minimum protections are upheld for everyone. Public concerns about immigration and border security are a legitimate matter for government attention. But the Convention does not present a barrier to effective immigration control; instead it provides a framework to balance people's right to private and family life with vital public interests such as national security and prevention of crime; and sets out the limited circumstances in which Article 3 applies to prevent torture and inhuman or degrading treatment.”

22 Interpretation of Refugee Convention: “lawfully staying”

We have no comments to make.

PART 4

ASYLUM SUPPORT

23 Power to require payments from recipients of asylum support

Asylum support (clauses 23 and 24) includes a new power for the Secretary of State to require people who have received asylum support to make a payment as a contribution to the costs of providing support.

24 Section 23: further provision

We have no comment to make.

PART 5

MODERN SLAVERY

Prevention and risk orders

Modern slavery (clauses 25 to 49) and Schedules 4 and 5 would make changes to the modern slavery system.

We share the commitment to ending modern slavery, human trafficking and exploitation. We agree with legal frameworks which ensure victims can be identified and supported. We note that the Government considers that the current system needs reform to ensure it can better prevent exploitation occurring and robustly identify and support those who are exploited at the earliest opportunity. In view of the shortness of time since the bill was introduced, we had no opportunity to prepare comments at Second Reading. We will continue to review the provisions in the bill. If we have any comments, we will raise them at a later point in the bill's passage.

25- 49

We have no comments to make on clauses 25-49

PART 6

GENERAL

50 Regulations

General (clauses 50 to 53) contains general legislative provisions for regulation-making powers, territorial extent and commencement.

We have no comment to make.



For further information, please contact:

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