



The Immigration Appeals System Revised - 2010 Version

This Briefing Paper substantially amends and brings up to date the previous version dated March 2005, taking account of recent changes in the law.

Introduction

1 The immigration appeals system has undergone major changes twice in recent years. Until April 2005 there was a two tier system, the first tier consisting of adjudicators sitting alone and the upper tier being the Immigration Appeal Tribunal. The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 [Referred to hereafter as “the 2004 Act”] created the Asylum and Immigration Tribunal, which was in essence a single tier tribunal and began operation on 4 April 2005. This Tribunal has itself now been abolished and superseded by further reforms which took effect from 15 February 2010. The hearing and disposal of asylum and immigration appeals has been taken over by the unified tribunal service created by the Tribunals, Courts and Enforcement Act 2007. Please refer to Briefing Paper 8.35 for details of the new tribunal. Appeals system -general

2 Rights of appeal are governed by sections 82, 83 and 84 of the Nationality, Immigration and Asylum Act 2002.[Referred to hereafter as “the 2002 Act.”] Section 82 confers a right of appeal against an adverse immigration decision, defined as one or other of the following:

- refusal of leave to enter the United Kingdom,
- refusal of entry clearance, e.g. to a spouse or fiancé living abroad of a person settled in the United Kingdom,
- refusal of a certificate of entitlement under section 10 of the 2002 Act, i.e. a certificate that a person is entitled to right of abode in the United Kingdom,
- refusal to vary leave to enter or remain in the United Kingdom if the result of refusal is that the person has no leave to enter or remain,
- variation of a person’s leave to enter or remain in the United Kingdom if when the variation takes effect the person has no leave to enter or remain,
- revocation of indefinite leave to enter or remain in the United Kingdom under section 76 of the 2002 Act, i.e. because leave was obtained by fraud or in related circumstances,
- a decision that a person is to be removed from the United Kingdom in accordance with the provisions of section 10 of the Immigration and Asylum Act 1999 because he is unlawfully in the United Kingdom, e.g. because he has overstayed his leave,
- a decision to remove an illegal entrant by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971,
- a decision under paragraph 10A of the same Schedule to remove family members being removed under the provisions mentioned in (h),
- a decision to make a deportation order under section 5(1) of the Immigration Act 1971,
- refusal to revoke a deportation order under section 5(2) of that Act.

Refusal of an asylum claim is not, except in one case referred to below, treated as a separate immigration

decision. An appellant who has been refused asylum appeals on the ground that refusal to give him leave to enter or to remain or a decision to deport him or any other of the immigration decisions listed above is contrary to the United Kingdom's obligations under the 1951 Convention on the Status of Refugees and its 1967 Protocol, because if the appellant is returned to his own country his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Some asylum applicants have their applications rejected by UKBA but are nevertheless given leave to enter or remain for a limited period as a measure of humanitarian protection in accordance with paragraph 339C of the Immigration Rules because conditions in their home countries, e.g. Afghanistan or Somalia, are such as to expose them to a real risk of suffering serious harm as defined in that paragraph. The commonest form taken by such a threat is "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". In accordance with section 83 of the 2002 Act, if an applicant is granted such leave for more than one year he may appeal against rejection of his asylum claim.

3 The Human Rights Act 1998 was brought into force in October 2000 and has the effect of making the European Human Rights Convention directly justiciable in courts in the United Kingdom. As a result it is now invariable practice for appellants to include an appeal on human rights grounds along with an asylum appeal. On this subject see paragraph 19 below.

4 Section 85 of the 2002 Act deals with matters to be considered by the immigration judge on appeal. Section 85(4) is of particular importance in that it allows the immigration judge to "consider evidence about any matter which he thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision." [My italics] However, the UK Borders Act 2007 amended this part of the 2002 Act with a new section 85A which sets out exceptions to section 85(4) with the result that in the case of appeals against decisions of Entry Clearance Officers at overseas embassies and High Commissions refusing either entry clearance or certificates of right of abode in the UK, the Tribunal may consider only the circumstances appertaining to the time of the decision. Section 85A contains further exceptions in the case of appeals against certain "in country" decisions which are required to be considered under the Points Based System and are taken in the name of the Secretary of State. i.e. refusal of leave to enter or to vary leave to enter or remain in the UK. In such cases the Tribunal may consider only evidence which was submitted at the time of making the original application. Section 85A contains much more detail which I do not attempt to summarise.

5 Sections 88-91 deny the right of appeal to particular categories of persons, largely in line with existing statutory provision. For example, applicants for visit visas have no right of appeal against refusal except in the case of family visits and applicants who lack a necessary immigration document such as entry clearance, passport or work permit may not appeal against an immigration decision taken on the ground of that lack. Section 92 introduces a new restriction on the right to appeal while in the United Kingdom except in specified cases. These are the categories of immigration decisions listed in paragraph 3 above in [c], [d], [e], [f] and [j] and cases of appeal against refusal of leave to enter where the appellant is in the United Kingdom and has an entry clearance or a work permit. The most important exceptions are in subsection (4), namely where the appellant has made an asylum claim or a human rights claim while in the United Kingdom, or in the case of European Economic Area nationals or their family members who make a claim to the Secretary of State that the immigration decision breaches the appellant's rights under the Community treaties in respect of entry to or residence in the United Kingdom. These latter exceptions apply to all categories of immigration decisions.

Certification sections

6 Section 94 of the 2002 Act provides an important limitation on asylum and human rights claims brought by persons who have a right to reside in any member State of the European Union and several other states, including Albania, Serbia, Jamaica, Macedonia, Bangladesh, Bolivia, Peru, Brazil, Ecuador, Sri Lanka, South Africa and Ukraine. In the case of a number of African states, Ghana, Nigeria, Gambia.

Kenya, Liberia, Malawi, Mali and Sierra Leone the Secretary of State's certificate certifies that in general he is satisfied there is no such serious risk in respect of men only. By subsection (5) of section 94 the Secretary of State may by order add other states or part of states if he is satisfied that in general there is no serious risk of persecution or breach of human rights there. The Secretary of State may also remove states or parts of states from the list. If he is satisfied that an asylum or human rights claimant is entitled to reside in one of the listed countries he is required to certify that the claim is unfounded, unless he is satisfied that it is not clearly unfounded. The applicant has no right of appeal if his claim is so certified. A recent High Court case on judicial review indicates however that the exercise of the Secretary of State's powers can be questioned. In that case the Court reviewed evidence on the human rights record of Bangladesh and ruled that the Secretary of State's conclusion that there was in general no serious risk of persecution or breach of human rights in that country was not justified.

7 Section 96 excludes a right of appeal against an immigration decision if the Secretary of State or an immigration officer certifies, in effect, that the appellant is simply raising an old issue which was raised in a previous claim and could have been the subject of an appeal or was in fact the subject of an appeal which was dismissed and in the opinion of the Secretary of State or an immigration officer is being raised solely for the purpose of delaying the removal of the claimant or a member of the claimant's family from the United Kingdom. Unfortunately the effect of this has now been considerably weakened by a recent decision of the United Kingdom's new Supreme Court to the effect that repetitious appeals are allowed in relation to appeals against deportation. On this please refer to Briefing Paper 8.37.

Removal to safe countries

8 Section 33 of the 2004 Act brings into effect Schedule 3 which is concerned with the removal of asylum seekers to countries known to protect refugees and to respect human rights. The Schedule lists as countries thus known all the Member States of the European Union plus Norway and Iceland, but not Switzerland, a country whose record on observance of human rights has sometimes left much to be desired. This part of the Schedule may be amended only by a future Act of Parliament. Part 3 of the Schedule then makes provision for the Home Secretary to have power to make statutory instruments listing other countries as safe in varying degrees and to remove such countries from the list. Asylum seekers may be removed from the United Kingdom to any state on any of these lists provided they are not nationals or citizens of the state in question. There is no appeal against removal. These provisions are intended to make it easier to remove asylum seekers from the UK to other countries through which they passed on the way here without claiming asylum. In practice their effectiveness is likely to be dependent on agreement with the destination states, but the denial of a right of appeal should facilitate and speed up the process.

Preliminary procedures in hearing of appeals

9 The procedures for hearing appeals are comparable to those for civil litigation. Originally procedures were fairly informal but in recent years it has proved necessary to introduce more formality in the interests of avoiding unnecessary delay and generally improving the disposal rate. There is now a system of first hearing which deals with preliminary matters before the appeal is listed for full hearing before an immigration judge. If for example the appellant fails to appear at all in person or send a representative at first hearing and no explanation for non-appearance is supplied the judge has a discretion to treat the appeal as abandoned and dismiss it forthwith. Appellants are normally required to comply with directions which oblige them to give in advance of the full hearing date a written statement of their case and to supply any documents or other evidence on which they intend to rely. Directions may also be given to the Home Office for e.g. a typed transcript of interview records which will be put before the immigration judge at the hearing. Normally interview records are in manuscript and may be illegible.

10 When the appeal finally comes up for hearing the judge will have a file before him which should contain all relevant papers. The file will contain interview records and other items of evidence. It will also contain in the case of a non-asylum appeal an explanatory statement or in the case of an asylum appeal a refusal

letter, in both cases prepared by the civil servant responsible for the adverse decision, setting out his reasons in detail. If the appellant's representatives have complied with directions there should be also a written statement of the appellant's case and other evidence on which he wishes to rely, such as medical or other expert reports. In the case of asylum appeals there will normally also be objective evidence of the current state of political and other affairs in the appellant's country of origin against which the appellant's evidence of alleged ill treatment or other form of persecution can be tested. The Home Office produces at six monthly intervals Country Assessment Reports on the countries from which asylum seekers come; these reports are digests of more detailed reports from a variety of resources, radio and TV broadcasts, local newspapers, bulletins from Amnesty International, Human Rights Watch and similar bodies. Such reports are also frequently submitted by the appellant's representatives in their original form. There is in particular much reliance on the country reports on human rights practices put out at the beginning of each year by the United States State Department.

Representation at appeal hearing

11 In most cases the appellant nowadays is represented by a barrister, solicitor or lay representative. Part V of the Immigration and Asylum Act 1999 created the new office of Immigration Services Commissioner, appointed by the Secretary of State after consulting the Lord Chancellor and Scottish Ministers. By Section 82(5) of the Act the Commissioner is required to exercise his functions so as to ensure that people providing immigration advice or services:

- are fit and competent to do so;
- act in the best interests of their clients;
- do not knowingly mislead any court or tribunal ;
- do not seek to abuse any procedure in connection with immigration or asylum.

The reference to immigration advice or services covers such advice given in relation to applications to the Home Office as well as appeals. By Section 85 anyone providing immigration advice or services must be a qualified person, i.e. a barrister, solicitor, a person registered with the Commissioner or certain other specified categories of person.

12 Appellants can now claim legal aid to cover the costs of representation before adjudicators and beyond. This is administered by the Legal Services Commission and as in the case of legal aid generally the appellant must show that he has some reasonable prospect of success. The quality of representatives varies considerably. Some are very able and are a great help to the court as well as to their clients. All too often, however, they are very inefficient. Firms of solicitors handling immigration or asylum appeals are entitled to send a partner or competent legal assistant to represent their clients but often choose instead to brief counsel. It is a common occurrence that they fail to instruct counsel until late on the day before the hearing, which means that counsel is not as well prepared as he ought to be and may come to court not even having had the opportunity to discuss the case with the appellant. There is frequently a degree of laxity or total failure to observe proper professional standards in such matters as submitting evidence or complying with directions.

13 The respondent is usually represented by a Home Office Presenting Officer, a junior civil servant with some immigration experience but not legally qualified. The job of the Presenting Officer is to cross-examine the appellant with a view in appropriate cases to casting doubt on his evidence and to make submissions on the appeal as a whole at the end of the hearing. Although they are not legally qualified they do receive training in their tasks and know what to look for in e.g. cross-examining the appellant on significant points of inconsistency between the evidence he gives at the appeal hearing and statements made to the immigration officer who interviewed him. From time to time over the past few years the Home Office has been short of Presenting Officers and judges have often had to hear appeals at which the respondent is not represented. The judge is then faced with the difficult task of deciding what questions he can ask the appellant about parts of his story which seem dubious and ought to be subjected to cross-

examination. There have been cases in the past in which the former Immigration Appeal Tribunal has concluded that a judge in this situation has gone beyond the bounds of his proper discretion in seeking to discredit the testimony of the appellant. The view of the Tribunal has been that appeals are adversarial and not inquisitorial in nature. The judge should not "descend into the arena", to quote the phrase commonly used in this context. The position of the immigration judge in such a situation is unenviable. The absence of a Presenting Officer inevitably adds to his burden. He may ask questions to clarify the evidence given by the appellant and must obviously try to ascertain the truth, but he must not go so far in this process as to appear to be engaging in hostile cross-examination. At times when the shortage of Presenting Officers has been particularly acute the Home Office has resorted to instructing counsel to act but is reluctant to engage in this practice on a significant scale on grounds of expense

14 The hearing of an appeal follows much the same procedure as that of a civil action in the ordinary courts. Two differences to note are that witnesses do not normally give evidence on oath, though that is possible, and hearsay evidence is admissible, though of course in evaluating evidence the judge is entitled to take into account the fact that it is hearsay. The appellant gives evidence first and if he has complied with directions and put in a written statement of his case he will normally rely on that and on the interview record instead of telling his whole story afresh in court. This saves a great deal of time. Cross-examination by the Presenting Officer will usually be directed primarily at credibility, a central point in most appeals and which is the main reason for most dismissals of appeals. Sometimes the appellant may call another witness to corroborate his case, but in most cases the appellant's is the only evidence heard. The appellant's representative may re-examine his witness if he feels that any answers given in cross-examination need further clarification in the appellant's favour. The Home Office never calls witnesses but in asylum cases in particular submits written evidence such as the Country Assessment Reports mentioned in paragraph 11. When all the oral evidence has been heard the Home Office Presenting Officer makes his submissions, giving reasons why the appeal should be dismissed and the appellant's representative makes closing submissions giving reasons why the appeal should be allowed. Both of them in asylum appeals will normally address questions of objective evidence, basing arguments on parts of the relevant written material which they have submitted to the judge. Submissions are of varying quality, but can nevertheless be helpful. Appellants' representatives often put in written skeleton arguments with the aim of reducing the amount of time which has to be spent on oral argument.

15 The immigration judge has to keep a detailed record of the evidence and submissions and later has to write a detailed summary of his determination and the reasons for it. It is not normal to deliver a determination in open court. Determinations are sent to the parties as soon as possible after they have been written and signed. Where an appellant has been detained under the Immigration Acts but is on bail it is necessary for him to be required to attend to take delivery of his determination. If the appeal is dismissed, as happens in most cases, the bail ceases and it is then up to the Home Office to detain the appellant afresh.

Credibility

16 Most asylum appeals are dismissed and the principal reason for dismissal is that the appellant's evidence is not believed. Reasons for not believing it include the following:

- The appellant has told a materially different story at the hearing from what he told the Home Office in interview. Such differences are infinite in number. The appellant may for example in a case where he was interviewed on arrival have said that he had reasons for coming to the United Kingdom which were not based on any alleged persecution or he may even admit that he has come here for economic reasons. This inevitably results in the refusal of asylum and he decides that he needs to improve on his story on appeal - but of course in so doing he digs a hole for himself. He may also give different dates for particular events from the dates he gave previously. He may relate facts which are completely at odds with what he said before.
- A seriously unbelievable story – e.g. an appellant from a large country such as Pakistan claims to

fear persecution at the hands of a group of people found in only one part of the country and alleges that they have all pervasive powers throughout the country.

- Doubts about the country of origin. E.g. in recent years there has been a general awareness that the Home Office has not been returning asylum seekers from Somalia. This has resulted in people from Kenya claiming to be from Somalia. In the same way, asylum seekers from Pakistan have claimed to be from Afghanistan.
- Long delays in leaving his own country. The appellant may allege e.g. that he was tortured, imprisoned and the rest but nevertheless remained in his country carrying on a normal life for months or years before deciding that he needs to leave for his own safety.
- Long delays in claiming asylum, e.g. it is not unusual for people who come to the United Kingdom on a visit visa to claim when the six months allowed on such a visa has almost expired.
- A clearly opportunist claim - e.g. when the appellant has been arrested for an immigration or other offence and he thereupon claims asylum.
- The fairy godmother syndrome. This is a variant of the seriously unbelievable story which crops up frequently because the appellant obviously wishes to disguise the means by which he was brought to the United Kingdom. As one example of many, a Tamil from Sri Lanka once told me that he was brought to the United Kingdom by an agent who travelled with him. The agent took him to an Underground station and left him, saying that the appellant should wait and the agent would shortly be back. He never returned, but the appellant alleged that he was saved by another Tamil who just happened to be on the spot, noticed him and immediately invited him to go to his home and enjoy free board and lodging indefinitely.

Credibility has always been a central issue in asylum and non-asylum appeals. Its importance is now recognised in statutory form by section 8 of the 2004 Act, on which the reader is invited to refer to paragraph 11 of the website paper on that Act.

Other reasons for dismissal of appeals

17 Apart from lack of credibility, perhaps the main reason for dismissing appeals is that the evidence, to the extent that it is believed, may show fear of returning to the appellant's country of origin but not for a Convention reason. This often arose in Sri Lankan cases when the civil war was raging there. It was understandable that people should wish to escape bombs and bullets which might have destroyed their homes and killed their relatives and friends, but that wish was not based on any fear of persecution. Other reasons are a wish to avoid military service, persecution by non-State agents and the internal flight alternative. The first is not in general a ground for claiming persecution, though it may be in certain cases if, e.g. the appellant can show that the punishment he would receive for draft evasion or desertion would be disproportionate and could reasonably be regarded as persecution. (UNHCR Handbook paragraph 169.) Persecution by non-state agents does not give rise to an entitlement to international protection unless the appellant can show that such persecution is knowingly tolerated by the authorities or the authorities refuse or prove unable to offer effective protection. (UNHCR Handbook paragraph 65.) This often arose in Sri Lankan appeals, in which the appellant would claim that he feared the Tamil Tigers rather than the police or army, though he might also claim that he feared both. It could be shown that there were areas of the north of Sri Lanka where the government's writ did not run and the only authority was exercised by the Tamil Tigers. In some continental European jurisdictions claims of persecution by non-state agents are not accepted in any circumstances. The internal flight alternative arises where the appellant has been able to show that he has a genuine fear of persecution but it is limited to one part of the country only and it would be possible for him to move to a different part of the country where he would not have any cause to fear. The Immigration Rule on this subject, paragraph 343 of HC 395, states that the different part for this purpose must be one to which it would be reasonable to expect him to go.

Human Rights Convention

18 Of growing importance is the European Human Rights Convention, which pursuant to the Human Rights Act 1998 became directly justiciable in courts in the United Kingdom on 2 October 2000. It is

invariably the case now that human rights claims are included in asylum applications and appeals. Appellants have an alternative cause of action. In practice the important rights on which appellants rely are contained in Articles 2, 3 and 8 of the Convention, respectively the right to life, the prohibition on torture and inhuman or degrading treatment or punishment and the right to respect for private and family life. Articles 2 and 3 are absolute, but Article 8 is qualified in that a public authority has the right to interfere with the exercise of rights protected by the Article "in accordance with the law and [as] necessary in a democratic society in the interests of national security" etc.

19 Asylum and human rights appeals are usually based on the same facts and normally if the asylum appeal is dismissed, the human rights appeal will also fail. However, human rights appeals do not depend on proof of persecution for a Refugee Convention reason and it is at least theoretically conceivable that appeals based on human rights grounds alone could succeed. If for example the Home Office were to serve notice of intention to remove a person to a country where there was a major war in progress he might be able to argue that the risks were such that his right to life under Article 2 would be infringed.

Determinations

20 Immigration judges are required to write detailed determinations, the expression used in this context for judgements, giving their decision on each appeal and the reasons supporting it. They need to make findings of fact based on the evidence presented to them, assess the credibility of the appellant and any other witnesses and reach conclusions on any legal issues which arise. This will often require hours of painstaking work resulting in a determination running to thousands of words

Removal conducive to the public good

21 Provision for appealing against a decision that the removal of an appellant is conducive to the public good by the Secretary of State and thus a matter of national security is covered by the Special Immigration Appeals Commission 1997. The Commission established by that Act must by paragraph 5 of Schedule 1 of the Act consist of at least three members, of whom at least one must hold or have held high judicial office within the meaning of the Appellate Jurisdiction Act 1876 and one other must be a legally qualified member of the Asylum and Immigration Tribunal.

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