ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

Briefing on the Government amendments to clause 14.

For debate Tuesday 4th May.

In summary, amendments 46A and 59 introduce a new appeals scheme as follows:

- The IAA and IAT still are abolished and replaced by the single tier Asylum and Immigration Tribunal, or AIT.
- The previous provisions for an internal review within the AIT have gone, as has the ouster.
- There is a 5-day time limit, papers only, statutory review of first decisions from single/two member AIT [103A]. Such decisions will be the vast majority of first decisions from the AIT. The application for statutory review is directly to the High Court, and is an application for an order that the AIT reconsider the appeal decision. If successful the case returns to the AIT for reconsideration. If not successful, there is no other statutory remedy.
- Importantly, in new clause 30 of schedule 2 [amendment 59] there is the power for the Lord Chancellor, for specified periods, to allow a single AIT member to decide 103A applications. If that member refuses them, a further application can be made to the High Court. In effect this introduces a pre filter on the statutory review applications before they reach the High Court. This provision is ostensibly transitional, but in reality could run for any period at any time, subject to consultation and statutory instrument. It has clear similarities to the existing application for leave to the Tribunal, which leads to a statutory review in the High Court if it is not successful.
- If a decision is reconsidered by the AIT, there is an appeal to the Court of Appeal [103B]. If the initial decision is from a panel, there is a similar appeal [103E]. This is not dissimilar to the existing provisions to appeal from the IAT. There is no bar on further appeals to the House of Lords.
- There is an additional route to the Court of Appeal directly from a High Court Statutory Review should the High Court believe the case merits it. [103C]
- There is a new legal aid regime for applications to reconsider and subsequent reconsiderations by the AIT [103D]. In these circumstances the Tribunal will have power to legal aid costs awards. The government have made it clear that a conditional 'no win, no fee' scheme will be introduced instead of certificates – although there is to be provision for 'near misses' to be funded as well as wins. In all but exceptional circumstances, we can envisage a 103A application will not get legal aid funding if it is not successful. Regulations will restrict the exercise of the power 'by reference to the outcome of the

appeal, the circumstances of the appellant, the nature of the appellant's legal representatives, or otherwise.' [103D (4) (c)].

ILPA welcomes the clear improvements of the amended scheme of that originally proposed. In particular we welcome:

- The removal of the ouster of the courts
- The supervision of the High Court of the process of reconsideration of the Tribunal by itself.
- The restoration of the right of further appeal to the Court of Appeal and by implication to the House of Lords.

However we doubt whether the new regime will be an improvement in any significant ways to the existing one.

- The changes will do nothing to deal with the poor initial decision making of the Home Office. As the Commons Home Affairs Committee stated - *The real flaws in the system appear to be at the stage of initial decision making, not that of appeal.* [1]
- There is no assurance that the new Tribunal, with streamlined administrative processes, will result in better quality decisions.
- The 5 day time limit for applications to reconsider, in addition to the legal aid changes, will mean rushed applications for reconsideration are presented, making the role of deciding the application a difficult one.
- The legal aid changes exacerbate the acute difficulties that asylum seekers now have in finding quality representatives to put their case at appeal.

We have specific concerns as follows:

A) <u>The single tier Asylum and Immigration Tribunal.</u>

The current appeal from an adjudicator to the Tribunal is replaced in the single tier by reconsideration by the same body that made the first decision. As it is within the same body, it does not amount to a fully *independent* reconsideration or appeal. Those who reconsider the decision will be colleagues and peers and, under the new regime, managers of the first appeal decision-maker. This offends the basic principle of natural justice that 'no one should be a judge in his own cause.' The government has yet to spell out how it proposes to guarantee sufficient independence on reconsideration..

B) <u>The appeal provisions.</u>

The appeal provisions in 103A are superficially similar to the present system of statutory review of the IAT's refusal to grant permission to appeal to itself. In particular there is a short time limit, the application is on the papers only and the decision of the High Court it final. However there are important differences that are unjustifiable, particularly in combination.

[1] HC109 published 16.12.03

1) The legal threshold for reconsideration of a Tribunal decision is apparently raised.

At present the task of the IAT (and the High Court judge on statutory review) is to consider whether the Tribunal may have made an error of law and either the appeal would have a real prospect of success or there is some other compelling reason why the application should be heard [this is the test in the Civil Procedure Rules 54.2.5 para 4 a]. The amendment allows the High Court to order reconsideration only if 'it *thinks* that the Tribunal made an error of law' [new section 103A (2)(a)]. It is a much more severe curtailment of the right to a fair hearing to deny the opportunity for oral argument where the judge is deciding whether or not there was an error of law in the Tribunal's decision, as opposed to whether there is an arguable error.

There may be compelling reasons of fact rather than law that would require reconsideration in the interests of justice, in particular when the first decision maker was not party to all relevant evidence. Examples include when there have been rapid political developments in the country of origin; when an appeal has been dismissed because of an unforeseeable failure of notification to the appellant; or when important evidence was not presented because of problems with representation. Such reasons may even include matters that the appellant is unaware of - one recent example of such a grant of permission stated "in view of the fact that the tribunal is soon to consider new evidence on the risk of return to the DRC."

2) Five day time limit in which to apply for reconsideration

This is an unexplained and unacceptable reduction from the current effective 14 day time limit which applies both to applications for permission to appeal to the Tribunal and to applications for statutory review of refusals of such permission. In only 5 days a representative will not only have to take instructions from a client, consider the first decision and draft the application. She or he may wish to obtain and introduce new evidence to show how the first decision was so irrational or unreasonable as to be wrong in law. An example would be a transcription of notes of evidence from the hearing, or the comment on a country expert on aspects of the factual findings. Furthermore, very often cases move from poor to specialist representative precisely at the point where the appeal has failed. In only five days a new representative may have to be found, and will have make space to assess a large body of wholly unfamiliar evidence not only to make the application for reconsideration, but also to make a judgement as to proceeding on a conditional fee basis.

3) No oral argument on application for reconsideration

ILPA can see no reason why there should not be a right to make oral submissions – or at the very least that there should be power in the deciding body to request oral submissions if it is considered by the High Court to be in the interests of justice. Asylum cases by reason of the profound rights involved demand the most anxious scrutiny by the courts. A decision to refuse

an application under 103A is final and the consequence if an error is made will be dire for the applicant. The tight time limit of only 5 days in which the application must be made will undoubtedly lead to rushed written applications that beg questions without which the application can not be safely determined.

The lack of ability of the judge to hear oral argument is does not make sense in the light of the judge's ability to refer the matter to the Court of Appeal if he deems it complex. It is extremely unlikely that a judge will make any such reference without having at least attempted to resolve the matter for himself. Plainly he would better placed to do so with the benefit of oral argument from all parties concerned.

C) Conditional fee legal aid

The new conditional fee legal aid system is an attempt to make legal representatives filter out weak applications for reconsideration. While clearly it is right that a wholly unmeritorious application should not be publicly funded, recent government initiatives, such as compulsory accreditation for representatives, mean there are now increasingly fewer representatives who would make such an abusive application. The debate must move on from the dwindling problem of abusive representatives. It should focus on the questions of how assessment of prospects of success should affect funding, and how to remedy widespread demoralisation and stop the haemorrhage of quality lawyers from the field.

ILPA has profound concerns about the introduction of a 'no win, no fee' regime, believing it to be fundamentally inappropriate and wholly disproportionate to the fundamental rights at stake in asylum cases.

1. Under a conditional fee arrangement, cases that would have succeeded in giving human rights protection will inevitably not get representation. This will have fundamental – often disastrous - consequences for appellants.

2. Patently weak cases should not get funding under the present system. Patently strong cases are rare. In all but the most clear cut cases it is often impossible for practitioners to predict prospects of success with any degree of confidence and they will frequently get it wrong.

3. The fact that a refugee's case has less than 50% prospects of success may be because of a host of factors unrelated to the real risk of death or torture he or she faces. Many if not most appeals revolve around issues of credibility, which are notoriously difficult to predict. They are strongly affected by the ability of an appellant to articulate his own case in oral evidence. The traumatised, the inarticulate, the under-confident and the ill -educated are disadvantaged in the hearing. A conditional fee scheme will mean their representative is less likely to apply for reconsideration even when a first decision is wrong in law. Such clients will be doubly disadvantaged.

4. In other respects also decision-making in human rights and asylum claims is not an exact science. Issues of both fact and law rest are often extremely complex and involve balancing a whole range of factors – for example in deciding whether a breach of a right is proportionate to a competing legitimate interest. Different decision makers within the Tribunal inevitably take differing lines on the same evidence – and there is an element of lottery as to who decides an appeal.

5. Moreover, under the new regime it would seem that a lawyer's work considering whether an application for reconsideration should be made in any given case would *never* be recoverable. This is unacceptable and will plainly operate as a very great disincentive to undertaking such work. More important, however, it will surely inevitably lead to refugees unable to obtain representation being removed in unsafe circumstances.

6. The current drafting of 103D suggests that the *Secretary of State* will make the new legal aid regulations. We can only presume this is a reference to the Lord Chancellor, who controls all other legal aid expenditure, and not the Secretary of State for the Home Office, who is party to any proceedings affected. This must be clarified.

ILPA notes that these proposals will be subject to consultation and looks forward to make detailed comment about the proposals after it has had the opportunity to consult with its membership.

D) The detail of the single tier AIT administration

The government has yet to set out in detail how the new AIT will combine administrative efficiency with independent decision making. A number of provisions remain in the Bill which give rise to concern:

1) ***Supervision*** (see Sched 2, Part 1, para 21): The power to make procedure rules for allocating responsibility to some Tribunal members for supervising other members and staff of the Tribunal is contrary to open justice and to the responsibility of decision-making which all AIT members should assume.

2) ***Terms and conditions*** (See schedule 1(3)(1)(c)): The terms and conditions of appointment of members of the AIT must not include provisions that may in any way be perceived to compromise their independence or judicial discretion. We support Lord Woolf's remarks about this at second reading in the Lords on 15th March:

Under the proposals contained in the Bill, the role of adjudicators within the single tier would be even more important than it has been until now. The adjudicators would be the majority of members of the new tribunal. Their role would be judicial. It is therefore a cause of some concern that Schedule 1(3)(1)(c) provides that a member "shall hold and vacate office in accordance with the terms of his appointment (which may include provision for dismissal)".

I am unaware of such a proposal for "dismissal" ever previously being included in a judicial officer's terms of appointment. The Council of Immigration Judges is concerned that this provision will be used as a justification for members of the new tribunal being dismissed because of dissatisfaction with their decisions. Their concerns are exacerbated because of the novel proposal that it should be a term of their engagement that they have to comply with practice directions. Judicial officers observe practice directions if they are issued by someone with such authority, but I am surprised that it should be felt necessary to have a term of appointment to that effect.

3) ***Nomenclature*** [see Sched 4 para 4]: The Bill gives the Lord Chancellor power to make provision for the title of members of the AIT. It has been suggested they will be called 'immigration judges'. We oppose the renaming of adjudicators as judges: they are not judges of a court and to call them this is obfuscatory. It should be clear to the public and to appellants alike that the AIT is a tribunal and does not have the status of a court

ILPA Bill team 30 April 2004

About The Immigration Law Practitioners' Association
President Ian Macdonald QC

ILPA members are barristers, solicitors and advocates practising in all aspects of immigration and asylum. Academics, NGOs and others working in this field are also members. The Association exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of high quality resources and information. It represents members on numerous government and Tribunal Stakeholder and Advisory Groups.

ILPA has advised parliamentarians of all parties on five immigration and asylum acts in the last 10 years: drafting amendments, briefing; sitting in the Advisors' box – we are busy people, but this matters to our clients: we know your procedures, and we are happy to help.

ILPA can provide detailed written briefings for those wishing to speak in debates, or improve their own understanding of this field and experts to speak to individual and groups of parliamentarians.

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