ILPA comments on the UK Border Agency pro forma for further submissions and responses to further submissions

ILPA provided comments at the meeting with the UK Border Agency on 14 August 2009 and has subsequently provided written comments on the proposed Guidance for legal representatives and for applicants on further submissions. Those should be considered with this response.

Seeing the draft pro forma completed for a 'dummy case' has not allayed, but rather has heightened ILPA's concerns. We are also extremely disappointed that, despite a month having elapsed since the meeting, the forms used for the dummy case contain so few amendments and have not addressed the many trenchant criticisms made by those at the meeting. That time should have been spent entering information into forms that have been shown to be flawed does not inspire confidence.

Comments on the draft pro forma for further submissions

General and introductory

As discussed, and as acknowledged by the UK Border Agency at the meeting, there can be no mandatory form for an asylum or human rights claim. If further submissions include an asylum or human rights claim, and most do (Article 8 of the European Convention on Human Rights), no form can be prescribed. Once again we draw attention to *R (AK (Sri Lanka)) v Secretary of State for the Home Department* [2009] EWCA Civ 447 which gives a broad definition of further submissions and makes clear that a form cannot be prescribed and that further submissions can simply take the form of representations. We reiterate that the form appears to us to be liable to confuse those with no legal representation in this regard, using phrases such as 'you are expected to use this form' and 'all documentation…should be submitted'. Technically these may be correct from the UK Border Agency's point of view, but they appear designed to make people think that the form is mandatory. For this reason these sentences would, we consider, fail a plain English test.

If the form is helpful, legal representatives will use it. If it is not, legal representatives will put in further submissions in the way that best serves the interests of their clients. When in 2002 ILPA published its *Making an asylum application: a best practice guide*, the UK Border Agency's predecessor, the Immigration and Nationality Directorate, was using prescribed forms for Statement of Evidence Forms (SEFs). The Best Practice said ('you', in the extract below, refers to representatives):

> *"The SEF in use at the time of writing and previous forms used by IND consists of boxed questions with spaces for answers. Different sections deal with different areas…Each 'boxed' section of the SEF is designed to elicit information that will establish whether an application is at risk of persecution or serious harm. It is debatable whether the 'key questions' posed are helpful in the construction of*

your client's claim. You should not feel constrained by the format of the form. Rather than trying to break down your client's narrative into headings, which may in any case overlap, you should write 'see attached statement' in the relevant sections of the form and then append a comprehensive statement explaining your client's reasons for claiming asylum in the UK.'

The UK Border Agency appears to be repeating the mistakes of the past and has prepared a pro forma that has all the faults of the old SEF (as well as some new faults all of its own). If the Pro Forma we have been shown were introduced by the UK Border Agency ILPA would advise its members and other interested parties that the form was not mandatory and that they should either not use it, or write 'see attached' over the form, as they used to do with the SEFs.

The situation for the unrepresented is more serious. The second full paragraph on the form:

> **You should be aware that very few further submissions are successful. Your claim has already been carefully considered by your trained Case Owner and you have had the opportunity to have that decision reconsidered by an independent tribunal.**

seems to ILPA to be designed purely to deter further submissions. It is completely inappropriate and should be removed if the UK is not to be in danger of breaching its international obligations.

As indicated above, the language of the form appears designed to mislead the unrepresented into thinking that the form is mandatory. The form should state clearly that it is not mandatory. If the UK Border Agency then wishes to set out why it is helpful to the Agency that the form is used, this would be preferable to trying to mislead people into using it.

For the questions under the heading 'Your further submissions should be:' please see ILPA's comments on the guidance, which we do not repeat here. The errors, including errors of law, to which we drew attention, have been repeated and comments on the guidance do not appear to have been taken into account in preparing the latest version of the pro forma.

We can see little virtue, even if the bullet points selected were legally accurate, in putting guidance in a separate place to the guidance on completion that appears at the end of the form.

The statement 'Where possible, please include with this form copies of…" is an improvement on the 'you must' on the original draft of the form, but we continue to consider that this requirement is wholly inappropriate. The documents in question have originated with, or in the case of the appeal, been sent directly to, the UK Border Agency. All of them should be on the UK Border Agency file. If the file is in such a parlous state that these key documents are missing, a caseowner should be extremely concerned that they are no position to decide anything on the basis of that file. If the idea is that the caseowner should be making decisions without reference to the file, that seems to us the height of irresponsibility, and certainly puts the caseowner in danger of breaching the UK Border Agency's obligations under the Human Rights Act 1998, let alone any number of Home Office policies or any amount of Home Office guidance. The UK Border Agency may also wish to reflect

on the effect of unnecessary copying of lengthy documents upon the environment given the focus in its in-house magazines etc. on creating a 'green' environment.

This part of the form highlights the need for a legal aid impact assessment: the case for making legal representatives working to a fixed fee paid by the Legal Services Commission, or those whose clients are paying for their services, photocopy these lengthy documents and pay the postage to the UK Border Agency has not been made. Once again the situation is even more grave for the unrepresented. Those who are street homeless, destitute or surviving on 'section 4' or asylum support are in no position to pay photocopying for further documents, or to pay postage. The detained and unrepresented may not have the facilities to do these things. Is it intended to be the case that poverty should be a bar to making further submissions, because that is the result of what is proposed? We reiterate our concerns that this part of the form would deter applicants. It may also frighten them into trying to retrieve these documents, from representatives who have closed down and thus not putting in their further submissions at the most appropriate time. We note that in the dummy case the applicant has simply left this blank. We do not consider that all unrepresented applicants would be so sophisticated.

The same issue arises with asking the applicant to identify their caseowner through the Immigration Enquiry Bureau. If the applicant has provided his/her Home Office reference number, it should not be difficult for the UK Border Agency to identify the caseowner. Once again, we wish to see the Legal Aid Impact Assessment that makes the case for giving this task to the representative. Once again, we question why a destitute or impoverished applicant should have to pay for this telephone call.

The request to list the documents submitted and asking for the date of those submissions and the person to whom they were submitted also appears to create unnecessary work for applicants and representatives and again we question whether it has been included solely for its deterrent effect. The dummy case highlights that it is unhelpful. That the applicant in the dummy case has previously submitted the passport, and that of her spouse, that she is now submitting again does not advance the submission at all. Many documents will have been sent into the UK Border Agency with a Home Office reference number, not sent to a particular caseowner, even if that is where they have ended up. If a caseowner is named who has now left the Agency, or changed jobs, what use it is it that they are named on the form.

There is a grave danger here that the information provided will confuse rather than elucidate the case. The form attempts to capture the information in isolation; nothing is said about why the document is being submitted this time. A document may have been submitted previously in another context and for another purpose. Or it may have been submitted for the same purpose by an unrepresented person or by representatives who did not do a good job and the current representative may be attempting to start from scratch and set out clearly to the UK Border Agency why the case has merit. Representatives, and applicants, do not always have the luxury of building on what has gone before: the case may have been misstated, or falsely stated, or misunderstood. A good set of further submissions will address this. The tick box will not. This section of the form can only encourage a tickbox approach that says 'We have seen that before; take no notice'. What is to be made of an inadvertent admission? If a person makes such an omission or gets the date or caseowner's name wrong have they made a false representation? If there is a risk of

breaking the law, that is yet another powerful disincentive to using the form. As stated, the caseowner should have the whole file before them when deciding the case. What a good set of submissions will give them is information about what they are looking at and how it pertains to the case being made.

Box one

Here we plead special knowledge of the dummy case to reveal why the form does not work. As we understand the client's form there has been a change in her country of origin relevant to her case; she considers that it is now safe and that she no longer wishes to assert a fear of persecution on return. But she has written no change relevant. If that were the case and she filled in the form as she has, a UK Border Agency caseowner might come back and say that she had been lying when she asserted a fear previously, and hold this against her.

Although perhaps it tries, the form fails to take account of the possibility that the change is not in country situation but related to one's own life in that country (e.g. 'The people who are after me murdered my brother last week'). The document list gives no clue as to what is to be submitted - what if you learned of the change in the situation in the country through a phone call? In such circumstances a witness statement would capture the evidence.

Saying that a person *must* attach evidence manages, again misleadingly, to suggest the mandatory nature of the form. If it is indeed the case that if you use the form then you 'must' submit certain evidence (something we strongly doubt would stand up in law) that would be a powerful reason for not using the form in the first place.

Box two

We defy any non-native English speaker to fight their way through the title '**Submission based on new evidence to support your previous claim which was not previously available'**. Those for whom English is their mother tongue will struggle with the grammar too. For example, no question mark is required after a sentence 'Explain why you did not give us this evidence earlier'. On a first draft of the form this could be a simple error, but we are looking at a revised version of the form.

Because the dummy case does not plead an on-going protection case it does not highlight one of the main difficulties with the form: the possibility that the information in boxes one two and three will overlap and interrelate. A change in relationship/family status may, for example, be an element in making country of origin unsafe.

What if it is blindingly obvious why evidence is significant - are you still supposed to spell it out in the box.? E.g. "I have a medical report corroborating my account. This is significant because you did not believe me. Fred Smith wrote on 1 January 2007 the reasons for refusal letter appended at Annexe A tab 6. that my claim to have been tortured was rejected for lack of evidence'.

Box three (personal circumstances)

The suggested documents such as a marriage or birth certificate risk misleading. These are official documents, but official documents will not always be available, for example if one is seeking to evidence that one is in a relationship.

The form does not focus on the requirements of paragraph 395C of the immigration rules, and yet this will be the basis for the UK Border Agency's consideration of further representations in the Case Resolution Directorate. This was highlighted at the meeting but has not been tackled in the intervening month.

We have already highlighted that those desperate to put in information on physical or mental health might put in information that six months later would need to be updated because the prognosis was that physical/mental health would change within such a timespan.

Notes to assist completion

We have already drawn attention in our comments on the guidance to the legal errors in what is presented as the boxes. We are disappointed that in the light of those comments these boxes have not been changed.

It is unclear whether these are notes to assist completion, or a form to return, given place to give details of the representative at the end.

The statement:

> "UKBA dedicates resources to monitoring the general situation in countries from which individuals arrive in the UK seeking asylum and will therefore already be in possession of such general information and will take it into account when considering the other material you have submitted."

will carry very little weight with an applicant who considers the reasons for refusal letter and submissions made by the Presenting Officer on any appeal to be evidence that the UK Border Agency does not understand the situation in the country. It is unlikely to carry very much weight with a legal representative as it does not indicate what information the UK Border Agency has. Many asylum cases and cases in the higher courts turn on challenges to the UK Border Agency's perception of the situation in a country. Nor is it clear what is meant by 'the general situation', a phrase which is open to a number of interpretations. It was suggested at the meeting that specific reports could be listed, or that the UK Border Agency could make clear that it is happy to receive, for example, title pages and relevant pages of documents submitted rather than, as would be standard practice in a court or tribunal, the document in full. Specific guidance is needed if the desire is to reduce the documentation sent in; this sort of general comment provides no reassurance.

With reference to the part at the end of the form asking if a legal representative or a voluntary organisation has helped the applicant to fill out the form, there appears to be some confusion. A legal representative or a person regulated by the Office of the Immigration Services Commissioner should be 'on the record' as assisting in a

matter. They should not be assisting a person to fill out a form without going on the record. A voluntary organisation is either regulated by the Office of the Immigration Services Commissioner (or has a supervising solicitor) and is thus able to go on the record, or is not so regulated and is therefore unable to assist in giving immigration advice and providing immigration services and should not be assisting in the completion of the form at all. If a legal representative or a person regulated by the Office of the Immigration Services Commissioner is on the record, the UK Border Agency should be communicating through that representative.
The section ' Is there anything else you have not told us?' is a best a one-stop notice, at worst a threat and it is so worded. There is no section corresponding to this on the form. Without a section on the form asking whether there is anything a person wishes to add this part of the guidance does not appear to relate to anything.

As was indicated at the meeting, any guidance should make reference to people seeking legal advice and representation and provide information on where to get help.

Note on translation

Any forms produced needs to be translated, otherwise the unrepresented or those with little English will not be able to deal with it. Again, we recall the position for SEFs:

> "*Mr. Lidington :To ask the Secretary of State for the Home Department what plans he has to issue guidance notes in languages other than English to assist applicants to complete a statement of evidence form to support a claim for asylum. [149569]*
>
> *Mrs. Roche: The explanatory notes which accompany the statement of evidence form are being revised and translated into over 60 languages. Non-governmental organisations have been consulted about the content of the revised document. The purpose of the explanatory notes is to help applicants complete the statement of evidence form and understand how their application will be processed. The explanatory notes also provide information on how to seek legal advice, access translation services and obtain medical assistance as required. The intention is to issue the first translated documents later this month." HC Deb 08 February 2001 vol 362 cc668W*
>
> ***"Angela Eagle:** We have received a number of representations from hon. Members and from non- governmental organisations (NGOs) about the length of time given to asylum seekers to complete their statement of evidence forms. There is concern that 10 working days is insufficient time for an asylum seeker to find help completing the detailed Statement of Evidence Form (SEF) in English, and to gather and translate evidence in support of the application.*
>
> *… Discretion is exercised where applicants need extra time to obtain translations or submit extra material, such as a medical report, in support of their claim.*
>
> *A higher proportion of applications was refused on grounds of non-compliance in 1999 and 2000 than had previously been the case. The increase was due partly to*

the stricter enforcement of the 10 day deadline for return of the SEF and partly to administrative problems which led to a backlog of correspondence within the Immigration and Nationality Directorate and some flawed refusals as a consequence. We have made a number of changes over the past 12 months to improve our administrative processes and reduce flawed refusals. These include the introduction of a dedicated PO Box for the return of completed SEFs, and adjustments to internal procedures to ensure that the receipt of SEFs is registered on a database.

We have also taken steps to improve asylum applicants' understanding of the asylum process and of the importance of meeting the time limit. We have done this by simplifying the explanatory leaflet which is sent out with the SEF, and by making it available in the 33 languages spoken by most asylum seekers in the United Kingdom. The SEF form has also been simplified. NGOs were consulted about these improvements." Hansard 6 Nov 2001 : Column: 177-8W

The guidance notes on the form are poorly drafted. It is unclear whether they are addressed to a representative or to an individual applicant; they are confused on this point in tone and content. They would be very difficult for an unrepresented person to use.

Pro forma response

We are aware that while the UK Border Agency cannot impose a form for further submissions, it can impose a standard response to further submissions. We reiterate our comments that most of the problems identified by the UK Border Agency at the meeting would be addressed if the Agency were promptly to acknowledge further submissions. High quality responses to high quality submissions, promptly received, and requests for clarification or further information where further submissions are unclear, are the most likely way to influence representatives' behaviour. If it is the case that the submissions, taken at their highest, do not provide the basis for a grant, we reiterate that we do not understand why it is impossible rapidly to respond to them, making this clear.

If further evidence were needed that our comments to date have not been taken into account we find it in the phrase

"…his removal may be enforced."

The form also refers to the client wanting to return to Turkey.

The client in the dummy case is a woman and is not from Turkey. If the UK Border Agency cannot get an applicant's gender or country of origin right, what confidence can the applicant have that their case has been considered with care?

The document continues to appear completely confused as to whether it is addressed to a representative or the client. Thus we find 'Your client's application has not been considered…' and similar phrases, followed by "the Immigration Office dealing with your case" and (in the case of the International Organisation for Migration) "you do NOT need to give your name."

We were told at the meeting that it was not intended to customise the letter according to the application and we can see this on the dummy response. In that case, the applicant has made no asylum claim but the asylum boxes appear with "not applicable" written in. This is awkward for the person trying to read it.

The summarising of the client's case seems to us a receipe for confusion and dispute. Either a summary cuts and pastes all that is in the further submissions, which is not the case in the dummy form, or it attempts to summarise it and in doing so loses some of it, which is the case in the dummy case. Were there any subsequent litigation the further submissions and the response to them are likely to form part of the papers before the court and much time could be spent picking over whether the refusal omits something vital in the further submissions. For example in the dummy case reference is made to the children not living with the couple but no reference is made to contact with the children. Reference is made to the submission of 'proof that Mr Jackson has sufficient funds to support you.' This we read as the Secretary of State accepting that the information supplied does constitute proof, not merely evidence, of sufficient funds, but that is not spelt out and we can well envisage the Secretary of State attempting to deny that this had been accepted at a further stage.

In the dummy case there is a section on 'below is a consideration of the points you have raised that have previously been considered.' What appears below this heading in the dummy case is a mish-mash of statements that these matters have already been considered and substantive consideration of them (without reference to their having been previously considered). It is unclear what this is designed to achieve. It should be clear from the letter whether the Secretary of State is considering the points afresh, and if so what his conclusions are, or whether he is declining to consider them at all, because he has considered them before, in which case this should be made clear.

In the dummy case there is a section "Below is a consideration of the points you have raised that have not previously been considered, but that taken together with the previously considered material, do not create a realistic prospect of success". But the points are not taken together. An atomised list of pieces of evidence is set out. It is then stated:

> "It is not considered that further evidence of a subsisting relationship that an immigration judge has already rejected under Article 8 of the ECHR (para 32 of appeal determination of 1 June 2008) would create a realistic prospect of success that another immigration judge might grant you leave to remain in the United Kingdom."

Are we to understand from that that the Secretary of State accepts that the atomised list of documents is indeed 'evidence of a subsisting relationship'? There is no attempt to tackle the point made in the application that the passage of time means that the earlier decision cannot be relied upon. The application stated:

> "At the time of her initial asylum application our client had only married her husband one week previously and had not spent as much time with her husband's children. As such her family life, whilst existing, was not as strong as it is today."

Nowhere in the response is there any evidence of an attempt to grapple with this. The effect of the pro forma form is to remove any opportunity for the decision maker to display that they have applied reasoning and exercised judgment.

Moreover, this part of the dummy case deals with an article 8 claim. It is thus confusing and repetitive to go through all this information before one gets to the section on 'consideration' of an Article 8 clam.

The weakness of an approach that does not customise the form is shown up in the section on consideration of an article 8 claim, which states:

(1) Does the claimant have family life in the United Kingdom?

	No – explanation below. .
*	Yes – explanation below:

Only the tiny star indicates that one option has been selected. It is unclear on first reading and, to a non-native English speaker, may be unclear on second reading. Moving from the third person (the claimant) in the question to 'you' in the respond does not make it easier to understand. The information in the first box has already been addressed in further sections of the form.

The attempt to split up Article 8 consideration is shown to have failed by what is in the first box. This box is supposed to be dealing with whether family life exists yet wanders into matters such as

> "Your husband's children are still very young and thus of an adaptable age. It is therefore considered that your return to Basakan with your husband does not constitute an insurmountable obstacle."

Not only is this in the wrong place, it appears before any attempt has been made to determine whether the children would be returning to Basakan with the couple or not. Being of an 'adaptable age' has nothing to do with whether family exists, nor whether it is being interfered with, nor whether it is envisaged that the separation be permanent or just the time to obtain entry clearance.

Nothing in the answer to the first box suggested that it was accepted that family life existed between the couple but not accepted that family life existed between either one of the couple and the children yet the second box appears predicated on this. It is stated that for a father and step-mother to leave the UK is not an interference with family life. We are providing feedback on a form, not on the Home Office's ability to apply the law to a particular case, but since this part of the form goes into all the steps in *Razgar*, presumably to aid in ensuring that the law is dealt with correctly, we cannot let this go without comment. Nothing in the application nor in the response would suggest that the case is an exception to the general rule that to separate a father and his child is an interference with family life. One can argue about whether such an interference is proportionate, but that there is family life seems to us clear and is certainly not explicitly rejected in the letter. The UK Border Agency might like to consider the extent to which forms completed in the way are going to ensure that it loses an awful lot of judicial reviews because the form will allow the applicant to demonstrate that the UK Border Agency has failed to apply the law correctly.

Once again, the text in the box demonstrates a lack of understanding of the way in which an Article 8 case is broken down under *Razgar*. The text refers to 'Article 8 of the ECHR provides only a qualified right to family life.' This is correct, but it does not go to whether there is an interference with family life, it goes to whether the interference is proportionate.

There appears to have been difficulty in distinguishing the elements of the *Razgar* test in the third and fourth boxes. The 'legitimate aim' with which Razgar is concerned is likely to be the upholding of immigration control. Yet this is nowhere stated; instead the comments in the text are about proportionality. Then the same point pops up in the fourth box, which again talks about proportionality. The dummy case was originally an exam question; the UK Border Agency would not, in our opinion, have passed the exam.

Most Article 8 cases turn on proportionality. Everyone has a private life, however impoverished or limited that life may be; many people have a family life. Being removed from the country where one is living, however precariously, is likely to constitute an interference with private life, and, where there is family in the country where one is living, will constitute an interference with family life unless it is asserted that all relevant members of family (albeit at some interference with their private life) can travel. The courts have held that the maintenance of immigration control is a legitimate aim under Article 8(2). Whether a decision is in accordance with the law is about having a known and published law, and applying it consistently and fairly. Some cases have turned on this point. Most turn on whether the interference is proportionate to the legitimate aim. The dummy case makes only too clear that the caseowner completing the response form wants to talk about proportionality, and has managed to do so under every box. The atomising of the elements of the Article 8 claim has not helped in the dummy case one bit. It has handed the applicant's legal representatives a judicial review on a plate. We suggest that breaking the case down into the elements of *Razgar* has not helped the UK Border Agency caseowner to avoid errors of law.

The above also applies to the boxes on private life.

The 'consideration of compassionate circumstances' heading has not been addressed in any detail on the form. Had this been done there would have been substantial repetition. As the form has been completed, this section does not appear to have added anything.

To summarise the feedback that we have provided in the meeting, on the Guidance and on the forms, this project appears to ILPA to misconceived and ill-executed. The primary need is for the UK Border Agency to respond rapidly to further submissions, with either a decision or a request for further information/clarification where a decision cannot be made. We suggest that this, together with improvements to processes within the Agency, are the way to tackle the concerns set out at the meeting. We have now had the opportunity to consider two versions of the forms, and to consider the latest version applied to an actual, albeit fictitious case. The forms do not make it easier for the UK Border Agency to obtain a clear statement of a person's further submissions. We had suggested in the meeting that guidance to caseworkers and not a form was the way to improve decision-making on further submissions. In any event, the evidence from the completed forms is that the forms

do not assist in structuring decision-making or in improving the quality of decision-making. Nor do the forms assist in communicating the decision, whether to the claimant or a judge reading the papers in the course of a judicial review.

Alasdair Mackenize
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ILPA
18 September 2009