ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

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Adam Whisker
UK Border Agency

Dear Mr Whisker,

Re: Five Year Review of Asylum Cases

This was briefly discussed at the National Asylum Stakeholders' Forum meeting of 14 May 2009. At that time, it was decided that further discussion would be beneficial once the UK Border Agency had provided some more detailed thoughts; and to assist with that stakeholders were invited to highlight areas or concerns, which such further detail ought to address.

Context
In August 2005, what was then the Immigration and Nationality Directorate (IND) changed the then current policy which was to grant indefinite leave to remain to refugees on recognition of their refugee status. There were considerable advantages in that policy, which necessarily reduced the administrative burden upon IND and its successors in having to deal with further leave to remain applications and provided a greater degree of security to refugees from the point of recognition. Given the emotional and mental strains faced by torture survivors, displaced persons and those in fear of the most serious mistreatment, and the uncertainty and delays (sometimes very long) faced by those in the asylum process, this was a significant benefit to refugees with real potential to assist in both recovery and integration.

From August 2005, refugees (and those granted humanitarian protection) have received 5 years leave. The Asylum Policy Instructions (APIs) on Active Reviews, Humanitarian Protection and Refugee Leave have made clear that for those granted 5 years leave, the expectation would be that a timely application for indefinite leave to remain (i.e. before expiry of the 5 years leave) would not lead to a review of the individual's protection needs except in two circumstances:

- The first relates to actions on the part of the individual. Essentially, where actions on the part of the individual indicate that he or she may fall within the Exclusion or Cessation categories, may have obtained refugee status by means to deception or may fall within the 'not conducive to public good' criteria for deportation, this may give rise to a review of protection needs.
- The second relates to changes in country conditions. A decision that there is a 'significant and non-temporary' change in country conditions

in a particular country is one to be taken at Ministerial level following consultation with UNHCR.

In either of these circumstances, a review of the individual's protection needs may occur at any time (i.e. prior to the completion of the 5 years leave). However, if on receipt of an application for indefinite leave to remain at the end of that period it appears that such a review ought to have been undertaken earlier, the APIs provide that it may be undertaken at that time.

The Borders, Citizenship and Immigration Bill contains provisions to introduce a new general policy in respect of naturalisation. This entails the significant change that naturalisation is to be a status that may be reached by migrants earlier than indefinite leave to remain (permanent residence). It is understood that the relevant provisions of the Bill are to be commenced in December 2010. This means that refugees and those granted humanitarian protection following the August 2005 change in policy will, except in a relatively small number of cases, come to the end of the 5 years leave at a time when the new general policy has been introduced. It is understood that the intention is that these people will then be expected to apply for probationary citizenship leave (i.e. an extension of their limited leave) for a potentially variable period following which an application for citizenship may be made (or after a longer period an application for permanent residence may be made). We understand, as was mentioned at the NASF meeting, that it is not intended that refugees should be required to pay a fee for making a probationary citizenship application.

Whereas the APIs make reference to the Five Year Strategy for Asylum and Immigration of February 2005, they do so expressly in the context of triggers for review of protection needs as set out above – i.e. they give clear indication that it is or was not contemplated that review of protection needs is to be triggered in other circumstances. The APIs do indicate an intention, as yet not realised, to impose language and life in UK testing in order to progress to indefinite leave to remain.

The foregoing provides the context for the following points made under discrete headings.

Fees

Merely that refugees and those granted humanitarian protection are not to be required to pay a fee in order to apply for probationary citizenship will not preserve the current position.

These people are required to pay for applications for citizenship. However, under the current policy, such a person can acquire a settled status in the UK without payment of a fee. Probationary citizenship is no more than further limited leave. No information has been given as to whether those who do not apply for citizenship, but apply for permanent residence (after a significantly longer period), will be expected to pay a fee. Whatever is the case, refugees and those granted humanitarian protection will be significantly prejudiced by the proposed change – and this is not effectively ameliorated by the proposal not to charge them a fee for applying for probationary citizenship.

Having regard to the particular circumstances of refugees and those granted humanitarian protection (briefly highlighted earlier in this letter), there is considerable sense in the current policy. It allows those who may have significant traumas to overcome, and who may struggle to find work or other income, to obtain a settled status and then make their application for citizenship at a time that is financially convenient and allows for proper reflection and consideration of the prospect of taking an additional (or in some cases an alternative) nationality.

English language and life in the UK testing

The intention expressed in the APIs to introduce this for those applying for settlement has not been acted upon. It is more than 4 years since the Five Year Strategy and almost 4 years since the adoption of the new policy on granting 5 years leave. Given it has not proven necessary to introduce this for settlement, it appears difficult to justify its adoption for a stage which comprises nothing more than an extension of limited leave. Indeed, since at a minimum the UK will need to maintain an option for further leave for a refugee or someone granted humanitarian protection at the expiry of 5 years leave (in order to avoid breaching its international obligations), introducing this for probationary citizenship appears both unnecessary and potentially complicating.

Transitional Protection

In any event, there are several questions which arise as to the fairness and legality of making changes that may substantially affect the expectations that refugees and those granted humanitarian protection will have had based upon the APIs and the letters notifying them of decisions to grant status. These have been touched upon in Parliament during the debates on the Bill (see, e.g., *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Column 95 *per* Gwyn Prosser MP).

There are two further circumstances that may need consideration. Firstly, there are the cases of those who suffered from significant delay in resolving their asylum claims or appeals without which their status would have been recognised prior to August 2005 – i.e. when they would have been granted indefinite leave to remain. There are a variety of reasons why this may have happened, but the degree of prejudice that may now be caused to the individual could not have been anticipated at the time. Secondly, there are the cases of those in the legacy backlog. Resolution of those cases is by way of indefinite leave to remain or removal. For those granted indefinite leave to remain, the Minister has made clear that they will benefit from transitional protection (see *Hansard* HC, Committee, Fourth Sitting, 11 Jun 2009 : Column 100). However, if the legacy is not fully resolved prior to the commencement of the Bill's provisions, the situation of those whose cases are resolved by way of a grant of status (rather than removal) is unclear. If these people, who have been told that they must simply wait their turn, are to find themselves prejudiced by having been taken late in the queue, the fairness and legality of their treatment will come into question. The High Court's earlier considerations of challenges to delays in the legacy queue (e.g. *FH & Ors* [2007] EWHC 1571 (Admin) and *HG & Ors* [2008] EWHC 2685 (Admin)) may

need to be revisited since the prejudice caused to those taken late in the queue could not have been anticipated in the proceedings before the Court.

Convictions related to illegal entry
Recent judgments highlight the need for further thought in relation to how convictions may affect a person's path to citizenship. The House of Lords in *Asfaw* [2008] UKHL 31 has highlighted again that the substance and practical effect of the refugee defence in section 31, Immigration and Asylum Act 1999 is inadequate. Consideration could also usefully be given to extending the protection to those granted humanitarian protection. Separate consideration could usefully be given to the judgment of the Court of Appeal in *Attorney General's reference nos. 1 & 6* [2008] EWCA Crim 677 in relation to those who may have been prosecuted in relation to working to avoid destitution.

Active Review
At the NASF meeting, the UK Border Agency made clear that to date no detailed consideration had been given to this, but that there was to be such. ILPA would be pleased to have an opportunity to influence any proposals around this, and to take part in any workshop as mentioned at the meeting. Some matters that would require consideration are addressed in outline below.

Undertaking active reviews in a greater number of cases would be likely to have impacts for legal aid and the courts if an individual was required to effectively re-establish a protection need. Adverse decisions could expect to be challenged by way of appeal (or judicial review if no appeal right was provided). Given the length of time since the individual may last have had legal representation, obtaining legal advice, recovering case papers and considering and preparing current evidence could prove substantial tasks.

The APIs on Cancellation, Cessation and Revocation currently provide for a specific role for UNHCR in relation to such decisions.

The administrative burden upon the UK Border Agency would potentially be substantial, and if decisions were subject to appeal (or judicial review) that burden would be significantly increased where such challenges were brought. This has significant implications for allocation of UK Border Agency resources. Currently, there are a number of areas of UK Border Agency operations which are subject to significant delays and backlogs – both in the asylum area and in other areas. Such problems are not new.

The policy aim of promoting integration for those who are on a path to citizenship would be undermined for refugees and those granted humanitarian protection, since for the period of the 5 years leave their longer-term future would remain uncertain. This may, for example, cause particular prejudice to those seeking to recover from torture or other trauma, the development needs of children (whether unaccompanied or in families) and for others in need of ongoing medical treatment.

Policy changes relating to illegal working have compounded the difficulties faced by those who have outstanding applications for further leave seeking to

establish their ongoing entitlement to work pending resolution of the application. Establishing other entitlements – e.g. to access healthcare and education – has also proven difficult for people with outstanding applications for further leave. Undertaking active reviews would be likely to increase the numbers of people facing these difficulties.

It may also be questioned whether the UK Border Agency has the capacity to deal with the consequences of any significant increase in active reviews leading to decisions that individuals or families are no longer permitted to stay in the UK. This may exacerbate the current scale of destitution among those who have been through the asylum system if individuals and families refused permission to stay beyond the 5 years were unwilling to return to their countries of origin.

Of course, even if it were the case that any protection needs may be shown not to be ongoing, this would not of itself resolve the question of whether an individual or family who had established a private and/or family life in the UK in the intervening 5 years could lawfully be required to leave the UK.

A related question arises as to the most vulnerable, where Article 20 of the EC Qualification Directive (2004/83/EC) requires that specific consideration be given to the length and quality of status provided to those such as children, disabled and elderly people and torture victims. This is currently reflected in the API on Refugee Leave. Any consideration of the length and quality of the leave (including the circumstances in which its extension or continuation shall be reviewed) to be given to refugees and those who qualify for humanitarian protection will need to take this into consideration.

Conclusion

We have not sought to provide a comprehensive response to the invitation to make comments following the brief discussion at the last NASF meeting because we understand that the UK Border Agency intends to provide some greater detail as to its considerations on these matters for further discussion. At this stage, therefore, we have largely sought to highlight areas that may – subject to any proposals or details that may be forthcoming – require consideration.

Yours sincerely

Alasdair Mackenzie
ILPA, Acting Chair