ILPA Response to the Tribunals Service Consultation on the Procedure Rules for the First Tier Tribunal (Social Entitlement Chamber)

ILPA is a professional association with some 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups. Among ILPA members are those who provide advice and assistance for asylum support appeals, and/or provide representation *pro bono*, often through the Asylum Support Appeals Project (ASAP), which has put in its own response to the consultation.

Our comments are restricted to the effect of the proposed rules on the Asylum Support Tribunal, the only one of the existing tribunals intended to join the Social Entitlement Chamber which falls within ILPA's area of expertise.

We are broadly in favour of the proposed rules and do not propose to set out in detail the points which we specifically welcome. That we focus below on the matters we regard as contentious or undesirable does not by any means imply that we regard the rules as a whole as contentious or undesirable, but we do ask that in addition to the points below, special consideration be given to the points made by the Asylum Support Appeals Project in their response to this consultation.

We consider that there should be a right to apply for review or appeal in asylum support cases. Asylum support cases engage fundamental rights to subsistence and accommodation under Articles 3 and 8 of the European Convention on Human Rights (amongst other provisions), as the House of Lords has recognised, for instance in the case of *Limbuela* (*R v SSHD ex p Adam, Limbuela and Tessema* [2005] UKHL 66). At present very few people are represented before the AST because of legal aid restrictions. The very small number of challenges to AST decisions by way of judicial review is also explained partly by the low level of representation and by the fact that it will often be easier to re-apply for asylum support than to challenge a previous refusal. Nevertheless, there will clearly be cases where a properly advised appellant ought to be entitled to appeal a decision of the Asylum Support Tribunal (AST). At present (apart from a very small number of judicial review cases) there is no system of ensuring uniformity or providing binding precedents to the AST, other than an informal system whereby, in some cases, the Chief Adjudicator issues a decision which she then indicates other Adjudicators should follow. The small size of the Tribunal makes such arrangements possible and workable, but it does not make them desirable, or make them an adequate substitute for a formal system of review. That **rules 36 and 37** will not apply to the (AST) reflects the law on

onward rights of appeal from the AST as it is, but that law should be changed, at which point the rules should be amended to reflect this change.

We consider it entirely inappropriate to have a 'strike-out' power in appeals engaging the fundamental rights of unrepresented people who are not British citizens. If such a power is to exist, it needs to be more circumscribed than similar powers in different jurisdictions of the Tribunal. It is highly unlikely that people who do not speak English and do not have representatives will be able to comply with directions; indeed, the experience of ILPA members appearing at AST hearings is that it is very rare for such appellants to have understood the directions made, let alone to have been in a position to comply with them. We therefore suggest that **rule 7(3)** should not apply at all in asylum support cases, and/or **that rule 5(5)** should not be applied to unrepresented appellants in asylum support cases.

For similar reasons – the fundamental importance of the proceedings and the vulnerability of the appellants – we suggest that **rule 4(2)(n)** (power to dismiss an appeal by way of directions for lack of prospects of success) should not apply in asylum support cases. The prospects of success may be far from obvious in advance of the hearing, given both the matters we have raised above and the tight timescales involved.

As to **rule 7(2)** (power to strike out for want of jurisdiction), we note that contentious jurisdictional issues do arise before the AST: see for instance *R v Chief Asylum Support Adjudicator ex p Secretary of State for the Home Department* [2006] EWHC 3059 (Admin), a judicial review claim brought by the Secretary of State for the Home Department on the question of whether persons who were said (by the Secretary of State) not to be asylum seekers had a right of appeal to the AST; the Administrative Court, like the Chief Adjudicator, decided the matter in favour of the asylum seekers. The lack of a ready route of appeal or review worsens the situation in such cases, which could therefore be wrongly dismissed for want of jurisdiction. We would therefore argue that the **rule 7(2)** power should only be exercised in asylum support cases after, rather than before, a hearing has been held and/or the parties have been given the opportunity to make representations.

We do not understand why **rule 10** (power to reimburse travel and other expenses for witnesses etc) does not apply to asylum support cases. Appellants themselves will usually be provided with travel expenses and, if necessary, accommodation by the National Asylum Support Service (NASS) of the UK Border Agency to attend hearings, but there is no reason, in our view, why witnesses who are not appellants should not also have their expenses reimbursed. Our understanding is that NASS does not have the power to do this. Rule 10 could easily be amended to apply with the proviso that asylum support appellants whose expenses were met by NASS did not also require to be reimbursed by the Tribunal.

As to the specific **rule 11(4)**, we do not see any particular need for this rule in AST hearings and do not understand its intention. Many (if not most) of those represented at hearings before the AST are represented *pro bono* by staff or volunteers of the Asylum Support Appeals Project (ASAP). However, representation is rarely arranged in advance and the appellant usually instructs the ASAP on the day of the hearing. The AST and ASAP enjoy a good working

relationship, to our understanding, and it seems an unnecessary additional step to require a written statement as well as the appellant's oral consent, routinely given to the Adjudicator at the hearing.

We do not consider the timescale provided by **rule 16(1)(a)** to be appropriate. Whereas we accept that speed in matters of real or potential destitution will be of the essence, it must be recognised that those who are destitute and homeless, or are facing destitution and homelessness, will have immediate and grave difficulties receiving or responding to post. These difficulties will be compounded where the individual does not speak English, has no representative to assist with the particular matter and is generally unfamiliar with legal processes - all factors which will be particularly prevalent in asylum support cases. In the circumstances, "received by" ought to be substituted for "sent to"; and we would recommend a longer period of time that "3 days" within which to appeal.

Sophie Barrett-Brown
Chair,
ILPA 12 July 2008