ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

RESPONSE TO COUNCIL ON TRIBUNALS

CONSULTATION ON THE USE AND VALUE OF ORAL HEARINGS IN THE ADMINISTRATIVE JUSTICE SYSTEM

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 1200 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 teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups. Our members represent asylum seekers and migrants in the Asylum and Immigration Tribunal (AIT) on a daily basis. Our comments will therefore focus on the value of oral hearings as they relate to proceedings in the AIT as that is our main area of expertise.

In relation to the AIT, there are only two ways of determining issues arising between the parties, namely (i) oral hearings and (ii) decisions taken by the Tribunal on the papers. Our comments will be confined to the relative merits of these two types of procedure.

<u>User-friendliness</u>

Question 1

ILPA's view is that oral hearings are more user-friendly than paper proceedings. In oral hearings:

- The appellant knows precisely who will decide the case: he/she can see the Immigration Judge (IJ) face to face.
- It is usual practice in the AIT for the IJ to explain his/her independent role and to stress that he/she is not appointed by the Home Office. This practice provides reassurance for appellants.

- If the appellant wishes, he/she can (most often through his/her lawyer) request face to face contact with the Home Office Presenting Officer either before or during the hearing. This provides the opportunity (albeit limited to the good will of the individual Presenting Officer) to clear up factual issues by informal discussion and concession, rather than by the more formal route of judicial decision.
- Oral hearings provide greater flexibility than paper proceedings. They can be tailored to the real issues in dispute. Issues can be dealt with as they arise. If the IJ spots a problem, he/she can put this directly to the parties there and then. The IJ can question the parties and ask their representatives to deal with the issues which concern the IJ, so that the parties have an opportunity to deal with points which may be taken against them.

Question 2

Some of our clients find it difficult to express themselves through speaking, such as those who are educated to no more than primary school level and those who are not fit to give evidence for medical or psychiatric reasons. These form a small proportion of cases and we would not like the DCA or the Home Office to regard oral hearings as less valuable simply because a proportion of appellants find them hard to cope with. Those same clients will also find it more difficult to supply written evidence in the form of a witness statement, so a paper procedure will present them with difficulties too. IJs should (and frequently do) take account of an appellant's inability (for health or other reasons) to give a clear account of his/her case in determining whether to treat evidence as reliable.

<u>Cost</u>

Question 3

ILPA is not in a position to give a comparative analysis of the costs of oral as opposed to paper proceedings. However, the following points need to be borne in mind:

- In oral AIT proceedings, legal submissions are made by way of skeleton argument supplemented by oral submissions. In written procedures, all submissions down to the last word must be set down in writing. Written submissions of this sort take time and cost money. What may be saved in court time may simply be hived off to more lengthy preparation of submissions.
- Oral proceedings cost money in terms of fees paid for a legal representative's travel and waiting time. However, in publicly funded cases, the rates payable for travel and waiting are usually much lower than for preparation. Therefore, these sorts of costs do not in themselves result in excessively expensive hearings.

- In terms of overall dispute resolution, an oral hearing will allow for proper ventilation of all relevant issues. This is likely to increase the chances that the parties will be satisfied with, or at least accept, the IJ's decision which will in turn reduce the incentive/prospects for a further appeal, which is cost effective.

Further, we note the reported comments of Paul Stockton, Head of Administrative Justice Division of the DCA, at the COT Seminar on 21 June 2005. He comments that oral hearings are expensive because they create the need for hearing centres, where money is spent on leases, electricity and other overheads rather than on the interests of users. With respect, this sort of comment is illogical. If users are getting justice, then the money spent on overheads is part and parcel of achieving justice for those individuals and is of benefit to them. In any event, many costs would remain even if oral hearings were removed (office costs, administrative costs, etc).

Mr Stockton comments that the standard of accommodation in hearing centres is getting higher, which has increased the cost. We would suggest that there is no need for ever higher standards of accommodation. From our members' experience, we would say that most appellants in the AIT are not concerned about high standards of accommodation: their minds are on other things. We are concerned that "customer services" has too great a role within the AIT. For example, we have seen TV screens inserted in hearing centres playing noisy programmes in areas where we are taking instructions from our clients. We raised the issue at the AIT Stakeholders Group and it was dealt with. This is an example (albeit small) where a misguided attempt at "customer services" led to expenditure which ought to have been used elsewhere.

In addition, we have seen services to users cut back for administrative purposes. For example, in the AIT at Taylor House, rooms originally designated for client interviews have been turned into store rooms. It is not users attending hearings but the administration of cases that is taking up this extra space.

On the issue of "customer services", the AIT's hearing centres contain so many notices to users that they lose their impact and may have the effect of obscuring the few necessary notices, such as those dealing with health and safety issues. For every notice, a member of staff has spent time writing, designing, lacquering and affixing the notice, which could have been spent on more useful matters.

We note Mr Stockton's comment that oral hearings create demand for "representation and experts". We fail to see how paper decisions would decrease the need for legal representation or for expert evidence. It would simply be a matter of transferring oral submissions/evidence to writing. The use of lawyers or experts in the AIT cannot be criticised when they are necessary to achieve the best representation of appellants. The AIT has itself regularly commented that legal representation assists the efficient processing of cases.

Opportunity to draw out salient points etc.

Questions 4-6

ILPA wishes to state very strongly that oral hearings are in our view the most satisfactory way of dealing with complex issues and with issues concerning the credibility of witnesses.

- ILPA considers that the right to oral representation by an advocate of an appellant's choice is an important aspect of fair procedure. Moreover, the potential benefit to a case of good oral advocacy is in itself something of great value, both in terms of the advocate's ability to persuade and to be of help to the IJ in dealing with matters arising. ILPA believes that the use of advocacy at oral hearings should not be dispensed with lightly, and certainly not in the absence of compelling reasons rooted in legal principle.
- In assessing credibility, there is simply no substitute for an IJ seeing and hearing a witness.
- In determining complex issues of fact or law, the most efficient method is for the parties to provide a skeleton argument which is then backed up by oral submissions. Otherwise, the amount of paperwork needed to cover every potential point that may be on the IJ's mind would be burdensome for the parties to produce and for the IJ to read.

Legalism

Question 7

Oral hearings are no more or less legalistic than paper proceedings: the same issues need to be covered. On the one hand, appellants may be nervous witnesses. On the other hand, the open nature of oral hearings means that appellants are given a greater understanding than otherwise of proceedings which will have an impact on the rest of their lives. In our experience, it is extremely rare for appellants to opt for a paper procedure simply because they may find an oral hearing to be daunting.

Having a "day in court"

Question 8

In ILPA's experience, few appellants are looking simply for a "day in court". To the contrary, for many appellants who are traumatised the prospect of a day in court, albeit necessary to the resolution of their immigration status which they seek, is a source of some trepidation.. The experience of a "day in court" is probably more relevant in civil disputes where a party may have a "point" to make.

Time consuming

Questions 9 to 11

In terms of time spent on preparing for proceedings, the same amount of work must go into preparing for an oral hearing as for a paper decision. AIT hearings are short – rarely more than 3 hours – so that the hearing itself is not particularly time consuming.

Paul Stockton comments that oral hearings cause delay which is "hard on the claimant" and "is undesirable because of the impact on the claimant". Whilst Mr Stockton's remarks may be applicable in some jurisdictions, we do not regard them as applicable in the context of the AIT. The Government has consistently argued that delay in asylum proceedings brings disadvantages to asylum seekers. We are concerned that the Government's stance merely has the political aim of giving the impression that it has an interest in protecting the interests of asylum seekers in introducing ever speedier procedures which are in reality Treasury-driven or driven by populist images of asylum seekers. The interests of appellants in the AIT are best served by close scrutiny of their cases, which is best achieved in our view by oral hearings on all substantial issues. Delay may bring some disadvantage to some asylum seekers and migrants but this would be far outweighed by reduction of rights to oral hearings. In any event, recent legislative changes ought to be sufficient to deal with any undue delay in the AIT.

Justice seen to be done

Question 11

We believe that oral hearings reinforce the notion that those who adjudicate in administrative tribunals are more than bureaucrats pushing papers. We would dispute Mr Stockton's assertion (as reported in his Seminar comments) that "members of the public do not make a reality of the ability to attend". Day after day the AIT sees family and friends of appellants give moral support by attending hearings. The writer of these submissions was involved in a case where twenty members of the public attended to apprise themselves of the process by which their friend was to have her immigration status determined.

The press may attend, as well as those who support appellants such as members of the House of Lords.

Mr Stockton comments that the Home Office is "quite often not present" at oral hearings. However the problem of the Home Office failing to supply a Presenting Officer has now been dealt with. The Immigration Appeal Tribunal had on several occasions made judicial comments about the undesirability of the Home Office failing to field a Presenting Officer.

Inhibiting

Question 12

We refer to our response to questions 1-2.

Practical and resource difficulties

Question 13

In AIT proceedings, witnesses who have difficulties in attending (for example because they live abroad) can submit witness statements which are admissible in evidence. Oral hearings nevertheless maximise the opportunities for an IJ to see and hear witnesses. Other issues raised by this question have been dealt with above.

Other issues: questions 14 to 22

The principles of oral hearings, and the degree to which they may be inquisitorial, have been rehearsed in other consultation exercises and in Parliamentary debates on recent bills. We do not seek to reiterate them. We simply ask the COT to note that:

- Procedural changes introduced in 2003 abolished the right to an oral hearing in applications to extend the time for appealing to the AIT. ILPA opposed this change because an appellant's reasons for being late in appealing may involve issues of fact and evidence best resolved by oral testimony. We are very concerned not that right to oral hearings should not be further reduced through political expediency.
- We attach a table drawn up by Citizens Advice. The table shows the success rates in oral and paper family visit visa appeals between 2003 and 2005. It is clear that there is a much higher success rate in oral appeals. We believe that the Government interprets this higher success rate as providing an incentive for exploiting the system in that appellants may be encouraged to opt for an oral hearing simply because they are aware of the heightened chance of success. However, we strongly oppose the position that rights of oral appeal lead to abuse. The simpler and surely preferable analysis is that oral appeals

are more often successful because the IJ has an opportunity to see and hear witnesses. Appellants benefit from having witnesses appear in person rather than having the case determined solely on a particular impression given by a particular set of papers.

ILPA
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