ILPA Response to DCA Consultation on Asylum and Immigration Tribunal - Procedure Rules, and Judicial Titles Order

Question 1

Do you support the change to lodging appeals directly with the Tribunal?

Do you agree with the proposed exceptions to this?

Is it helpful to have the option of lodging with the Tribunal where the exceptions apply?

ILPA would answer Yes to each of the above questions. We would add that if the ECO fails to comply with rule 6(6), it should be open to the appellant to submit the papers to the AIT and request listing.

ILPA supports the general intention of the Rules to ensure earlier and more robust case management of appeals, within a framework aimed at ensuring fairness.

However, we are concerned that it is vital that IJs use the powers now given them to regulate the handling of appeals from an early stage robustly and fairly. We therefore wish to take this opportunity to make submissions on the proposals for improved case management.

Powers have existed for some time in the current Rules enabling Adjudicators to manage cases more effectively. These are not used in practice, largely, it would seem, because of a lack of will on the part of Adjudicators. Case management hearings have become routine, with HOPOs often absent, and directions are rarely case-specific. In addition, there is a lack of consistency in enforcing case management decisions, including reluctance by some Adjudicators to respect and enforce their colleagues' rulings. We consider it vital that measures are put in place to ensure that similar problems do not arise in future.

We therefore suggest that the following measures will enhance the case management powers which follow from lodging appeals directly with the Tribunal:

- Provision should be made in the Rules for the anticipated case management hearings. We do not understand why, if these hearings are such an integral part of the proposed system, they are not entrenched in the Rules: failure to do this creates the risk that these hearings will be treated as optional, not taken seriously and, in the worst case, eventually abandoned as a waste of time.

- Provision should be made in the Rules for the Respondent to lodge a reply to any matters raised by the Appellant in the appeal form (or otherwise in response to RFRL: see below for our concerns as to the contents of the appeal form as presently envisaged) in time for the case management hearing.

- A Practice Direction should make clear that IJs are expected to follow, and enforce, each other's case management decisions unless there are clear reasons for not doing so.

- IJs must not allow themselves to be deflected from proper and fair case management by inefficiency or non-co-operation by the parties, in particular the Home Office.

- Reasonable and fair sanctions must exist for failure to comply with directions, Rules or

Practice Directions. There must be, as far as possible, equality in these sanctions. If these can include, in the worst case, dismissing an appeal without consideration of the merits where the appellant is at fault, they should include allowing an appeal without consideration of the merits where the respondent is at fault.

ILPA is also very concerned at the fact that time limits for lodging appeals remain the same, while the appeal form itself has been greatly expanded. Whilst we recognise that the information included in the appeal form may well be useful in case management, the level of detail required is quite unnecessary simply in order to lodge an appeal.

Nor in any event do we consider it at all likely that constructive use will be made of the extensive information required in the appeal form at such an early stage: it ought to be sufficient for case management information to be submitted shortly before the first hearing so that all parties are able to prepare for that hearing. Submissions as to the contents of the RFRL (which are apparently required in the appeal form as currently drafted) are for the substantive hearing, or for skeleton arguments, and are certainly not necessary at the time the appeal is lodged. We return to this point below in our response to Question 10.

We also return to the contents of the appeal form under Question 10, and make further comments as to the difficulties of completing it within the timescale envisaged, but at this stage we suggest that one of the following options needs to be taken:

i. The time for lodging an appeal needs to be extended if the appeal form is to remain as it is: we suggest 28 days, or 14 days (10 working days) for those in detention; or

ii. The time for appealing should remain as it is, but the information needed for the appeal form to be valid should be reduced, and an extended deadline should be set for the filing of the remainder of the information needed for case management purposes: we suggest that the latter information should be submitted three days in advance of the first hearing, if not submitted at the time of the appeal; this would give time for all concerned to consider it and prepare for the hearing.

Question 2

We agree that the respondent should provide all of the documents listed in Rule 11.

We also consider that the words ‘except for documents which the respondent has already sent to the appellant’ should be removed from R.11(4). Although we understand the desire not to duplicate documents, we consider that this is outweighed by the desirability of having a standard comprehensive bundle of documents of which all parties have a copy. The current practice whereby a bundle is both filed with the IAA and served on the Appellant by the IAA is a useful one (albeit at present imperfect), which should continue.

We think that leaving this responsibility with the Respondent would best support the effective handling of appeals, because the Respondent already has all the papers on which it has relied; the Appellant is already under significant time pressure; and preparation of bundles by the Respondent is a system which has generally been effective up to now.

We also suggest that R.11(1)(b) should also include, among the documents to be provided by the Respondent, any representations on the substance of the claim which may have been made by the Appellant to the Home Office. ILPA members frequently encounter situations where the Home Office bundle misses out representations made by the Appellant which are vital to the determination of the appeal, regardless of whether or not they have been mentioned in the reasons for refusal letter.

We also suggest that R.11 should make clear that the documents should be provided in an indexed and paginated bundle, thus mirroring the requirement in R.45(e)(ii). Clearly it would make no sense for different rules requiring production of documents not to impose the same

requirements in terms of the format in which they should be provided.

Question 3

ILPA considers that appellants with genuine appeal rights or reasons for lodging late notices may be adversely affected by the provisions of Rule 13.

Commentary

This question is asked in the context of **rules 12 and 13**.

However, **rule 13** makes specific provision also as regards **rule 9** ("Late notice of appeal"). Although **question 2** in theory engages with rule 9 it asks *specific* questions. Yet as explained below **rule 9** will plainly lead to grave injustice as presently drafted, a matter more appropriately raised in the context of ILPA's answer to **question 3**.

Commentary in this answer thus focuses on rules 9, 12 and 13

Rule 9

Rule 9 lays down the circumstances in which late notices of appeal may be accepted. Its application if implemented without amendment will lead to grave injustice. This is because of the possible impact of the following cumulative factors:

- Late notices of appeal MUST include an application to extend time, which MUST include a statement of reasons for failing to give notice in time and provide written evidence in support of those reasons (rule 9(1));

- Where a late notice does not include an extension application the Tribunal MUST notify the appellant it proposes to treat the appeal as being out of time (rule 9(2));

- Upon receipt of such notice the appellant can (only) contend that notice "WAS GIVEN IN TIME" (in which case he may file written evidence in support of that contention) (rule 9(4)).

The potential for grave injustice arises for the appellant who may not *know* that a notice of appeal is given out of time. Such appellant's notice would not in these circumstances include reasons for the failure to give notice in time, yet he has a possible remedy *only* if he is able to contend only that the notice WAS GIVEN IN TIME (rule 9(4) refers). Plainly it must be open to such appellant who risks suffering injustice by reason of the striking out of a late notice of appeal (for example where notice has been given out of time through the fault of his representative) to be able to contend not only that "notice of appeal was given in time" (as drafted), but also that the appeal should be allowed to proceed "in the interests of justice" or where the appellant has a "reasonable excuse" for not having given the notice in time.

The foregoing analysis is not changed by reason of the power given to the Tribunal in rule 9(6) to extend time by reason of special circumstances if it would be unjust not to do so. However the inclusion of this power plainly demonstrates that it is not proposed to limit the exercise of the Tribunal's power to allow a notice of appeal to proceed ONLY where the appellant both has raised reasons for delay and contends that the appeal has been given in time. This makes the case for amendment as suggested overwhelming.

For these reasons it is essential that:

- Rule 9(4) is amended in the manner suggested above; and

- (consequently) that rule 9(1) is amended also to cover the possibility of an appellant not knowing that an appeal notice is being given out of time (for example so it reads "if it is

known that a notice of appeal is being given outside the applicable time limit …").

Moreover, rule 9(2) imposes an unnecessary 'straight jacket' on the Tribunal which is given no discretion whatsoever to allow an appeal to proceed without invoking the procedure mandated by rule 9(2). The Tribunal must have discretion itself to extend time without invoking the rule 9 (2) procedure.

ILPA believes that the Home Office receiving a notice of appeal which is minimally out of time will not always take the time point. It would be far more cost effective were the Tribunal similarly able to take the same approach without being mandated to act in a prescribed manner. Some flexibility ought therefore to be given to the Tribunal enabling the Tribunal *itself* to exercise discretion and to accept late receipt of a notice of appeal. The Tribunal can plainly be trusted to exercise such discretion sensibly. Take for example the situation where there are known difficulties with post. Must the Tribunal *necessarily* invoke its rule 9(2) procedure and inform the appellant that it proposes to treat the appeal out of time? Far better that there is a caveat to the word "must", for example " by inserting the phrase "if in the interests of justice".

Rule 12

A question arises whether a decision under rule 12 can be the subject of an application for review under section 103A of the 2002 Act.

ILPA considers that a decision made by the Tribunal under rule 12 finally determines the appeal as between the parties, and moreover that this position is not altered by reason only of the fact that this is a decision made only on the basis that there *is* no valid appeal.

Thus a rule 12 decision will itself be subject to the possibility of application for review under section 103A of the 2002 Act.

This position should be made clear in rule 12 itself.

Rule 13

Rule 13(2) is poorly drafted. It can imply as presently drafted that it is possible for an appellant to be removed prior to the making of a decision on late notices of appeal (rule 9) or validity (rule 12). Plainly until any such decision is taken the appellant will still have a pending appeal (sections 78 and 104 2002 Act refer).

It is suggested that throughout this rule the word "proposed" is substituted for the word "intended" (in the context of removal) and that in rule 12(2) the following words are added in parenthesis at the end "(notwithstanding that any such removal could not take effect whilst the appeal remains pending)".

As regards the reference in rule 13(3) to rule 9, see comments above.

As regards rule 13(3)(b), ILPA has concerns at the prospect of evidence being required to be given "by telephone". This may be fraught with difficulty. To mention only two imponderables. What provision will be made for interpreters and how will they be used? *Who* is to give such evidence – a solicitor or representative? Flexibility to avoid injustice is to be welcomed but such proposal may be both impracticable and unworkable.

Question 4

ILPA has no objections to Rule 17 as such.

However, since the outcomes of appeals generate intense political interest in the context in particular of the provision of public funding it is *essential* that statistics are able to reflect that

the Home Office has withdrawn a decision under appeal.

Question 5

We have no strong views concerning Rule 21. We oppose the system of closure dates, which has proved unworkable in practice, and welcome its removal. In our opinion the key to reducing the number of repeat adjournments is the efficient use of case management powers. Such powers, used properly, should identify at an early stage potential causes for an adjournment being required and result in the issuing of appropriate directions and the setting of a realistic timetable.

Repeat adjournments cannot be eliminated as there will always be unforeseeable and exceptional circumstances arising which make further adjournments of an appeal unavoidable in the interests of justice and fairness. However the greater use of case management powers which the new procedures envisage should ensure that only as many adjournments as are necessary are granted.

Question 6

We approve of Rule 22. Of course it will only work effectively if sufficient resources are available to ensure that determinations can be written, typed, checked and posted within the time-scale provided by the Rules.

We object most strongly to the proposed rule 23 for the following reasons:

- We consider it wrong in principle that one party to an appeal should have responsibility for service of the decision on the appeal on the other party.

- If an appellant has an appeal heard by an independent Tribunal then surely that party is entitled to be told by the Tribunal what the outcome of the appeal is. Equally there is a corresponding responsibility on the Tribunal to ensure that an appellant is informed of the result. The proposed arrangement is an abdication of this responsibility to suit the convenience of the Respondent to the appeal.

- There can be no rational justification for the Home Office being told the result of an appeal well in advance of the appellant.

- There is no mechanism for ensuring that the Home Office complies with the requirement of serving the determination. In the event that 28 days elapses, and the Tribunal has not been informed of whether and when the determination was served, it will hardly be a prudent deployment of limited resources for Tribunal staff to go on what will probably be a wild goose chase attempting to get details of service from the Home Office. We assume this will not happen, which means there will be no means of monitoring or enforcing the Home Office's obligations.

- We object to appellants with asylum appeals being treated differently from those with non-asylum appeals.

- Some of the appeals covered by the new rule will have been allowed. Where this is the case it is particularly objectionable that the successful appellant should not be told by the appeal authority of the result at the same time as the Home Office.

- Without prejudice to our objections in principle to the new rule, we consider the period of 28 days to be much too long. It is difficult to understand why it should take the Home Office so long to send a determination to an appellant. The long timescale contrasts vividly and unfairly with other stringent time limits on appellants. We also think that there should be a time limit for the Home Office to notify the Tribunal under rule 23(5)(b), which is otherwise completely toothless. In addition, it should be spelt out in the Procedure Rules or

in rules of court that the timescale for the Home Office to apply for a review of a determination runs from the date it receives the determination and not from the date it sends the determination to the appellant – otherwise the Home Office can buy time which is completely unacceptable. We reject entirely the concept of "Chinese walls" whereby one part of the Home Office does not consider the determination until another part has sent it to the appellant.

It is our firm view that the new rule will make no contribution whatsoever to promoting the efficiency of the appeal system. We believe the rationale behind the proposal is a belief on the part of the Home Office that it will facilitate removal of unsuccessful appellants. This can only be based on the wholly unproven assumption there are a significant number of appellants who go to ground upon receiving a negative determination through the post in the normal way. No figures have been produced, to our knowledge, to substantiate this proposition. It is also entirely contrary to the experience of practitioners.

We recognise that there have been persistent delays in effecting removal of unsuccessful asylum-seekers. These delays have absolutely nothing to do with how determinations are served: they are caused largely by inefficiency on the part of the Home Office and Immigration Service which the proposed change in procedures will have no bearing on.

Question 7

ILPA has no particular comment on this question.

Question 8

It would clearly be unfair for errors of procedure to stand in the way of delivery of substantive justice. Hence, we agree with the rationale of Rule 59.

Question 9

We have no comments on the proposed transitional arrangements.

Question 10

As explained above in our answer to Question 1, ILPA has grave concerns about the length of the appeal form and the level of detail apparently expected in it. Appellants are told to 'be as extensive as possible'. Some questions (for instance the first, concerning the country situation), demand answers which, to be anything approaching complete or comprehensive, would need, in many cases, to be many pages long. We wonder what possible use this can be in case management, and suggest it ought to be sufficient for case management purposes to identify the areas in dispute, without entering into the substance of the disagreement.

The amount of information required seems to us excessive, given that the most important and urgent aim is to get the appeal lodged on time. As we have suggested earlier in this response, information needed for case management purposes does not need to be submitted at the time of the appeal: it should be sufficient for such information to be filed later, after the appeal has been lodged but in good time for the first hearing.

The consultation paper suggests that '[t]he form is intended to help non-represented appellants by asking clearer questions to assist them in setting out their grounds of appeal'. Whatever the intention, the tone of the form is of a threat, not of an attempt to assist. In any event, we consider that most, if not all, of the questions posed in the form will be incomprehensible to most non-represented Appellants. Nor will most Appellants have any chance of providing useful information, even if they understand the questions, especially if they do not speak English.

As to those who are represented, we are concerned about practicalities. In order to complete the form effectively, it is likely that detailed instructions will have to be taken from the Appellant. This will particularly be so if the Appellant has not been represented (or not been represented effectively) before the refusal of his/her application. Therefore, instead of a relatively brief interview between the representative and the Appellant before the appeal form is lodged, the interview will have to be much longer. Such interviews will be much harder to fit into a representative's busy schedule, in comparison with a shorter meeting, and so they require more notice to arrange. Therefore more time should be given for appeal forms to be lodged. It seems to us entirely unrealistic to expect busy legal representatives, at a few days' notice, to fit in appointments with clients which may last several hours.

Moreover, any Appellant who has been competently represented before the refusal is likely to have answered the questions in the form, at least implicitly, in his or her application. We see little point in repeating these answers.

It appears to us that a choice needs to be made. If the intention is to ensure that case management hearings (first hearings) are effective, then the amount of information required from Appellants and the amount of time available for it to be provided both have to be realistic. Proper case management requires care, and therefore time, on the part of the parties as well as the judiciary. If, on the other hand, unrealistic expectations are imposed on Appellants, we consider that the information provided is likely to become brief, standardised and unhelpful, simply because the time and resources to provide useful information do not exist. Case management hearings will then become pointless, directions will be standardised and not case-sensitive, and the intention to ensure early and effective case management will be thwarted.

We assume it is the intention that the RFRL, which has to be submitted to the AIT under R.11(1)(a), should form the basis for the Respondent's case at the hearing of the appeal: clearly it is not possible to expect the Appellant to specify what grounds and reasons he/she relies on if the reasons for refusal are subject to change.

Indeed, it is only possible for the Appellant to specify his/her grounds of appeal and the reasons for those grounds on the basis of the RFRL. Unfortunately, RFRLs are themselves often less than clear as to the basis of the refusal: for instance, it may not be made plain in the RFRL whether the Appellant's credibility is in dispute, or if it is, whether the Appellant's entire account, or just specific parts of it are in dispute. We wonder whether it is intended that IJs will direct, where necessary, that the Home Office make its case absolutely clear before any hearing, and suggest that specific provision be made in the Rules for this.

We also point out that any improvements in case management require genuine action on the part of the Home Office to improve its decision-making processes.

We suggest that if any amendment or addition to the RFRL is to be made, for instance in response to the Appellant's grounds of appeal, the time for this is clearly before the first hearing. We suggest that the Rules should include provision for the Respondent to file a reply to any matters raised by the Appellant in the appeal form (or in any case management form, it being ILPA's view that such the appeal form itself should contain less information than currently envisaged in the draft Rules), and a timetable for this to be done.

We also note that, whilst there is power in Rule14 to allow amendment of the *grounds* of appeal, there is no such power to allow amendment of the *reasons* for those grounds. This appears anomalous. Presumably the intention is that reasons can be changed without permission of the Tribunal, but the Rule could just as easily be interpreted as meaning the opposite, and if it is the intention that reasons can be changed without permission, the Rules should say so.

We would add that rule 8(4) should include instructions from the sponsor or a relative who is present in the UK, which is often more practicable than taking instructions from the appellant abroad.

Question 11

ILPA has previously opposed the use of the title 'judge' for members of a tribunal which is not a practice reflected as regards members of other tribunals.

Question 12

If qualified members of the AIT *are* to be called Immigration Judges there is no good reason not to distinguish between them as suggested.

6th December 2004