ILPA information sheet

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Appeals – Admissible Evidence

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This information sheet provides information about evidence that may be relied upon in an appeal before an immigration judge at the First-tier Tribunal (Immigration and Asylum Chamber). On 23 May 2011, the Government brought section 19 of the UK Borders Act 2007 into force. This introduces a new and significant restriction on the evidence that may be relied upon in certain appeals concerning Points Based System applications. More information is given below.

The general rule

The general rule about evidence that may be relied upon in an appeal is set out in section 85(4) of the Nationality, Immigration and Asylum Act 2002. This allows an immigration judge to consider any evidence that he or she considers to be relevant to the appeal. This can include evidence that was not available at the time of the UK Border Agency's decision to which the appeal relates.

The general rule, therefore, allows an immigration judge to consider evidence that was not available to the UK Border Agency decision-maker. This new evidence on appeal can be important in two ways:

- ***New evidence showing new circumstances since the UK Border Agency decision:*** New evidence may show that the requirements of the Immigration Rules are now met, even if the requirements were not met at the time the UK Border Agency made the decision to which the appeal relates (see e.g. the cases of *LS (Gambia)* [2005] UKAIT 00085 and *YZ & LX (China)* [2005] UKAIT 00157)
- ***New evidence that shows the circumstances at the time of the UK Border Agency decision:*** New evidence may show that the requirements of the Immigration Rules were met at the time of the UK Border Agency decision, even though at the time it was not clear on the evidence available to the UK Border Agency that this was so (see e.g. the cases of *NA & Ors (Tier 1 Post-Study Work funds)* [2009] UKAIT 00025)

The general rule means that an appeal may be allowed by reason of new evidence in either of these two circumstances. However, there are exceptions to the general rule. The exceptions relate to:

- appeals against refusal of entry clearance
- appeals against refusal of a certificate of entitlement
- appeals against refusal of leave to remain on a Points Based System application

The exception relating to entry clearance

Entry clearance is applied for before a migrant travels to the UK. Not all migrants are required to apply for it. For those that do apply for and are granted entry clearance, the right to enter the UK is not guaranteed. However, on arrival at the immigration desk in the UK, the grounds on which an

immigration officer can refuse entry to the UK to a migrant with entry clearance are limited.

Appeals against a refusal of entry clearance are made by migrants outside the UK. On an appeal against a refusal of entry clearance, new evidence may be relied upon to show the circumstances at the time the UK Border Agency made the decision. However, new evidence cannot be relied upon to show new circumstances. A new application for entry clearance may be made instead.

The exception relating to refusal of a certificate of entitlement

A certificate of entitlement may be obtained by someone who has the right of abode, to show he or she has that right. The September 2008 "Draft Bill and Right of Abode" information sheet provides more information about the right of abode. The draft Bill, to which that information sheet relates, did not become law. However, the information about the right of abode given there remains good. On an appeal against a refusal of a certificate of entitlement, new evidence may be relied upon to show the circumstances at the time the UK Border Agency made the decision. However, new evidence cannot be relied upon to show new circumstances. A new application for a certificate of entitlement may be made instead.

The exception relating to Points Based System applications

More information about the Points Based System is available from information sheets on the "Points Based System". On an appeal against a refusal of leave to remain relating to a Points Based System application, no new evidence may be relied upon on the appeal unless:

- the appeal is brought on a ground or grounds relating to race discrimination, human rights, European Union law or asylum; or
- the evidence is necessary to show that a document is genuine or valid (this allows someone to address any allegation by the UK Border Agency that a document he or she submitted with his or her application is false or invalid); or
- the evidence is necessary to show that a reason for the refusal, which does not relate to 'points', is wrong (e.g. this allows someone to address any allegation by the UK Border Agency that the person has an immigration or criminal history justifying refusal; but prevents the person introducing new evidence to show he or she meets the requirements of the Immigration Rules specific to the application he or she made)

The Government introduced this exception on 23 May 2011 by a Commencement Order – the UK Borders Act 2007 (Commencement No. 7 and Transitional Provisions) Order 2011, SI 2011/1293. (The other two exceptions are not new.) This new exception applies to appeals against refusals of leave to remain relating to Points Based System applications – i.e. Points Based System applications made by migrants in the UK. The Commencement Order includes a provision that means the new exception does not apply to an appeal, begun before 23 May 2011, if there has been a hearing of the appeal before an immigration judge before that date (including where the hearing was not completed). However, if there has been no hearing by that date, an appeal begun before 23 May 2011 will still be caught by the new exception – i.e. the rules on what evidence could be relied upon will have changed between the time the person began his or her appeal and the time his or her appeal comes to be heard. This is unfair and its legality may be open to doubt. However, ILPA is not yet aware of any judicial rulings on the legality of this unfairness.

Please note

The information given here relates only to what evidence may be relied upon in an appeal before an immigration judge in the First-tier Tribunal (Immigration and Asylum Chamber) where an appeal is properly made. The law on when an appeal can be made is complex, and is not dealt with here. Where an appeal is properly made, the First-tier Tribunal (Immigration and Asylum Chamber) also has powers to make requirements as to how and when evidence must be submitted. An immigration judge may refuse to consider evidence that is not submitted in line with any such requirements.