Asylum Law and Practice – Hot Topics

1. These notes accompany a discussion with members of Student Action for Refugees (STAR). Their purpose, and that of the discussion, is to highlight current and prospective topics of particular and new importance in relation to asylum and refugees in the UK. They follow a similar structure to notes accompanying a similar discussion in September 2009.[1]

2. Discrete topics are discussed under individual headings. Much background is assumed (though some background is provided for discrete topics); and necessarily the information provided here is not comprehensive, and some generalisations are made. There is some highlighting of specific changes since the preparation of the previous notes and discussion in September 2009. ILPA information sheets[2], which are relevant to topics discussed here, are listed at the end of these notes.

Screening:

3. Screening is the initial part of the asylum process. It often takes place at the place at which an asylum claim is first made – e.g. at the port of entry to the UK or Asylum Screening Unit (in Croydon) – and in certain 'lorry drop' cases it takes place in detention. Screening involves fingerprinting and a lengthy interview, covering several matters (personal details such as name, age, nationality, parents' personal details etc.; the journey to the UK and documentation used/held etc.; housing & support needs). Detailed enquiry as to the reasons for an asylum claim should not be made at screening. Generally, asylum-seekers are not represented at screening; and in many cases screening will take place before an asylum-seeker first meets a legal adviser. At screening, a decision will be taken as to whether an asylum-seeker should be permitted to enter the UK asylum system; and if so how his or her asylum claim will be dealt with. Essentially, there are three possibilities:

[1] Those notes (Asylum Law and Practice – Hot Topics, September 2009) remain available at: http://www.ilpa.org.uk/pages/ilpa-information-service-workshops-and-seminars.html

[2] These are available in the Info Service section of the ILPA website at http://www.ilpa.org.uk/pages/info-service.html

- If it is considered that a safe third country should consider the asylum claim, the case will be passed to the Third Country Unit and the asylum-seeker may be excluded from the UK asylum system[3];
- If a safe third country is not considered responsible for the claim, the case may be referred to a New Asylum Model (NAM) team in one of the six UK Border Agency regions; or
- Instead of referring the case to a NAM team, the case may be taken into the detained fast track (DFT) on the basis that it can be decided quickly.

4. The UK Border Agency is reviewing screening. The previous notes made the same observation and highlighted that screening had been under review for many months. That situation has continued for several years. While some things have changed, and some plans for change have been identified, it is not clear when the review of screening will be completed. Current problems or concerns which arise in relation to screening include:

- In relation to the DFT: "*UNHCR doubts whether the current screening process allows for the gathering of sufficient information to ensure that unsuitable cases are not routed to the DFT. In this regard, UNHCR notes the apparent tension between the quality of information required to reach a sustainable conclusion as to whether a case can be 'decided quickly' and the amount of information that could (and should) be collected at the asylum screening stage.*"[4] Reference was made to this in 2009, and the concern is as pertinent today as it was then. Indeed, arguably more so given the report of the chief inspector of borders and immigration (formerly known as the chief inspector of the UK Border Agency) on the DFT.[5]

[3] Arrangements between EU Member States determine responsibility for asylum claims according to criteria set out in Council Regulation EC 343/2003 (often referred to as Dublin II or the Dublin Regulations)
[4] UNHCR Quality Initiative Project, Fifth Report to the Minister, March 2008, para. 2.3.85 available at: http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/
[5] The report was published in February 2012 and is available at: http://icinspector.independent.gov.uk/wp-content/uploads/2012/02/Asylum_A-thematic-inspection-of-Detained-Fast-Track.pdf

- In 2009 there were just two Asylum Screening Units in the UK – in Croydon and Liverpool. Now there is only one. An asylum-seeker who is in-country (as opposed to at port, on entry) must travel to one of these two locations in order to make a claim. Not all asylum-seekers have an opportunity to claim asylum at a port. Some asylum-seekers may be brought into the UK without passing through immigration controls. Others may not be seeking asylum when they come here, but because of changes in their country may need to claim asylum after they have arrived. In 2010, considerable potential for inconvenience, delay and obstruction to asylum-seekers making their claims was introduced by a new practice to generally require in-country claims to be made at the Croydon ASU by appointment only. While enormous problems getting through on the telephone to make an appointment seem largely to have been ironed out, the system remains problematic. An asylum-seeker must telephone and provide a telephone number on which he or she may be contacted later that day or over the next two or three days. He or she is called by ASU. If they get through, an interview (taking biodata and wider information) is conducted with a view to assisting UKBA to prepare for and conduct a screening interview when the asylum-seeker attends his or her appointment, for which a date and time should then be set. If ASU do not get through, after a time they may stop seeking to do so. There are concerns as to the reliability of information taken by telephone, and how this may be used by ASU and by UKBA later in the process; and as to the several weeks that some may have to wait before their appointment, and how those with urgent support and accommodation needs may not be identified or provided for by this system.
- It continues to be the case that asylum-seekers are usually without any legal representation at the point of screening. Although screening is not meant to make any detailed investigation of an asylum claim, questions may be asked which do relate to the claim or the answers to which will be relied upon in refusing asylum or which may lead to prosecution for illegal entry or document offences.

Third Country Unit cases:

5. Under arrangements between EU Member States, asylum-seekers who have passed through another Member State on their way to the UK may be returned to that other State without their asylum claim being considered in the UK. One of the purposes of fingerprinting during screening is to check whether there is any record of the asylum-seeker in another Member State.

6. In 2011, decisions of the Court of Justice of the European Union[6] and of the European Court of Human Rights[7] have called into question the UK legislation relating to these cases. The UK legislation includes presumptions that Member States can be relied upon not to act in breach of either Refugee or European Conventions. The European courts have found conditions for asylum-seekers in Greece generally not to be compliant with either Convention/EU standards.

Nationality etc. disputes – language, DNA & isotopic testing:

7. In some cases, the UK Border Agency refuses to believe someone's nationality or claimed origins. These disputes can begin as early as the point of screening. In 2009, there were a range of tests being explored by the UK Border Agency including language, DNA and isotopic testing, each of which could be conducted at screening. It now appears that DNA and isotopic testing has been abandoned.

8. Language testing, however, has received endorsement from the tribunals and courts.[8] The method that has been used involves a telephone conversation with an analyst commissioned by the UK Border Agency. On the basis of that conversation, a report is made giving an assessment of

[6] *NS v SSHD* [2011] EUECJ C-411/10, see http://www.bailii.org/eu/cases/EUECJ/2011/C41110.html
[7] *MSS v Belgium & Greece* [2011] ECHR 108 (30696/09), see http://www.bailii.org/eu/cases/ECHR/2011/108.html
[8] Most recently from the Court of Appeal in *RB (Somalia)* [2012] EWCA Civ 277 (see http://www.bailii.org/ew/cases/EWCA/Civ/2012/277.html) approving the reported determination of the Upper Tribunal (Immigration and Asylum Chamber (see http://www.bailii.org/uk/cases/UKUT/IAC/2010/00329_ukut_iac_2010_rb_somalia.html); though for a more different perspective see *FS (Treatment of Expert Evidence) (Somalia)* [2009] UKAIT 00004 available at: http://www.bailii.org/uk/cases/UKIAT/2009/00004.rtf

the language and dialect spoken in relation to the asylum-seeker's claimed nationality and origins. Criticisms have been levelled at the expertise of analysts, the quality of their reports, the conditions of the interviews (short length of conversation, quality of telephone connection, preparedness and ability of asylum-seeker to participate in a telephone interview), that the reports provide for the analysts' anonymity, and of the use to which these reports are put (UK Border Agency merely accepting the conclusions in the report without evaluating the other evidence presented).

Age disputes and age assessment:

9. As stated in 2009, there continue to be highly contentious or outstanding issues in relation to how the UK Border Agency deals with claims for asylum by separated children (unaccompanied asylum-seeking children). These start with disputes about whether a person is or is not a child, generally referred to as an age dispute; and the means that are used and relied upon in order to reach an assessment of a person's age. In 2012, the controversies surrounding this issue have been to the fore, with the UK Border Agency seeking to trial the use of x-rays as a means to assessing a person's age despite questions as to informed consent and utility of such methods.

10. The 2009 notes provided information about ILPA's 2007 report on extensive research into age disputes and age assessment[9]; and highlighted that the UK Border Agency had reduced funding to the Refugee Council's Children's Panel, thereby reducing the independent scrutiny or capacity for independent scrutiny in relation to age disputes[10]. As indicated in 2009, this area has been one in which there has been much litigation, and that continues. What has changed is that judicial review challenges of local authority age assessments may now, following a decision of the Supreme Court in late 2009[11], involve the court in making a decision for itself as to

[9] *When is a child not a child?* The report remains available in the Publications section of the ILPA website at http://www.ilpa.org.uk/pages/publications.html
[10] This particularly affects children who are detained because their age is disputed
[11] *A v Croydon* [2009] UKSC 8, see http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0106_Judgment.pdf

the child's age; and since 2011 some of these judicial review challenges have been dealt with in the Upper Tribunal (Immigration and Asylum Chamber).[12]

Children seeking asylum:

11. A number of further critical issues arise in relation to children, whether separated or in families, in the asylum system. Several of these are very briefly highlighted in the paragraphs which follow.

12. In 2009, one key issue was that in third country removals of separated children seeking asylum to an EU Member State, the UK Border Agency policy and practice had been not to give notice to a child or his or her legal representative of the removal. This was, somewhat dubiously, said to be in the child's best interests. However, this practice of not giving notice has since been found to be unlawful[13], and even in advance of that finding had been ceased by the UK Border Agency in respect of children.

13. As explained in the 2009 notes, separated children who are refused asylum are usually granted discretionary leave to remain while they remain a child[14]. The UK Border Agency continues to explore ways to remove separated children, discussing with foreign governments what arrangements may be made (including for returns to Afghanistan and Vietnam). Of more immediate consequence or more recent development has been the changes made to the immigration rules concerning Article 8 of the European Convention (private and family life), and the consequential changes made to the asylum policy instruction on

[12] See later in these notes, but there is a developing intention to pass more of the judicial review workload of the High Court to the Upper Tribunal, where it may be dealt with by a High Court judge or tribunal judiciary.

[13] *R (Medical Justice) v SSHD* [2010] EWHC 1925; [2011] EWCA Civ 269 – see http://www.bailii.org/ew/cases/EWHC/Admin/2010/1925.html and http://www.bailii.org/ew/cases/EWCA/Civ/2011/1710.html

[14] The grant of discretionary leave is made to age 17½ years or for three years, whichever is the shorter period ; and is made in circumstances where there are no adequate reception arrangements available for his or her return to his or her country of origin.

discretionary leave[15]. It is unclear what is to be the approach to applications by separated children for further leave following a grant of discretionary leave on the grounds that there are no adequate reception arrangements for the child's return to his or her home country.

14. As was the case in 2009, the detention of children remains a highly controversial topic. However, the coalition Government committed itself to end the detention of children. To that end, a new family returns process has been introduced.[16] That process is intended to provide opportunities for families to consider their situation, take legal advice and pursue legal challenges, with options to make voluntary returns, in the enforcement process. A problem with the process is that it is designed for asylum cases, and some families subjected to enforcement will neither have made nor be making asylum claims, albeit that they may have reasons to wish to remain in the UK. The process includes an option to detain families (including children) at a centre called Cedars at Pease Pottage. There is also an option to separate parent and child, by detaining a parent. Other families may be detained when refused entry to the UK, or where there is a history of criminality. Children may also be detained at the point of their entry to the UK. While changes have reduced the number of children detained, and the length of time children endure detention, the detention of children has not been ended. Nonetheless, the Government claim to have met their stated commitment.

15. The UK Border Agency has now been under a duty to have regard to the need to safeguard and promote the welfare of children[17] for nearly 2 years; and the withdrawal of the UK's reservation to the 1989 UN Convention on the Rights of the Child took place about a further year previously.

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[15] The current policy asylum instruction is at:
http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/discretionaryleave.pdf?view=Binary

[16] More information is given in the enforcement instructions and guidance on family cases (chapter 45), see:
http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/chapter45?view=Binary

[17] Section 55, Borders, Citizenship and Immigration Act 2009

Nonetheless, questions continue to arise as to the UK Border Agency's understanding of its domestic and international obligations regarding children's interests. A recent development has been litigation concerning the UK Border Agency's failure to seek to trace family members of a child asylum-seeker.[18] More generally, the Home Office continues to misunderstand its obligations to consider the best interests of a child, in respect of whom it has obligations, by seeking to defend actions contrary to the child's interests (e.g. the exclusion of a general policy for the grant of refugee family reunion in respect of child refugees) as in the 'best interests' of children who may be deterred from attempting to journey to the UK to claim asylum.

16. As stated in 2009, guardianship continues to be a much-debated subject in relation to children seeking asylum. A particular concern, although not the only matter related to guardianship, is the need for a guardian to provide instructions to a lawyer in circumstances where a child is unwilling or unable to provide adequate or safe instructions[19].

Permission to work:

17. In 2010, the Supreme Court[20] upheld the decision of the Court of Appeal that the EC Reception Directive[21] requirement that Member States consider granting permission to work to any asylum-seeker who has been waiting for 12 months or more for an initial decision on his or her asylum claim[22] included a decision on a fresh asylum claim. The Home Office response was to change the immigration rules. While consideration may be given to granting permission to work to any asylum-seeker waiting for 12 months or more for a decision on his or her original or fresh asylum claim, the types of employment that may be permitted is severely restricted

[18] The most recent decision is that of *KA (Afghanistan) v SSHD* [2012] EWCA Civ 1014, see http://www.bailii.org/ew/cases/EWCA/Civ/2012/1014.html
[19] This is more fully explained in the April 2008 letter of ILPA to the Lord Adonis, then Minister at the Department for Children, Schools and Families, see the Submissions section of the ILPA website at www.ilpa.org.uk
[20] *ZO (Somalia) v SSHD* [2010] UKSC 36, see http://www.bailii.org/uk/cases/UKSC/2010/36.html
[21] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
[22] see Article 11

– arguably so restricted as to render ineffective the Reception Directive requirement. It remains to be seen whether this will be challenged.

Asylum support:

18. In 2008, the maintenance of asylum support rates at 70% of income support rates ceased. This level had previously been explained as reflecting that asylum-seekers could qualify for accommodation with utility bills (water & energy) paid for. Asylum support rates have now fallen significantly below 70% of income support, and with no formal pegging mechanism and no standard mechanism for assessing the applicable rate, there is a continued risk that rates will in real terms effectively continue to fall subject to what decisions are (or are not) taken each year as to reflecting inflation costs in these rates.[23]

19. In late 2009, a payment cash card was introduced as the means by which those refused asylum, who were permitted to claim what is known as section 4 support, were to be provided with financial support. While this may be considered an improvement on the previous vouchers scheme, it continues to cause problems – not least because such systems are far more restrictive than cash, and there is a restriction that only £5 can be carried forward from one week to the next.

20. The most recent development in this area has been the successful judicial review challenge in *R (MK & KH)* [2012] EWHC 1896 (Admin). This challenge was to the UK Border Agency practice and policy whereby, claims for section 4 support on the basis of making a fresh asylum or human rights claim, were not considered for up to 15 days in which it would first be attempted to make a decision on the fresh claim. The aim of this practice was to exclude from support those whose fresh claims were not accepted. The High Court concluded that a blanket approach which tended to leave all claimants for support, however acute their need and

[23] A short overview of the current position is provided at: http://www.testimonyproject.org/testimonyprojectuk/article/news/asylum-support-rates-still-not-enough

whatever the merits of their claim, without support for 15 days was unlawful.[24]

Detention:

21. Many of the concerns expressed in the 2009 notes remain, including that for a substantial number of foreign nationals who have completed prison sentences, indefinite detention (over periods of months and years) has become the norm.[25] In recent months, there have been a growing number of unlawful detention rulings by the High Court in respect of detainees, often held for several months or years (and often following prison sentences), with serious mental health difficulties. In a number of these cases, the High Court has found that the detention of the person has been contrary to Article 3 – i.e. that his or her treatment in being detained has constituted at least inhuman or degrading treatment.[26]

22. The 2009 notes drew attention to the detained fast track (DFT):

> *The use of the DFT is another ongoing example of an egregious use of detention in the UK. Asylum-seekers who are transferred to the DFT will generally have their claims considered and refused, and appeals considered and dismissed, in a matter of days. Although the formal criteria for transfer to the DFT is based on whether a quick decision can be made (and not on whether there is any reason to think a negative or positive decision is likely), decisions in the DFT are overwhelmingly to refuse asylum (out of all proportion to the rate of refusal and appeal dismissal outside of this process). Although asylum-seekers are offered free representation in all cases prior to a decision by the UK Border Agency, thereafter a greatly disproportionate number receive no further legal aid representation or advice. In practice, this means that an asylum-seeker in the DFT may*

[24] More information is available at: http://asaproject.org/web/index.php?option=com_content&view=article&id=206:section-4-delay-policy-ruled-unlawful&catid=41:latest-news&Itemid=72

[25] see http://www.detainedlives.org/

[26] Three examples where such a finding has been made are *HA (Nigeria)* [2012] EWHC 979 (Admin), *S* [2011] EWHC 2120 (Admin) and *BA* [2011] EWHC 2748 (Admin).

have seen his or her lawyer for little more than a few hours, and been represented for little more than a couple of days.[27] *The DFT is simply to* (sic) *fast for safe decision-making.*

23. These concerns over the DFT remain. Since 2009, the practice developed whereby individuals were transferred to the DFT (so detained) before the UKBA was in a position to begin the asylum process in the DFT. These asylum-seekers were not allocated a lawyer until the UKBA was ready to start. This meant that many asylum-seekers were being detained, for several days (more than one week), without access to legal advice or representation, and for no other purpose than to wait for the UKBA to start a process that is supposedly predicated on the basis that it can be done quickly. This outrageous situation appears to have ceased. However, the policy position on the DFT has become more confused, and detrimental to asylum-seekers. The policy instruction to those taking decisions on whether someone should be transferred to the DFT states that a quick decision is one that can be made within up to 14 days (with some additional flexibility). The reality is that those transferred are likely to have their decision (to refuse asylum) within 3 days.

24. Concerns as to the use of video link, referred to in the 2009 notes, also remain. However, the more pressing concerning now is that detainees are not getting adequate access to legal advice and representation. There are now specific legal aid contracts permitting legal advisers to undertake work in Immigration Removal Centres. The few legal advisers with such contracts have a near exclusive entitlement to provide legal advice and representation to detainees, and are responsible for holding regularly surgeries for the purpose of this. Concerns include that some detainees are unable to attend surgeries because these may have become full, and that the restriction on legal advisers with detention contracts (to 2 or 3 per

[27] Reports by Bail for Immigration Detainees reveal profound problems with the DFT; and it is revealing that the ILPA best practice giude on DFT (sponsored by the Legal Services Commission) emphasises the need for lawyers to concentrate on getting clients out of the DFT. The ILPA guide is available in the Publications section of our website at www.ilpa.org.uk and the BID reports are available at: http://www.biduk.org/library/publications.htm

Immigration Removal Centre) means that individuals who receive inadequate advice and representation are effectively precluded from seeking to transfer their case to another adviser.[28] The position with the DFT, while slightly different, is similar in that legal advisers are (on legal aid) allocated and only certain legal advisers are permitted to do this work (on legal aid). In DFT cases, somewhere around two-thirds of men and one-third of women are left without representation for their asylum appeal. Note that access to immigration legal advice and representation for those held in prisons is ever more dire.

Removals and judicial review:

25. Since 2009, one of the then current controversies has been (for now) resolved. The UK Border Agency policy whereby in certain cases no notice of a person's removal might be given to him or her (or his or her legal representative) has been found to be unlawful[29], and the policy has been withdrawn.

26. As regards removals, the use of charter flights to return substantial numbers of nationals from a specific country has increased. Countries for which charter flight returns have been used in recent months include Afghanistan, Democratic Republic of Congo, Ethiopia, Ghana, Italy[30], Nigeria, Pakistan, Sri Lanka and Tanzania. The use of restraint, and the conduct, supervision and training of private contractors, in forced returns is also a matter of current concern – particularly following the recent decision that no prosecutions were to follow the death in October 2010.[31]

27. There are other controversies or concerns regarding judicial review following, in 2010, the commencement of transferring certain immigration and asylum related judicial reviews from the High Court to be dealt with in the Upper Tribunal (Immigration and Asylum Chamber). The Crime and

[28] Though note that even in non-detained cases there are restrictions on transferring a legal aid case.
[29] *R (Medical Justice) v SSHD* [2011] EWCA Civ 269; [2010] EWHC 1925 (Admin)
[30] The charter flight to Italy will not have been for the return of Italian nationals, but of safe third country returns where it was said that the asylum-seekers' claims were the responsibility for Italy.
[31] More information is available at: http://www.guardian.co.uk/uk/2012/jul/17/jimmy-mubenga-death-fresh-questions

Courts Bill, currently before Parliament, includes provision to permit the transfer of any such case. This raises several questions, including whether it is appropriate for such cases to be dealt with by the tribunals judiciary (albeit that judiciary necessarily includes the judiciary of the High Court), whether the Upper Tribunal has capacity for this work, and whether the practice and procedure in the tribunals will be appropriate for this work. As to the latter, a concern that ILPA has consistently expressed is that the rules of proceedings in the High Court mean that both sides are represented by solicitors (and generally barristers) and, while far from perfect, the practice, procedure and powers of the court tends to produce greater transparency in exchange and disclosure of evidence and legal argument. It remains unclear what will be the position in the Upper Tribunal if the transfer of immigration and asylum judicial reviews were to become the norm.[32]

Document-related and other prosecutions:

28. The 2009 notes referred to concerns around the prosecution of asylum-seekers for presenting false documents or failing to produce valid documents when passing through UK immigration controls. These concerns remain, but there is little collated data to identify the scale of such prosecutions. Similar concerns relate to section 35 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which permits prosecution (with a maximum 2 years sentence) for failure to comply with instructions or requests for information for the purpose of facilitating a person's removal from the UK. From time to time, there are reports of threats of such prosecution by the UK Border Agency, but there is a dearth of information relating to the making of such threats (or the pursuit of prosecutions).

Legal Aid:

29. In 2009, the notes said:

[32] ILPA's briefing relating to the relevant amendment to the Crime and Courts Bill is available at: http://www.ilpa.org.uk/data/resources/14902/12.06.21-Transfer-of-JR-G-amendment-135.pdf

The Legal Services Commission (LSC) is in the midst of making radical changes to the way in which legal aid is provided in the UK.

30. While those changes had a substantial impact, even grater changes have happened and are now being pursued. In 2010, Refugee and Migrant Justice (formerly the Refugee Legal Centre) closed. The following year, the Immigration and Advisory Service followed. There have been profound problems for some seeking to retrieve files held by these organisations. The pressure on legal aid provision (and legal advice generally) has been considerable, and this was increased by the blanket reduction in legal aid rates by 10% in 2011.

31. However, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will make even more devastating changes in April 2013. From that time, many areas of law for which legal aid is available will cease to qualify for legal aid (or its provision will be severely restricted). Immigration and asylum is affected. From April 2013, legal aid will generally cease to be available for non-asylum immigration claims or appeals. This will have a huge impact for many migrants and their families. However, it will have substantial effects for asylum-seekers, e.g.:

- Those asylum-seekers who are refused asylum but who may have good non-asylum immigration claims to pursue will be without legal aid – and therefore may be without any legal advice or representation.
- There will be far fewer legal aid contracts available to immigration legal advisers, and there will be less opportunity to manage the financial insecurity of legal aid contractual arrangements by way of balancing legal aid work in immigration and asylum – with potential consequences for both quality and accessibility of legal advice for asylum-seekers.
- There is the risk that asylum claims are increased because those who currently may not need and may choose not to make an

asylum claim, because some alternative immigration option suffices in their case, may in future choose to claim asylum influenced by the availability of legal aid – thus creating greater pressure on the asylum system.

Appeals and judicial review:

32. With the creation of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal, replacing the Asylum and Immigration Tribunal in 2010, there have been two new restrictions on challenges to the decisions in asylum (and other immigration) appeals.

- In the past, when the equivalent of what is now the First-tier Tribunal made an initial decision on an appeal, the losing party could seek permission to appeal to the equivalent of what is now the Upper Tribunal.[33] This has not changed. However, where permission to appeal is refused by the Upper Tribunal, although it remains possible to seek judicial review of that refusal, the Supreme Court has ruled that such a judicial review challenge will only succeed where it raises some important point of principal or practice or some other compelling reason.[34] It is no longer enough, therefore, to persuade the High Court judge that there is an arguable error of law in the First-tier Tribunal's decision, which if rectified could alter the outcome of the appeal.
- In the past, when the equivalent of what is now the Upper Tribunal decided an appeal against the decision of the equivalent of what is now the First-tier Tribunal, the losing party could seek permission to appeal against the Upper Tribunal to the Court of Appeal. This also has not changed. However, the Court of Appeal now applies what is known as the 'second-tier appeals test', which is essentially the test applied by the Supreme Court to judicial review of the Upper Tribunal (see previous bullet).[35] Thus, the Court of Appeal will only entertain an appeal where it raises some important point

[33] The precise process and terminology has changed over time, but it is unnecessary to consider the technical differences between appeals, reviews and reconsiderations in the tribunal system.
[34] *Cart & Anor v The Upper Tribunal* [2011] UKSC 28
[35] *PR (Sri Lanka) & Ors* [2011] EWCA Civ 988; *JD (Congo) & Ors* [2012] EWCA Civ 327

of principal or practice or some other compelling reason. It is no longer enough, therefore, to persuade the Court of Appeal that there is an arguable error of law in the decision of the Upper Tribunal, which if rectified could alter the outcome of the appeal.

33. The statutory appeals system for immigration and asylum cases remains very complex, and there have been several rulings by the Court of Appeal in recent months drawing attention to its complexity.[36] Where in future legal aid is no longer available, it may be expected that individuals will either not understand they have an appeal right or find themselves unable to pursue such a right effectively. The UK Border Agency can, however, be expected to be represented at all levels of the appeal system[37], including in particular in higher appeals before the Upper Tribunal, Court of Appeal and Supreme Court – including where it is appealing against a decision to allow someone's appeal, and that person had no and continues to have no legal representation.

Settlement and citizenship:

34. The changes to how naturalisation in the UK works, to which reference was made in the 2009 notes, were abandoned by the incoming Government in 2010. The current position, therefore, remains that a refugee (or person granted humanitarian protection) can apply for indefinite leave to remain (settlement) after completing 5 years of refugee leave, and usually after a further year may seek to naturalise. However, there are two compelling controversies now surrounding settlement and citizenship for refugees:

- The Home Secretary has stripped some refugees of their indefinite leave to remain while they are outside the UK, and in doing so argued that they cannot return to the UK in order to appeal against her decision. This was e.g. done in the case of *MK (Tunisia)* where he had been extradited to Italy on terrorism charges of

[36] Some information regarding the complexity in the area of immigration (including appeals) is given by the ILPA short briefing at: http://www.ilpa.org.uk/data/resources/14300/12.03.05-ILPA-complexity-briefing-note.pdf

[37] Though note that there continue to be complaints at the UK Border Agency's failing to provide representation at all initial appeals.

which he was acquitted. Before he could return to the UK, the Home Secretary stripped him of his indefinite leave to remain and left him facing removal from Italy to Tunisia, the country in which he had been found to be at risk of persecution. The courts ruled that the Home Secretary was required to permit an opportunity for his return to the UK to pursue an appeal against her decision.[38] Following the courts' ruling, the Government has included provision in the Crime and Courts Bill currently before the House of Lords so as to amend the law to allow the Home Secretary to exclude someone from returning to the UK in a situation such as that of MK.

- In another case the Home Secretary has stripped someone of their British citizenship in circumstances similar to her stripping MK of his indefinite leave to remain. The courts have ruled that in such a case there is nothing to prevent the person's exclusion from the UK and that any appeal against the decision to strip the person of citizenship can be conducted from outside the UK.[39]
- Another controversial issue has recently been the refusal by the Home Secretary to give full or any reasons for her decision to refuse naturalisation on the grounds that she says a person is not of good character. The High Court has indicated that, where the Home Secretary asserts that a person is not of good character on the basis of evidence that she says cannot be disclosed for e.g. reasons of national security, there may be little that the applicant can do to effectively challenge such a decision.[40] The Justice and Security Bill, currently before the House of Lords, would permit such cases to be brought before the Special Immigration Appeals Commission in a process by which the Commission could consider the evidence the Home Secretary refuses to disclose, but

[38] *MK (Tunisia) v SSHD* [2011] EWCA Civ 333
[39] *GI v SSHD* [2012] EWCA Civ 867
[40] *AHK v SSHD* [2012] EWHC 1117 (Admin)

in which the applicant and his or her lawyers could not see this evidence.[41]

Backlogs and delays:

35. The legacy backlog was discussed in the 2009 notes. The backlog was to be cleared by July 2011. It has not been cleared. There is a new unit at the UK Border Agency called the Case Assurance and Audit Unit. This now deals with the legacy backlog, which still contains 10,000's of cases. Many of those cases are of people who have remained in contact with the UK Border Agency and legal representatives, continued to report and have at the request of what was the Case Resolution Directorate submitted passport-size photographs and other information during the 5 years period that was supposed to conclude the legacy backlog.

36. To add insult to injury, in the early part of 2011, the UK Border Agency changed its practice when making grants of leave in legacy cases. Before that time, the Case Resolution Directorate had, generally when making a grant of leave, granted indefinite leave to remain. This changed to generally, when deciding to grant leave in a legacy case, making a grant of 3 years discretionary leave to remain. Those granted only 3 years discretionary leave must apply for a further 3 years (and so accumulate 6 years discretionary leave) before they may apply for indefinite leave to remain.

37. A further difficulty facing those still in the legacy backlog is the process by which any fresh asylum or human rights claim is required to be submitted. This requires an appointment to attend Liverpool, for which no travel expenses are available. At Liverpool (the Further Submissions Unit), some asylum-seekers have been turned away because the UK Border Agency says that it is unable to communicate effectively with them, and it needs to check that what they are submitting does constitute a

[41] Further information about this matter and what are called closed material procedures, particularly in the Special Immigration Appeals Commission is available from the ILPA briefing at: http://www.ilpa.org.uk/data/resources/14991/12.07.09-HL-Committee-briefing-with-Proposed-Amendments.pdf

fresh claim. This process appears designed simply to deter people from making fresh claims.

38. There are several outstanding judicial review challenges to the way by which legacy cases are currently being dealt with. An important case is expected to be heard later in the year as to the change of practice to grant only 3 years discretionary leave. As to when the legacy backlog will ever be concluded, this is uncertain. The Case Assurance and Audit Unit have indicated a target of dealing with this backlog by the end of 2013. However, even then – which will be 7½ years after the commitment to clear the legacy was made, and 2½ years after it was to have been concluded – it is anticipated that there may be some remaining cases.

Changes to Immigration Rules (and approach to Article 8):

39. The recent changes to the immigration rules and in policy concerning Article 8 claims will likely affect some asylum-seekers. The Government has sought to constrain the decision-making of tribunals and courts in relation to Article 8 claims on the basis that the changes to the immigration rules are intended to fully set out the circumstances in which it will or will not be proportionate to interfere with a person's private and/or family life for the purpose of immigration control. The new rules seek to reduce what the courts have long described as a "*difficult evaluative exercise*"[42] to consideration of little more than the length of time a person has lived in the UK. Such an approach leaves no real room for consideration of the particular relationships or needs of any individual, including the interests of children, and it is to be hoped will swiftly be ruled to be ineffective or unlawful – hence requiring continued individual consideration of the private and/or family life and the relative weight of the individual/individuals' interests and wider public interests in each case.

40. However, the harshness of the new approach is not limited to the way by which the immigration rules seek to restrict the consideration of Article 8. Previously, where a claim succeeded on Article 8 grounds, the usual result

[42] e.g. *EB (Kosovo)* [2008] UKHL 41

was a grant of 3 years discretionary leave, following which a further 3 years could be applied for and then, after 6 years, and application for indefinite leave to remain could be made. The new approach is to grant 2½ years limited leave to remain. Extensions may be applied for, but only after 10 years may indefinite leave to remain. Critically, and unlike the previous 6 years period, during this 10 years the person is to have no recourse to public funds.

Conclusion:

41. While the UK Border Agency has in recent years expressed a greater willingness to seek to consider the scepticism with which it has generally approached asylum-seekers and their claims, and some steps have been taken to seek to improve the quality of decision-making[43], it is yet unclear that there is a willingness or capacity to overcome longstanding and profound scepticism as regards asylum-seekers and migrants generally. Much of the focus of the UK Border Agency and Home Office policy development has been on immigration other than asylum, but the focus tends to be on enforcement and numbers. Such a focus is unlikely to shift scepticism in this area.

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[43] The UK Border Agency has improved some of its country policies over recent months, and has made efforts to devise means audit the quality of its decision-making.

Related ILPA information sheets:

These are available in the Info Service section of the ILPA website at http://www.ilpa.org.uk/pages/ilpa-information-service-further-information-sheets.html
The list here is not intended as comprehensive; and the information contained in these information sheets must be treated with some caution, especially in relation to the passage of time, since developments in law and practice may in the area of asylum take place frequently and rapidly.

Age Disputes (Dental X-Rays)
Age Disputes & Age Assessments 4
Age Disputes & Detention 2
Appeals – 'the second-tier appeals test'
Article 8 – No. 2
Children Best Interests (information sheets 1 & 2)
Crime and Courts Bill
Deportation
Detained Fast Track
Detention 2
Discretionary Leave & Separated Children
Family Tracing
Immigration Advisory Service (IAS) client files
Justice and Security Bill
Legal Aid Bill (information sheets 1 to 7)
Long Residence Rules 2
MK (Tunisia) Judgment
Removals and Judicial Review 4
Safe Third Country (Dublin) Returns
UKBA Family Returns