IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
RESPONSE TO INQUIRY INTO
ASYLUM AND IMMIGRATION APPEALS:
CALL FOR EVIDENCE BY
THE COMMITTEE ON THE LORD CHANCELLOR'S DEPARTMENT

ILPA responds to the issues for inquiry as follows:

1. *The extent to which recent reforms have produced any significant efficiency savings and/or improved the quality of the appeals process*

   - As the Committee will be aware, the new appeals provisions are contained in Part 5 of the Nationality, Immigration and Asylum Act 2002. Under commencement provisions, the majority of the new appeals provisions apply to cases where the primary Home Office/Immigration Service/Entry Clearance Officer's decision has been made on or after 1 April 2003 [see The Nationality, Immigration and Asylum Act 2002 (Commencement No 4) Order 2003]. Thus, the new provisions are not effective at the moment: the Immigration Appellate Authority is still dealing with cases where the primary decision pre-dates 1 April 2003. Consequently, it is currently impossible to measure the effectiveness of Part 5 of the 2002 Act.

2. *The costs to public funds of supporting the new appeals structures, such as the Asylum Support Adjudicators, and of supporting the extension of legal aid*

   - ILPA has no expertise on purely budgetary issues. However, we see absolutely no reason why the new appeals provisions should increase the costs of an average appeal before the Immigration Appellate Authority or the Asylum Support Adjudicators. It is imperative that adjudicators fully understand the new appeals provisions, so as to reduce the risk that they make legal errors that need to be corrected on appeal to the Immigration Appeal Tribunal or on judicial review, which would increase the costs of an individual case.

3. *The extent to which the Immigration Appellate Authority could be made more efficient, without sacrificing fairness*

   - ILPA does not accept that the IAA provides an inefficient system. We believe that IAA staff work hard and diligently. In our experience, the majority of cases are listed and disposed of within a reasonable time of the IAA being seised of the appeal. Procedure Rules lay down constraints on an adjudicator's powers to adjourn a case. We believe that adjudicators ought to be trusted as being able to ensure the expeditious progress of appeals.

   - We are concerned that measures to increase the IAA's efficiency should turn out in fact to be measures to promote the speedy removal of asylum

seekers from the UK, currently a burning policy issue. It is not the role of the IAA to promote or concern itself with removal of asylum seekers from the UK. The IAA is a judicial body and should exercise judicial independence. It must not concern itself with policy issues which are the domain of the executive branch of government.

- We are concerned that the IAA should not equate efficient proceedings with speedy proceedings. Several current practices appear to put the emphasis on completion of appeal proceedings in as short a time as possible. For example:

  - Overlisting of cases: ILPA members regularly appear in immigration courtrooms where as many as four substantive appeals are listed for hearing in one day. On the one hand, from the perspective of the IAA, the listing of large numbers of cases may be the most efficient way of getting cases through the system. On the other hand, it is clearly impossible for an adjudicator to hear four appeals and so cases are regularly adjourned for lack of time. It is a waste of time and money for an appellant to attend court only for his/her case to be adjourned for lack of court time. Overlisting represents a partial and narrow approach to efficiency. It fails to take account of other factors, such as wasted costs, which are relevant to the overall efficiency of the appeals system for the public purse.

- ILPA strongly supports an efficient appeals system. In particular, it is in the interests of refugees to have their status determined as expeditiously as possible so that they can begin the difficult task of integration into our society. However, efficiency must not be at the expense of fairness. The Committee will agree that our justice system has traditionally upheld the highest standards of fairness and justice. Asylum seekers and other migrants must be seen worthy of the same standards as any other person in our society.

4. *Whether the relevant procedure rules properly balance fairness and justice with efficiency*

- ILPA has grave concerns that procedure rules are increasingly a vehicle for speedy disposal of appeals rather than for fair hearing. We are not saying that the majority of asylum seekers and other migrants do not at present receive a fair hearing. We are saying that recent procedure rules appear to chip away at fairness and justice. Yet, standards of fairness and justice must be retained by the judiciary, notwithstanding pressure from the executive branch of government to remove failed asylum seekers from the UK.

  We set out two recent examples where fairness, or the perception of the IAA's independence, appear to be secondary to Home Office asylum policy for speedy removal of asylum seekers:

♦ *The Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003*

The new fast track appeals system came into effect on 10 April 2003. It applies potentially to all asylum claimants from a range of countries including Sri Lanka and Turkey. Fast track claimants will be detained at Harmondsworth. The current timetable for processing fast track cases is about 19 days from the claimant's arrival at Harmondsworth to exhaustion of IAA appeal rights. We wish to make the following comments, concentrating on the IAA's role in the fast track system, which is governed by the Fast Track Procedure Rules:

- There was no consultation on the fast track procedure or on the accompanying procedure rules. ILPA became aware of the system in piecemeal fashion, so that we were unable to advise our members about this potentially far-reaching development. As a major stakeholder, we were surprised not to be consulted. It is ultimately inefficient for the Government to fail to keep major stakeholders informed of important developments. By preventing dissemination of information and by hindering stakeholders' ability to prepare properly for change, the prospects of a smooth and efficient change-over to the new scheme are reduced.
- The Immigration and Asylum Appeals (Fast Track Procedure) Rules were initially very difficult to access on the internet. At a briefing meeting organised by the Legal Services Commission on the fast track scheme on 3 April 2003, a representative of the LCD apologised that the route to the Rules on the internet hindered simple access. He stated that the LCD would take steps to make the Rules easier to find on the internet. ILPA believes that the interests of open justice are not served if procedure rules are introduced at short notice and even after that are difficult to find on the internet. We add that the Immigration and Asylum Appeals (Procedure) Rules 2003 were also extremely difficult to find on the internet until very close before they came into force.
- The only plausible motivation for having fast track appeals must be to aid the speedy removal of failed asylum seekers from the UK. The fast track appeals rules make sense from no other point of view. Aiding the removal of asylum seekers from the UK is not a legitimate objective of an independent immigration judiciary. It is constitutionally dubious for the LCD, which is the guardian of the judiciary, to design procedures geared towards implementation of the executive's policy on asylum seekers. It is impossible for the judiciary to appear even-handed between the parties if the LCD appears to have become entangled in Home Office policy issues.
- The fast track scheme appears to have been the result of co-operation between the Home Office, the LCD and the Legal Services Commission. We suggest that co-operation of this sort has serious constitutional ramifications, for the sorts of reasons set out above. It does nothing to promote the appearance of separation of powers.
- The Legal Services Commission has set up a duty scheme for solicitors to represent persons who are processed through the fast track. We understand that the LSC will contact an approved solicitor directly and

allocate a fast track case to him/her. We have reservations about the propriety of the LSC, as a funding body, getting involved in allocation of solicitors to clients.

- The quality of legal representation is highly likely to suffer under the fast track scheme. Only two days are allowed for submission of grounds of appeal to an adjudicator. Giving notice of appeal is a serious matter and requires care and attention. The hearing must be listed within a further four days. By that time, a solicitor will be expected to have all documents for the case, including medical or other experts' reports and to have found and instructed counsel. This amounts to a great deal of work. We query whether such work can be done to the sort of standard which serves clients' interests and indeed the public interest. We are concerned that experienced and skilled solicitors and counsel will simply be unable to work to these sorts of timetables: please see also response to question 5 below.
- The countries on the fast track list do not always yield simple cases. For example, ILPA members regularly represent both Sri Lankan Tamils and Turkish Kurds who are victims of torture and who suffer post-traumatic stress disorder. The added complexities which these cases raise make us very doubtful that they can receive a just and fair hearing within the fast track timetable.

♦ *Applications for extension of time to appeal to an adjudicator: Immigration and Asylum Appeals (Procedure) Rules 2003 paragraph 10*

Under the new Procedure Rules, an adjudicator must decide whether to extend time for appealing without an oral hearing. In determining an application to extend time, an adjudicator will consider any explanation from the appellant about why notice of appeal was late. It is doubtful that an adjudicator can properly assess the credibility of the appellant's account of events without an oral hearing. We believe that it is unsafe and unfair for a party to be deprived of an appeal right, without any opportunity to put his case for extension of time at an oral hearing.

In our experience, the IAA is not swamped with applications for an extension of time: oral hearings on this issue do not take up a disproportionate amount of adjudicators' time.

We note that the draft rule contained provision for an adjudicator to fix a hearing in exceptional cases if the interests of justice required it. This provision was removed from the final rule. Yet, adjudicators ought to be trusted to exercise discretion to fix an oral hearing wisely: there is no reason to suppose that, if given such a power, adjudicators will exercise it in a way which slows down the proper consideration of appeals.

Furthermore, determination of the timeliness of an appeal is a serious and substantial issue. It is not in the interests of open, public justice for it to be determined other than by way of an open hearing.

We draw attention to the Council on Tribunals *Model Rules of Procedure for Tribunals*, consultative draft, January 2003, rule 29(3):

"The Tribunal may decide the question, and also dispose of the case, without an oral hearing, but, in each case only if-

(a) the parties so agree in writing,
(b) the Tribunal has considered any representations made by them, and
(c) there is no important public interest consideration that requires a hearing in public".

We also direct attention to the Council on Tribunal's notes to rule 69 of its draft model rules:

" 'Publicity of proceedings' (together with 'knowledge of the essential reasoning underlying the decisions') was regarded by the Franks Committee as a requirement of openness - one of the three basic characteristics which tribunals should exhibit…'Publicity keeps the judge himself while trying under trial': Bentham."

We submit that costs and administrative convenience should not prevail over public scrutiny of the administration of justice. Nor do we see that this rule will assist in the objective of ensuring that asylum and other applications are processed as swiftly as possible. It represents an unnecessary interlocutory stage in the process. Further, the question whether time ought to be extended should be judged in the context of the merits of the case. We would recommend the approach adopted in other tribunals, namely that the question of whether an appeal is in time should be taken at the main hearing.

5. *Whether there is sufficient availability and provision both of legal advice and representation and of interpretation facilities for appellants in asylum and immigration cases*

- ILPA is concerned about the shortage of quality legal representation for asylum seekers and migrants, especially outside London and the south east.

- Many of our members are severely stretched and run to full capacity almost all the time. They work long hours, often for comparatively little reward. There is generally a feeling of crisis about the future.

- We suggest that there are a number of serious disincentives for solicitors' firms to start up or expand their immigration departments:

  - Constant changes in immigration law and practice
  - The feeling that the future of public funding is precarious
  - The administrative and other complexities of funding by way of Controlled Legal Representation
  - Tight deadlines eg 10 working days to file grounds of appeal to the Immigration Appeal Tribunal
  - Large amounts of non-billable work eg researching country information on the internet and preparation of Bundles

- Increased workloads as a consequence of the increasing formality of IAA proceedings, which are now barely distinguishable from proceedings in the ordinary courts.

♦ Our members outside London may experience difficulties in obtaining a suitable interpreter. There is not a notable problem in London. We stress the value of solicitors using professional, qualified interpreters as adding efficiency to the overall progress of an asylum appeal. Non-professional interpreters may be unscrupulous, because they are concerned to make as much money as possible from asylum seekers. Non-professional interpreters have less skill and make mistakes of interpretation which are then costly to rectify. Professional interpreters perform a skilled and valuable job.

6. The extent to which non-suspensive appeals provide an adequate right of appeal

♦ During the passage of the Bill, ILPA consistently and strongly opposed the introduction of non-suspensive appeals. We supported the speeches of Lord Lester of Herne Hill QC, Lord Goodhart QC, Lord Archer of Sandwell QC, Lord Mayhew of Twisden QC and Lord Judd. We refer the Committee to the speeches of their Lordships on this issue at Committee, Report and Third Reading.

♦ There must be the risk that a person appealing abroad, from the country of feared persecution, will be unable to give proper instructions to an English solicitor. This would prevent an appeal from being prepared as thoroughly and effectively as in other cases. The practical obstacles are obvious and serious. The utmost scrutiny should be applied to Home Office decisions to add to the list of countries that can yield non-suspensive appeals.

♦ We suggest that there have so far been too few non-suspensive appeals for any conclusions to be drawn about the efficacy of this new regime. There have certainly been too few appeals to conclude that the risk of refoulement of refugees is minimal.

ILPA, April 2003