IMMIGRATION LAW PRACTITIONERS' ASSOCATION'S RESPONSE TO LCD CONSULTATION PAPER CPL 01/03 ON IMMIGRATION AND ASYLUM APPEALS (PROCEDURE) RULES 2003

QUESTION 1

The new numbering system will be difficult to type and to remember. We would like the previous numbering system to be preserved.

QUESTION 2

We have concerns about the transparency of rule 3.13: see question 9.

QUESTION 3

We are generally satisfied with the definition section. However:

- We do not see a need for "filing" to have a place in rule 1.1(2), because rule 6.17(1) amounts in effect to a definition of "filing".

- In any event, the definition of "filing" in rule 1.1(2) makes reference only to "delivering" and makes no reference to "sending". It cannot be the drafting intention to require parties to deliver all documents to the IAA: this would preclude sending documents by fax or email, as envisaged in rule 6.17(1).

- We suggest that the first part of the definition of "relevant decision" should read "an immigration decision under section 82(2) of the 2002 Act". We assume that this is the drafting intention.

- We suggest that it would be useful to give a definition in rule 1.1(2) of "cross-appeal" as used in rule 3.6(1)(a). Given that cross-appeal represents a new process in immigration appeals, the scope for confusion (and consequent litigation) will be reduced by a definition. We suggest that a similar form of wording could be used as is contained in the section on respondent's notice in Part 52 of the Civil Procedure Rules.

QUESTION 4 *THIS IS AN ILPA PRIORITY*

We are opposed to the reduction in the time limit for appealing in detained cases:

- Our concern is that the speed of the decision-making process for detained persons undermines their ability to get competent and effective legal advice, prepare and present their applications in an informed and proper fashion, and get representation for an appeal.

- Giving notice of appeal is a serious matter: any grounds advanced can only be varied with permission; the contents of the notice of appeal must be explained to the appellant who must agree to it (rule 2.3(4)). Clear, full and effective communication between representative and appellant is plainly necessary at this stage of proceedings, even in those cases where the appellant has already had a representative assisting with an asylum claim or other immigration application. Many of those affected will need an interpreter. A visit to the Detention Centre to take instructions on the reasons for refusal will almost certainly be required. These matters take time to arrange.

- It would be wholly wrong to assume that detained cases are inherently less meritorious than others. Research by Amnesty International in 1996 (“Cell Culture” AI (UK)) showed that there is no necessary correlation between being detained and the underlying merits of a case. Plainly detained cases both require and are entitled to as much scrutiny as cases where the appellant is at liberty and detainees need equally high quality representation. A reduced time limit provides a grave obstacle to such needs and entitlements.

- The proposed change also coincides with an increase in the number of persons detained. This will put a further strain on limited legal advice and representation resources, which will be stretched even more if notice of appeal has to be lodged in 5 days. We believe the result will be a diminution in the quality of advice and representation provided for detained appellants.

- While we appreciate the need to keep the period of detention to the minimum we consider reduction in the time limit for appealing cannot achieve this consistently with the overriding objectives of justice and effectiveness. Appeals getting off on the wrong footing, with appellants being inadequately advised at that stage, only prolongs litigation.

QUESTION 5

Rule 2.5 *THIS IS AN ILPA PRIORITY*

ILPA strongly opposes the changes that rule 2.5 seeks to bring about. We are concerned that the rule places speed over substantive fairness:

- **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.

- **Open justice:** 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.

- **Requirement to state reasons for lateness in notice of appeal:** At present, an appellant is always informed that there is an out of time allegation and therefore always has an opportunity to respond (paragraph 12(1)(b) of the 2000 Procedure Rules). By contrast, rule 2.5(1) would cover cases where the appellant/representative does not actually know that the appeal notice is given out of time (eg it's posted in time but delivered out of time). This means that when the adjudicator considers the issue of time, he/she may well have no explanation for the late appeal, which may then in effect be summarily determined against the appellant.

- It is unclear from rule 2.5 whether the respondent is under a duty to send the documents mentioned in rule 2.5(2)(b) to the appellant at all. Thus, the appellant may be unaware that the adjudicator will determine timeliness of the appeal as a preliminary issue.

- If an appellant gives notice personally and does not appreciate that the application is out of time, no information will be given as to why the appeal is out of time and the appeal may then in effect be summarily dismissed without consideration of the merits.

- **Documents on which decision will be made:** From our experience, we doubt that the materials referred to in rule 2.5(6) will ordinarily be enough to determine whether the interests of justice require the appeal to be allowed to proceed out of time. As at present, an appellant may wish to rely on documentary evidence, either to show that the appeal notice was in time, or to show that there are mitigating or extenuating circumstances for its lateness. Some of these documents may, for understandable reasons, not be available when the notice of appeal is given.

- The notice of appeal is not obviously the place to exhibit any form of substantial documentary evidence: it is a place to set out grounds of appeal and it is trite that grounds of appeal are part of the pleadings, not evidence. It is doubtful that rule 2.3 contemplates submission of substantial documentary evidence as part of the notice of appeal.

- **Constraining adjudicator's discretion:** In any event, there is no good reason to constrain an adjudicator's discretion to consider all relevant evidence, as submitted by either party. It is potentially unjust to prevent an appellant from relying on relevant evidence that arises after service of the notice of appeal.

- **Respondent's error:** As the draft currently reads, an adjudicator would have no duty to consider documents that the respondent ought to file under rule 2.5(2) but does not file, by oversight or other error. The rule does not enable the appellant to send to the IAA any documents that the respondent omits to send to the IAA.

- **Ensuring the overriding objective:** We do not 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.

- We do not believe that rule 2.5(5) provides sufficient safeguards against the dangers outlined above: rule 2.5(5) is limited to exceptional cases only.

Rule 2.6

In our experience, this kind of preliminary issue is very rare. In the circumstances, we see no good policy reason to change the procedure. In particular:

- The three-day time limit in para 2.62.6(3) is draconian and impracticable. Some issues as to jurisdiction may well be straightforward, but others will include complicated issues of statutory construction. The litigation last year about whether removal directions trigger a human rights appeal is an example. In such cases, solicitors may want counsel to draft the written statement. We think that ten days represents a preferable time limit.

QUESTION 6

As we made clear in our briefings on the Bill, ILPA objects to the principle of closure dates. Closure dates may not allow enough flexibility to deal with the different situations that may arise in the course of proceedings. Adjournments can only be given in any event where it is necessary to do justice. This is sufficient safeguard against unwarranted prolonging of cases. In addition:

- It is noticeable that rule 2.9 does not permit any flexibility for an adjudicator to extend the closure date where the interests of justice require a further adjournment.

- The concept of a closure date is particular inapt where issues of expert evidence may be involved. In particular, questions of the proper provision of medical evidence to an adjudicator are not addressed sufficiently by the current drafting of the rule. As a result of the small number of specialists in the medical effects of torture and in particular the small number of psychiatrists available to give proper medical reports, it is inevitable that delays of upwards of 6 weeks will occur in order to obtain the relevant medical evidence. If the rule is to be introduced we suggest that the appropriate time limit should be 12 weeks as there is greater prospect of being able to ensure that a medical report can be obtained from a reputable specialist in that time.

QUESTION 7

ILPA has no strong view on the issues raised in this question.

QUESTION 8

We have concerns that the test of "no merit" is not further defined in the Rules:

- It would be clearly draconian if certificates were to be used in every case in which permission is refused. An application or appeal that is refused does not mean that the application was not properly brought. The ultimate merits of a case can often only be determined after the event, eg where the witnesses turn out to be hopeless. It cannot be right that the IAT has power effectively to penalise the representative for bringing an appeal that appeared meritorious but went wrong.

- We suggest that the test for certification should be vexatious or unreasonable conduct (cf Council on Tribunals *Model Rules of Procedure for Tribunals*, consultative draft, January 2003, rule 81).

- We are also concerned that the rule gives power to the IAT (on a permission application) to determine that the appeal to the adjudicator had no merit. We do not think that it is fair for the Tribunal to do this on a permission application, which is determined on the papers only, so that legal representatives will not have an opportunity to make representations against the making of a certificate.

- The rule appears to assume that all cases are legally aided, as service of the certificate on the LSC is required in all cases deemed to be without merit. It goes without saying that the Home Office is not legally aided. Thus, the rule gives the impression that it is intended to penalise asylum seekers' representatives, rather than the Home Office's representatives. This is inconsistent with the principles of fairness whereby parties should be treated on an equal footing in procedural matters (cf Council on Tribunals *Model Rules of Procedure for Tribunals*, consultative draft, January 2003, rule 2(2)(c)). It is very unclear whether the rule lays down any sanction against the Home Office for unreasonably resisting an appeal to an adjudicator or unreasonably pursuing an appeal to the Tribunal.

- The rule does not entitle a person to make representations against a certificate before it is issued. Given the potentially serious consequences of a certificate, we believe that this is procedurally unfair.

QUESTION 9

We do not think that rule 3.13 sets out a clear of fair framework for determining costs of statutory review:

- The statutory review Judge is in the best position to make an award of costs in statutory review proceedings, not the Tribunal.

- The Tribunal does not have the structures or personnel to undertake taxation of High Court costs. These structures already exist in the High Court. It would be costly and a drain on Tribunal resources to establish these structures in the Tribunal.
- The costs regime in Parts 43, 44, 47 and 48 of the Civil Procedure Rules is complex and is not obviously suited to the Tribunal, which is and ought to remain a comparatively informal forum.
- The rule lacks transparency: it is not at all clear how the proposed modifications to the CPR would work.
- We note that the Council on Tribunals contemplates assessment of tribunal costs in the County Court (Council on Tribunals *Model Rules of Procedure for Tribunals*, consultative draft, January 2003, rule 81(4)). We agree that costs in the IAA are best assessed by a court with special expertise and structures for taxation of costs.

QUESTION 10

There should be scope for making an out of time application for permission to appeal in exceptional circumstances. This might prevent the necessity of an application having to be made directly to the Court of Appeal, which is a much more costly procedure.

QUESTION 11

As you will be aware, article 5 of the ECHR requires detained persons to have access to an independent review of detention. We are concerned that lack of availability of a prescribed form should not be an unreasonable obstacle to a bail application being commenced so that the merits of detention can be reviewed promptly.

A further concern arises from the information required by rule 5.2(2), which we consider to be more detailed than strictly necessary. Some of the information may not be readily available. Even some appellants will genuinely not be aware of the date of

arrival in the UK, eg where they have travelled in an enclosed lorry over many days. Problems in providing an address in advance should not be a bar to a bail. The NASS will often not provide an address in advance, but will do so, if bail or release is authorised.

The use of the word "must" (rule 5.2(2)) might be taken as meaning that no proper application has been made if all the information is not provided. This would be wrong. Access to bail applications should not depend on technicalities such as whether a form has been completed fully. The rules should reflect this.

The requirement for "grounds" to be provided for the application is peculiar (although we are aware it is something that has been required on forms in the past): the starting point in bail applications should be that the detained person is entitled to be at liberty unless there are sufficient and proper grounds for detention.

QUESTION 12

We do not believe the form should call for any more information. If anything, too much information is required (see above). Obviously there is more information needed "to determine the application", such as the Home Office objections to bail, if any. However the application form is not the place for this.

We have other concerns about the proposed procedure. We welcome the requirement on the HO to provide a written statement of reasons for opposing bail. However there appears to be no sanction for non-compliance. We suggest that unless there are exceptional circumstances the HO should be barred from relying on reasons not advanced by way of written summary. Where detention is authorised then consideration should have already been given to the detainee's individual circumstances and the reasons for detention recorded. It should therefore be a straightforward matter to provide written objections to bail.

The rules should also make it clear that the written statement should be served on the appellant (or representative if he/ she has one).

Under current procedures, adjudicators sometimes require the depositing of the recognizance with the appellant's solicitors. This is highly unsatisfactory and can give rise to a conflict of interest. The Court Service has recently instructed all Justices' Chief Executives to ensure "that the practise (sic) of some courts of allowing bail securities to be held by the Defendant's Solicitor, irrespective of value, ceases with immediate effect" (audit bulletin number 10, 28 October 2002). The new procedure rules should make it clear that this practice is not permitted.

QUESTION 13

This part of the Rules is reasonably clear. We have some concerns about the fairness of rule 6.8(1)(d), which permits the appellate authorities to determine an appeal without a hearing whether or not the parties to the appeal agree. Although the appellate authorities must seek the views of the parties, there is no requirement that the appellate authorities are in any way bound by those views.

QUESTION 14

Proposal for a new rule on expert evidence

We believe that procedure rules could usefully deal with the content and format of any expert evidence to be adduced by either party. There is currently a dearth of guidance about how experts in immigration cases should set out their reports and what their reports should contain. There is no coherent body of Tribunal case law on these kinds of issues and, in any event, the case law dealing with experts' report is subject to rapid change. We believe that parties would be assisted by a clear and certain framework in which to invite experts to give their opinions. Procedure rules would steer parties in the right direction and would give parties the assurance that they have adduced expert evidence in a way that can satisfy an adjudicator or the Tribunal.

It is notable that the Civil Procedure Rules contain plenty of guidance about expert evidence - both in Part 35 and in the accompanying Practice Direction. We believe that many aspects of Part 35 and the Practice Direction could be modified so as to

apply to immigration cases. We also draw your attention to the Council on Tribunals *Model Rules of Procedure for Tribunals*, consultative draft, January 2003, rules 57 and 58, which would be apposite in immigration cases.

OTHER COMMENTS

a) Rules 2.3(2) and 3.3(2): We are concerned, with respect, about the frankly facile requirement to give clear legible and concise reasons in support of grounds of appeal. This sort of language is more suitable for a practice direction. As it stands, the requirement goes to whether a valid appeal has been brought. It is unduly draconian that an appeal be ruled invalid on the ground that the grounds/reasons are unduly prolix or because some words are not legible.

b) Rules 2.3(4), 3.3(5) and 4.2(4): The requirement that a representative explain grounds of appeal to a client is impracticable and onerous in the short time limits for lodging appeals. It is unnecessary and will at times be pointless: a client may be unable to understand grounds of appeal, which ought to be a legal document containing legal arguments. There is no good reason why a client cannot delegate the submission of grounds of appeal to a lawyer: this is arguably part and parcel of a lawyer's retainer. A duty to explain the grounds will add to legal aid costs with no clear benefit to any party or to the IAA. It will prevent a representative from lodging protective grounds in cases where it has been impracticable to make contact with the client (eg the client is in hospital).

c) Rule 3.8(2): This rule sets down a new requirement that the Tribunal may only admit fresh evidence if it is satisfied that there were good reasons why the evidence was not submitted to the adjudicator. There is no good reason for this restriction, which may detract from proper consideration of the issues. The Tribunal should retain a discretion to receive any evidence which it believes will assist it in determining the case.

d) Rule 3.9 permits remittal by a legal chair of the tribunal without a hearing- with no indication that this would be limited to cases where the parties

consent. Further, for the sake of clarity, we suggest that the rule should read "may remit an appeal to the same or another adjudicator…".

e) Rule 6.11(4): We are concerned about the use of the word "must" as opposed to "may": there is no good reason for this restriction, which may detract from proper consideration of the issues. Adjudicators should retain a discretion to receive any evidence which they believe will assist in determining the case. In any event, there is no need for this rule: adequate sanctions for breach of directions are set out in rule 6.2(5) and 6.8(1)(c).

10 February 2003