Comments to the Inspectorate of Borders and Immigration for the Inspection into Administrative Review

1. **What notification did you receive of the changes concerning the abolition of some appeal rights and the introduction of administrative review, and how well were these changes communicated to you?**

The abolition was set out in the Bill that became the Immigration Act 2014, which was published with explanatory material and debated in parliament. However, the communication was incomplete.

When the Bill that became the Immigration Act 2014 was published, the Government also published a Statement of Intention concerning 'Administrative review in lieu of appeals'. This document indicated that administrative review would not be available in automatic deportation or national security cases, or where a human rights or asylum claim is or had been made. As regards changes to the immigration rules to provide for administrative review, at Lords' Report, the Minister indicated that these would be laid:

> "*...no later than the Summer Recess* [and] *will be the subject of a targeted consultation with key interested parties, including the Immigration Law Practitioners' Association and Universities UK.*"[1]

This was done, and ILPA responded to the consultation. The draft rules were not the subject of a public consultation. On 20 October 2014, Statement of Changes in Immigration Rules (HC 693) amended the immigration rules so as to bring into effect a scheme of administrative review for certain persons who would have had a right of appeal but for the limited commencement of section 15 of the Immigration Act 2014 by the Immigration Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2014, SI 2014/2771. On 21 October 2014, the Home Office published modernised guidance on 'Administrative review'. From 2 March 2015 and 6 April 2015, Statement of Changes in Immigration Rules (HC 1025) has amended and extended these provisions in the rules.

During the passage of the Immigration Act 2014 examples were given of where those losing rights of appeal would instead be given an administrative review. The Government's I*mmigration Bill – Statement of Intent on Administrative Review in lieu of Appeals*[2] said of administrative review:

> *1. Who will be able to apply for administrative review?*
>
> - *Individuals who will no longer have a right of appeal as a result of changes to the appeals system.*
>
> […]
>
> *14. Will existing leave continue while an administrative review is conducted?*

[1] *Hansard* HL, 1 Apr 2014 : Column 903 *per* the Lord Wallace of Tankerness

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254851/SoI_Administrative_review.pdf,

- *Yes where an individual with leave applies for further leave before their current leave expires and, following a refusal, applies for administrative review; their current leave will be extended until their administrative review has been concluded.*

The Explanatory Notes accompanying the Bills, published on both 10 October 2013[3] and 03 February 2014[4] stated:

> *Where an application is refused and there is not a right of appeal, the applicant may be able to apply for an administrative review. Similarly, an administrative review may be sought when a person's leave is curtailed or is revoked. The Immigration Rules will set out when an applicant may seek an administrative review. In Schedule 8, Part 4 extends the effect of section 3C and 3D where an administrative review can be sought or is pending. The question of whether an administrative review is pending will be determined in accordance with the Immigration Rules.*

Thus parliament was led to understand that there would be an administrative review of a decision to curtail leave.

Despite this however, when the Home Office subsequently published the immigration rules on administrative review[5], decisions to curtail leave were excluded from the scope of administrative review. Thus, for example, a person, who on or after 20 October 2014 makes a Tier 4 application in respect of which he or she is granted leave, is without a remedy save by judicial review, against a subsequent decision to curtail that leave. He or she may make a human rights (or asylum) claim, which if refused will carry a right of appeal. If, however, having had his or her leave curtailed before making such a claim, he or she will not have the advantage of section 3D (or section 3C) in continuing his leave statutorily.

ILPA raised this in its comments on a draft version of the rules, (**appended hereto** as Annex 1 but no action was taken. The rules received limited scrutiny from parliament.

The Government now seeks, by clause 32 in the Immigration Bill now before parliament, to remove section 3D of the Immigration Act 1971 on the basis it is "no longer necessary." Section 3D of the Immigration Act 1971 is the provision under which a person may have their leave automatically extended whilst they bring an administrative review against a decision to curtail their leave. It is "no longer necessary" because appeal rights have been taken away without substitution.

Our comments on the draft version of the rules also illustrate matters on which there had been no clear communication before the draft rules were shared with ILPA.
In particular it had been unclear:

- Whether an individual would be able to elect for administrative review or appeal
- Whether an individual would simultaneously be able to bring an appeal and an administrative review

[3] http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0110/en/14110en.pdf, para 73
[4] http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0084/en/14084en.htm, para 77
[5] C 395, Appendix AR.

- Whether an individual applying under Appendix FM would be able to apply for administrative review

There has been no public notice or notice to ILPA of subsequent changes. It is current Home Office practice to share draft rules with some law firms and we do not know whether changes to the rules on administrative review were shared with some law firms.

At the time of the consultation on the draft rules it was understood that the existing administrative review procedures would continue to apply in entry clearance cases. In the event, with effect from 6 April 2015 (HC 1025) entry clearance applications have been made subject to the administrative review procedure used for in-country cases.

In ILPA's comments on the draft rules, we argued that it should be possible to use administrative review to correct errors other than those which would alter the outcome of the eligible decision. We pointed out that a finding of dishonesty against an applicant, or that a false document had been submitted, might affect future applications, to the UK and to third countries. These was accepted and a change was made so that the rules as published allowed an applicant to seek an administrative review in these circumstances. A person could pursue an administrative review while at the same time making a fresh application.

Then HC 297 was published on 13 July 2015, changing the rules with effect from 3 August 2015 for all applications for administrative review made on or after that date. The date of the original application was irrelevant.

The effect of the changes was that those who wished to make a fresh application during the 14-day period that their leave is extended under section 3C to give them time to make a fresh application for leave to remain would no longer complete an administrative review waiver form. Instead, paragraph AR2.10 was been amended to provide that administrative review is no longer pending if a person makes a fresh leave to remain application. This means that 3C leave ends. Any subsequent application for administrative review is treated as invalid.

HC 297 inserted new paragraph 34X (4) which provides that while an administrative review application is awaiting determination, making a fresh application for entry clearance, leave to enter or leave to remain has the effect of withdrawing the administrative review.

New paragraph 34N (4) is in similar terms, providing that if a new application is made during the period when application for administrative review may be brought, an application for administrative review may not be made. Thus a person cannot obtain a simultaneous fresh application and administrative review by making the fresh application first.

Thus this reversed the decision to amend the draft rules in the light of ILPA's arguments to ensure that those who wished to challenge a decision to clear their immigration history, but in the interests of speed wished to get on and submit a new application, could do so. There was no public consultation on the change. There was no explanation of it. The Explanatory Memorandum to HC 297 provides:

> *7.5. Some people in relation to whom an eligible in-country decision has been made prefer to make a fresh application for leave to remain rather than proceed with Page 3 of 11 an application for administrative review where they recognise that their original application was correctly decided. At present they are unable to make a fresh application for 14 days if their original application was*

made in time and their leave expired while the application was under consideration, because section 3C(1) of the 1971 Immigration Act extends their leave and section 3C(4) prevents an application for variation of leave being made during this period. Accordingly, if they wish to make a fresh application during the 14 day period that their leave is extended under section 3C, they must complete an administrative review waiver form in accordance with paragraph AR2.10. This is confusing for applicants and creates an administrative burden on the Home Office. To rectify this, paragraph AR2.10 has been amended to provide that administrative review is no longer pending if a person makes a fresh leave to remain application. This means that 3C leave ends and the person is able to make a fresh application without the need to submit the waiver form.

Thus it suggests that the change is to advantage applicants. ILPA considers that the disadvantages to applicants wholly outweigh any advantages. It would be helpful for the Chief Inspector to ascertain whether those sponsoring the changes and drafting the Explanatory Note took into account the earlier decision not to take this approach in the rules as originally published, as no reference is made to this.

2. Are administrative review applications dealt with in a timely manner?

Most members who recorded the time it has taken to deal with their administrative review say that it has taken "about a month".

The two administrative reviews in the Tier 1 Investor/nanny example below took more than 28 days.

This is a matter on which Home Office information has been extremely misleading.

ILPA's note of the Business User Forum meeting of 27 May 2015 records:

> *It was asserted that 100% of Administrative Reviews are completed within 28 days – in line with customer service agreement. Time from the submission of the Administrative Review to a final decision being made – is currently running at six days. AH raised that 100% does not reflect the statistics provided by John Kelly in January 2015. Response was that as long as the customer is informed that will not be completed within 28 days, those cases can be included in the statistics as having been completed within the 28 days. AH asked – in AH asked – in real terms, counting days – how many have not been dealt with in 28 days? The answer was 11.* [AH is Alison Harvey, Legal Director ILPA. Mr Kelly's remarks were made when ILPA visited the UK Visas and Immigration in Liverpool in January 2015]

We reiterated these concerns when we met with Home Office staff at Manchester Airport on 5 August 2015. We were then told that the percentage of cases not decided within 28 days is less than 15, however, it was unclear whether this figures was based on one case not having been decided within the timescales or 11 or more.

We do not suggest that large numbers of applications are dealt with outside the target times. We do, however, suggest that it is not possible to have confidence in what is said about timescales.

3. What are your views on the quality of decision making at the administrative review stage, including the quality of the decision notices?

We do not consider that quality is satisfactory.

The examples below demonstrate not only the problems but that legal representatives with good contacts with UK Visas and Immigration are having to get in touch with them when the administrative review process is not satisfactory to get the case looked at again. This is not an option open to unrepresented applicants or indeed to all legal representatives.

Tier 1 Investor (Case study - 5 documents attached)

This was an investor application by a nanny who was given the funds by her employers who considered a million a price well worth paying for the best interests of their child, who had various complications including autism and had a very strong bond with his nanny. The applicant was totally transparent about the source of money and reasons. A deed of gift had been executed under UK law, by a well-known UK firm. There was in law absolutely no question that the money irrevocably belonged to the nanny. The lawyer writes "Of course not what Home Office had in mind in creating the Investor route and entirely understandable that they didn't like it, but without a shadow of a doubt the applicable met the rules…"

The family have homes in both Russia and the USA and the nanny had visas for both applications. The application was made in Russia. It was refused with the Home Office claiming that the nanny did not control the funds and referring to a non-existent requirement that in assessing the application the Home Office must have regard to the purpose of the route being for high net worth individuals wishing to invest in the UK (the lawyer comments "… that would be a person with £1 million of their own money, no?") There was also an attempt to allege deception on the basis that in her last, successful, domestic worker application she had not mentioned that she had £1 million, even though it was clear from the bank statement submitted that at the time of that application she did not. Lawyers were instructed at that point. They submitted an application for administrative review, setting out why the rules were met and their concerns about handling of the matter.

The refusal was upheld and the administrative review largely repeated the original refusal. It did not address the representations the legal representatives had made.

A fresh application was made in New York where the family were by that time. By this time the nanny had already invested the money in the UK, via a well-known reputable financial institution. Evidence of this was provided and the institution confirmed that it was instructed by the nanny and not by some other person. It was also now much more than three month that she had held the money herself so there was no need under the rules to provided evidence of the source, although the lawyers did so in any event.

The previous refusals were declared and representations submitted comprehensively addressed the spurious refusal reasons, making is clear (with evidence) that the application met the rules. It was refused with the refusal largely repeating the grounds from Moscow.

The lawyers submitted an administrative review of the second decision. They also got in touch with senior Home Office policy staff in London and liaised directly with the British Consulate General in New York. New York were liaising with Home Office policy staff in London. The lawyers indicated that there was no lawful basis for the refusal and that they would have to advise the client to apply for judicial review if the administrative review upheld the refusal.

Eventually, and rather reluctantly the administrative review overturned the refusal. The lawyer comments "Many months lost (applications took longer than usual and both administrative reviews took more than the 28 days) and a lot of unnecessary expense and disruption for the client.

The Home Office has since changed the Rules to create new refusal grounds that make it viable to refusal these sorts of cases, but those were not the relevant Rules at the time.

Tier 1 Entrepreneur (Team) – two applications

A case from early November. These applications were made in Russia but dealt with in Sheffield. Both the Tier 1 (Entrepreneur) refusals were decided by the same caseworker in Sheffield, and an Administrative Reviewer going by the initials 'AW' in Sheffield reviewed both administrative review requests. The refusal wordings and reasons given in the administrative review are essentially replicated verbatim for both applications.

Both administrative review decisions simply say that the refusal is upheld. Absolutely no reasons are given whatsoever. No attempt is made to counter the points the lawyers made in application for administrative review. Yet the Modernised guidance says "You must explain in the letter why the decision was correct, addressing each claimed error raised in the administrative review application".

There were a catalogue of problems with the handling of these cases (including the Home Office losing papers) . The case involved an entrepreneurial team who had already set up and invested in a UK company. The refusal grounds turned on the interpretation of whether they must have jointly invested the £200,000 rather than each invested £100,000 to make up £200,000 (all a red herring as the money came from a third party anyway, but evidence of that was not required because the rules do not require that where the money has already been invested). Also, in one of the cases HO had overlooked one of the bank statements provided for proof of maintenance even though the lawyers' letter itemised every enclosure, including the period the statements covered, so it should have been easy to identify that a document had gone astray.

In the original refusal letters the funds point was made but then several paragraph numbers of the rules are cited: one relates to the available funds reason but the other rule numbers detailed relate to the "genuine entrepreneur" test (including the test relating to extensions, not initial applications as these were). Absolutely no suggestion was made in the reasons given that the Home Office had any doubts about genuineness. The lawyers raised this in the application for administrative review and questioned whether this was an error or whether it was actually intended also to refuse the applications on the grounds that the genuineness test was not met. This made it all the more surprising that absolutely no reasons were given in the refusal of the administrative review request. It does not state which of the refusal grounds are upheld.

Tier 1 (Entrepreneur Team) – Case Study 3 (documents attached)

This was a case from New Delhi. The Administrative Review does not engage with the matters raised in the grounds for administrative review. The lawyer writes I " have grave concerns about the original decision making process, as I believe, from many years of experience, that this was a first class application."

Tier 1 (Entrepreneur)

The client had used a mixture of funds including funds transferred between accounts, and also funds given by third party members. The Home Office initially refused the application on the basis that the applicant had not held the funds for 90 days, and had not taken the third party funds into account.

An administrative review was submitted. It was acknowledged that an error had been made in the first decision, and had incorrectly ignored the 3rd party funding.

The refusal was upheld because the applicant had not held the funds for 90 days in one account. The reviewer have ignored all the other bank statements submitted to show transfers of the funds between accounts (including a business account).

Tier 1 (Entrepreneur) (extension)

An administrative review was submitted twice in this case. On both occasions the Home Office refused to overturn the decision despite the solicitors making clear in our submission that their interpretation of the rules and documentation was not correct. Those reviewing the decision demonstrated that they were not trained sufficiently well to interpret a set of year end accounts and management accounts, nor standard corporate documents, such as a loan agreement. They were not familiar with standard accounting terms such as "subordinated" in the context of a loan agreement. They did not understand usual accounting practices for a set of accounts and so could not see evidence of the investment from the applicant in the accounts.

The solicitors referred the case to senior officials in the Home Office outside the administrative review procedure "for a thorough caseworking" and so that a fresh document clarifying earlier documents could be submitted.

Tier 2(General)

The applicant had applied for entry clearance under Tier 2 General in a Standard Occupational Code at NQF Level 4 at time when the role was within the Shortage Occupation List. The Home Office refused his initial application on the grounds that he was not in an NQF Level 6 role, and also on the grounds that he did not meet the minimum salary requirements which would apply for applicants for entry clearance in the (current) shortage occupation list. The lawyers analysed the legal position and concluded that the Home Office was incorrect. They submitted an administrative review application referring to the specific paragraph of Appendix A which showed that the role did not need to be Level 6, and the minimum salary requirement did not apply in this case.

The administrative review maintained the original decision, referring again to the wrong paragraph of Appendix A. The lawyers again conducted a detailed analysis of the legal position and were fully satisfied that they were correct. They made further representations outside of the administrative review process. On receipt of these the Home Office reversed their original decision and granted the applicant leave to remain. In the interim the applicant had had to be suspended from work.

Tier 2 General

The application was refused in Amman on the basis that the lawyers did not include a reference number for the LinkedIn job advertising in the explanation on the Certificate of Sponsorship of having satisfied the residence labour market test. An administrative review was submitted and the decision was overturned 28 days later. No correspondence was confirming this. Instead the client (not the legal representative) received a telephone call asking him to return his passport to the Embassy. The visa was inserted into his passport and he was called again to collect his passport. No official correspondence confirming the decision or providing any explanation has ever been received. The lawyer in that case observes

> "*I tried most days to contact Amman but without success. I sent numerous faxes and emails but no response and then resorted to using the UKVI Contact Web page but that process is entirely painful and they seem to offer just a standard response regardless of the query.* "

Tier 5 (Government Authorised Exchange) category – case study 2 (documents attached)

This was refused after a client had a telephone interview. An application for administrative review was submitted. It was refused. See the documents attached.

4. Are you aware of any cases where the reviewer has not been independent of the original decision maker?

All cases: both are internal to the Home Office.

The 'Wilson Committee' said in 1967:

> …*"it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal'.*

A right of appeal against a range of immigration decisions was created by the Immigration Act 1971, following the recommendations of the *Report of the Committee on Immigration Appeals*[6]. The Committee said:

> *…however well administered the present [immigration] control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal…The safeguards provided by [a procedure requiring a clear statement of the administration's case, an opportunity for the person affected to put his case in opposition and support it with evidence, and a decision by an authority independent of the Department interested in the matter] serve not only to check any possible abuse of executive power but also to give a private individual a sense of protection against oppression and injustice, and of confidence in his dealings with the administration…themselves of great value.*

In *Asifa Saleem v Secretary of State for the Home Department* [2001] 1 WLR 443 the then Lady Justice Hale said of the right of appeal to the Immigration Appeal Tribunal that:

> *In disputes between citizen and state [tribunals] are established because of the perceived need for independent adjudication of the merits and to reduce resort to judicial review.*

We recall the Department for Constitutional Affairs White Paper *Transforming Public Services: Complaints, Redress and Tribunals* ((Cm 6243, July 2004):

> *"Complaints to departments and agencies*
>
> *3.12 What can an individual do? The first and most direct remedy is to dispute decisions directly with departments and agencies.*

[6] August 1967, Cmnd. 3387

3.13 But in a democracy ruled by law, and under a government committed to high quality and responsive public services, simply appealing to a department's sense of fairness is not, and never has been, enough. There has to be redress beyond the department"

See also the Joint Committee on Human Rights Legislative Scrutiny report on the Bill that became the Immigration Act 2014 HL Paper 102, HC 395. It stated "…limiting rights of appeal to the extent that they are restricted in the Bill constitutes a serious threat to the practical ability to access the legal system to challenge unlawful immigration and asylum decisions" citing the broader context, including the loss of legal aid (paragraph 38). It expressed the view that the Tribunal, not the Secretary of State, should decide whether it is within its jurisdiction to consider a new power on appeal (paragraph 46).

As to the link between the reviewer and the original decision-maker within the Home Office, in the majority of cases we have no well of telling. A member, however, writes

As a former Immigration Officer, I have insight of the administrative review process when it comes to port refusal casework. Since the rules on administrative review changed earlier this year I had cases where I refused entry to a passenger and the case then went to administrative review.

…

- *There is not sufficient independence of the Chief Immigration Officer conducting the review from the refusing Immigration Offcer. The administrative review would be conducted by whichever Chief Immigration Officer was the duty casework Chief Immigration Officer at the time the appeal came in. Given the close working relationship between Immigration Officers and Chief Immigration Officers, the Chief Immigration Officer conducting the review would know the refusing IO very well, in some cases they might even be the refusing IO's line manager. I believe this has the potential to introduce bias to the appeal decision based on the relationship between the Chief Immigration Officer and the Immigration Officer.*

5. What are your views on the guidance for applicants who wish to apply for administrative review?

It is insufficient and nor is it supplemented by accurate information from the Home Office. This is not just about the "modernised guidance" on the Home Office website, but all the information surrounding the process.

It is not always clear whether a person has an administrative review at all.

When we met with Home Office caseworking staff at Manchester Airport on 5 August 2015 we asked about domestic violence cases, which, along with applications from bereaved partners and contrary to our submissions, are alone among the cases in Appendix FM as not being treated as raising human rights. We were told that in all the domestic violence cases where an administrative review had been sought before that date were cases where the applicant had wrongly been denied a right of appeal because of a wrongful application of the transitional provisions.

Sole representative Case study 1 (documents attached)

This was application for entry clearance under the Sole Representative category. The application was refused with no right of applying for Administrative Review on the refusal notice (GV51). Lawyers submitted a request for administrative review. An Entry Clearance Officer telephoned the client (not the lawyer) to say that she did not have a right to apply for administrative review. The lawyer made further representations to the Entry Clearance Manager (in Shanghai) outlining the error in law. The Entry Clearance Manager realised the error and re-issued a fresh GV51 giving right to apply for administrative review. An application for administrative review was submitted. It was refused after approximately one month.

Domestic worker Case study 4 – documents attached.

An entry clearance application in New Delhi. It related to human rights issued were not raised within the application, when it was refused, the client was given IAFT-6 appeal notices.

The decision falls within the category of eligible decisions as set out within the Immigration Rules, and is eligible for administrative review. The Home Office failed to confirm that it would consider the Administrative review. The legal representative wrote by post and email to various departments, but received no response save from admin.review.enquiries@homeoffice.gsi.gov.uk to say that they only deal with in-country admin reviews.

With no other way of getting a response, the solicitor submitted the letter before claim attached. Nine days later it was confirmed that the client would be given an administrative review. This was refused.

The solicitor comments:

> *I struggled to find the 'application form' for Administrative Review (which is supposed to be provided at the time the Entry Clearance Notice is issued but wasn't in this case) and had to rely on a Points Based System one which is the only one available on the government website.*

Another representative comments:

> *"The only one I have seen yet was for a refusal of entry at the airport - given out at the same time as a Statement of Additional Grounds request, very unclear how they mesh together and no way of sending documents on line with the admin review request and not clear how you get documents to anyone doing the admin review."*

This was a matter on which ILPA representatives were being asked to seek clarification at the Business User Forum on May 2015:

> *VG raised the point that there is a character limit of 1,000 per ground and that there is no facility for follow-on grounds to be sent. Would applications be rejected on this basis? Response was that they would make provision on a case-by-case basis for follow-on grounds to be sent. They will allow grounds provided they are not additional.* [VG is Vanessa Ganguin, one of ILPA's representatives at the meeting]

The Home Office website does not make it clear that it is possible to exceed the 1000 word limit in the administrative review submission, as the form appears to indicate that only 1000 words are allowed. Furthermore, it is not made clear that additional documents can be submitted.

A solicitor records

> *"… I ended up lodging an on-line and email version of the admin review request as the directions on the gov.uk website were appallingly unclear. I had to refer to three other practitioners to confirm how to lodge the application, and only when I repeatedly emailed the admin review team was I sent confirmation they had received my emailed administrative review request. … My client paid £80 for the mistaken in-country application, and a month later we are still waiting for the promised refund"*

As per our response to the consultation on the draft rules, delegations to guidance fall foul of the judgment in *Alvi v SSHD* [2012] UKSC 33 wherein the Supreme Court held that anything in the nature of a rule has to be laid before parliament, i.e. that a matter addressed only in guidance cannot found a mandatory refusal.

In addition, guidance contains important concessions not in the rules. For example only in guidance are found the list of doctorates other than PhD that qualify for Doctorate Extension Scheme applications, or entail exemption from the five year limit on degree-level study, only in guidance is it set out that Tier 4 dependants can rely on official sponsorship. Whether provisions are in rules or guidance is not logical. Either failure to follow the guidance should be recognised as a case working error or all such matters must be moved into the rules.

When we met with Home Office staff at Manchester Airport on 5 August 2015, we asked what happens when they receive an application that is a mixture of within and out of scope of administrative review. We were told "we still look at what we can look at" and that an unlawful decision could potentially go back to the casework even if what is wrong is not a caseworking error as defined. The guidance does not make this clear.

6. Have you seen any improvement in the quality of initial decision making since the introduction of administrative review?

No.

When we met with senior caseworkers at Manchester Airport on 5 August 2015, they identified that lots of the successful administrative reviews involve grants of leave and caseworkers getting them wrong. This is something that has improved dramatically through the feedback loops.

This is called into question by the evidence from members. A member who was formerly an immigration officer and carried out administrative reviews writes

> *There was no feedback process once an Administrative Review had been conducted. The refusing Immigration Officer would not receive any notification that their decision had either been upheld or overturned, and would be reliant on chasing the case up themselves.*

7. How does the administrative review process compare with the previous appeals system? Do you think the introduction of administrative review has had a positive, negative or no impact in terms of providing migrants with an avenue of redress if they consider that their application has been decided incorrectly?

Negative.

Administrative review is not merely poor by reason of it being a process conducted by the same body that made the decision under review. There are significant restrictions on what evidence may be included, what issues may be considered and what outcome may be reached. Moreover, when considering questions of credibility, the role of the reviewer is not to consider the original application for him or herself, but rather to conduct a judicial review-style consideration of whether the original decision-maker has reached a decision which was reasonable open to him or her – see paragraph AR3.4(g) of Appendix AR to the immigration rules.

The Home Office is a public authority bound by the Human Rights Act 1998, in particular s 6. It is bound to act in accordance with human rights. If on administrative review the Home Office identifies that the decision challenged breaches the applicant's human rights then it must address this. It cannot allow the flawed decision to stand. The distinction between human rights claims and other immigration applications is both fictional and forced.

ILPA said it its submissions on the Immigration Bill 2014:

> *"If a department has got a decision wrong then the decision should be looked at again, by someone capable of identifying the mistake. This is the case just as much to avoid a costly appeal as where there is no right of appeal. Administrative review is another name for the department doing its job. Table 8 in the Appeals Impact Assessment shows that 49% of "Managed Migration" (work and students) appeals are allowed, 50% of entry clearance appeals are allowed and 32% of appeals against deportation are allowed. At any stage before the decision on those appeals the former Agency could have reviewed, or did review, its own decision. The only conclusion to be drawn is that the former Agency continues to stand in need of independent oversight. The Appeals Impact Assessment itself tends to support this conclusion. It says that where a claim is made on the basis of Article 8 "…the refusal of that claim will have (sic.) a right to appeal unless the case in question relates to an overstayer, where there is no right of appeal*[7]*. This is wrong; an overstayer has a right of appeal on the grounds of Article 8."*

As the examples above make clear it is still the case that members with good contacts within the Home Office rely on representations rather than the procedure where they consider that an erroneous decision has been made.

When the Bill which became the Immigration Act 2014 returned to the House of Commons, the Immigration Minister summarised the Government's stated reasons for preferring such a system of internal review to independent appeal:

> "*The administrative review process is already effective in identifying and correcting caseworking errors. From April to December 2013, 93% of these administrative reviews were completed within 28 days, and 21% of the administrative reviews resulted in the original decision being overturned. This shows that the review process can provide an effective way of*

[7] Appeals Impact Assessment page 6.

> *correcting errors, and it does so in a speedy and efficient manner, so that periods of uncertainty are addressed. I do not think it does anyone any good to have long and protracted periods of uncertainty. Indeed, we are in the perverse position of having 17 rights of appeal, which are being reduced to four, to ensure that matters are dealt with effectively and appropriately, supplementing the administrative review process outlined in the Bill."*[8]

Administrative reviews were said during the passage of the Bill which became the Immigration Act 2014 to be to correct factual errors, mistakes in calculations etc.

For such factual errors, the process created is more bureaucratic (and costly) than what preceded it. ILPA's note of the Business User Forum of 27 May 2015 records:

> *Alison Harvey (AH) raised applicants and their representatives being told they should use the Administrative Review route to correct printing errors in Biometric Residence Permits. Phillip […] responded that:*
> - *out of country Biometric Residence Permits error corrections are not subject to Administrative Review; and*
> - *in-country correction of biographic details are also not subject to administrative review but other errors are.*

A member writes of obtaining such corrections:

> *Previously, this was not too arduous a process – basic correspondence with the Error Team via email and then returning Biometric residence cards for correction.*
>
> *Now we find ourselves having to make a payment of £80 to the Home Office (albeit later refunded, if they agree) … we are solely pointing out the Home Office's own error. An application for administrative review and payment of an £80 fee is therefore entirely inappropriate.*

When we met with the Home Office at Manchester Airport on 5 August 2015 Mr Ellingworth recorded that there had been discontent at having to submit an administrative review to get corrections on a biometric identity document, where previously an email had been enough. He confirmed that the distinction made at the 27 May 2015 Business User Forum as to which corrections to biometric identity documents require admin review and which (broadly biodata) can be done by emails was correct.

Of greater moment is that the process is not dealing only with factual errors.

When we met with Home Office staff on 5 August 2015 we asked about the narrow definition of a caseworking error and whether this was causing them problems and they did acknowledge that there was some ambiguity around the evidential flexibility policy that could cause problems. The immigration rules have subsequently been amended on this point although as far as we can ascertain this is a response to the judgment in *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 on evidential flexibility.

[8] *Hansard* HC, 7 May 2014 : Column 225 *per* James Brokenshire MP

Subsequent to the passage of the Immigration Act 2014 the Home Office has increasingly introduced "genuineness" tests into the rules which introduce a subjective element into decision-making.

When we met with Home Office Senior Caseworkers in Manchester Airport on 5 August 2015 we asked about the genuineness tests and whether they presented new challenges in the context of administrative review. They said that they did but observed that they were already looking at credibility with administrative review.

The main genuineness tests within the Points-Based System are:

- Tier 1 (Entrepreneur) – Genuine Entrepreneur Test
- Tier 2 (General) Sponsor Licence Applications
    - Genuine attempt to recruit
    - Ability to offer genuine employment
- Tier 2 – Genuine Vacancy Test
- Tier 4 (General) – Genuine intention to study
- Tier 5 (Temporary Worker) – Genuine intention to undertake role
- Tier 1 (Investor) – source / control of funds

Tier 4

A Tier 4 applicant in Iraq was refused a visa, primarily due to a problem with his bank statements. He accepted the refusal, studied for a year in Iraq and then reapplied to come to the UK. His second Tier 4 application was refused because the entry clearance officer considered he was not a "genuine student". He applied for administrative review and was unsuccessful Counsel has considered the grounds for the visa refusal and advised there is a strong prospect of successfully applying for judicial review. But the student will not do so (a) due to cost and (b) as any outcome will arrive far too late for him to start his course as planned and so is not an effective remedy.

Tier 4

A Tier 4 General student was refused entry clearance due to concerns over the genuineness test included under Immigration Rule 245ZV(k). The reasons for the refusal related to a previous breach of immigration conditions six years earlier and that the client had sought an academic vacation from her current university.

The lawyers lodged an administrative review questioning the relevance of the immigration breach (which occurred while the client was a minor) and rebutted the presumption that the academic vacation informed any indication of the client's commitment to and "genuineness" of studying in the UK, explaining that it was to save her place so that if the year of study in the UK did not work out, she could return to her current university and resume her studies.

The client, three weeks after the refusal, and three days before the administrative review was lodged, attempted to enter the UK under an existing visitor visa and was detained for questioning, mainly regarding her intention to enter the UK and presumption that she was trying to study. The client was released on temporary admission and the decision over entry was abandoned as the client returned to her country of origin before the border control made a decision.

The administrative review decision was sent by email to not to the lawyer but to the client without any reference number or identifying name as to who had prepared it, the lawyer describes it as "just a short almost casual email" stating that:

- The client was not being truthful in asserting that the immigration breach was not a breach. This is a clear misreading of the information by the person conducting the administrative review. Nowhere in the representations was it asserted that the client had not breached her conditions. Rather it was acknowledged that he had and the context was provided as well as information on its having been considered in previous litigation and deemed
- The client had been stopped coming into the country as a visitor and that during the interview with the Border Control had said she still intended to pursue her studies in the UK as well as stating her studies were resuming in her country of origin. This was stated to be indicative of her not being truthful about the Tier 4 application and her behaviour. The comments alleged to have been made by her regarding her wish to pursue studies in the UK) are disputed.

Thus in this case a border control interview over a visitor entry, with disputes of fact and questions of credibility, informs the outcome of a Tier 4 General refusal.

The administrative review decision does not refer to the matters the lawyers raised to challenge the original decision.

If the client had been refused under the general grounds of refusal, she would have had been permitted to include evidence in addition to that which she included in her original Tier 4 General application, but because the decision was made under Rule 245ZV(k) she was not able to include fresh evidence to rebut the decision that she was not genuine.

We have been shown management information on administrative review at meetings but not given documents to take away and the figures have been whisked away before we have had a chance to write them all down. It is, however, clear that refusal rates rose sharply after the initial period and we suggest that the Chief Inspector look not only at current refusal rates but at how these have changed over time and why. As recorded above, we are unpersuaded that the success of feedback loops provides a complete answer. ILPA's note (not an agreed note; minutes are available but do not have this detail) of the Business User Forum on 27 May 2015 records:

> **Administrative Review** – Simon Illingworth and Ian Macqueen
>
> *(Slides were not available in advance and copies were not supplied. Very detailed slides – hard to get all figures down).*
>
> *Team consists of 16 caseworkers and 5 senior caseworkers.*
>
> *In-country Administrative Review has been in place since October 2014 for Tier 4 students.*
>
> *During phase 1 (Tier 4 students)*
>
> *As at 13/5/15 there were 863 Tier 4 Administrative Review of which:*
>
> - *127 were rejected or withdrawn - either due to no grounds detailed on the form (including where they were sent in a follow-on email), non-payment of the fee, Administrative Review*

having been submitted out of time, Administrative Review having been submitted in-country when should have been out-of-country or duplicate applications

- *261 decisions overturned*
- *475 decision maintained*

Nov 14 - 1 decision maintained
Dec 14 – 19 decisions were maintained
Jan 15 – 73 decisions were maintained ***(did not manage to capture any more)***

Were 347 casework errors – 145 on the basis of incorrect expiry dates and 58 on the basis of a maintenance funds decision ***(did not manage to capture the rest)***

During phase 2 (Tiers 1, 2 and 5)
162 Administrative Reviews received
150 have been worked
95 – decision was maintained – 81.20%
22 – decision was overturned – 18.8%
33 – were rejected ***(did not manage to capture the rest)***

Of the Administrative Review s where the decision was maintained, these were mainly on ILR, followed by Tier 1 and then Tier 2.

Percentage of decisions maintained is increasing.

It has been suggested to us by Home Office officials that judicial feedback on administrative reviews has been positive. When we have queried this it has been clarified that this is a reference to the feedback received by the Home Office Change Programme dealing with the Immigration Act 2014 changes from Sir Jeremy Sullivan, President of the Tribunals who said "that the implementation of the appeals provisions in the Act had been an object lesson in consultation and cooperation", adding "it should be a model for other Government Departments to adopt". We do not consider that this constitutes judicial feedback on decision-making on administrative review.

We have been told by Home Office staff that if a caseworker is minded to allow an administrative review then senior caseworkers are consulted before the decision is made but that this is not the case with refusals.

The Appeals Impact Assessment published with the 2014 Bill said that that displacement onto judicial review could not be quantified and therefore could not be costed. But the "sensitivity analysis" in the assessment models the effects of an extra 5,600 judicial reviews being started and of up to 1000 granted permission. By way of comparison, in 2011 there were 8,711 immigration and asylum judicial reviews[9] and only 4,630 reached the stage of a decision on permission. Judicial reviews cost more than appeals, costs can be sought from the other party, and damages may be claimed.

[9] See *Unpacking JR statistics*, V. Bondy and M. Sunkin 30.4.13 for the Public Law Project, available at http://www.publiclawproject.org.uk/documents/UnpackingJRStatistics.pdf

The proportions of all immigration appeals to the First Tier Tribunal that were allowed for the years prior to the Bill appear below. Figures in parentheses are for "managed migration" appeals: appeals are appeals from people lawfully present in the UK, with leave to enter or remain, at the time the decisions refusing to extend their stays or revoking their permissions were made[10]:

2007/08 34% (34%) 2008/09 39% (43%) 2009/10 41% (52%)

2010/11 48% (51%) 2011/12 45% (49%) 2012/13(annual total) 44% (49%)

2013/14 (April – June) 45% (52%)

Many of ILPA's comments on the draft rules on administrative review remain pertinent. While a number of ILPA's comments were taken on board many parts of the rules criticised remain the same. For example our comments on time limits:

> *Reference is made in the Statement of Intent on Administrative Review published with the Bill to time limits mirroring the time limits for appeals. … the comparison is not sound. The time limits for appeals are limits within which a Notice of Appeal must be lodged. Legal arguments are not pleaded in full in a notice of appeal and evidence is not submitted with it. Written and oral submissions and bundles of evidence follow, in accordance with directions, in the subsequent weeks and months. This allows time to complete steps that are often essential, such as a subject access request to gain sight of the Home Office file.*
>
> *Only practical barriers prevent a person keen to progress their administrative review from submitting their application as rapidly as possible. A longer period for making an application does not force anyone to move slowly, but allows those not in a position to marshall the evidence or give full instructions to representatives at once, adequate time in which to do so.*

We should be most happy to assist further with the inspection if we can be of use. In particular we should be happy to provide further information or analysis in response to emerging findings.

Adrian Berry

Chair, ILPA

11 November 2015

APPENDIX – ILPA COMMENTS ON THE DRAFT RULES PERTAINING TO ADMINISTRATIVE REVIEW, 15 AUGUST 2014

General

ILPA regrets that draft guidance has not been provided with the draft rules which, given the volume and nature of matters left to guidance, makes it extremely difficult to make meaningful comments. Our initial reading of the draft rules suggests the proposed delegations to guidance fall foul of the judgment in *Alvi v SSHD* [2012] UKSC 33 wherein the Supreme Court held that anything in the nature of a rule has to be laid before parliament, i.e. that a matter addressed only in guidance cannot found a mandatory refusal.

[10] *Tribunal Statistics Quarterly (including Employment Tribunals and EAT): April to June 2013* Ministry of Justice, 12 September 2013, Table 2.5 'Number of First Tier Tribunal (Immigration and Asylum) Appeals Determined at Hearing or on Paper, by Outcome Category and Case Type, 2007/08 to 2013/14. See *Annual Tribunals Statistics, 2011 – 12,* Ministry of Justice, 28 June 2012, 'Definitions'.

Related to this, guidance contains important concessions not in the rules. For example only in guidance are found the list of doctorates other than PhD that qualify for Doctorate Extension Scheme applications, or entail exemption from the five year limit on degree-level study, only in guidance is it set out that Tier 4 dependants can rely on official sponsorship. Whether provisions are in rules or guidance is not logical. Either failure to follow the guidance should be recognised as a case working error or all such matters must be moved into the rules.

We have given headline answers to the questions posed below. We have then gone through the rules in order providing comments that go to questions of clarity and consistency, scope and additional comments.

Q. Do you think the rules clear and coherent?

No.

In general, and as to matters of form, members have worked concurrently on the draft rules and members' meetings have also been held. We struggle adequately to express how difficult we have found the form of the draft rules. Only the page numbers have saved us from meltdown in meetings and in marrying up different persons' comments. This replicates a numbering system used in Appendix FM and Appendix FM-SE that the Home Office case working staff to whom we have spoken find as tedious, confusing, time-consuming and misleading as we do. Cross references in the rules pose particular challenges when this form of numbering is used.

Aside the vexed and vexing question of paragraph numbers, to have appendices numbered 1, 2 and 3 when there are already appendices 1, 2 and 3 to HC 395 is a recipe for confusion. It is further confusing to have definitions scattered between paragraph 34L, AR 1.12, appendix 2 and appendix 3 rather than collected in one place.

As to matters of substance, we have set out below examples of where we think individual rules are not clear and/or coherent. These are examples only: that we have not commented on a rule should not be treated as indicating that we consider it to be clear and/or coherent.

Have we correctly defined the scope of administrative review?

No.

Legality and efficiency of the proposed process

ILPA's understanding is that it is proposed that an individual who makes a human rights claim can only challenge the decision on that claim by an appeal.

ILPA's understanding is it is proposed that all or some individuals pursuing a human rights claim or an appeal cannot simultaneously bring an administrative review. We say "some or all" because on one reading of the Immigration Act 2014 and the draft rules there is a different approach depending upon whether the person has s 3C leave or s 3D leave or made an in-country application while s/he did not have or no longer had leave.

Insofar as it is intended that if an individual with a pending administrative review makes a human rights claim, the administrative review will lapse, and insofar as the Act and rules give effect to that intention, such an outcome represents an inefficient system. It would displace efforts to resolve case working errors from the administrative review system that is supposed to deal with them onto representations to decision-makers in individual cases and in some circumstances pre-action protocol letters. The problems to which this gives rise will be exacerbated where the Home Office grants different legal representatives different access to informal means of resolving disputes (giving telephone numbers to some firms but not others; taking calls from some but not others).

If an applicant for leave under Appendix FM brings a human rights appeal and in the course of this facts are found that indicate that s/he meets all the requirements of the rules, what leave will be given if the appeal succeeds? Discretionary leave on human rights grounds or the leave that would have been given had the Home Office dealt with the application correctly?

In our view it should be open to applicants under Appendix FM to apply for administrative review. These should be eligible decisions. An applicant who would not succeed on human rights grounds may nonetheless have a valid application under the rules that has been wrongfully refused.

It should be possible to bring an administrative review of decisions for which there is no right of appeal. It should be possible to bring an administrative review of a decision where, although there are also human rights grounds of appeal, the error complained of is a straightforward case working error. A person may be advantaged by succeeding within the rules. The alternative to allowing such a person to bring an administrative review is that they bring a human rights appeal, which is allowed and in the course of which findings of fact are made that necessitate reopening the original decision (whether or not judicial review proceedings are caused to be started to allow this to happen). This benefits no one, is inefficient and will increase costs.

Any proposal to require an applicant to elect for administrative review or for a human rights appeal should be dropped.

The Home Office is a public authority bound by the Human Rights Act 1998, in particular s 6 (and see paragraph 2 of HC 395). It is bound to act in accordance with human rights. If on administrative review the Home Office identifies that the decision challenged breaches the applicant's human rights then it must address this. It cannot allow the flawed decision to stand. The distinction between human rights claims and other immigration applications is both fictional and forced.

The quality of Home Office decision-making and casework guidance on Article 8, in particular, and especially among entry clearance decision-makers, has been very poor indeed. But these problems are not appropriately answered by trying to pretend there is a clear distinction between the immigration rules (or certain categories under the rules) on the one hand and human rights on the other, without any overlap in the ambit and application of the two. Moreover, it is not compatible with section 6 of the Human Rights Act 1998 to act as if such a distinction exists. The Home Office is a public authority bound by the Human Rights Act 1998. It is bound to act in accordance with human rights. Decision-makers cannot lawfully refuse an immigration application that engages human rights without consideration of human rights. If on administrative review the Home Office identifies that the decision challenged breaches the applicant's human rights then it must address this. It cannot allow the flawed decision to stand. Whereas many applications are wholly appropriately dealt with full square under the rules, they entail real issues of private and family life. Where children are concerned, such an approach will also be likely to breach the Secretary of State's duties under section 55 of the Borders, Citizenship and Immigration Act 2009 and under the UN Convention on the Rights of the Child see *ZH (Tanzania) v SSHD* [2011] UKSC 4.
Decision-makers cannot properly, where an application or appeal is being considered on human rights grounds, fail to have regard to any final conclusion that the claimant or appellant falls within the rules and is hence entitled to leave under the rules and not some lesser exceptional leave on Article 8 grounds.

We highlight here that it will be necessary to amend the Immigration (European Economic Area) Regulations 2016 (SI 2006/1003) not only for cases involving free movement rights but also for cases involving Treaty rights that might have started life as applications under the rules.
The process is unduly bureaucratic. We have seen the results of such an approach in the Points-based System and spouse/partner cases: it becomes necessary to reintroduce the exercise of judgment/discretion.

Confidence in the Home Office will diminish if it is seen not to correct its erroneous decisions. An example is that it is proposed that an allegation that the Home Office has got a decision wrong can be

treated as invalid, and not entertained. Another is that it appears to be intended that it will not be possible to challenge findings that will not make a difference to the overall decision, however grave the matter (for example an allegation of dishonesty) or however egregious the Home Office error. If such cases are not considered then the Home Office will nowhere record them as errors. It will be impossible to have confidence in the figures it produces as to the level of error that is made.

Faced with a track record of uncorrected Home Office errors we suggest that those applicants who have the choice of making their home anywhere in the world will go elsewhere.

The purpose of administrative review

There is an assumption running through the draft that the sole purpose of administrative review is to secure a positive outcome. This is not the case. A person against whom there has been, for example, a finding of deception, may want and need to get that finding overturned, not least because it will have implications for future immigration applications both to the UK and to other countries. And indeed immigration application procedures, in the UK and in other countries require past rejections of applications to be identified so that even where there was no finding of misconduct on the part of the applicant. Or the decision may have implications for subsequent applications, for example from family members.

For these reasons a person may have made a fresh application, including because of time pressures, but still want a wrong decision to be overturned.

Consider also the effect of refusal rates on, for example, Tier 4 sponsors who thus have their own reasons for asking those whom they are sponsoring to challenge all wrong decisions.

Q. Having regard to the Statement of Intent on administrative review, have any decisions been excluded from the list of eligible decisions which should have been included?

Yes.

Please see comments on "Appendix 1" below.

Q. Do you have any other comments on the draft immigration rules?

Please confirm how applicants will find out about their ability to apply for administrative review? Will an invitation to apply be sent with a refusal?

Please confirm the minimum level of decision-maker whom it is intended will undertake administrative reviews.

We are concerned about how the process will work. There have been myriad problems with the "Visa4uk" website. The online option for change of address did not work. We have heard repeated expressions of lack of confidence in the logistics. We urge the Home Office to create a dummy online process and test this to iron out all problems before it goes live.

Administrative review may require the submission of documents, whether evidence, or Home Office policies. There must be the facility to upload these.

What security measures will be in place? Paper applications require a signature and visa applications require attendance in person.

We are aware from the Statement of Intent on Administrative Review at paragraph 13 and Ministerial Statements made during the passage of the Immigration Act 2014 as well as from the text of the draft rules themselves that this procedure does not replace the existing procedure for "administrative review" of entry clearance applications. However, there are entry clearance decisions which currently carry a right of appeal under s.82(2) which will not do so, other than on human rights grounds, when s 82 is amended by the Immigration Act 2014. For example, refusal of a UK Ancestry visa or a refusal to admit a person under the returning resident's rule. We have seen family visit appeals succeed on human rights grounds. These are

not included in the list of eligible decisions. It would be helpful to have confirmation that the current procedures for "administrative review" of entry clearance decisions will be extended to cover them.

Amendments to other parts of the rules

Amendments to other parts of the rules are required. These include (the list is not exhaustive)

- Paragraph 320(7B)(iv) to include a reference to a pending administrative review, as well a pending appeal
- Paragraphs 245ZW(c)(iv)(2), 245ZY(c)(iv)(2), 245ZZB(c)(v)(2) and 245ZZD(c)(v)(2) to include reference to administrative review, as well as appeals.

Comments on the text of the draft rules

These comments address all the questions above. They are not exhaustive and no inferences should be drawn from ILPA's not having commented on a particular rule.

34L
"representative" – Reference is made to regulation 2 of the Immigration (Notices Regulations (SI 2003/658). Regulation 2 refers to regulation 4; regulation 4(1) refers to 'appealable' decisions. The regulations need to be amended to add reference to administrative review.

34M and *passim. (*e.g. 34W, 34Z)
"specified". As described above, in accordance with *Alvi* [2012] UKSC 33 it is necessary to ensure that all that could found a mandatory refusal should be set out in the immigration rules and laid before parliament and that changes to that which is specified after the rules are laid may lead to refusal for failure to meet the new requirement being held to be unlawful.

34N (2)
This requires an amendment.

An applicant whose application is rejected under paragraph 34O and who receives a notice of invalidity within the time limit for lodging an application for administrative review, i.e. within the applicable deadline as set out in paragraph 34S of receiving the decision on their initial application, can lodge a valid notice for administrative review without falling foul of 34N. This should be highlighted in the notice of invalidity. But what steps will be taken to ensure that this option is open to the person who does not receive the notice of invalidity until after the time limit for applying for administrative review has expired, because of Home Office delay in issuing that notice (or simply because the application for administrative review was submitted at the end of the period set out in paragraph 34S)? Provision equivalent to that made in 34N(2) for applications rejected on fresh grounds needs to be made for such applications unless the Home Office changes its stance and allows persons to correct the invalidity on the initial application.
34O
The repetition with slight variation in "will not be considered and will be rejected" adds confusion not clarity. The paragraph deals with an invalid application and should therefore say "will not be considered". The words "and will be rejected" should be deleted.
We highlight particular concerns around failure to make payment making an application invalid. Errors in processing payments have occurred on a number of occasions. Where a payment is not processed successfully efforts should be made to take the payment by getting in touch with the applicant.

34Q(b)
See comments on 34N(2) above.

34R

Para 34R refers to para AR 3.4(a) or (b) however AR3.4 does not have any sub-paragraphs (we assume that they have been removed from an earlier draft). The same comment applies to page 2 paragraph 34S(3)(b). We are concerned that 34R may disadvantage an applicant travelling outside the UK during the currency of existing leave or within the UK, for example as a visitor. See also comments on 34Y below.

34S
Short time limits for persons in detention are not helpful. There is nothing to prevent a detained applicant from submitting an application as rapidly as they can in an effort to ensure that they are detained for the shortest possible time, but this should not be an obligation upon them. It is more difficult to find a legal representative, and more difficult for a legal representative to get access to person, when the person is in detention. This is a problem in all detention cases but can be particularly difficult where persons are held in prison service establishments, whether under criminal law or Immigration Act powers. The current service level agreement makes 600 prison beds available for immigration detainees and there is provision under it for more to be made available: figures have touched 1000 in recent months. We do not understand why paragraph 34S(1)(a) refers to detention rather than to detention under Immigration Act powers as elsewhere in HC 395 but in any event, the problem arises for those held under both criminal and Immigration Act powers in prison service establishments.

We are in favour of the Home Office prioritising its own casework on these applications for administrative review so that time in detention is kept to a minimum.

Reference is made in the Statement of Intent on Administrative Review published with the Bill to time limits mirroring the time limits for appeals. First, please be aware that changes have been made to these and that they are set to change further, as set out in the Tribunal Procedure (Amendment No. 3) Rules 2014 (SI 2014/2128 (L. 30)) of 11 August 2014 which come into force on 1 September and 10 October 2014 respectively. These make reference to the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which have yet to be published.

Secondly the comparison is not sound. The time limits for appeals are limits within which a Notice of Appeal must be lodged. Legal arguments are not pleaded in full in a notice of appeal and evidence is not submitted with it. Written and oral submissions and bundles of evidence follow, in accordance with directions, in the subsequent weeks and months. This allows time to complete steps that are often essential, such as a subject access request to gain sight of the Home Office file.

Only practical barriers prevent a person keen to progress their administrative review from submitting their application as rapidly as possible. A longer period for making an application does not force anyone to move slowly, but allows those not in a position to marshall the evidence or give full instructions to representatives at once, adequate time in which to do so.

See also comments under AR 1.3 below.
34S(2)

We recommend that that the test of "it would be unjust not to do so" be adopted. This language is taken from rule 10(2) of The Asylum and Immigration Tribunal (Procedure) Rules 2005 (S.I. 2005 No.230 (L.1)).

Without this there is the risk of unfairness and of displacement onto other means of resolution described above.

There should be no restriction on the reasons for which the Secretary of State can reject an out of time application that she is satisfied that it "could not" have been made within the time limits specified. An application should be accepted where the Secretary of State is satisfied that it "could not" have been made within the time limits. In the alternative, rather than cumulatively, an application should be accepted where the Secretary of State is satisfied that compelling and compassionate etc. circumstances apply. The test of "it would be unjust not to do so" would cover both these scenarios.

The additional requirement in 34S(2)(b), that the application was made as soon as reasonably practicable is unduly prescriptive. The Secretary of State should have wider powers to accept an out of time application. All applicants should be given an opportunity to put forward reasons why their application should not be rejected as out of time, including those who have not realised that their application was out of time.
34S(3)(b)

See above. 34S(3)(b) refers to para AR3.4(a) or (b) however AR3.4 does not have any sub-paragraphs.

34T
As we understand it paragraph 34T is intended, *inter alia,* to provide that where a person applies for leave and there are applications for dependants that stand or fall with that of the principal, such that it is necessary only to review the substance of the decision on the application of the principal, only one fee will be payable. This should be spelt out more clearly.

34V
We are concerned that making part of the form mandatory, quite apart from the risks of failing to comply with *Alvi* [2012] UKSC 33 may disadvantage unrepresented applicants who are struggling to complete the form. It is desirable according to Ministerial statements made in parliament during the passage of the Act that matters that could be dealt with by administrative review are dealt with in this manner and therefore the Secretary of State should have discretion to accept an application despite these requirements not being complied with. Whether this is done or not, or it would be helpful if care were taken to ensure that as few requirements as possible are made mandatory.

We see no provision for a fee waiver, equivalent to the Lord Chancellor's certificate for appeals. For a significant number of categories, e.g. domestic violence applications, this will be essential. The applicant will not be in funds to submit the application against hope of a refund when s/he succeeds. Please make express that provision will be made for fee waiver and that persons refused will be given information on how to apply for such waiver at the time of being given information about making an application for administrative review.

Passports should not be required, just as they are not required for appeals or for reconsiderations.

34T
The drafting "an application on behalf of a dependant of the applicant" must be reviewed. A person who makes an application is an applicant and the drafting must accommodate this.

34U
The definition of "overstay or overstaying" in paragraph 6 needs to be amended to include applications for Administrative Review rejected under 34U. E.g.

> *(iii) the date that an applicant receives the notice of invalidity declaring that an application for leave to remain* ***or an application for administrative review*** *is not a valid application, provided the application* ***for leave to remain*** *was submitted before the time limit attached to the last period of leave expired.*

Why not cross-refer to 34C for a definition of a notice of invalidity?

34V(2)
The drafting requires revision as one does not "submit" a "process".

34V(3)(c)
It should be spelt out that a document is 'submitted' when it is posted.

34W
See comments on 34V above.

34W(1)
The reference to paragraphs 34A and 34B is otiose. By contrast 34D appears to be in point.

34W (2)
It should be spelt out that it is possible to start an administrative review by facsimile.
It is not possible to comment on the timescale without knowing what documents are to be specified as mandatory in guidance. In the appeals system it is required only that the appeal notice and immigration decision should be sent. Thus a rapid timescale is feasible. Other documentation follows in accordance with directions. If all documentation is to be sent up front during this process, including supporting evidence then this timescale is short. It may also be too short to get all signatures required under

34W(3)(d) if this is maintained.

34W(3)(d)
Why are dependants required to sign? Substantive leave to remain applications only require the main applicant to sign. Why cannot a representative sign on behalf of the applicant as happens with appeals?

The paragraph states that the form "may" be signed by a child applicant's parent or guardian. This seems to imply that the form could be signed by the child applicant. Is this what is intended?

34X(1)
The references are in the wrong order, i.e. (a) and (b) should be 34W and (c) should be 34V.

34Y. 34Y(1) refers to the Common Travel Area. 34Y(2) refers to the UK. The reference in both parts should be to the "Common Travel Area".

34Y
An applicant may have current valid leave and be travelling in and out of the UK at the time where an administrative review is under consideration. We see no reason why they should forfeit either their application or their ability to travel.

34Y(3)
Is there a deemed date of receipt by the Home Office? Leave to remain applications are now withdrawn using an online form. Will the same mechanism be used for administrative review applications?

Appendix AR

Introduction
The reference to Appendix 1, Appendix 2 etc. is ambiguous as it could refer to Appendices 1 and 2 to HC395.

AR1.1
See comments on case working error below. To have a paragraph named AR 1.1 that is not part of Appendix AR-1 is confusing beyond belief.

AR 1.3
AR1.3 includes the words "Where the eligible decision was an application for leave". Something has gone wrong there as a decision cannot be an application.

Is there a difference between "remains in force" and "is maintained" in AR1.3? The different wording suggests there should be, but it is not clear. If this is not intended, the same wording should be used.

AR1.3(a)

Please confirm that leave will always be granted at the same time that the decision that an administrative review application is successful is issued. We wish to avoid the problems that have arisen with implementation of allowed appeals.

AR 1.3(c) (i) (ii) (iii)
As described in the introduction and in our comments on AR1.4 below, there will be circumstances in which an applicant wishes to challenge a case working error albeit that this will not result in a grant of leave. AR 1.3(c) (i) and (ii) read with AR 1.10 prevent such challenges being brought as does the inclusion of the word "only", which should be deleted, in AR 1.3(c)(iii).

It is not clear how a second Administrative Review would work if the decision is maintained for different reasons under AR1.3(c AR2.1 and 3.1 say "Administrative Review is only available where an eligible decision has been made". Then 34S talks about submitting the Administrative Review application within 10 days after receipt of the "notice of the eligible decision". If in AR1.3(c) a decision is maintained, it is not clear how the notice provisions will work for applicants, as there is still only one "eligible decision".

AR 1.4
This is just one example, there are a number in the draft, of ambiguity in the use of "and" and "or" exacerbated by the presentation of the hierarchy of clauses. Does it mean that an eligible decision will only be reviewed to the extent of a+b OR a+c+d OR a+c+e? Or does it mean to the extent of a+b+d OR a+b+e or a+c+d OR a+c+e?

AR1.4(d)
As described in the comments on "The purpose of administrative review" above, we consider that in the interests of good administration and the protection of the interests of applicants, those connected to them and sponsors, case working errors other than those that would alter the outcome of the eligible decision should be reviewed and corrected. For example a finding of dishonesty against an applicant, or that a false document had been submitted, might affect future applications, to the UK and to third countries.

AR1.5
This is too restrictive. It should be possible to submit evidence to demonstrate that a case working error has occurred not limited to the errors in AR2.4(e)(g)(i) and (j) and or AR3.5 (c) and (f). For example it should be possible to submit new evidence in cases under AR2.4(b) which is concerned with cases where the decision-maker applies the immigration rules incorrectly. The proposed rules do not reflect the current rules of evidence on appeals: they apply to a much wider range of applications than those envisaged by s 85A of the Nationality, Immigration and Asylum Act 2002. The rules would apply to matters that fall within s 85A(4) and also to non-points-based applications that are outwith the section.

Where the Home Office has misapplied the immigration rules by failing to give the applicant an opportunity to provide documents in the correct form, or to provide a specified document, we suggest that it would be desirable to make provision for submission of the appropriate document(s) in support of the administrative review? It would be much quicker than the Home Office quashing the decision and then requesting that the applicant send in the necessary documents.

Paragraph AR1.5 says no evidence that was not before the original decision maker except where evidence that was not before the original decision maker is submitted to demonstrate that a case working error as defined in paragraph AR2.4 (e), (j), (k) and (l) or paragraph AR3.5(c) and (f) has been made. Para 3.5 relates to those whose leave is cancelled on arrival, but (c) is about where the original decision maker has not considered all the evidence that was submitted and (f) is for where "the applicant challenges the original decision maker's decision to refuse an application on the basis that the supporting documents did not meet the requirements of the Immigration Rules". There is no application to refuse where there is cancellation on arrival due to a change of circumstances etc. As we read it you cannot submit new evidence to show that there has not been a change of circumstances etc. If this is how it works, that seems extraordinarily unfair as the relevant application could have been years before

What of cases where an applicant asserts that they should have had the benefit of evidential flexibility or any other extra-statutory policy?
See comments on AR2.4 (and AR3.5) below.

AR1.6
As described above, this is not lawful. Section 6 makes provision for a decision-maker to act in a way in which s/he was bound to act as a result of primary legislation, not secondary legislation or the immigration rules. The decision maker is bound by the Human Rights Act 1998 and the paragraph does not alter this. The rules should contain an explicit statement that the reviewer will consider s 55 of Borders, Citizenship and Immigration Act 2009, the duty to have regard to the need to safeguard and promote the best interests of children and will be able to correct a decision if it is incompatible with s 55.

AR1.7. If it is obvious to the reviewer that a person meets the rules in another category there may be circumstances in which they should grant leave in that category, for example where not to do so would be unlawful because it would have the effect of separating or maintaining separation of a child from his/her parent. As drafted, the paragraph is not compatible with s 55 of the Borders, Citizenship and Immigration Act 2009.

AR1.12(b)(iii)
An administrative review should not be stopped when an application is made? It may be vital for an applicant to overturn a wrong decision as this will stay on his/her record but necessary for him /her to try to make rapid progress by submitting a fresh application.

A person should not be required to submit a fresh application (e.g. after becoming an overstayer) rather being allowed to remain lawfully present and submit additional documents with the administrative review application? AR1.12(b)(iii) ends s 3C leave where a person makes an application for leave. Because of AR1.5 evidential errors cannot be corrected in most cases, so people will need to make new applications within 28 days of becoming overstayers. Knowingly overstaying is a criminal offence which the Home Office appears to encouraging by this approach.

AR1.12(b)(iv)
This provision is only adequate if leave will always be granted either before, or at the very same moment as a decision that an administrative review application is successful is issued. Otherwise applicants will lose the protection of s 3C and s 3D leave. We trust that this is what is intended, but should welcome confirmation.

Articles 8ZA -8ZC are articles of the Immigration (Leave to Enter and Remain) Order 2000 (SI 200/1161) not the Immigration (Leave to Enter and Remain) (Amendment) Order 2013 (SI 2013/749).

AR1.13
As we understand it, this means that where a new decision for refusal is made on review, the review remains pending (with any section 3C leave continuing) for the period during which a review of the new decision could be sought and for the period until that review is completed and communicated, but only if the applicant complies with the requirements for applying for review in respect of the new decision in accordance with the rules on how to make an application etc. The drafting is obscure and lacks specificity.

AR2.1 to AR 2.3 see comments above.

AR 2.4 (with comments on AR3.5)
The phrasing of AR2.4. and AR3.5. suggest that the reviewer will take a judicial review type approach rather than review the merits of the decision on the facts and the law. It changes the standard of proof on an application. An applicant decides to make an application, pays the fee for that application and incurs other expenses on the understanding that it will be decided correctly according to the rules in force. If it is the case that where the Home Office makes a mistake and fails to decide that application correctly then this in

itself alters the standard of proof in a manner that disadvantages the applicant this is unfair not to say perverse. Aside its questionable legality it would undermine confidence in the department's ability to recognise its own errors.

The lists in AR2.4. and AR3.5 have significance in two ways. Firstly, they provide the only basis on which the Home Office can conduct an administrative review. Thus, an error not listed (or not falling within a category listed) cannot be reviewed.

Secondly, by reference to paragraph AR1.5, it is important for certain types of error to be distinguished (as opposed to just falling within a category listed) so that AR.1.5. can then identify the particular type of error as one in respect of which new evidence is permitted to be produced in support of the application for review.

One example is the general grounds for refusal. An incorrect general grounds refusal is not listed separately. If an application is wrongly refused on general grounds, this is likely covered by either AR2.4.(a) or (b) (and the equivalents in
AR3.5.). But whereas the applicant can reasonably be expected to anticipate having to demonstrate that s/he meets all the specific requirements of the rules relating to his/her category of application and hence have submitted any and all supporting evidence, where the decision-maker wrongly concludes the general grounds apply, the applicant cannot reasonably be expected to have anticipated a need to submit evidence to demonstrate that the general grounds do not apply.

Thus, failing specifically to list wrongful refusal on general grounds will cause problems. The general grounds need to be listed specifically in AR2.4. and AR3.5. so that they may in turn be listed in AR1.5. as errors in respect of which the applicant is permitted to adduce new evidence to show the case working error.

Another example is a wrongful refusal based on the "genuineness" test.

In a number of places the case working errors in AR2.4 and AR3.5 are worded differently although they appear to cover the same ground. Examples are AR2.4.(f) and AR3.5.(d) and & AR2.4.(i) and

AR3.5.(f). Different wording should be used only when it is intended to highlight a difference. In both the examples highlighted, we can identify no reason for the different wording.

AR2.4 (a) and (b) appear to cover the same ground.

AR 2.4(c) appears confined to arithmetical errors and fails to address the decision-maker who has calculated the points incorrectly.

AR 2.4(e) and AR2.4(f): why are the words "refusal decision" used in one and "eligible decision" in the other.

AR2.4(g) will a wrong decision always be identified as unreasonable? If not, this provision needs to be broadened. It should always be enough that that a decision is "the wrong decision".

AR2.4(h) (i) and (j) – what, if any, distinction is intended between flawed and incorrect? Throughout the Appendix words such as "incorrect", "flawed" and "wrong" appear to be used interchangeably.
ILPA would be grateful for sight of the earlier draft of the rules to consider what were the types of case working errors that were envisaged by the now removed paragraphs AR2.4.(l) and AR3.5.(g).

AR3 Admin review on arrival

AR3.1 to AR 3.3

See comments above.

AR3.4 control zone
Should this be two sentences? As written it is unclear.

AR3.5
See comments above on AR 2.4 which apply *mutatis mutandis*.
Are these provisions, in sum, enough to ensure that an application will be granted if the applicant meets the requirements of the rules?

Administrative Review Appendix 1 - Eligible decisions for administrative review in the United Kingdom.

See above.

The approach taken in Appendix 1 will necessitate amendment of the Appendix every time the rules are changed.

It appears that in any case where a category of the rules is not listed (such as most Appendix FM applications) this is because they are considered as necessarily being human rights claims, whether any explicit reference is made to human rights in the application or not. If this is the approach, it should be made explicit.

How will the Home Office distinguish a human rights claim from any other immigration application? Will any statement with or accompanying an application to the effect that refusal will breach section 6 of the Human Rights Act 1998 do the job (where the application is otherwise validly made)?

We are concerned that as matters stand there is at least the possibility that some decisions have neither appeal nor administrative review. The Home Office should set it out which applications under the rules it considers to be human rights claims.

It is not possible to list broad classes of decisions and specify that there will be an administrative review of refusals of decisions in these classes wherever there is no right of appeal on human rights or protection grounds? E.g. any decision to refuse to grant leave to enter, remain or to vary leave to enter or remain which decision is not otherwise appealable.

Assuming that this is not done:

Refusal on general grounds should be included in "Appendix 1".

In-country curtailment/cancellation decisions should be included. This is of particular import when read with s. 1 of the Immigration Act 2014.

What of long residence applications under paragraph 276A, indefinite leave to remain applications under paragraph 276B, refusal of a certificate of entitlement to the right of abode/deprivation of right of abode and revocation of Indefinite Leave to Enter or Remain? Will these always be treated as encompassing human rights claims? If not, they should include a right to administrative review. And so on through the categories.

The approach to children's applications is confusing. Some are eligible decisions and some are not and we cannot identify the rationale behind the distinctions made. Here the numbering wholly defeats us – in Appendix 1 are we looking at paragraph 30(b), (c) etc. etc. or just (b), (c) etc. And what happened to (a)? But we wish to highlight (e), (f),(g),(h) and (j) in "Appendix 1." These all raise Article 8. As to (o), (p) (domestic violence) and (q), (r) and (s) (bereaved spouses and partners) we are also puzzled as to why

bereaved spouses and partners, and survivors of domestic violence, are alone singled out from Appendix FM as having an administrative review. Is it assumed that the bereavement/violence means that they have no family life claim? If so, this ignores relationships with children, or other family members. It also omits consideration of private life, which may be highly relevant in such cases.

There appear to be errors in this part where the reference is not made to the correct paragraphs of the Immigration Rules.

For example, when read as a whole, para AR.APP-1.2.(a)(i)(1) states: Refusal of an application for leave to remain or an extension of stay where: one of the following paragraphs of the Immigration Rules applies: general visitor: paragraph 45.

Paragraph 45 is the paragraph under which extension of stay as a general visitor is granted. Where the application has been refused, this paragraph will not apply. The eligible decisions paragraphs should be re-worded to refer to the eligibility paragraph (in this case, para 44). The refusal paragraph should not be used because admin review is also available where leave is granted but the applicant is not happy with the period of grant (see para AR.APP-1.1.(b)).

AR APP 1.2
We have not worked through these line by line but they do not appear to be complete. For example, prospective entrepreneurs do not appear to be listed.

AR.APP-1.2.(a)
The relationship between (i), (ii), (iii), (iv) and (v) is ambiguous.

AR APP 1.2 (ii)
This needs to be amended or a new ground added to cover situations where the application is wrongly refused on the grounds that the further leave sought would exceed the maximum period allowed under the Immigration Rules.

Administrative Review Appendix 2
AR APP1.4
A further ground should be added to cover the situation where the decision is that the decision that the purpose specified in the entry clearance is not the same as the purpose for which the applicant is applying for leave to enter.

APPENDIX 3 definitions

Applicant
See comments on 34T above. It is necessary to make clear that in a group made up of a principal and dependants where the applications stand or fall with that of the principal, only one fee is payable. However, it is necessary to make express that must benefit from all the protections afforded applicants.

Case working error.
The proposed definition of case working error would restrict what can be challenged by administrative review and result in the displacement described above. It does not appear to us to be helpful to have a definition of case working error.

What if a decision-maker considers the evidence pertaining to the case but fails to give it due weight, etc?

We have expressed above our concerns about those errors that would not have altered the outcome of the decision.

We have expressed above our concern about those decisions where a policy outside the rules is material.

Is it envisaged that a decision on credibility might be reasonable but shown to be wrong, or is it envisaged that all decisions shown to be wrong are unreasonable?

Adrian Berry
Chair
ILPA
15 August 2014