Future of immigration advice

How changes to the immigration system will impact on advice providers.

Introduction:

1. These notes accompany a workshop to be held at the ASA conference on 18th April 2008. This workshop is to be run jointly with Fiona Hannan of the Legal Services Commission (LSC), who will outline the LSC's strategy in relation to the provision of immigration advice. These notes will focus on how changes to the immigration system will impact upon advice providers.

2. A starting point for the discussion here is the new UK Border Agency, which brings together the Border and Immigration Agency, Customs (operating at the UK border) and UK Visas; and in particular the Agency's 3 years business plan published on 3 April 2008. Thereafter, the discussion highlights specific themes or developments that are expected to have significant effect for immigration advice providers.

A new agency and new approaches:

3. Just over a year ago, the Border and Immigration Agency ("BIA") replaced the Immigration and Nationality Directorate ("IND"). Now the BIA has been replaced by the UK Border Agency ("UKBA").

4. Some immediate problems for advisers with these successive changes are simply administrative in nature. Changing departments and changing contacts may mean that tried and tested methods of resolving specific problems no longer work because the person who has previously been able to provide a solution, or just get things moving along, is simply no longer there.

5. At the same time, there have been significant changes to the website – e.g. when the entire Operational Enforcement Manual was recently replaced with the Enforcement Instructions and Guidance. The UK Border Agency and its predecessors have not always been diligent in alerting stakeholders

to changes in policy, guidance or the website. It is clearly important, therefore, to check at source what is the current position before giving advice or making representations. (There is a wealth of law and policy materials on the UK Border Agency website, including the Immigration Rules; and important Entry Clearance Guidance on the UKvisas website.)

6. There are also concerns as to consistency of practice across an agency that has been regionalised; and where operational responsibilities lie in the individual regions[1].

7. The UK Border Agency business plan[2] sets out priorities for the following 3 years, some of which are reproduced here. Priorities relating to asylum include:

- Maintaining and managing asylum intake levels at 2007/08 levels. (p18)
- Returning to the previous position whereby we remove more failed asylum seekers than we receive unfounded claims by December 2008. (p25)
- Expanding our detention estate by a further 400 new beds in 2009 by building a new detention facility at Gatwick, and a further 400 new beds in 2010 by expanding the facilities at Harmondsworth. We will publish plans for extra detention capacity and making more productive use of the estate during the course of 2008. (p26)
- Concluding 60% of new asylum claims in fewer than 6 months by December 2008. We will then continue to ramp up our performance to 75% by December 2009 and then to 90% by December 2011. In support of this, all new applications for asylum are now routed to fast track regional asylum teams and a single case owner is managing each new application from the beginning to its conclusion. (p30)
- Clearing the legacy of old cases by Summer 2011. (p30)

[1] There are 6 regions – London and South East; Wales and South West; Midlands and East; North West; North East, Yorkshire and the Humber; and Scotland and Northern Ireland.
[2] It is available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/businessplan/april2008march2011/ukborderagencybusinessplan.pdf?view=Binary

- Building on the saving of £50m in 2007/08, which was achieved later than planned, we have a firm basis to deliver a further £80m of asylum support savings in 2008/09. (p30)

- Delivering more sensitive treatment for children and victims of trafficking by:
  reforming the immigration and support system for unaccompanied asylum seeking children to ensure that they receive the specialist services they need;
  ratifying the Council of Europe Convention on Action against Trafficking In Human Beings.

- Delivering returns and more effective action to reduce the inflow of illegal immigration by sharing biometric and biographical data with our key international partners within the framework of data protection legislation. (p31)

- Working with FCO, Ministry of Justice and DfID to manage the Returns and Integration fund to secure with Foreign Governments improved arrangements to return foreign national prisoners, failed asylum seekers and immigration offenders to their country of origin. (31)

The following priorities relate to foreign national offenders:

- Those sentenced to more than 12 months or who have received a custodial sentence of less than 12 months for drug and gun crime or who have had their deportation court recommended will face automatic deportation under the terms of the U.K Borders Act 2007, by summer 2008. (p21)

- Alongside activation of automatic deportation powers, increasing the number of lawbreakers we remove, as well as increasing the proportion of those we remove who cause the most harm. (p24)

- Increasing the number of foreign national prisoners we remove to over 5,000 in 2008 (p24)

The following priorities relate to non-asylum related immigration:

- Implementing the Point Based System by April 2009. We are revolutionising the migration system and bringing in a Points Based System. To deliver a flexible 5-tiered system explicitly designed to deliver the UK's economic needs and improve our control over the managed migration system, the system will consolidate over 80 existing work and study routes into just 5 points based tiers; Tier 2 (Skilled workers with a job offer to fill gaps in the UK labour force) and Tier 5 (Youth mobility and

temporary workers) will be delivered by Autumn 2008 with Tier 4 (Students) rolling out in Spring 2009. (p29)

- Overhauling the short term visit system, tourist, family visit and business visas. We will begin the change by implementing the business visitor category in Autumn 2008 and introduce the full package of measures by December 2009. (p29)

- Modernising the spouse visa system by December 2008. Following the consultation on marriage and visitors we will be overhauling the system to make sure it is robust against abuse whilst ensuring that Britain is easy to visit legally. (p30)

- Having an allocated case owner by December 2008 with responsibility to oversee individual cases from application to outcome, whenever the case is under consideration. (p30)

The following priority relates to naturalization as a British citizen:

- Taking forward the proposals for a new, earned path to citizenship which we published for consultation in February 2008 with an aim for primary legislation to be introduced in December 2008 subject to the Parliamentary timetable. Earned citizenship proposals will be implemented, following consultation, in December 2010. (p30)

The following priorities relate to immigration control and immigration crime:

- Carrying out over 1,400 successful prosecutions against those involved in immigration crime and focusing our efforts on more serious crimes, such as facilitation and trafficking. (p21)

- Enforcing civil penalties of up to a proposed maximum of £10,000 per worker for employing migrants illegally. (p22)

- Introducing ID cards for foreign nationals by November 2008. This will mean that there is one secure document that proves entitlement to work or study in the UK, making checks easier for employers and colleges, as well as public agencies. (p26)

- Strengthening joint working arrangements with the police and other agencies to increase our future enforcement capacity, including creating a Criminal Investigation capability by December 2008. (p26)

8. The remainder of these notes focuses on particular themes or developments which are expected to have significant effect for

immigration advice providers, some of which may be specifically identified within the priorities listed. Others that are not specifically identified, however, can be seen to relate back to one or more of these priorities.

Caseownership:

9. The paradigm principle behind caseownership is that every case should have a named individual who is readily contactable and personally responsible for any particular case from its start to its end. This has been introduced for all new asylum claims from March 2007, and for a number of such claims in the 12 months or so before that date as the New Asylum Model was being rolled out.

10. As NAM has developed, the meaning or extent of caseownership has slipped. As originally proposed, it was envisaged that the caseowner would undertake all the significant events and decisions in the life of the case (excepting in relation to higher appeals). However, it has been apparent over a significant period of time that caseowners have been delegating and sharing work – including substantive events and decision-making in an effort to manage pressures on their time.

11. The principle of caseownership is one that has significant benefits. Although these may be undermined where the paradigm of caseownership is not fully met, it remains significant that a named individual responsible for a NAM asylum case ought to be known to the claimant and his or her representative and readily contactable. This allows for opportunities to confirm progress on a case, ensure appropriate and timely information exchange and better manage time, including where necessary seeking flexibility. It is important that advisers make use of this opportunity. However, for those providing advice only, it will be important to consider whether contact with a caseowner may nevertheless prove useful or necessary – in which case formal, written consent will be needed to allow the caseowner to discuss otherwise confidential matters.

12. The most developed form of caseownership is that currently adopted in the Solihull NAM pilot. In this pilot the opportunity for discussion and dispute-resolution between the caseowner and representative is extended to actively seeking to identify areas/aspects regarding which the caseowner has specific doubts or needs further evidence so that these can be addressed prior to interview or in any event prior to decision. Agreement over what is and is not in issue is sought prior to interview; and the representative is funded to appear at the interview. The aim is to resolve disputes earlier in the process, reducing appeals and ensuring that time and other resources are effectively targeted with the result of faster and safer conclusions on cases and reduced expense to public funds. The possible benefits of this approach are only achievable with active participation of both caseowner and representative.

13. However, the implications of caseownership in NAM are not necessarily all benign; and certainly there are significant responsibilities upon representatives if caseownership is to be of benefit in any individual case. A significant potential problem for the client-representative relationship arises from the encouragement given to claimants to develop a relationship with and contact their caseowner for assistance. This is explicit encouragement to undermine the traditional position whereby representatives in legal disputes communicate through each other and not direct to either's client. Given that the caseowner, in NAM, has responsibility for asylum support matters – and given that many representatives are not able to assist clients with such matters – there is clear opportunity for the development of a relationship between claimant and caseowner that the former may not wholly understand, and in respect of which the latter's position may become conflicted. There appears to be little, if any, appreciation of this concern within UKBA. Advisers would be advised to consider this carefully.

14. A further potential problem (particular to the Solihull pilot) – though one more obviously within the control of representatives – is that any agreements between the caseowner and representative are not simply

transferable to any appeal proceedings. If the representative does wish to rely upon concessions made by the caseowner, these must be formally accepted as concessions – in which case reliance may be placed by the determination in *Carcabuk & Bla v SSHD* (00/TH/01426)[3]. Moreover, the representative must be alive to the possibility that concessions may be withdrawn, including on the prompting of the immigration judge – where necessary, these may justify adjournment of the proceedings.

15. As caseownership expands beyond asylum, it will be of interest to see whether problems identified here are repeated or whether indeed new difficulties are encountered.

Legacy cases:

16. The Case Resolution Directorate of the UKBA has now established around 60 Case Resolution teams each dealing with around 5,500 cases. These cases constitute the asylum backlog, announced as between 400,000-450,000 case records by John Reid MP, the then Home Secretary, in July 2006[4]. These cases are to be concluded (that is closed – whether because the person is granted status, removed or it is discovered that the case record remains open in error) by summer 2011.

17. There has been substantial confusion over the use of questionnaires and speculation about amnesties. The Case Resolution Directorate is not conducting an amnesty; and questionnaires (and requests for photos) are no indication of what decision may be taken on a particular case. Nevertheless, there is substantial anxiety among some individuals within the legacy backlog to have their cases dealt with quickly – and sometimes this relates to mistaken beliefs of an amnesty. It should be noted that questionnaires are not used in all cases – depending on whether the Case

[3] This determination of Collins J and Mr Ockelton had been intended to be starred (and it is expressly stated in the determination that it is to be treated as starred). Reported determinations that have considered this determination are: *DE (Turkey) v SSHD* [2005] UKAIT 00148, *A (Somalia) v SSHD* [2004] UKIAT 00065 and *Z (Cameroon) v SSHD)* [2003] UKIAT 00183.
[4] Hansard HC – 25 July 2006 : Column 747

Resolution team considers that a questionnaire will be likely to lead to their obtaining new and useful information in any particular case.

18. There is a specific policy instruction on when the Case Resolution Directorate will expedite consideration of a case[5]. The Directorate is intending to introduce a standard process on notifying individuals – and if they have one, their legal representative – when the particular team begins active consideration of an individual legacy case. However, there are to be exceptions to this process. It is currently intended that individuals will not be given notification in this process if they are considered to be a serious absconding risk or there is an imminent or planned removal. (Individuals will criminal records, and cases where there is a clear intention to grant are also excluded.)

19. The difficulty for immigration advisers and representatives is to know when it is necessary or most useful to undertake work on a particular case, including obtaining evidence and making representations. Since the notification process is not intended to apply in all cases, and it seems it will not be possible to predict in advance whether a particular case falls within one of the groups who are expected to not receive notification, there is a real pressure to undertake work immediately – even at the risk that this may need repeating or updating in the future (possibly more than once). This appears to be the only sure way of protecting the interests of some individuals – especially given the very short timescales that are allowed for in relation to notice of removal directions[6].

20. There are other difficulties associated with legacy cases. For those with outstanding extension applications there are problems with seeking to show ongoing entitlement to support or to work. For many others, who face destitution, there may be real difficulties (and oftentimes a significant

[5] The API on Case Resolution Directorate – Priorities and Exceptional Cases is available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/crd_prioritiesexceptional.pdf?view=Binary

[6] Chapter 60 of the Enforcement Instructions and Guidance gives details and is available at: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter60.pdf?view=Binary

difficulty maintaining contact with an immigration adviser) in terms of food, shelter or clothing; with individuals feeling compelled to turn to illegal employment or indeed other forms of earning where they face exploitation. These concerns seem likely to be compounded by the policy aim to significantly reduce asylum support.

Detention, fast tracking and foreign national criminals:

21. The UKBA remains committed to expanded use of the Detained Fast Track for processing asylum claims at Yarl's Wood (women) and Harmondsworth (men). The particular difficulties of that process are not discussed here. However, for those working in the detained fast track, there is an ILPA Best Practice Guide which has been published this year.

22. The UKBA are committed to expanding the detention estate. They are also committed to increasing the number of removals of foreign national criminals. This summer, the so-called automatic deportation provisions in the UK Borders Act 2007[7] are expected to come into force, which will mean that certain individuals may face mandatory deportation – without consideration of their individual circumstances – if convicted of certain crimes and/or sentenced for certain periods of time. It is important to note that the commencement provisions relating to automatic deportation allow for a degree of retrospective application so that those still serving sentences or still under a suspended sentence at the time these provisions take effect may be caught.

23. The upshot of these changes in policy and law is likely to mean an increased number of individuals detained under immigration powers following completion of sentence. These may be detained at Immigration Removal Centres or prisons. As has been seen over the last couple of years, pressures on the detention and prison estates have contributed to increased movement of detainees around the detention and prison estates. The difficulty of access to immigration advice for many in these

[7] see sections 32-39 of the UK Borders Act 2007

circumstances is particularly acute. However, with the mandatory linkage of specific crimes and/or sentences to deportation, there is a further and similarly difficult problem of ensuring individuals have access to immigration advice before taking decisions in criminal proceedings – e.g. when considering a plea. There are similar issues to consider around foreign national prisoners and early removal schemes.

Points Based System:

24. Tier 1 of the points based system (for the highly skilled) was introduced into the Immigration Rules by Statement of Changes HC 321 on 1 April 2008. As the Home Office replace previous economic (broadly speaking, business, student and working) migration routes with the points based system there are important implications for those in the UK with leave under categories that are disappearing. As we have seen with the changes that were made in late 2006 to the highly skilled migrants route, these may have substantial detrimental effects upon individuals who had previously considered their immigration situation was secure.

25. It will be important to follow the progress of the litigation challenging the these transitional provisions introduced for highly skilled migrants, and their retrospective effect upon individuals who are expected, under the provisions, to wait longer and satisfy different criteria in order to obtain settlement in the UK. The recent successful judicial review in *HSMP Forum Ltd v SSHD* [2008] EWHC 664 (Admin)[8] may yet be subject to further challenge.

Entry clearance applications and re-entry bans:

26. For those advising on overseas applications for entry clearance, applicants under the points based scheme will not enjoy a right of appeal (except on human rights or race discrimination grounds); and instead applicants will be restricted to a process of administrative review by UK Visas.

[8] see http://www.bailii.org/ew/cases/EWHC/Admin/2008/664.html

27. Statement of Changes HC 321 has also introduced from 1 April 2008 re-entry bans so that individuals who have previously breached UK immigration law in certain specified ways face a ban on their seeking to enter the UK for a fixed period. The length of the fixed period depends upon how they left the UK after the relevant breach of immigration law – 12 months from departure (if having left voluntarily), 5 years from departure (if left voluntarily but at some expense to the UK) and 10 years from departure (if removed). The Government has announced a time-limited concession, which is now set out in the Entry Clearance Guidance at chapter 26.17[9].

28. There have also been important changes to how deception – whether by the applicant or a third party, including an adviser – may lead to the mandatory refusal of any application for entry clearance, leave to enter or leave to remain. Guidance on this is available at chapter 26.16 of the same guidance.

29. A critical difficulty for immigration advisers is how to advise individuals, currently in the UK who may face a ban on re-entry if they leave the UK. There are those who have already left the UK – sometimes on advice – who have now received refusals of their applications for entry clearance to join their partners in the UK. It is noticeable from some of the early decisions made by entry clearance officers that consideration of human rights grounds is very brief and formulaic; and likely not lawful by reason of the failure to follow the guidance given by the Court of Appeal in *AG (Eritrea) v SSHD* [2007] EWCA Civ 801 (paragraph 37)[10], which requires that decisions on proportionality "*should have proper and visible regard to relevant principles in making a structured decision about it case by case*" and specifically finds that it "*is not sufficient… to simply characterise something as proportionate or disproportionate…*". It is noteworthy that what is expected of entry clearance officers here is very much the reverse

[9] Chapter 26 is available at: http://www.ukvisas.gov.uk/en/ecg/chapter26/
[10] see http://www.bailii.org/ew/cases/EWCA/Civ/2007/801.rtf

of what the Home Office intends to be the result for decision-makers by the introduction of the points based system.

30. If individuals cannot take advantage of the time-limited concession (which at 26.17.4 and 26.17.5 is set out in unhelpfully inconsistent terms), they may need to consider whether it is to their advantage to pursue applications, appeals or judicial reviews in country.

Miscellaneous other matters:

31. The Criminal Justice and Immigration Bill[11] includes provisions for a new special immigration status. This is intended to be applied to individuals who have committed certain criminal offences or individuals excluded (under Article 1F) from the Refugee Convention; and their dependent families. It is the Government's long anticipated response to the Court of Appeal judgment in the Afghan case[12]. Issues for immigration advisers will likely centre around: (i) the incompatibility with the Refugee Convention of the UK's legislative interpretations of Articles 1Fc and 33.2 of the Convention[13]; (ii) the Article 8 rights of those subjected to the miserable regime envisaged under the special immigration status; (iii) the need for ongoing advice and representation for those subjected to what will be an indefinite regime; and (iv) the need for separate applications/appeals for family members of those who may be subjected to this regime.

32. Section 16 of the UK Borders Act 2007 has extended the conditions that may be imposed upon someone who is granted limited leave to enter or remain. Reporting and residence conditions may now be imposed (in addition to conditions not to work, not to access public funds and to register with the police)[14]. Dealing with such conditions, which may in individual cases raise issues of interference with private or family life may

[11] The latest version of the Bill is available at: http://www.publications.parliament.uk/pa/ld200708/ldbills/041/2008041a.pdf
[12] see http://www.bailii.org/ew/cases/EWCA/Civ/2006/1157.html
[13] see section 54 of the Immigration, Asylum and Nationality Act 2006 and section 72 of the Nationality, Immigration and Asylum Act 2002 respectively
[14] see section 3(1)(c) of the Immigration Act 1971 as amended

become an ongoing concern for immigration advisers in respect of individuals who in the past may have ceased to need any or any immediate immigration advice or representation following a grant of leave. Moreover, the importance of these new conditions is emphasised by the possible application of a re-entry ban (see discussion above under separate heading) if there is any breach of these conditions.

33. The proposals of citizenship appear likely to extend the length of time, and degree of ongoing immigration advice, of temporary leave through which migrants who may expect ultimately to settle in the UK must pass. The proposals include a new probationary citizenship stage and the removal of indefinite leave to remain – except for those who are determined not to become citizens (or cannot hold dual nationality) after much longer periods of temporary leave than would be required even to British become citizens. The process proposed is generally more complex, with the probationary stage being variable (shorter for behaviour that is 'good' and longer for behaviour that is 'bad'; but in any event no less than one year). Under these proposals, there will likely be a need for ongoing immigration advice – including in relation to welfare and other entitlements.

34. Long-outstanding proposals relating to unaccompanied asylum-seeking children remain to be resolved. However, the Home Office intention is to disperse newly arrived children to specialist local authorities outside of London and the South East. As to when these proposals may be implemented, and where such specialist authorities may be located, the position remains unclear. The importance of access to specialist legal advice will be particularly important given the ongoing and profound controversy around age assessment, particular policy instructions and processes relating to children and particular needs and entitlements of children. All the more so given the possibility that other proposals are adopted, which have been discussed by the Home Office including relating to no longer granting discretionary leave in these cases, recurring discussions on forced returns of children and changed approaches to welfare support (particularly leaving care arrangements).

Conclusion:

35. These notes do not attempt to identify all significant changes in immigration law and policy; nor to map the full range of impacts that may be faced by immigration advisers. However, they provide an introduction to some important issues facing immigration advisers in the months and years ahead.

36. In broad terms, what the discussion reveals is:

- The UKBA envisage a greater role for caseownership across the agency's casework. While this may allow for greater transparency and more effective contact with the agency, it may also require increased contact with the agency and more careful management of the relationship between adviser-client-agency.

- The emphasis on caseownership and early resolution, the removal of appeals in certain entry clearance matters and the consequences of particular immigration behaviour, and criminal convictions or sentences, may each substantially increase the significance of early access to specialist and reliable legal advice.

- The introduction of mandatory deportation decisions, the removal of some appeal rights, ongoing interferences with the private and family life of those permitted to stay in the UK and the re-entry bans introduced into the immigration rules provide a greater role for human rights and judicial review challenges.

- The continuing potential for interference with private and family life of those permitted to stay in the UK, the proposed extended processes for citizenship or permanent residence, the expansion of the detention estate coupled with increased targets for removals of foreign national criminals and the reduction in support and crackdown on illegal

working each are likely to increase the need for, and difficulties involved in, advisers maintaining contact and providing ongoing advice.

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