Law and Policy Update

Introduction:

1. This note accompanies a discussion session at the Terrence Higgins Trust on Thursday, 10th September 2009, and provides an update on various legal and policy developments that may be of interest to service users of THT and those working with them as part of the THT Refugee Mentoring Project.

2. Various discrete developments are briefly addressed under distinct headings below:

    - Naturalisation
    - Transfer of the Asylum and Immigration Tribunal into the Tribunals Service
    - UK Border Agency policy on judicial reviews and removal directions
    - Permission to work for asylum-seekers
    - Access to healthcare
    - Legacy cases
    - New children's welfare duty

3. Some of these matters relate to the Borders, Citizenship and Immigration Act 2009, which was enacted in July 2009. However, an overview of that Act is not provided here since much of its content is likely of lesser interest that other developments in policy.

4. ILPA has produced information sheets on several of the topics addressed in this note. All information sheets are available in the 'info service' section of the ILPA website at www.ilpa.org.uk and relevant information sheets are highlighted in the body of this note.

Naturalisation:

5. Naturalisation is the way by which migrants in the UK may be able to become British citizens. In February 2008, the Government opened a consultation on

this subject. The Borders, Citizenship and Immigration Act 2009 contains changes to the law on naturalisation. These changes are designed to introduce the proposals the Government had set out in the February 2008 consultation[1].

6. **There are several changes that are to be made. However, the Government confirmed that it does not intend to bring these changes into effect until July 2011.**

7. The changes that are to be introduced in 2011 include changes that may lengthen the period of time some migrants will have to spend in the UK before they can apply for citizenship. The changes will also introduce a new stage in the process by which some migrants can become British citizens – this new stage is to be called 'probationary citizenship'. The changes will seek to discourage migrants, who intend to make the UK their long-term home, from becoming permanent residents rather than British citizens. The changes will do this by significantly lengthening the time a migrant would need to be in the UK before he or she could apply for permanent residence (i.e. what is now called indefinite leave to remain). The following paragraphs provide a short explanation of some of the key aspects of these changes.

Active citizenship

8. The Government intends that migrants should be encouraged to undertake community or voluntary work. The changes to be made include the introduction of what the Government refers to as 'active citizenship'. The full details of this have not been worked out. However, the basic idea of the Government is that migrants should have to do some community or voluntary work, which is in some way formally accredited or approved, in order to be able to apply for British citizenship at the earliest opportunity. A migrant who does not do this work will be required to spend an additional 2 years before he or she can make an application for citizenship.

[1] The original consultation document, and Government's analysis of responses and its own response to the consultation are available at http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/pathtocitizenship/

Probationary citizenship

9. Currently, migrants who become British citizens usually pass through three stages – (i) limited leave to enter or remain in the UK, (ii) indefinite leave to remain in the UK, and (iii) British citizenship. In the future migrants will usually pass through three stages – (i) limited leave (or temporary leave), (ii) probationary citizenship, and (iii) British citizenship. It can be seen that it is the second stage that is intended to change. It appears, however, that probationary citizenship is no more than limited leave by a different name. The key change, therefore, will relate to access to services and benefits. Most migrants (other than those granted refugee leave or humanitarian protection) are excluded from various services and benefits while they only have limited leave. By making the second stage a further stage of limited leave, this will extend the time during which these migrants will be excluded from these services and benefits. This will not affect those granted refugee leave or humanitarian protection who will continue, as now, to be eligible to receive services and benefits.

Points-based requirements

10. Since the Borders, Citizenship and Immigration Act 2009 was enacted, the Government has issued a new consultation about its proposals on naturalisation[2]. This consultation provides an opportunity for individuals and organisations to lobby the Government about the proposed changes to be introduced in July 2011, and whether and how they should be introduced. One significant aspect on which the Government's position remains unclear is whether it is intended to change the policy on 'active review' of refugee leave. Currently, refugees are granted 5 years' refugee leave and may apply for indefinite leave to remain at the end of this period. The current policy sets out that in ordinary circumstances, unless the refugee has committed a criminal offence, an application for indefinite leave to remain will be considered without any reconsideration of whether the refugee is still in need of asylum. The UK Border Agency has indicated recently that this policy position is not

[2] This consultation will remain open until 26 October 2009. Details of the consultation are available at: http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/221878/earning-the-right-to-stay/

intended to change[3]. However, the consultation document suggests that it may be changed[4].

Permanent residence

11. The Government intends to replace the term 'indefinite leave to remain' with the term 'permanent residence'. However, it is intended to do more than just make a name change. In future, a migrant seeking permanent residence (rather than British citizenship) will have to spend an additional 2 years beyond the time he or she could have applied for citizenship before he or she can apply for permanent residence. This may be particularly harsh for those whose current nationality precludes dual citizenship and who do not want to abandon their current nationality.

Transitional protection

12. One concern that was much discussed during the passage of the Borders, Citizenship and Immigration Bill through Parliament was the need for transitional protection – whether and how any changes to naturalisation should affect migrants already in the UK but who have not become British citizens by the time the changes are introduced. In response, the Government agreed that it would not introduce the changes before July 2011. It further agreed that anyone who has applied for British citizenship or has been granted indefinite leave to remain or has applied for indefinite leave to remain before the changes are introduced, will be able to apply for British citizenship under the current provisions – provided their application for British citizenship is made within 2 years of the changes being introduced.

13. See further ILPA information sheets: *Changes to British Nationality Law* and *Path to Citizenship 3-New Consultation*.

---

[3] This was the position presented to stakeholders at a UK Border Agency workshop held for members of the National Asylum Stakeholders' Forum on 18 August 2009.

[4] At page 7 of the consultation document it is stated: "*A points based test would need to capture the requirements for probationary citizenship which already exist within the earned citizenship system. For family members and refugees, sufficient points to pass the test would be awarded on the basis of their continuing family relationship or protection needs.*"

Transfer of the Asylum and Immigration Tribunal into the Tribunals Service:

14. In early 2010, it is intended that the Asylum and Immigration Tribunal (AIT) will be transferred into the Tribunals Service. The Tribunals Service was established by the Tribunals, Courts and Enforcement Act 2007 and began operating in November 2008. Most, but not all, tribunals in the UK have already been transferred in. The aim is to bring together all or most tribunals into one overarching body (the Tribunals Service) where there may be greater influence of higher court judges (e.g. judges of the High Court) and greater consistency in practice and procedures.

15. It is not yet clear how much of a change the transfer of the AIT will make. Certainly there will be some technical and name changes, but the general appeal process may well look very much like it does now. However, two significant changes which will result from the transfer relate to access to the higher courts (High Court and Court of Appeal). These are described in the following paragraphs.

Judicial review

16. Where a public body (such as the UK Border Agency or the AIT) acts or fails to act in circumstances where there is no right of appeal, a legal challenge may be brought in the High Court by what is called judicial review (e.g. to require the public body to stop acting unlawfully, or to act lawfully). Significant numbers of judicial reviews are brought in immigration cases. One situation where a judicial review may be brought is where an asylum-seeker, whose claim and appeal has been refused, seeks to make a fresh asylum claim and the UK Border Agency decides that the representations made to it are not sufficient to constitute a fresh claim. This is important because a fresh claim would require a new decision with a new appeal right. Judicial review proceedings may be brought to force the UK Border Agency to treat representations as a fresh claim. Currently, these judicial reviews are dealt with in the High Court. When the AIT is transferred, it is intended that these judicial reviews (only the fresh claim judicial reviews described here) will be transferred to the Tribunals Service, where they may be heard by High Court judges or by senior immigration judges.

Appeals to the Court of Appeal

17. Currently immigration and asylum appeals are dealt with by the AIT. In most cases, a decision of the AIT which is wrong in law may be challenged by requesting reconsideration of the appeal by the AIT. However, when the full AIT process has been gone through, if the final decision remains wrong in law, an appeal may be brought to the Court of Appeal. To appeal, at this stage, to the Court of Appeal it is necessary to show that there is an arguable error of law in the decision of the AIT and that the appeal has a real prospect of success. When the AIT is transferred, this test will be added to. In order to appeal to the Court of Appeal when an appeal has gone through the full Tribunals Service process, it will be necessary to also show that there is some important point of practice or principle at stake or some other compelling reason why the Court of Appeal should hear the appeal. The Government has suggested that this additional test should not affect appeals on asylum or human rights grounds. However, it remains to be seen whether the courts will agree with that, and whether the additional test does lead to a greater restriction on appeals that are heard by the Court of Appeal.

18. See further ILPA information sheets: *Borders, Citizenship and Immigration Act 2009* and others referred to there in the section on "Transfer of 'fresh claim' judicial reviews".

UK Border Agency policy on judicial reviews and removal directions:

19. In 2009, the UK Border Agency has twice changed its policy relating to when and how it will suspend a removal in response to a judicial review challenge. These changes are designed to restrict the circumstances in which the UK Border Agency will suspend a removal.

20. The general position before 2009 was that the UK Border Agency would suspend a removal in circumstances where the High Court has formally acknowledged receipt of an application for judicial review. However, the changes mean that removal may not be suspended if the judicial review application is submitted within 3 months of the final decision on the person's

appeal or within 3 months of a decision by the High Court to refuse permission in a previous judicial review.

21. See further ILPA information sheet: *Removals and Judicial Review 2* (however, note that the full extent of these changes were made after that information sheet was published[5]).

Permission to work for asylum-seekers:

22. For some years, the general position in the UK has been that asylum-seekers are not permitted to work. The European Reception Directive, however, requires the UK to set out circumstances in which asylum-seekers may be permitted to work if they have been waiting for 12 months or more for a decision by the UK Border Agency on their asylum claim. The Immigration Rules permit permission to work to be granted (if an application is made) to an asylum-seeker who has been waiting for 12 months or more for a decision from the UK Border Agency on their original asylum claim.

23. In May 2009, the Court of Appeal decided that European Reception Directive applies to a fresh asylum claim just as it applies to an original asylum claim. Thus, according to the Court of Appeal's decision, the UK Border Agency is required to consider granting permission to work where an asylum-seeker, who has been refused asylum but has made a fresh claim for asylum, has been waiting for 12 months or more for a decision on that fresh claim. The UK Border Agency has appealed to the House of Lords. In the meantime, it has adopted a policy under which it will not make a decision (until it has a decision from the House of Lords) on applications for permission to work by those who have been waiting for 12 months or more for a decision on their fresh asylum claims. However, it is arguable that this tactic of delay by the UK Border Agency is itself unlawful. Someone who makes an application for permission to work in these circumstances may apply for judicial review of the

[5] See UK Border Agency news item at: http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/2009/july/policy-changes-on-jr-challenges?area=allNews

UK Border Agency's failure to make a decision and failure to grant permission to work.

24. It is important to note that the Court of Appeal judgment only applies if someone has submitted a fresh claim for asylum and at least 12 months have gone by without a decision on that fresh claim.

25. See further ILPA information sheet: *Permission to Work Judgment*.

Access to healthcare:

26. The rules on access to NHS healthcare for migrants are similar but not exactly the same throughout the UK. This is because health is a devolved matter – i.e. it is a matter for the national/regional Governments in Northern Ireland, Scotland and Wales. In March 2009, the Court of Appeal gave an important judgment on access to healthcare for refused asylum-seekers in England. In July 2009, the UK Government announced[6] its conclusions following a 'review of access to the NHS by foreign nationals'. Its proposals will only apply to England (unless the Governments in Northern Ireland, Scotland and/or Wales decide to adopt the same proposals).

27. Following the Court of Appeal judgment, the Department of Health (DoH) issued further guidance to be applied in England. The Court decided that there was discretion to provide secondary healthcare (e.g. hospital treatment) free of charge to refused asylum-seekers. The DoH guidance makes clear that refused asylum-seekers who have received treatment or begun a course of treatment free of charge should not now be charged or have that treatment interrupted.

28. Currently, there are no charges to foreign nationals for treatment given in an accident and emergency department, for family planning services and for treatment of certain listed diseases. Asylum-seekers (whose claims remain outstanding) are not charged for any NHS services. Those recognised as

[6] Statement by Lord Darzi of Denham, Parliamentary Under-Secretary of State for Health, *Hansard* Lords, 20 July 2009 : WS158-160

refugees or lawfully resident (i.e. living here with some form of leave to enter or remain) for 12 months or more are also not charged.

29. TB is listed, and treatment for this should always be provided free on the NHS. HIV, however, is not listed. Treatment for this may be charged, e.g. if the person has been refused asylum. However, the Government included the following in its July announcement:

> "*In relation to HIV treatment, the Government recognises that clinical evidence on treatment, including its role in prevention, is developing constantly. Moreover, HIV is a major global problem, the control of which creates significant financial as well as human costs. We will therefore undertake further analysis of the latest medical and public health evidence together with consideration of how the current policy on treatment aligns with the Government's wider international aid strategy on HIV. This analysis will inform a future decision on whether the current treatment policy (that only initial diagnosis and counselling is offered free of charge to non-UK residents or individuals who are not otherwise exempt) should be revised.*"

30. The Government also announced its intention to extend the exemption from charges for NHS treatment to new categories of people. These categories will include all unaccompanied children and those refused asylum-seekers granted section 4 support if they have children or it is currently not possible to return them to their home countries. Victims of trafficking, who have been recognised as victims by the UK Border Agency or UK Human Trafficking Centre are also exempt.

31. Access to general practitioner (GP) services is controlled by GPs. A GP is entitled to register anyone as a patient and to provide free services. A GP has discretion whether or not to register a new patient, but must not refuse to register for discriminatory reasons.

32. See further ILPA information sheet: *Access to Healthcare 2* (however, note that this information sheet was published before the Government's announcement in July).

Legacy cases:

33. General and background information is available from ILPA information sheets: *Legacy Cases* (Nos. 1 – 6). This note addresses two recent developments relating to contacting the Case Resolution team responsible for a specific legacy case and the criteria to be applied by Case Resolution teams when deciding whether to grant leave to remain in the UK or to remove someone from the UK. It also gives a short update on operational developments at the Case Resolution Directorate (the department at the UK Border Agency responsible for all legacy cases).

34. The Case Resolution Directorate has created an online service by which people can check whether their case is included in the legacy backlog, and discover which Case Resolution team is responsible for the case (with an address to write to that team). To use the service, all that is needed is the Home Office reference number. The service is available at: http://www.bia.homeoffice.gov.uk/asylum/oldercases/who-is-processing-my-case/

35. The policy guidance[7] under which some legacy cases may be considered and granted indefinite leave to remain has been revised. It now makes clear that the Case Resolution teams should give consideration to whether there is any real prospect that, if it is decided not to grant leave to remain, the person can be removed from the UK. Of itself, this will not be a reason to grant indefinite leave to remain. Moreover, those with a criminal history may be refused a grant of leave to remain even if it unlikely that they can be removed. However, where someone has no criminal history, and his or her immigration history is not poor, the revision to the guidance may assist a Case Resolution team to make a decision to grant indefinite leave to remain rather than continue to leave a person in limbo in circumstances where it is unlikely that he or she can be removed from the UK. A person's length of residence in the UK is already a relevant factor for the Case Resolution team to consider. The

[7] The relevant guidance is contained in Chapter 53 of the Enforcement Instructions and Guidance available at (paragraphs 53.1 to 53.1.2): http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter53?view=Binary

revised guidance allows a Case Resolution team to grant indefinite leave to remain to someone who, because it is unlikely they can be removed, would likely qualify for indefinite leave to remain in the future. This will avoid leaving some people unnecessarily in limbo. In some cases it will save the UK Border Agency the cost of supporting them.

36. Currently, the Case Resolution Directorate is undergoing further operational changes. They are employing new administrative staff, and changing the way they work so that Case Resolution teams are relieved of much of the administration involved in retrieving, considering and implementing decisions on cases. It is intended that this should speed up the resolution of cases by Case Resolution teams. It remains to be seen how successful this may be, but in the short term it is possible that (while new administrative staff are being trained) the resolution of cases may even slow temporarily.

New children's welfare duty:

37. The Borders, Citizenship and Immigration Act 2009 contains a new statutory duty on the UK Border Agency to safeguard and promote the welfare of children. The Government intends that this new duty will become effective from around October 2009, and is currently drafting guidance to be published when the duty is introduced. It remains to be seen what effect the new duty has on the way in which the UK Border Agency, and its private contractors, deal with cases involving children (whether the case put before the UK Border Agency is that of the child or of the child's parent or other carer). However, when the duty is in place, decisions or actions on the part of the UK Border Agency which do not have proper regard to safety and welfare needs of children may be challengeable – whether in court proceedings or through complaints mechanisms.

38. See further ILPA information sheet: *Chidren – New Statutory Duty*.

Steve Symonds
Legal Officer, ILPA

8th September 2009