

REPRESENTATION AT IMMIGRATION APPEALS

a best practice guide

ILPA

Immigration Law
Practitioners' Association



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a best practice guide

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with a foreword by Mr Justice Collins

December 2005

ILPA
Immigration Law
Practitioners' Association



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The Immigration Law Practitioners' Association (ILPA) is the UK's professional association of immigration lawyers, advisers and academics practising or engaged in immigration, asylum and nationality law.

The Office of the Immigration Services Commissioner (OISC) is a statutory regulator established to regulate those providing immigration advice or immigration services across the UK.

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Foreword

Immigration law is by no means straightforward. In asylum cases, the result may literally be a matter of life or death. Thus competent representation is of the very greatest importance.

When I was appointed to be President of the Immigration Appeal Tribunal in 1999, with some noteworthy exceptions the standard of representation was frequently poor. Registration has assisted, but, if only a guide such as this ILPA Best Practice Guide had been available, I am sure that there might well have been an earlier improvement.

This guide is an essential aid for any immigration practitioner, however experienced he or she may believe him- or herself to be. It covers in some detail but with admirable clarity how to present a claim in the best possible way and the conduct which is appropriate. If representatives read and apply the guidance it contains, the correct result will be the more likely to follow.

I have no hesitation in commending this publication. It must be on the desk of all who practise in the immigration field.

Mr Justice Collins

Lead Judge, Administrative Court

December 2005

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This is the fourth such guide that ILPA has produced. We are pleased for it to be published in association with the Office of the Immigration Services Commissioner.

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The project was co-ordinated by Susan Rowlands, General Secretary of ILPA, assisted by Helen Williams.

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Abbreviations

Home Office/immigration service procedures

CIO	Chief Immigration Officer
HOPO	Home Office Presenting Officer
IDIs	Immigration Directorate Instructions
TA	Temporary admission
TR	Temporary release

Courts

AIT	Asylum and Immigration Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IAA	Immigration Appellate Authority
IAT	Immigration Appeal Tribunal

Legal representation

CLR	Controlled Legal Representation
OISC	Office of the Immigration Services Commissioner
OSS	Office for the Supervision of Solicitors

Law

AIA 1993	Asylum and Immigration Act 1993
AI (TC etc.) A 2004	Asylum and Immigration (Treatment of Claimants etc.) Act 2004
HRA 1998	The Human Rights Act 1998
IA 1971	Immigration Act 1971
IAA 1999	Immigration and Asylum Act 1999
IAN (Bill) 2005	Immigration Asylum Nationality (Bill) 2005
NIAA 2002	Nationality Immigration and Asylum Act 2002
2005 Practice Directions	Asylum and Immigration Tribunal Practice Directions 2005
2005 Procedure Rules	Asylum and Immigration Tribunal (Procedure) Rules 2005

Purpose of this guide

This guide is aimed at and addressed to representatives at immigration appeals before the Asylum and Immigration Tribunal.

It covers both how to prepare a case for appeal and how to represent an appellant at the appeal hearing.

Appeals are stressful, time consuming and expensive whether paid for by individuals or public funds. It is obviously better to avoid having to appeal against a decision and this guide also briefly considers how best to make an application: this includes advising a prospective appellant on the likely outcome of the application and when the decision should be appealed.

This guide does not consider judicial or statutory review. Nor does it consider in any detail how to appeal to the Court of Appeal.¹

Keep up to date

Detention is a contentious area of Government policy and it is subject to rapid changes. This is particularly so because many changes are possible without primary legislation. It is essential for representatives to keep up to date with policy and practice, as well as legislative changes. Membership of the Immigration Law Practitioners' Association (ILPA) will help to ensure that you are kept up to date. 'Call counsel' services provide telephone advice to holders of Legal Services Commission contracts.

Telephone numbers, correspondence addresses and fax numbers are changed often and frequently without notice. It is therefore important that you keep up to date with any changes.

This guide is published in January 2006. References in the text to current practice and procedure are current through November 2005.

¹ See Civil Procedure Rules and specialised legal text books

1

Preliminaries

Obligations to others

You owe a duty to behave professionally not just to your client but also to others such as the courts and tribunals, the Home Office and the Immigration Service, experts, interpreters, etc.

The Bar Code of Conduct provides rules governing how barristers may conduct cases. Many of these are relevant to the conduct of immigration appeals.

Barristers must not rehearse, practise or coach a witness in relation to his or her evidence or encourage him or her to give evidence that is not truthful or not the whole truth. Other rules include the following:

- A barrister must ensure that the tribunal is informed of all relevant authorities and statutory provisions whether favourable to the client's case or not.
- Any procedural impropriety must be drawn to the tribunal's attention at the time of hearing and not reserved for appeal.
- A barrister must not make a submission which he or she does not consider to be properly arguable. This does not mean that you are not entitled to present a weak case; what you cannot do is make submissions you know to be wrong either factually or legally.

Although these rules are for barristers they are aimed at ensuring the integrity of the system of justice and are equally appropriate for other advocates.

Offences committed by advisers under the Immigration Acts

There are criminal offences in the Immigration Acts that advisers can commit which are punishable by fine and/or imprisonment.

Basic principle

You should never knowingly mislead the immigration authorities or the tribunal or advise a client to deceive the tribunal or the immigration authorities.

Main offences in the Immigration Act 1971

- s25 Assisting unlawful immigration to the European Union
- s25A Helping an asylum seeker to enter the UK
- s25B Assisting entry to the UK in breach of a deportation or exclusion order
- s26 General offences in connection with administration of the Act

Your duties to your client

The professional bodies publish guidance on the relationship between an adviser and his or her client.¹

- Solicitors and those working in a solicitors' office or law centre are regulated by the Law Society. The Law Society has issued specific guidance for immigration practitioners.² Some law centres are registered with the Office of the Immigration Services Commissioner (OISC).
- Barristers are regulated by the Bar Council.
- All others giving immigration advice, unless the subject of a specific exemption, are governed by the OISC. The OISC also retains a general discretion to regulate solicitors and barristers.
- It is a criminal offence to give advice if you are not authorised or exempted, even if you do not charge for the advice.³

The main principle, which applies to all advisers regardless of their professional governing body, is to act in the best interests of the client. Legal advice has to be given in accordance with current immigration law and policy. ³See appendix 1, sources of immigration law.

You are required to keep your knowledge up to date.⁴

Solicitors, or those working in solicitors' firms, are under a professional duty to assess eligibility for legal help or controlled legal representation. If you do not take the case on, for example because you are not contracted to do publicly funded work, you are still under a duty to assess and offer referral.⁵ If you are an OISC regulated adviser you are under a duty to assess your client's case and if, unable to take the case on, refer appropriately.⁶

Your role as a practitioner

Your client, or his or her friend or relative, is unlikely to come to the first meeting with a full understanding of your role as a legal representative. It is important that you explain as fully as possible the contract that will be established between you when you take on a client.

Aim to provide correct legal advice efficiently and with impartiality. Your personal views on your client's application are irrelevant. It is not your role to prejudge an application or appeal on the basis of your personal moral standards. The 'worthiness' of your client for assistance is not relevant.

1 Law Society Rule 1; Bar Council Code of Conduct; OISC Code of Standards 49.

2 Guidelines for immigration practitioners, Law Society, June 2001, September 2002 and July 2005 see www.lawsociety.org.uk/professional.law

3 The OISC does not permit advisers regulated by the OISC to undertake judicial review work or to act as a McKenzie friend. See OISC News, Issue 12, spring 2004.

4 ILPA runs an extensive programme of accredited training courses and also sends a monthly mailing to members containing recent changes in policy and practice as well as immigration news. Details at www.ilpa.org.uk

5 'A solicitor is under a duty to consider and advise the client on the availability of legal aid where the client might be entitled to assistance under the Legal Aid Act 1988.' Guide to the professional conduct of solicitors, s5.01

6 OISC Code of Standards 13

The issues are:

- What is your client's current and/or past problem?
- What are his or her current circumstances and how does the law and policy apply?
- Does he or she have an arguable appeal?

The fundamental issue is how you can act in your client's best interests.

Barristers are required by the 'cab rank' principle⁷ to take on any case that they have the competence to undertake and that is appropriate to their experience and seniority, regardless of whether the case is privately or publicly funded. In particular, a barrister who supplies advocacy services must not withhold his or her services on the ground that the nature of the case is objectionable to him/her or to a section of the public or on the ground that the conduct, opinion or belief of the client is objectionable.

There is no such 'cab rank' rule for solicitors or those who are OISC regulated, who are free to decide subject of course to discrimination legislation which clients they take on.

Who is the client?

Individuals, couples or family groups may seek advice. Individuals in the UK may seek advice on behalf of those abroad. It is essential to identify who is the client and thus the person for whom you are acting to ensure that advice given is directed to that individual's problems and questions.

It may be that you act for more than one person who is concerned in a case. Solicitors call this a 'joint retainer'. For example, you may be instructed in an entry clearance appeal by both the appellant abroad, and his or her sponsor in the UK. You should explain at the outset to both clients involved in the case that you act for them both, and that this means that you are obliged to disclose all information to both parties.

■ EXAMPLE

You may be instructed by a spouse seeking to enter the UK but the sponsor in the UK wishes you to contrive to lose the appeal. There is a joint retainer – the spouse abroad and the spouse in the UK. Their instructions are opposed. You have information that relates to both. You cannot continue to act for either.

OR

A mother may seek advice about her teenage child's application as a student – ensure you speak to the child too, and separately from the mother, to establish whether their interests are the same.

OR

A father may come wanting to discuss the case of his son-in-law who is abroad and how he can come to the UK. The person who is sponsoring him is his wife in the UK, and thus although the father may legitimately want advice about his son-in-law's position, you should be careful to identify who you are advising, and not assume that the father-in-law is able to give instructions on his daughter or his son-in-law's behalf.

⁷ Embodied in the Bar Council Code of Conduct, Part VI

What is a 'conflict of interest'?

'Conflict of interest' means that you as the legal representative have, or could have, an opposing interest to your client about the outcome or any other aspect of the case. It can arise in a number of ways.

■ EXAMPLE Five instances where conflict can arise

- Between the client or his or her case and the ethos of your advice agency/firm
For example, does the agency/firm have any non-discriminatory policies about the type of case it will take on?
 - Between your role as a legal representative and another role
For example, a representative who is a charitable trustee cannot benefit financially from the charity.
 - Between the adviser and the client
For example, roles can become confused if a legal representative acts for friends or relatives
 - Between two current clients
In immigration cases the most obvious source of conflict is if there is a difference of opinion between spouses, or between parents and children (including where parents have arranged a marriage for their daughter but the bride is reluctant)
 - Between a new client and an old client of the agency/firm
Every legal representative should know what arrangements are in place in your agency/firm to identify potential conflicts between clients.
-

If there is a conflict of interest

Conflict between people involved in the case can arise at any stage. If the client has not been identified and it is not clear for whom you are acting there could be difficulties. If there is a conflict, you are under a duty to refer the person for whom you can no longer act to other representatives. In some cases you may have to refer everyone, for example where you know information that could affect the outcome in favour of one or the other, but you might not have had that information if you had not acted for both clients.

You will also have to take into account that you cannot use information gained from one client for the benefit of another without the consent of the first client. You may find that the conflict in knowledge renders it difficult to continue to act. In those cases it may well be appropriate to cease acting for either one or both of the clients.⁸

Should a conflict arise, you should refer the case immediately to a reputable legal practitioner. Any decision to terminate your representation of a client because of a conflict of interests should be confirmed in writing to the client immediately.

You must tell the court and Home Office that you are no longer instructed but on no account should you tell them why. To do so would be a breach of client confidentiality.

⁸ Guidance on how to deal with conflicts of interest, or whether a particular situation is in fact a conflict, can be obtained from the Law Society Ethics and Professional Department, the Bar Council or the OISC.

Confidentiality

There is a duty to keep your client's affairs confidential. A breach of confidentiality can have severe consequences, including the wrongful detention or even removal of an individual from the UK.

What does client confidentiality mean?

- All information given to you or your agency/firm by a client is confidential.
- The very fact that a client has instructed you is confidential. Obviously, the details of a client's circumstances are confidential, and the consequences of a breach can be serious.
- The client should be informed about confidentiality and ideally this should be confirmed in writing.
- Client confidentiality extends to documents and post. You should not disclose any documents, including a determination with your client's name on or which contains information which could identify your client, without authority. Court decisions including determinations are public documents but, if sensitive, a request can be made to the tribunal or court for them to be anonymised.
- Client confidentiality lasts forever, even when you have stopped acting for the client, and even if she or he dies.
- Third parties (eg interpreters, experts etc) should also understand your policy on client confidentiality. They are covered by the same duty of confidentiality.
- If the client authorises you to disclose information to anyone, this should be recorded on your file, ideally in a signed consent form.
- You must not, without consent, disclose the reasons why you are no longer acting.
- Even if the tribunal or the Home Office asks for reasons why you cease to act, you should not disclose them without your client's (or ex-client's) explicit consent.
- Legal representatives should be aware that it is an offence to aid, abet, counsel or procure the commission of any criminal offence. Legal representatives must be careful that they are not seen to be encouraging a criminal offence. For example, under the Social Security Administration (Fraud) Act 1997, legal representatives must not knowingly assist with a fraudulent claim for benefits. Avoiding encouraging a criminal offence does not mean that you should disclose information about a client to a third party.

When you can breach client confidentiality

- To avoid the commission of a crime. This is particularly important in relation to children, where there may be child protection issues.
- In accordance with the Money Laundering Regulations 2003.⁹
- In accordance with the Prevention of Terrorism Act. It is an offence to fail to give information which may help to prevent acts of terrorism or to apprehend a terrorist.

Barristers are required to preserve the confidentiality of the client's affairs, including the contents of case papers and instructions and any information communicated to the barrister in confidence.

An exception permits disclosure of information to other barristers and pupils. This is sensible, as it is often in the interests of the client for the barrister to be able to discuss a case with colleagues.

Solicitors and those regulated by OISC can discuss client matters with colleagues within their organisation as it is the firm, not the individual, that is instructed.

Change of representative, what you should do

- You need to have a signed authority from your client to obtain the full file from his/her previous representatives.
- Write to the former representatives and request the full file urgently. Ensure that regular reminders are sent until the file is received.
- Notify the tribunal, court, Home Office, entry clearance officer or port that you are acting.
- Request copies of all documents from the Home Office which have been filed with the tribunal.
- Make any required applications for Controlled Legal Representation.
- Consider whether an adjournment of a hearing date is necessary to enable you to obtain full instructions. Bear in mind the possible future delay and the effect this will have on your client against the need to ensure that cases are heard expeditiously.
3 See chapter 4, adjournments.
- If the file is not received, consider whether the relevant documents can be obtained from other sources and make the appropriate requests. Consider making a complaint to the relevant professional body about the failure to comply with a request for the client's file.
- The Law Society has issued guidance¹⁰ which sets out time limits for file transfer procedures: compliance with this guidance is best practice for all practitioners.

⁹ Guidance on the Proceeds of Crime Act 2004, the Regulations and their impact on solicitors and barristers can be obtained from the Law Society and the Bar Council respectively. At the time of writing, the OISC does not have specific guidance on money laundering, but guidance will be issued in the future.

¹⁰ File transfer in Immigration cases Annex 12E to Law Society Guidance July 2005. www.lawsociety.org.uk

Keeping records

Files should be maintained meticulously so that you have and can retrieve information quickly.¹¹ Much of the information required to be held will be obtained during the course of interviews and taking instructions. ³See chapter 3, taking instructions.

- Files should be orderly.
- Correspondence should be tagged and identifiable.
- Original documents should be identified and linked to your client.
- Photocopies of documents sent to the tribunal should be identifiable as such.
- Fax confirmations should be kept, as should confirmation of recorded delivery numbers.
- Confirmation of information received, advice given and action agreed should all be confirmed in writing unless otherwise agreed with your client for example because of literacy problems, the need to act very quickly or risk factors (for example, a prisoner being concerned that his or her post may be examined by a prison officer). The reason for not confirming advice in writing should be noted on the file.
- All telephone calls should be noted on the file.
- Referral of your client or closure of the file should be confirmed to your client in writing with details of what will happen to your client's papers.
- Records should be kept of any advice given and instructions taken.
- Retain on the file any request for transfer of the file and information of how and when the request was complied with.
- Documents, tapes, or other information kept off file should be noted on the file.

Correspondence is sometimes posted by the Home Office after the date on which it purports to be sent. Time limits are crucial. ³See chapter 3, time limits. It is essential that you keep an accurate and accessible record of when you receive Home Office decision letters and tribunal decisions, as you may have to prove it. The actual system you use may be one of several: for example you may date stamp correspondence with the date received; you may keep a log book; you may countersign a copy of any decision with the date it is received.

11 See OISC code of standards codes 29–36

Translation and interpretation

Translation (of documents) and interpretation (of speech) are skills that require concentration, knowledge of nuance and of culture as well as vocabulary.

- Interpretation will be most effective if speech is broken into short coherent blocks to enable an interpreter to translate everything that is said.
- Nuances in the wording of a question may easily be lost in translation; it is advisable to keep the phraseology of a question straightforward and simple.
- Remember that interpreters have to provide a more or less instantaneous interpretation of what is said. They do not have the luxury a translator of written material has to spend time selecting the most exact word or phrase to use.

Translation of documents

- Translations should always be written in legible, coherent and understandable English. If the English translation is poor, capable of one or more meanings, or simply incoherent, little or no weight will be placed upon it as evidence.
- If there is an ambiguity or incoherence in the original this should be stated in the translation.
- If the translation is provided by an official translation agency ensure that the translated document is endorsed accordingly. If translated by a member of the family or informally by a friend or acquaintance, ensure that the relationship of the person to the applicant is stated.
- There is no need to provide officially translated documents in support of an application to the Home Office or entry clearance officer but the tribunal requires the translation to be typed and to be certified by the person translating.¹²
- If you produce a document that has not been translated, the tribunal will either refuse to admit it, or will place no weight on it. If an untranslated document is produced at a hearing, there is usually no objection to a willing interpreter translating a short document, although tribunal interpreters are not always qualified to translate documents and it is not their job.
- If original documents from abroad are produced on the day of the hearing there may be issues raised about their validity, for example, whether they are forged. The respondent will not have had an opportunity to consider their validity. The tribunal may place very little weight on them.

¹² Practice Direction 8.2(b) and 2005 Procedure Rules, rule 52

Interpretation at the hearing

The tribunal should ensure at the commencement of the hearing that the interpreter and the appellant understand each other.¹³

If it does not do so, you should intervene and ask your witness whether he or she understands the interpreter.

The tribunal interpreter should:

- translate accurately the questions asked and the replies given in a language and dialect understood by the appellant
- translate discussion in the tribunal between the immigration judge and the advocates
- interpret into direct speech the questions asked and the answers given
- interpret all comments made
- disclose any difficulties with translation including variations in possible translation of different words
- intervene only to ask for clarification, to point out that a party may not have understood something or to alert the parties to a possible missed cultural inference.

The interpreter should not offer advice or express opinions.

Address your questions to the appellant or witness, not to the interpreter: it is the appellant or witness who is giving evidence.

Your interpreter

You should bring your own interpreter to the tribunal to enable you to communicate with your client as well as to provide a check on the tribunal interpreter.

If you do not have your own interpreter and you wish to communicate with your client you can ask for the assistance of the tribunal interpreter. Provided it does not involve anything contentious, or translating detailed instructions, this may be permitted, but you should not rely on this.

Your interpreter should:

- remain in the hearing room while the case is proceeding
- sit close to you to enable easy communication with you.

Problems with interpretation

- If your interpreter considers that the tribunal interpretation is incorrect in some way, he or she should tell you, not the immigration judge. Decide whether the interpretation error requires intervention or correction, whether it should be done immediately or on conclusion of evidence, whether the interpretation issue can be clarified in re-examination.
- If necessary, ask for a short break to enable you to take instructions.
- If you complain you must state exactly what the problem is, whether it is a lack of interpreting skills or a failure to interpret and what you would like done.

13 Guidance note No 3
[May 2002] pre-hearing
introduction

- If you consider a new interpreter is required, give detailed reasons why your request should be complied with.
- If the tribunal considers an admonition to interpret better will be sufficient ask for your objections to be noted.
- If the case is adjourned because of poor interpretation, at your request or at the tribunal's instigation, consider whether evidence should start from scratch at the next hearing or whether some can be agreed. Make the appropriate request to the tribunal with reasons.

Appealing against a negative immigration decision is stressful, can be slow, and will be expensive either for the appellant or for the legal aid budget. It is far better to avoid the appeal process entirely by ensuring the initial application is made properly and the application, whether to the Home Office or to an entry clearance officer, is likely to result in a sustainable decision. Time spent by an adviser before an application is made, ensuring that the applicant, or the relative in the UK, understands what is required and has prepared all the relevant evidence, including original documents (translated as required), will save time later.

How to make an application

Applications may be made

- for entry clearance – to British embassies and high commissions abroad
- for leave to enter – at a British airport or sea port
- for leave to remain in the UK – to the Home Office.

Find out the circumstances

Establish what the real issue is. It may not be presented to you as an immigration problem although it may be; and what result is actually wanted either in the short or long term.

■ EXAMPLE

A person may ask for help because she has been refused child tax credits and wants to appeal to the Department for Work and Pensions – but the problem may really be that she does not have an immigration status which allows her to obtain these benefits.

Get the relevant facts needed to advise

Find out what has already happened and what the person wants to happen. Relevant information includes:

- client's full name and any other names that he or she may have used or been known by
- name of UK-based contact if client is abroad
- address and telephone details
- date of birth
- nationality
- whether an interpreter is required, if so the language and dialect
- whether the client is literate
- current immigration status
- previous immigration history including dates of entry and/or departure, endorsements, length of stay in the UK, applications previously made and/or refused and/or appealed
- dependants e.g. spouse, children, whether in the UK or abroad, their whereabouts, their immigration/citizenship status and history
- family members e.g. grandparents, parents, siblings whether in the UK or abroad, their whereabouts, their immigration/citizenship status and history
- Home Office, British post abroad, UKVisas or tribunal reference, if known.
- any correspondence from the Home Office, other immigration authorities or other representatives about the case
- any determinations by the tribunal
- details of any other representative involved in the case
- any criminal record
- any documents to support the application, e.g. passports, bank statements, college letters, marriage, divorce, death or birth certificates
- details of any documents given to the Home Office, British post abroad or the tribunal
- any compassionate circumstances.

■ EXAMPLE

If a person was refused a visit visa last year but did not appeal, the refusal letter may be important to show the particular areas to address in a fresh application

Respect for your client is wholly compatible with a rigorous interviewing style. A fear of tackling ambiguities in your client's instructions will get in the way of providing effective representation. If there are inconsistencies in your client's account these must be discussed at the first opportunity. Instructions which are incoherent, incomplete or which suggest that the basis of the application has not been adequately established will prevent the application from being effectively progressed and can be fatal to an appeal.

Initial advice

The aim of initial immigration advice is:

- to help people to succeed in their applications, or
- to explain why they will not, and
- to suggest any alternative courses of action.

In order to ensure this is done in the most cost effective way:

- Find out what the client wants.
- Advise on the type of application to be made.
- Explain what the law and rules say and how the Home Office implements them.
- Advise whether the application complies with the law and rules and, if not, whether there are concessions or exceptional compassionate circumstances which might be relevant.
- Advise what documents the applicant(s) need to provide to fulfil the requirements of the rules.
- If the relevant documents cannot be obtained, find out why not and advise on the effect on the application.
- Always consider submitting additional documents, even if these are not asked for, if they add to the application.
- Assist or advise on filling in the relevant application forms.
- Follow up the progress of the application with the Home Office, UKVisas or the relevant post abroad to ensure the application is dealt with in a timely fashion.
- Advise what to do in the event of unreasonable delay.
- If the application is refused, check that correct information was given about any appeal rights, advise about further representations or alternative action and/or time limits and possible grounds of appeal.

■ EXAMPLE

A couple who wish to get married here and where one person has immigration problems need to understand that the rules require the Home Office to issue a certificate of approval before a marriage can take place in the UK. Even if the couple have married, the person from abroad can be required to go abroad to get entry clearance. But exceptions can be made and they need to put forward the reasons and evidence to support this, for example, medical problems, the effects on children here. The Home Office has published information on when it will make an exception (in an instruction to caseworkers known as DP3/96). See chapter 8, human rights

Making an application – if your client is in the UK

Any application made for further leave to remain in the UK has to be made on a stipulated application form and the requisite fee has to be paid.¹ Exceptions are: asylum applications, applications from children of refugees, applications made on basis of the European Convention on Human Rights. Applications under the EC Association Agreements do not attract a fee. There is a non-compulsory form that legal representatives are advised to use. Errors and omissions on any applications will lead to the form being returned as invalid.

- Complete the correct form properly and fully.
- All the sections on the form must be answered.
- The form must be signed by the applicant.
- Enclose all the necessary documents, with translations.
- If a document is not available, explain why and when it will be submitted. ³See chapter 1, documents.
- Documents must be originals or an explanation given why they are not.
- Address in a covering letter why and how your client meets the requirements of any immigration rule, policy or concession.
- Do not simply ignore the failure to meet the rule, concession or policy. Address the failure and state why discretion should be exercised either in accordance with a published concession or otherwise.

Make the valid application in time – before a person’s leave to remain has run out. This is vital because:

- If the person applies in time, she or he remains legally in the UK while the application is under consideration, and any conditions about work, recourse to public funds etc attached to the leave continue to apply while the application is pending.²
- There is normally only a right of appeal against refusal if the application was made in time.
- If the person has overstayed this means that any request for an extension is outside the immigration rules and more likely to be refused. That decision is not an appealable decision. ³See chapter 3
- Overstaying is a criminal offence.

¹ Forms can be downloaded from the Home Office website www.ind.homeoffice.gov.uk Current fees are listed on the website. Alternatively, use the Home Office application forms telephone line 0870 241 0645.

It is possible to ask for a waiver of Home Office fees in certain circumstances, for example, if making an application for a child in local authority care. However, normally, a failure to pay the Home Office fee will result in the application not being accepted.

² IA71, s3C

Making an entry clearance application

A current application form must be submitted, signed by the applicant abroad with supporting evidence and the correct fee.³ If an out-of-date form is used or an incorrect fee submitted, the application will be rejected. A legal representative, a friend or relative in the UK can fill the form in and then send it to the applicant to check and sign.

Many British posts abroad now operate a postal or courier service for entry clearance applications. Some posts abroad suspend services for a variety of reasons and some posts do not operate entry clearance facilities. It is essential to check operations at a particular post on the UKVisas website.

■ EXAMPLES OF EVIDENCE NEEDED

A visitor needs to show she or he has been invited. An ordinary letter is fine, there is no need for a sponsorship declaration witnessed at great expense by a solicitor. Evidence to be produced includes:

- Where there is a particular reason for a visit, for example a wedding, produce the printed invitation to the ceremony or celebrations.
- Proof of financial support available in the UK, for example the host's bank statements for the previous three to six months, **not** a letter from a bank manager saying a person is a good customer; pay slips for the previous three to six months, **not** just a letter from an employer confirming employment.
- Evidence of how the visitors support themselves in the country of origin; if they are employed, their bank statements and pay slips for three to six months; if they are farmers, evidence of ownership of land, evidence of sales of crops, purchase of farm machinery; if they are not working and not economically active, evidence of the existence of other family members abroad; evidence of particular commitments or events in the home country for which the visitors will have to return.
- A sponsor for a spouse or partner abroad may need a letter from the council or from an approved surveyor about the accommodation available to the sponsor with full details of the size of accommodation and number of people living there.
- Evidence of continuing contact between the spouses or partners e.g. letters and cards – with envelopes if possible – emails, itemised phone bills, phone cards together with dated receipts from the shop where they were bought. Some phone card companies will provide a print out of numbers called either free or for a small charge.
- A student needs to check that the college she or he is attending or plans to attend is on the Department for Education and Skills' list of colleges which are recognised for immigration purposes, listed at www.dfes.gov.uk/providersregister/

Students also need adequate evidence of:

- enrolment, in writing from the college
 - financial support
 - their ability to understand sufficient English to undertake the course.
-

³ Forms can be downloaded from www.ukvisas.gov.uk or obtained from High Commissions and embassies or from other offices in countries where the British authorities work through commercial partners, for example the Visa Facilitation Centres in India, Gerry's/FedEx offices in Pakistan.

British posts abroad still frequently interview applicants for most types of entry clearance. Sometimes the interview takes place by telephone. The interview is not tape-recorded, but the interviewing officer takes notes of what is asked and the responses given. An interpreter will be provided, if appropriate.

If the application is refused

- The record of interview is crucial evidence in the appeal.
- A copy of the interview record is not normally given to the applicant after the interview, but it can be requested.
- In some cases a copy of the interview record is attached to the refusal decision.
- If it is not attached, ask for a copy of the record as soon as an adverse decision is received. The adviser will need to attach to the request an authority from the applicant permitting the disclosure.

In-country applications

Most applicants for variation of leave to remain are not interviewed by Home Office officials. Those who might be interviewed are: asylum seekers with temporary leave such as discretionary leave;⁴ some overstayers or suspected illegal entrants; and some in-country marriage applicants, where there is a suspicion of marriage of convenience or illegal entry. Overstaying and illegal entry are criminal offences. These interviews are normally conducted under caution and are tape recorded.⁵

Port applications

Some port applicants, for example those who apply for leave to enter on the basis of marriage, or visitors who do not have entry clearance in this capacity, may be interviewed by immigration officers.

- The record of the interview is crucial evidence in any appeal.
- A copy of the interview record is not normally given to the applicant after the interview, but it can be requested.
- Ask for a copy of the record as soon as an adverse decision is received.

It is Immigration Service policy to provide, on request, a copy of all formal interview notes where the case results in a refusal of leave to enter. Notes of interviews with sponsors will also be disclosed on request, but only to the sponsor.

It is good practice to encourage anyone who is to be interviewed in connection with an immigration application of any type to write down their recollection of the interview immediately afterwards. If the application is refused, the applicant's own record of the interview can be contrasted with the interviewing officer's record.

If an application is refused, a copy of the interview record will form part of the Home Office's or entry clearance officer's evidence. It is essential to take instructions on this from the applicant as part of the preparation of the appeal.

⁴ See *Making an Asylum Application – a best practice guide*, Coker, Kelly and Soorjoo, ILPA, May 2002

⁵ Because they are conducted under Police and Criminal Evidence Act 1984. See also *Advising in Police Stations*, Rosie Brennan, 3rd edition, Law Society, to be published December 2005.

Points to consider

- Is the applicant credible?
- Did the applicant understand the questions put to him or her?
- In entry clearance cases, does she or he know what the sponsor said on his or her behalf?

What happens next?

The Home Office or the post abroad will take a decision. If there is considerable delay in notification of a decision or if there is a need for an urgent decision to be taken or court hearing date to be fixed, you should notify the Home Office, post abroad or tribunal with relevant supporting documentation.

Once a decision is taken it will be handed or posted to the applicant with details of any appeal rights if the application is refused. An applicant may be wrongly informed there are no appeal rights and may also be informed that there are appeal rights when there are none. ³ See chapter 3.

If the application is refused

If there is no legal merit in an appeal or if there is no right of appeal

Detailed written representations can be made to the entry clearance manager, the Home Office or the port asking for a review of the case to try to reverse the decision; in some cases you may wish to consider asking the sponsor's MP to become involved. Such representations should attempt to take issue with each element of the decision and in addition draw attention to any compassionate aspects of the application refused. Analogies with other cases, letters from family and friends may assist with the review.

The Law Society has written a note on how best to contact MPs. It is most important to:

- give the client or sponsor's name, address and telephone number, so that the MP knows that he or she is a constituent and is able to contact him or her
- explain as clearly and concisely as possible the basis of the case, the reasons why the MP's intervention is appropriate and what you and your client hope that the MP will do
- ensure the letter includes the client's Home Office, entry clearance and/or appeal reference numbers
- explain to the client that he or she has the right to contact the MP directly and that MPs do not charge for any help given.

In the request for a review, reference to the European Convention on Human Rights should be made if applicable. If the ECHR has not been raised before, you should explain why not. ³ See chapter 8, human rights. The response from the decision maker may then be an appealable decision.

If there is no right of appeal but the decision, on the basis of the evidence, has been incorrectly taken, consideration can be given to judicial review (JR) proceedings. Judicial review is outside the scope of this guide but all representatives should know and explain to their clients that JR is not a review or appeal of the facts but only a review of whether the administrative process of taking the decision was correct.

Where rights of appeal are exercised

Detailed representations in addition to grounds of appeal may result in a decision being overturned prior to the tribunal hearing. The grounds of appeal should not be any less detailed than usual but additional representations can provide further substance and background.

■ EXAMPLE

If a family visit to attend a wedding is refused, consider making representations through UKVisas, or direct to the British post abroad, or advising the person to apply again and to address the reasons given for refusal, perhaps also with a letter from the representative or the MP, in addition to lodging the appeal. If the representations or fresh application are successful, the appeal will be withdrawn; if they are not, the appeal can go ahead and if it is successful several months later, the person may be able to come for a visit even though the wedding has taken place. ³ See also chapter 6.

Entry clearance officers will often not consider a second application unless the appeal against the first decision is withdrawn although this is not a requirement of the immigration rules.

If your client is detained

An application for bail can be made to a chief immigration officer (CIO) or to the tribunal⁶ or both if the CIO is taking a long time to come to a decision. There is no restriction on the number of bail applications that can be made.

You should ensure that:

- you are aware of the current guidance⁷
- you obtain copies of all forms sent to the detention centre and served on the detainee
- you are aware of the reasons for detention
- you obtain copies of the reviews of detention that are carried out in accordance with the guidance.

An important resource is *Challenging Immigration Detention, a best practice guide*, published by ILPA, the Law Society and Bail for Immigration Detainees, October 2003.

⁶ 2005 Procedure Rules, rules 37–42

⁷ At present Bail Guidance Notes to adjudicators May 2003 (3rd Edition)

Taking instructions

It is critical that you understand all areas of immigration law to be able to identify the grounds for the appeal and the extent of the interplay between legislation, rules and policy.¹ See appendix 1 sources of immigration law. Only then will you be equipped to:

- give accurate advice
- identify potential grounds for appeal
- draft relevant and coherent grounds of appeal
- submit an appeal that has a realistic prospect of success.

Your client has sought advice on an appeal against refusal of leave to remain or refusal to grant leave to enter or refusal to grant entry clearance. What are the most important substantive matters to address initially?

- Is there an immigration decision which can be appealed?
See overleaf, is there a right of appeal?
- What are the time limits for submitting the appeal?
Make a note of this in your diary.
- Consider the decision to refuse, the reasons for refusal and any other documents presented with the application and the extent to which an appeal is likely to succeed.
- Was your client interviewed?
- Do you have a copy of any interview record or notes made by the client of any interview?
- If not, can you obtain these prior to lodging the appeal?
- Consider the content of the interview in the context of the refusal.
- Should an appeal be lodged?
- Is your client eligible for free legal advice or representation?
- Confirm your initial advice in writing to your client and to the contact in the UK if there is one.
- Ensure that he or she has been given written confirmation that you are instructed and how to contact you.

¹ Guidelines for immigration practitioners, Law Society, June 2001, Para 1; good training opportunities are available from www.ilpa.org.uk

If, after taking instructions, you are of the view that there are no sustainable grounds for an appeal, advise your client of this immediately, providing a full explanation. If you take this view you may want to consider discussing the case with a colleague before finally concluding that you should no longer assist the client. You might want to suggest to the client that he or she seeks a second opinion. ³See chapter 9, funding, page 81.

Is there a right of appeal?²

Appeal rights are subject to exceptions and limitations. These limitations and exceptions do not generally apply if there is an allegation that the decision is unlawful on race discrimination or human rights grounds although such grounds of appeal may be difficult to sustain. ³See chapter 8.

Decisions defined as 'immigration decisions' may be appealed against to the Asylum and Immigration Tribunal (the tribunal).³ Always check this as the Home Office may wrongly assert that there is no right of appeal. ³See chapter 3.

An immigration decision is:

- refusal of leave to enter
- refusal of entry clearance
- refusal of a certificate of entitlement
- refusal to vary leave to enter or remain (this means a refusal to extend a person's stay – but only where the refusal means the person no longer has any permission to stay and when the person applied before their previous permission ran out)
- variation of leave to enter or remain (that is, curtailing a person's stay so that they no longer have any permission to stay)
- revocation of indefinite leave
- administrative removal – for example for overstaying or breach of conditions
- a decision that an illegal entrant is to be removed
- removal of certain family members under schedule 2 of the Immigration Act 1971
- a decision to make a deportation order (for example, because the person has committed a criminal offence)
- refusal to revoke a deportation order.

These may also be known as 'appealable decisions'.

² The IAN Bill 2005, being debated at the time of writing, includes proposals to restrict rights of appeal. An update on the proposals can be found on www.ilpa.org.uk under briefings.

³ NIAA 2002, Part 5, s82

Who cannot appeal at all?

Some of the exceptions apply because of the **ground** on which the decision is made.⁴ Always check the ground of the decision. The Home Office may refer to an incorrect rule or requirement.

There will be no right of appeal against a decision taken on the grounds that:

- **The person does not comply with a requirement of the immigration rules as to age, nationality or citizenship.** An example would be a person refused entry clearance as a working holidaymaker because she or he is over 30, or a person refused entry as an au pair because she or he is not from one of the countries specified in the rule relating to au pairs.
- **The person does not have an 'immigration document'** (a passport or equivalent document, entry clearance, work permit or other document authorising employment).
- **The person is seeking to enter or remain in the UK for a period longer than that permitted by the immigration rules.** An example would be a visitor who applies to extend his or her stay beyond the six-month period allowed.
- **The person is seeking to enter or remain in the UK for a purpose not provided for in the immigration rules,** for example a husband whose marriage has broken down within the 24-month period may have applied to remain indefinitely on compassionate grounds or a person may apply for leave to enter the UK in accordance with the Turkish EC Association Agreement 1963 (the Ankara agreement).
- **Work permit decisions.** A decision about whether to grant a work permit is not an 'immigration decision' within the definition of s82 NIAA 2002 and thus does not attract a right of appeal.

The Secretary of State is now entitled to add (by statutory instrument) further similar grounds to these.⁵ There is no right of appeal against any refusal to vary leave if the application was made after the leave expired.

Some applicants may be able to appeal if their particular application falls within particular categories:

- **Decisions taken on national security or similar grounds** do not have a right of appeal to the tribunal where the decision has been made on the ground that the person's exclusion from the UK is in the interests of national security or in the interests of relations between the United Kingdom and another country. However there may be a right to appeal to the Special Immigration Appeals Commission. This tribunal has its own special procedures for hearing security cases. These are beyond the scope of this guide.
- **Visitors.** Persons refused entry clearance for a visit may only appeal if they are 'family visitors.'⁶ Visitors refused entry can only appeal the refusal of entry in country if they hold an entry clearance⁷

4 NIAA 2002, s88

5 NIAA 2002, s88A(1)(b)

6 NIAA 2002, s90. At the time of writing it appears that this may be re-defined.

7 NIAA 2002, s89

- **Students.** Persons refused entry clearance for the purpose of studying in the UK have no right of appeal⁸ if:
 - they seek entry to follow a course that lasts six months or less
 - they have not yet been accepted on any course of study.
- **Dependants** of all the above may not appeal.

Discretion

Entry clearance officers and Home Office officials make decisions based on the immigration rules and should look at policies and concessions outside the rules. Both can consider the exercise of discretion separately from concessions or policies. ³ See chapter 3, what matters the tribunal can consider.

What if there is no right of appeal?

Consider alternative remedies: further representations, possibly through an MP or judicial review.

Who can and who cannot appeal while in the UK?

The only appeal rights that can be exercised while the person remains in the UK are:⁹

- Appeals against refusal of entry where the person holds a current entry clearance. However there is no in-country right of appeal if the ground of refusal is that the person is seeking entry for a purpose different from that for which the entry clearance was issued, for example a person who has entry clearance as a visitor but is seeking entry as a student.
- Appeals by certain UK passport holders (e.g. British overseas citizens) against refusal of entry where the person holds a work permit.
- In cases where the person has made an asylum claim or human rights claim (unless the claim is certified as 'clearly unfounded').
- In cases where the person is an EEA national (or family member of one) and claims that the decision breaches rights of entry or stay under EU treaties.
- Appeals against refusals of certificates of entitlement or decisions to make a deportation order.
- Appeals against refusal to vary or extend leave provided the application was made prior to the expiry of the existing leave and it does not come within one of the exceptions referred to above.

⁸ NIAA 2002, s91

⁹ NIAA 2002, s92 although note that at the time of writing the IAN (Bill) 2005 may reduce these rights of appeal

The following situations do not give rise to in-country appeal rights:

Unfounded human rights claims

There is no in-country right of appeal on human rights grounds where the Home Office certifies the human rights claim as 'clearly unfounded'.¹⁰

To be clearly unfounded a human rights claim must be so clearly without substance that any appeal would be bound to fail.

If the person is entitled to live in one of certain specified countries¹¹ the claim must be certified as clearly unfounded unless the Home Office is satisfied that it is not, save in some cases where extradition and related procedures are involved.¹²

Previous applications

There will be cases where a further 'immigration decision' is made, following an earlier decision. This second decision will not attract a right of appeal¹³ (whether or not an earlier appeal was made) if:

- the Secretary of State certifies that there was a right of appeal against the earlier decision
- the matter to which the new decision relates could have been raised in that appeal
- there is no satisfactory reason for not raising the matter in the earlier appeal.

³See also chapter 8.

Grounds of appeal and the tribunal's jurisdiction

The grounds of an appeal

An appeal may only be brought on one or more of certain specified grounds, listed below:¹⁴

- the decision is not in accordance with the immigration rules
- the decision is unlawful under section 19B of the Race Relations Act (discrimination by public authorities)
- the decision breaches the person's human rights, contrary to section 6 of the Human Rights Act 1998
- the person is an EEA national (or the member of the family of one) and the decision breaches the person's rights under EU treaties
- the decision is not in accordance with a law for some other reason
- removal would breach the person's rights under the Refugee Convention or the Human Rights Convention.

¹⁰ NIAA 2002, s94

¹¹ NIAA 2002, s94(4)

¹² NIAA 2002, s94(6a)

¹³ NIAA 2002, s96

¹⁴ NIAA 2002, s84

What matters can the tribunal consider?

- Where there is a discretionary power inherent in the immigration rules, the tribunal determines whether the rules have been satisfied or any discretion exercised appropriately. For example: the second part of paragraph 320 of the rules states that applications should 'normally' be refused if any of the situations listed apply, but the ECO/IO can use his or her discretion to allow the application. It is for the tribunal to decide if the discretion has been exercised properly.
- The tribunal has to determine whether a policy which requires or enables the exercise of discretion has been applied when an application was considered. The decision is not in accordance with the law if the consideration was not in accordance with the exercise of discretion and you should ask for the appeal to be allowed. The Home Office should then reconsider the decision in accordance with the requirements of the policy on the basis of facts found by the immigration judge.
- If the Home Office considered the policy or rule but on erroneous facts, you should ask the tribunal to consider whether the appeal should be allowed on the basis that the Home Office should reconsider on facts as found by the tribunal.
- The tribunal has jurisdiction to consider whether the conduct of the Home Office gave rise to a legitimate expectation to which effect ought to be given.

There is nothing to prevent the Home Office exercising a discretion not set out in the rules or any policy or concession i.e. wholly outside the rules, law or policy. Whether the Home Office exercised such discretion or refused to exercise discretion is not a matter on which an immigration judge can adjudicate – such action or inaction does not give rise to a ground of appeal. There may be a possibility of judicial review but that is outside the scope of this guide.

Time limits

There are strict time limits for giving notice of appeal.¹⁵

At the time of writing, these apply:

- Where an appellant is in detention under the Immigration Acts and served with notice of decision the notice of appeal must be served in five working days.
- Where the appellant is in the UK the notice of appeal must be served in ten working days
- Where the notice of the decision is served on the person in the UK but he or she is not allowed to appeal until after departure the notice of appeal must be served within 28 days from the date of departure from the UK.
- Where the appeal is brought from outside the UK and the appellant is not in the UK when the decision is made, usually where entry clearance is refused, the notice of appeal must be served within 28 days of the date of service of the decision.
- Where a decision was sent by post, time starts two days after posting in the UK or 28 days after posting outside the UK.

■ EXAMPLE

If a decision is posted by the Home Office to the client on Monday 6 December, it is deemed to be received two working days after posting, that is, on Wednesday 8 December. You have ten working days to lodge the appeal, the first of these ten days being Thursday 9 December. That means that the notice of appeal must reach the Tribunal by Wednesday 22 December.

Lodging an appeal out of time

The tribunal can extend the time limit for appealing 'if satisfied that by reason of special circumstances it would be unjust not to do so.'¹⁶ This decision is made without a hearing on the basis of the information in the papers.

If a notice of appeal is lodged late it must include:

- an application for an extension of time
- a statement of the reasons why notice of appeal was not given in time
- any written evidence to support the reasons for lateness.

Time limit for application for review

An application for review of a decision of the tribunal has to be served in five working days of deemed receipt of the decision.¹⁷

3 See chapter 6, applying for a review, page 67

¹⁵ 2005 Procedure Rules, rule 7. The time limits for cases heard in accordance with the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 are shorter. At present these are only applied to asylum and Article 3 cases. See Macdonald 6th edition and JCWI handbook. There are some instances when time limits are more complicated. Check the relevant provisions of the 2005 (Procedure) Rules, or in the case of applications for review, the provisions of the Civil Procedure Rules.

¹⁶ 2005 Procedure Rules, rule 10

¹⁷ NIAA 2002, s103A(3)

Lodging the appeal

Appeals against immigration and asylum decisions have to be lodged with the tribunal¹⁸ except:

- If the prospective appellant is in detention, then the appeal can be lodged either with the tribunal or with the person having custody of the detainee.¹⁹ The custodian must then forward the appeal to the tribunal within two days.²⁰
- In entry clearance cases, the appellant can lodge the appeal either with the tribunal or with the entry clearance officer.²¹ If the latter, the ECO must forward the appeal to the tribunal within ten working days.²² If lodged with the tribunal, it sends the papers to the entry clearance post for comments. There are no time limits laid down in the Procedure Rules, but the tribunal usually requests comments within a specified period.

At the time of writing the appeal is likely to be listed more quickly if the notice of appeal is lodged with the entry clearance officer rather than the tribunal.²³ However, if there is a doubt about getting an appeal lodged on time (for example if there are difficulties with local postal services) lodge the appeal with the tribunal. If lodged with the ECO, the ECO will send it to the tribunal to be recorded as lodged and it will then be sent back to the ECO.

There may be cases where a speedy review of the refusal by the post abroad is likely to result in the issuing of entry clearance. At the time of writing, UKVisas had informed an Appeals Directorate stakeholders meeting²⁴ that a review would only be undertaken once the papers had been returned to the ECO by the tribunal.

At the time of writing there is a very great delay in the listing of entry clearance appeals. If there are special circumstances why the appeal should be heard early, a letter requesting expedition and setting out the reasons should be sent to the tribunal. This will be considered by the duty immigration judge who will make an order if appropriate. An application can be made even if there is no tribunal reference number. In this situation, attach a copy of the appeal lodged with the ECO to the letter requesting expedition.

Why stating grounds is essential

It is not sufficient merely to state ‘the decision is not in accordance with the rules’. The notice of appeal has to be in prescribed form²⁵ and for in-country appellants is multi functional, used by both asylum and immigration appellants.

- The first section deals with the formalities of who the appellant is, his or her contact details etc.
- The second section deals with the basis of the appeal.
 - It must set out the grounds for the appeal.²⁶
 - It must give reasons in support of the grounds.²⁷
 - If grounds and reasons are not included there is a serious risk that the appeal will be deemed invalid.

18 2005 Procedure Rules, rule 6(2)

19 2005 Procedure Rules, rule 6(3)(b)

20 2005 Procedure Rules, rule 6(5)(b)

21 2005 Procedure Rules, rule 6(4)(b)

22 2005 Procedure Rules, rule 6(6)(b)

23 Legal representatives should check the latest position with the tribunal and information will be circulated in the ILPA mailing.

24 18 October 2005

25 2005 Procedure Rules, rule 8

26 2005 Procedure Rules, rule 8(1)(c)

27 2005 Procedure Rules, rule 8(1)(d)

- So far as possible, list any documents on which you intend to rely.
- Attach a copy of the decision appealed against, as this helps establish that the appeal was filed in time.
- The form must be signed by the appellant or the representative. If it is signed by the representative, the representative must certify that s/he has completed it in accordance with the appellant's instructions.²⁸

Drafting the notice and grounds of appeal

Well-prepared grounds are useful and important weapons in your appeal for the following reasons:

- Well drafted grounds of appeal that clearly and succinctly explain why the decision is wrong mean that less work has to be done later in the proceedings. For example, a good skeleton argument can be much more readily and quickly drafted if the grounds of appeal clearly set out the appellant's case.
- The process of providing reasoned grounds of appeal will help you to identify at an early stage any gaps or weaknesses in the appellant's case that will need to be remedied by further evidence.
- Many people assume that a decision is never reversed in response to a notice of appeal. This is not so. It may happen only occasionally but when it does it means the time, trouble and expense of an appeal hearing have been saved.
- Remember that immigration judges may not have very long to read up on their cases in advance of the hearing. The decision letter/notice and grounds of appeal may well be among the first documents they look at to find out what the case is about. Well drafted grounds of appeal and supporting reasons will leave the tribunal with a favourable impression. It shows you know what you are doing and that you have a serious case to argue.

The requirements for asylum appellants are different from those for immigration appellants. Asylum appellants have to set out reasons in specific sections of the form. This is outside the scope of this guide.

For immigration appeals, including entry clearance appeals, the form is not so directive, but it is good practice to:

- state the ground(s) on which your client is appealing
3 See chapter 3, example of grounds of appeal, page 29
- state the reasons for the ground or grounds by addressing the reasons for the refusal as set out in the decision and any issues raised in any accompanying refusal letter
- identify the particular paragraph of the rule, policy and/or concession relied upon by the appellant/respondent
- state briefly why the appellant satisfies each element of the paragraphs referred to
- address the specific issues raised by the decision maker in the refusal notice

²⁸ 2005 Procedure Rules, rule 8(3) & (4)

- raise any other issues such as concessions or policies outside the rules that the decision maker should have looked at but has not
- identify any relevant articles of the European Convention on Human Rights relied upon
- if alleging racial discrimination contrary to the Race Relations Act 1976, as amended, give details of the allegation
- assert that the appellant satisfies all other relevant paragraphs of the rules
- address all the matters that the tribunal can consider so far as they are relevant to the decision appealed against ³ See chapter 3, what matters can the tribunal consider?
- aim for a balance between full reasons and verbosity. If you have a good point to make you should be able to state it clearly and concisely. Long-winded labouring of a point will detract from clarity and persuasiveness.
- ensure you state on the form if either the appellant or a witness requires an interpreter, and if so, in what language and dialect.

Although required to list documents so far as practicable, you should **never** list a document that you have not yet had translated, or if you are not certain of its provenance. It is far better to include such documents in the appellant's bundle, once you are certain what they are. You should not normally at this stage refer to evidence you intend to send but which does not yet exist, such as a medical report or other expert evidence. Bear in mind that if you later get this evidence and it does not support the appellant's case you will not wish to submit it. If you receive expert evidence that does not support the appellant's case, legal representatives should advise the appellant about any change in the prospects of a successful appeal.

Amendments to grounds

If a point is not set out in the grounds when filed, you will have to apply for permission to amend the grounds. In asylum appeals this will be at the case management review hearing, in immigration appeals, by written application. The application should:

- Set out the proposed amendment.
- Although there is no requirement to give reasons for such an amendment, it is usually advisable to provide reasons why the grounds were not sufficiently detailed initially.
- If there has been delay submitting the request to amend, you should explain why. This may be particularly important if the hearing date is imminent and the amended grounds are significant and would require considerable additional work by the respondent.

The application should be copied to the Home Office Presenting Officers' Unit.

The tribunal may grant or refuse the application on the papers or deal with the application at the hearing of the appeal.

■ EXAMPLE

The entry clearance officer has refused an application for entry clearance:

GROUNDS OF REFUSAL

You have applied for entry clearance to the UK for one year as a student. However I am not satisfied that you meet the requirements of the immigration rules, in particular:

- that you are able and intend to follow the course.
- that you intend to leave the UK at the end of your studies.
- that you can meet the cost of the course and maintain yourself without recourse to public funds.

You initially travelled to the UK in May 2003 and stayed until June 2005 when you returned to Brazil to apply for entry clearance. You claim you had applied to the Home Office for an extension of stay as student but they have no record of this.

I note that in the UK you were living with a friend Mr Smith, and that he is now your sponsor. Based on the financial information that you have supplied I am not satisfied that Mr Smith can meet the costs of your study and maintaining you in the UK.

You have applied to attend an English course in the UK for 12 months but you conducted your interview in English and communicated well. I am not satisfied you intend to follow the course. You have also said you intend to follow this course with another course. I am therefore not satisfied that you intend to leave the UK at the end of your proposed course in the UK.

These are the grounds of appeal:

GROUNDS OF APPEAL

- 1 The appellant is both able and intending to follow the course of study. The ECO has not given any reason why he would not be able to follow the course. The ECO has overestimated the appellant's ability in English: further formal tuition in English would significantly benefit him in terms of improving his written and oral comprehension and communication skills and in ensuring that he is fully able to pursue his further studies thereafter without being disadvantaged by any language difficulties.
 - 2 The appellant intends to leave the UK on completion of his studies. The company that previously employed him in Brazil would employ him again when he has acquired further qualifications. A letter to this effect is enclosed herewith.
 - 3 The circumstances surrounding the appellant's previous stay in the UK have already been fully and credibly explained in the solicitor's letter that supported this application. In summary the appellant did make an in-time application to extend his stay which was lost either by the Home Office or in the post. On getting legal advice on his position he left the UK voluntarily and submitted the present application, disclosing his previous stay in the UK to you. The appellant's history provides no proper basis for supposing the appellant does not intend to leave the UK.
 - 4 The ECO is wrong in law in relying on the fact that the appellant intends to follow a further course after the English course. It is settled law that where a person intends to do a series of related courses the immigration rules require the person to show that they will leave at the end of all intended studies – not after the first course on which they are enrolled: *Kharrazi v Immigration Officer* [1980] 3 All ER 373.
 - 5 The appellant's sponsor is able to meet all the costs of the appellant's stay in the UK. Enclosed are documents showing that he is in employment, earning a salary of £35,000 p.a., and owns a three bedroomed house [documents listed].
-

Standard tribunal procedures when an appeal is lodged with the tribunal

On receipt of a notice of appeal, the tribunal administrative staff will check that there is an appeal, that the form has been signed and properly completed and that the appeal has been lodged in time. The appeal form will then be sent to the respondent i.e. the Home Office or the ECO as soon as practicable. ³ See chapter 3, lodging the appeal, page 26.

If there is no valid appeal, for example where an appeal is filed prior to the appellant leaving the UK and the right of appeal only accrues after the person has left, the tribunal will notify the person giving the notice of appeal and the respondent that the appeal has not been accepted. No further action will be taken. Any challenge to such a decision is by judicial review.

If the notice of appeal is out of time, the tribunal will consider any application to extend time. If no application to extend time is made, the tribunal will either decide on the basis of information before it to take a decision to extend time or will notify the person giving notice of appeal that it proposes to treat the appeal as out of time and invite evidence why the appeal could not have been filed in time. ³ See chapter 3, lodging an appeal out of time, page 25.

If the notice of appeal is valid the tribunal will send out standard directions and list the case for hearing. There is no time limit within which a case is to be listed for hearing.²⁹

The respondent, on receiving the notice of appeal from the tribunal, must file with the tribunal and the appellant (unless they have already been sent, for example in entry clearance cases) in accordance with directions given:

- the decision to which the appeal relates
- any record of interview with the appellant that relates to the decision being appealed
- any other document relied upon by the respondent
- notice of any other decision made in relation to the appellant in respect of which he has a right of appeal under s82 of the 2002 Act.

The tribunal will serve on you any documents it receives from the respondent.

Your client is not required to leave the UK while an in-country appeal is pending. Previous conditions continue.³⁰ If leave is curtailed, the extension of conditions lasts until the date of curtailment.

A decision will be taken either by the duty judge in Loughborough or by the resident senior immigration judge or following a preliminary hearing whether a case will be heard by a single judge or a panel. A panel can be two or more immigration judges, designated immigration judges or senior immigration judges or a combination. Most cases will continue to be heard by a single immigration judge. Panel hearings will generally, although not always, be allocated for complex legal issues or where a case has already been heard by a single judge and an order for reconsideration made.

²⁹ Asylum appeals have to be listed not later than 28 days after service of the notice of appeal.

³⁰ IA71, s3c

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Preparing for the appeal hearing

Dates in immigration appeals are crucial. Make a note in your diary of the timetable for the appeal, including the date of the appeal itself, when any directions have to be complied with, such as when the evidence has to be lodged and set dates for preparing the materials in good time.

Documents from the tribunal

The Home Office is under a duty to file with the tribunal the documents on which they are relying, after receipt of the notice and grounds of appeal. The tribunal will serve these on you. **Check them.**

Ensure that all the documents referred to are in the bundle and are legible.

- If documents are missing or illegible, write to the tribunal and the respondent informing them and requesting copies if they are seeking to rely on them.
- If there are assertions made which are not supported by documentary evidence, consider whether to require production of documents or leave the issue as a matter for the hearing and obtain your own evidence to rebut the assertion in any event. Take the following typical example:

■ EXAMPLE

The entry clearance officer or Home Office asserts that the sponsor's place of employment does not exist because the ECO/Home Office telephoned the number given and there was no reply or the person who answered the phone said the named company did not exist; however there is no copy of the telephone attendance note, no detail of when the call was made or by whom; no note of exactly what was asked or the status of the person who answered the telephone call.

- Ensure that all the documents sent to the Home Office or entry clearance officer in support of the application are included in the bundle. This may not be necessary if it is clear that the respondent has accepted some of the evidence, for example that there is sufficient maintenance and accommodation.

In such cases letters to the tribunal and respondent should be sent, noting the absence of the documents but that the basis of the decision makes clear that the evidence was accepted. State that if that is not the case the documents should be produced. This is very common in entry clearance cases where maintenance and accommodation evidence is not in the bundle and the decision does not allege there is a lack of maintenance and accommodation. The Home Office presenting officer (HOPO) cannot go behind this and raise the issue for the first time at the hearing although some try to; a letter to this effect would stop even that attempt.

Documents produced by your client

Do not assume that documents given to you by the appellant or witnesses are genuine. Even if the client believes the document to be genuine, it does not mean that it is.

- Look at the document carefully.
- If it is supposed to be an old document does it look old?
How pristine is the paper? How many folds are there?
Is the ink fresh?
- Were the bank statements from an account abroad presented to the entry clearance officer to enable verification?
If not, why not?
- Why is the birth certificate not dated within a few days of the birth?
- How did the appellant or witness get the document? When?
- If the document came through the post, where is the envelope, and on what date did it arrive?

Consider obtaining your own expert verification if you rely heavily on the document and there is some doubt as to its source.

Raise any doubts or questions you have with the appellant or witness at an early stage. The Home Office usually checks the veracity of documents in advance and might raise questions before the tribunal. It is important to remember that if there are weak points in the appellant's case you need to be well prepared in advance to deal with them. If you present as evidence a document that is held to be false or unreliable this is very likely to reflect on the credibility of the appellant's account generally.

What should tribunal documents look like?

Documents in immigration appeals are pleadings. There are conventions to follow on how pleadings are set out. A standard heading to any pleading should include the tribunal reference number, the name of the appellant and the respondent, and a description of what the document is. The back sheet should also contain this information. Despite this convention, the Home Office rarely complies with it. That does not mean you should not. A well set out document will make a good impression on the tribunal.

■ EXAMPLE

In the Asylum and Immigration Tribunal **Appeal number** IA/XXXXX/200X

THE IMMIGRATION ACTS

Between

[Your client's name] Mr Hxxxxx Bxxxxxxxxx

Appellant

and

[Respondent's name] Secretary of State for the Home Department (or ECO)

Respondent

Description of documents

eg chronology

witness statement of [name]

'A' = Appellant

'S' = Sponsor

Date Incident

_____ A born in [place of birth]

_____ S born in [place of birth]

_____ A commenced current employment

_____ S commenced current employment

_____ A and S first met in [place]

_____ A and S decided to marry in [place]

_____ A and S commenced cohabiting as husband and wife

_____ S returned to the UK

_____ S visited A in [place]

_____ S commenced maternity leave

_____ S gives birth to child [name] in [place]

_____ S returns to work from maternity leave

_____ A applies for entry clearance

_____ A interviewed by respondent in [place]

_____ A refused entry clearance

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Preparing
for the
hearing

Preparing a chronology

The chronology is an essential part of the appeal documents. Although in many immigration appeals the tribunal does not direct submission of a chronology or skeleton, it is best practice to produce and serve both. It is usually easiest to draw up the chronology at the same time as preparing the appellant's witness statement. The chronology should set out all the relevant dates relating to the appeal.

Preparing a witness statement

The appellant is normally directed to provide a witness statement. Even if there is no direction it is good practice to submit one. Anyone who is giving oral evidence should submit a witness statement. If a witness comes to court without a witness statement, you should be prepared to be told by the tribunal to prepare a handwritten one prior to oral evidence.

You should start preparation of the witness statement as soon as your client has been refused and the appeal filed. It is good practice to take detailed instructions from the appellant on each of the points made in the decision and refusal letter (if there is one). Additional evidence required will thus be identified at an early stage. If you cannot contact or communicate with the appellant directly, take instructions through the sponsor.

Evidence from other witnesses, for example the sponsor, friends, family, social workers, ministers of religion, teachers should be identified and a draft witness statement prepared as soon after the lodging of the appeal as possible. Only use a witness if he or she has something useful, corroborative or constructive to add to the appellant's appeal.

Although the explanatory statement from the Home Office or the entry clearance officer is likely to contain detail additional to that included in the decision and any accompanying refusal letter, the time from receipt of the explanatory statement to the date of hearing may be very short. As soon as it is received, further detailed instructions should be taken on any additional material, draft witness statements amended and then submitted.

Consider who should give oral evidence at the appeal. The appellant, if in the UK, should give oral evidence.¹

If a witness is in the UK but does not attend, less, or probably no, weight will be given to his or her witness statement. This is because the evidence cannot be tested by cross-examination. Non-attendance also means that the tribunal may be left with the impression that the people are not willing to back up what they have said by appearing at the hearing. If there is a good explanation why a witness cannot attend (for example, the witness is housebound, abroad, cannot travel a long distance etc.) then evidence of this should be provided. This will help to support an argument that some weight should be given to the person's written testimony even in his or her absence at the hearing.

There may be matters that you would wish the tribunal to take into account that can be dealt with by letter without the need for attendance by the author of the letter. For example, a letter from a reputable employer on headed paper to the effect that the appellant is employed there, earns so much and is a valued employee, may well suffice to establish these matters: it is not necessary for the personnel officer of the company to attend the hearing unless there is some reason to suppose the matter is going to be challenged.

¹ It is rare for appellants to be given entry clearance to attend their appeal to give evidence, although it is possible. See the Immigration Directorate's Instructions (chapter 2, section 1, Annex B, para 2.3). There is nothing in the Diplomatic Service Procedures instructions to ECOs about this situation when dealing with visa applications.

Vulnerable appellants

Clients with mental health problems may be difficult to identify. This may be due to difficulties in communication. You may have to obtain information from other family members. You may need to obtain expert evidence from a psychiatrist on, for example, an individual's ability to give evidence, or of his or her ability to recall accurately or the deleterious effect of giving evidence about particular topics.

Gender guidelines have been published by Refugee Women's Legal Group,² the tribunal,³ and the Home Office;⁴ guidelines for working with children have been published by ILPA.⁵ These are also relevant for other vulnerable people. The guidelines should be referred to closely when taking instructions, preparing for the hearing and at the hearing itself. ³See chapter 5, children.

The witness statement should:

- State the witness's full name, address, immigration status (if in the UK).
- Identify his or her relationship with the appellant, for example how long they have known each other and in what context.
- If not from the appellant, it should state why the evidence he or she is giving is relevant.
- Set out facts, not opinions or legal submissions: these should be in the skeleton argument. ³See chapter 4, skeleton argument, page 42
- If the appellant has submitted a formal statement to the Home Office or the entry clearance officer with the original application, the witness statement should adopt this where possible. If there are errors in that document, point these out in the witness statement and explain, in the witness statement, how they came about.
- Use the language of the person making the statement so that it is appropriate for that person. The tribunal will not expect to see the legal representative's language in the client's statement. For example, if the appellant is a child, then it may not be appropriate to use complex language in his or her statement.
- Factually address each of the points in the notice of refusal and any accompanying letter.
- If it is an appeal against a negative decision made on an application within the rules, deal with each point of the relevant rule, and explain how the appellant satisfies it.
If it is an appeal against removal, then each of the factors set out in paragraph 364 of the immigration rules should be addressed.
- If the credibility of the appellant is raised as a reason for refusal of the application, it is essential to deal with each negative point of credibility in the witness statement.
- Conclude with a statement of truth and the witness's signature. If the statement was translated back to the witness prior to signing, there should be a statement to that effect and this should be signed by the translator.

² The guidelines are available at www.rwlg.org.uk

³ The guidelines are available at www.ait.gov.uk

⁴ Available on www.ind.homeoffice.gov.uk/_policy_asylum_policy_instructions_gender

⁵ *Working with children and young people subject to immigration control: guidelines for best practice* Heaven Crawley, November 2004, ILPA; can be found on www.ilpa.org.uk

- Have a back sheet setting out the heading of the case including the tribunal reference number, what the document is, and the name, address and reference of the legal representative who has produced the document. ³See chapter 4, what should tribunal documents look like?, page 33
- Any attachments should be given a covering 'exhibit sheet'. This should have the usual heading of the case, including the tribunal reference number and identifying text as follows: 'This is the document marked 'A' referred to in the witness statement of [name] dated [date]' ³See chapter 4, what should tribunal documents look like?

³See also chapter 5, examination, and chapter 4, credibility.

Credibility

There will be appeals in which the facts are not in dispute and the issues will be limited to whether the decision under appeal is in accordance with the law and the immigration rules, whether discretion should be exercised differently, or whether human rights have been breached. In other cases, the alleged lack of credibility of an appellant is frequently used to undermine an account given by an appellant or witnesses. It has caused considerable comment in the tribunal and there is no well-established consistent test for assessing 'credibility'.

Credible means worthy of belief or capable of being believed. The word 'plausible' is also used to identify whether an account should be believed. Plausible means fair or reasonable, apparently reasonable and valid, appearing to merit belief or acceptance.

The determination will usually be affected by the response of the decision maker or tribunal to varying degrees of credibility in:

- evidence they are certain about
- evidence they think is probably true
- evidence to which they are willing to attach some credence even if they would not go so far as to say it is probably true
- evidence to which they are not willing to attach any credence.

³See also appendix 2, key cases.

In preparing for and presenting an appeal it is not your job to decide whether the appellant or witnesses are telling the truth or not. That is the job of the tribunal. It is your duty to prepare and present the case in a way that maximises the chances of the tribunal accepting the facts relied on by the appellant. In order to do this you need to identify points that either support or detract from credibility and consider how the case can be strengthened and what explanations there may be for any points that reduce credibility.

It is impossible to provide a complete checklist of matters that are relevant to credibility, as each case will have its own particular facts. However you may find it helpful to consider matter such as these:

- Is the appellant's account consistent? This includes considering whether it is internally consistent (in other words, if there are contradictions in the appellant's witness statement) and whether it is consistent with statements made on other occasions (at interview, for example, or in the context of earlier applications).
- Inconsistencies do not necessarily mean that lies are being told. There are many reasons why the evidence of a perfectly honest witness might be inconsistent. These will include the witness's age at the time of the events spoken of, psychiatric conditions, the length of time that has elapsed or quite simply the fact that witnesses will typically have an imperfect recollection of events.
- Is the account inherently plausible? Bear in mind that in immigration appeals appellants and witnesses will often be from very different social, cultural and religious backgrounds and account has to be taken of this.
- Can the appellant's account be corroborated by independent or objective evidence?

There are also statutory provisions that are relevant to assessing credibility. These are known as the 'section 8' considerations.⁶ The tribunal is required to take into account as adversely affecting the credibility of the appellant's account in relation to a human rights (and asylum) claim (which includes a claim that removal would result in a breach of Article 8 of the ECHR) any behaviour which it considers was designed or likely to result in concealment of information or to mislead or delay consideration of a claim.

This behaviour includes:

- a failure by the claimant to take advantage of a reasonable opportunity to make a human rights claim before being notified of an immigration decision unless the claim relies wholly on matters arising after the notification
- a failure by the claimant to make a human rights claim before being arrested under an immigration provision unless he had no reasonable opportunity to make the claim before arrest or the claim relies wholly on matters arising after the arrest.

If any such points apply, you must address them.

⁶ AI (TC etc.) A 2004, s8.
 This section is mainly used to undermine credibility in asylum appeals.

Expert witnesses

Expert witnesses such as medical experts, social workers and teachers sometimes give evidence in the form of letters or reports, rather than formal witness statements. It is very unusual for immigration judges to object to this.

An expert witness⁷ should be instructed to prepare a report as soon as possible. Analyse what area of the case would benefit from expert evidence and identify exactly what you wish the expert to comment upon. Experts should confine their opinions to matters which are material to the areas of dispute and only in relation to matters which lie within their areas of expertise. You may want to disclose the letter of instruction in your bundle of documents but this should not be necessary if the expert has summarised the basis of his or her instructions in the report. You should assume that your letter of instruction will be disclosed at some stage.

Reports produced by the experts should include:

- a statement of the expert's qualifications, training and experience
- a statement setting out the substance of material instructions received and questions raised
- the documents, for example witness statements, considered in reaching their opinion
- the material facts they have taken into account and any literature or other material on which they have based their opinion
- the response to the questions raised and an explanation of how each answer was reached, setting out the particular aspects of qualifications, training, experience and sources relied upon
- a declaration that the expert is aware of his or her overriding duty to the court.

The report should state those facts upon which their opinion is based and must distinguish clearly between those facts which the experts know to be true and those facts which they assume to be true. Where there are separate facts in dispute, experts should express separate opinions on each hypothesis put forward and should not express a view in favour of one or other disputed version of the facts unless as a result of particular expertise and experience they consider one set of facts as being improbable or less probable, in which case they may express that view and give their reasons.

⁷ See also ILPA *Best Practice Guide to Asylum and Human Rights Appeals* 2003 p224–235; Civil Justice Council Protocol on the Instruction of Experts Part 35 Civil Procedure Rules at www.civiljusticecouncil.gov.uk

Whether an expert witness is competent to give expert evidence (evidence of opinion) is a matter for the tribunal. Accreditation may be a pointer towards expertise but can never be conclusive. The tribunal may decide:

- an accredited expert does not have sufficient expertise to give expert evidence
- even if the expert has sufficient expertise, to reject evidence in the particular case
- to accept expert evidence from an expert witness who is not accredited.

On receipt of the report:

- check it against the appellant's account
- ensure there are no factual errors
- that it is clear and coherent and
- that the expert has responded to the question(s) you have asked
- if there are errors or elements that are confusing, misleading or require clarification, contact the expert and discuss amendments to the report.

Representation at the appeal

If you are representing an appellant in the appeal process you must notify the tribunal immediately. You must also notify the tribunal if you cease to represent an appellant as until you do so any notice served on you will be deemed to have been served on the appellant as well.

³ See chapter 1, your duties to your client, page 2.

There are restrictions on who can represent an appellant in court in immigration appeals.⁸ Those who are eligible to represent are:

- any solicitor or barrister
- a person acting on behalf of and under the supervision of such a person
- an OISC (currently level 3) accredited representative.

If you are not personally representing the appellant at the hearing itself, then you will need to instruct someone to do so.

⁸ Rights of audience, IAA 1999, s8 and 2005 Procedure Rules, rule 48

Instructions to the representative at the tribunal hearing

An appellant or sponsor cannot instruct counsel directly. Traditionally only solicitors have been able to instruct barristers to represent their client in court. Although Bar Council Rules do allow barristers to be instructed directly by members of the public in certain circumstances,⁹ this is expressly prohibited in the case of immigration work (including asylum).

Instructions to the tribunal representative should be in writing. The purpose of written instructions is to ensure that he or she understands the factual background, the issues at stake in the appeal and any possible difficulties. A written instruction to a barrister to represent an appellant in court is called a 'brief'.

The brief should include the following documents:

- the notice of hearing
- directions given by the tribunal
- replies to directions lodged
- the Home Office's or entry clearance officer's explanatory statement with annexes
- any relevant correspondence you have had with the ECO or Home Office
- the chronology
- the appellant's witness statement
- any other witness statements
- any documentary evidence with translations where appropriate
- any expert reports
- any objective evidence, such as country information, that may be relevant.

The brief should:

- set out the factual background to the appeal
- identify the issues in the appeal
- identify any areas of difficulty
- tell (instruct) the barrister to do whatever you want him or her to do. At the very least this will be to appear for the appellant at the appeal hearing, but in addition it is probable that you will ask him or her to prepare a skeleton argument, to advise on any additional evidence necessary and to advise the appellant or the sponsor in conference, prior to the hearing.

⁹ Licensed access: an application for a licence providing evidence of experience and expertise must be made on a form to the Access to the Bar Committee of the Bar Council. Further information is available from them.

Preparing the bundle for the hearing

Preparation of an appellant's bundle is similar to that required in other courts although it is accepted that an agreed trial bundle may not be practical.¹⁰ If there is time or if you have had a preliminary hearing or case management review you may be able to agree some of the evidence.

Service

- The appellant's bundle has to be served five working days before the full hearing.¹¹
- The Home Office also has to serve a proper bundle and a list of authorities¹² five working days before the full hearing.

Structure of the bundle

It is good practice to have one indexed bundle, with pagination running sequentially through the bundle. Ensure all pages are legible and the whole document has been copied. Suggested structure for the appellant's bundle is as follows:

- 1 essential reading list
- 2 index
- 3 skeleton argument
- 4 client-specific documents
 - chronology
 - witness statement of the appellant
 - other witness statements
 - medical report or other expert reports, if appropriate
 - other client-specific documents

Translations must be typed and certified by the person who did the translation.¹³ See chapter 1, translation of documents.
- 5 country-specific information

Objective country information can be relevant to non-asylum appeals. Only include relevant passages not the whole report (take the whole report with you to the hearing, to show the tribunal if necessary). The tribunal no longer takes judicial notice of country information¹⁴ such as the US State Department reports. If you want to make reference to any country information, it must appear in your bundle.
- 6 relevant paragraphs of the immigration rules
- 7 relevant IDIs or concessions
- 8 citation of cases¹⁵ – unreported determinations cannot be cited unless there is good reason to do so and particular procedures complied with.

You are under a professional duty to provide the tribunal with determinations and judgments that both support and detract from the legal position you are arguing. You should, if possible, distinguish determinations that are against you, not simply fail to produce them. The Home Office frequently does not produce decisions adverse to its case but that does not absolve you of your responsibilities and duties.

¹⁰ 2005 Practice Direction 8

¹¹ 2005 Practice Direction 6.5(a)

¹² 2005 Practice Direction 6.5(b)

¹³ 2005 Practice Direction 8.2(b)

¹⁴ 2005 Practice Direction 8.6

¹⁵ 2005 Practice Direction 17

Skeleton argument

Suggested structure

- advance reading (unless already in the bundle as essential reading)
- summary of case
- facts
 - put best gloss on facts
 - put strongest facts first
- credibility
 - deal with each paragraph of the decision and any accompanying letter, as well as making any other arguments in favour of credibility
- relate the facts to the law and the rules but do not regurgitate well-known and accepted principles or cases.

Withdrawal,¹⁶ abandonment¹⁷ or hearing in the absence of a party to an appeal¹⁸

An appellant can withdraw an appeal orally at a hearing or at any time in writing to the tribunal.

An appeal is treated as withdrawn if the respondent notifies the tribunal that the decision to which the appeal relates has been withdrawn.

An appeal will be treated as abandoned if an appellant leaves the UK.

A case will be heard in the absence of a party provided the appellant or representative has been given notice of time, date and place of hearing and has given no satisfactory explanation for absence.¹⁹

Where the appellant is not present at the hearing the tribunal may hear the appeal in his or her absence:²⁰

- if the appellant has a UK based legal representative who is present at the hearing, or
- if there is no UK based representative and it is impracticable to give the appellant notice, or
- the appellant is not in the UK, or
- there is a risk of the appellant behaving in a violent or disorderly manner, or
- the appellant is unable to attend because of illness or some other good reason, or
- the appellant has notified the tribunal that he or she does not wish to attend the hearing.

16 2005 Procedure Rules, rule 17

17 2005 Procedure Rules, rule 17

18 2005 Procedure Rules, rule 19

19 2005 Procedure Rules,
rule 19(1)

20 2005 Procedure Rules,
rule 19(2)

Adjournments²¹

Although there is a general power to adjourn, the procedure rules have to be complied with; requests for adjournments are seldom allowed.

A hearing will only be adjourned if the tribunal is satisfied that the appeal cannot otherwise be justly determined. In particular the tribunal must not be adjourned for more time to produce evidence:

- unless it is satisfied that the evidence relates to a matter in dispute
- unless it would be unjust to determine the appeal without permitting a further opportunity to produce evidence
- unless there has been a satisfactory explanation for failure to comply with directions to produce evidence.

An application must be made in writing with full reasons not later than 4pm the day before the day before the date of the hearing. This means that if a case is listed for hearing on Friday, the application for an adjournment must be submitted by 4pm the previous Wednesday.

If submitted after that it must be made in person unless there are exceptional circumstances.

The party applying must, if practicable, notify all the parties of the intention to apply for an adjournment.

If an adjournment is required for example for medical evidence or expert evidence the application should identify:

- the doctor/consultant or other expert and his or her relevant expertise
- why the medical or expert evidence is required
- its evidential use
- the time scale by which it can be obtained.

It may well be of assistance to the tribunal if a copy of the letter of instruction to the doctor or expert is produced and the tribunal may request it. ³See chapter 4, expert witnesses and chapter 8, human rights.

Do not assume that an adjournment has been granted.

Always check with the tribunal. If the hearing has not been adjourned, the hearing will go ahead in your absence if the tribunal is satisfied that notice of the hearing date was given.²²

If an adjournment is granted, a new hearing date will be fixed within 28 days unless there are exceptional circumstances.

If you need an adjournment for more than 28 days ensure you ask for this and explain why.

²¹ 2005 Procedure Rules, rule 21; 2005 Practice Direction 9. The rules for adjournment of Fast Track Procedure cases are different. See Asylum and Immigration (Fast Track Procedure) Rules 2005, rule 28.

²² 2005 Practice Direction 9.6 & 9.8

Case management reviews or other preliminary hearings

The Practice Directions²³ clearly state that case management review hearings are only listed in asylum cases. However, the tribunal may give directions relating to the conduct of any appeal and can provide for case management review hearings to be held or particular matters to be dealt with as a preliminary issue.²⁴ There is nothing to prevent you from applying for a hearing if you have a preliminary matter that needs to be dealt with. In some cases the tribunal may list a hearing on its own initiative. Prior to requesting a preliminary hearing you should however consider whether you should simply write to the tribunal requesting specific directions.

Directions pre hearing²⁵

There are no plans at present for short administrative hearings prior to the substantive hearing of an immigration appeal, whether or not the appellant is in the UK.

The tribunal can give directions relating to an appeal:

- in relation to preparation for the appeal
- to provide further details of the appellant's case or any other information
- to set time limits within which something has to be done
- to require particular matters to be dealt with as a preliminary issue
- to limit the documents a party can rely upon
- to limit the length of oral submissions.

Standard directions will be sent out prior to the substantive hearing. These will usually require each party to:

- file witness statements
- file a paginated, indexed bundle of any documentary evidence on which the party intends to rely, together with any translations.

In addition you may be required – and it is good practice even if no direction is made – to:

- file a chronology
- file a skeleton argument.

If you have any specific requests for particular directions, given the particular nature of your case, a written request should be made either with or as soon as possible after lodging grounds of appeal. Requested directions might be for an all-female court (see chapter 4, vulnerable appellants, page 35), or for video facilities, a child-friendly court or for the case to be heard in private, or for additional time to enable documents to be obtained and translated, expert evidence on marriage customs, medical or social services reports.

³ See chapter 2, if the application is refused.

²³ 2005 Practice Direction 6

²⁴ 2005 Procedure Rules, rule 45(4)

²⁵ 2005 Procedure Rules, rule 45

Variation of the grounds of appeal can only be made with the permission of the tribunal.²⁶ If you wish to vary your grounds of appeal, make an application in writing as soon as possible after lodging the appeal. ³See chapter 3.

There is no provision in the Procedure Rules for the respondent to vary the decision which is the subject of the appeal. The Practice Directions²⁷ that refer to case management review hearings (which are currently restricted to asylum appeals) state that the respondent must provide the tribunal and the appellant with any proposed amendments to the decision which is the subject of the appeal. Failure to do so may mean that the respondent cannot rely on an amendment raised at the substantive hearing.

There may be circumstances where you would want an amendment proposed by the respondent to stand, for example where lack of adequate maintenance and accommodation is no longer relied upon as a reason for refusal. The proper way to deal with this at present is probably to request that it be noted as a concession for example that the maintenance and accommodation requirements of the Immigration rules are met.

Powers of Home Office presenting officers

If the Home Office presenting officer (HOPO) withdraws the decision which is the subject of the appeal, the appeal is treated as withdrawn.²⁸

HOPOs are currently unable to concede entry clearance or in-country immigration appeals without authorisation from a senior caseworker.

Determination 'on the papers'

In some cases your client may not obtain public funding or be able to afford representation at a hearing or may decide that he or she wishes the appeal determined 'on the papers'. The prospects of a successful appeal increase where there is an oral hearing. It helps the tribunal to assess the evidence by hearing witnesses give evidence. This is a factor legal representatives should take into account when advising clients about whether or not to have an oral hearing.²⁹ The tribunal has jurisdiction to determine an appeal 'on the papers' if an appellant is not in the UK and has not nominated a UK based representative.³⁰ You should prepare the documents, including witness statements, in the same way as if there were an oral hearing. A written submission or skeleton should be submitted at the same time. ³See chapter 4, skeleton argument, page 42.

26 2005 Procedure Rules, rule 14

27 2005 Practice Direction 6.4

28 2005 Procedure Rules, rule 17(2)

29 See ILPA response to Council of Tribunals consultation on use and value of oral hearings in the administrative justice system, September 2005; *The case for oral hearing*, Adam Griffith Legal Action November 2005; Verity Gelsthorpe et al *Family Visitor Appeals: an evaluation of the decision to appeal and disparities in success rates by appeal type*, Home Office Online Report 26/03 June 2003

30 2005 Procedure Rules, rule 19

5

The appeal hearing

5 The appeal hearing

An appeal can be heard by a single immigration judge or by a panel of immigration judges. A panel can consist of one or more immigration judges, designated immigration judges, senior immigration judges or lay members sitting with an immigration judge. Some three person panels are designated 'legal panels'. If the appeal is before a panel you should be informed in advance and should therefore provide additional bundles of documents.

Housekeeping

Get to the tribunal early, ensure your client is there.

Ensure you look smart – you are representing your clients at a tribunal, probably the most important hearing they will ever go to. If you look scruffy or untidy you may have to work harder to convince your client, as well as the immigration judge, that you know what you are talking about.

Notification of the time, date and place of the hearing will be sent to both representatives.¹ There is no requirement for it to be sent to the appellant as well. Ensure that your client knows she or he has to keep you informed of any change of address. Notify the tribunal and the respondent of any change of address.

If you cease to act for any reason it is essential that you notify the tribunal, and the respondent, immediately otherwise the appellant will not receive notice of hearing dates.

Read the notice. Ensure you and the clients have the correct address, date and time. Send your client a map of how to find the hearing centre.²

Ensure that you know whether the hearing is a full hearing or a case management review hearing (CMR), although the latter is very unlikely in an immigration case. If it is a CMR there is no requirement for the appellant to attend.

Cases are listed to start at a specific time but a number of cases may be listed at the same time. That does not mean you can afford to arrive late. Ensure you allow yourself sufficient time to pass through security – in some of the larger centres it can take over half an hour.

¹ 2005 Procedure Rules, rule 46

² You can download maps to help you locate each hearing centre from the tribunal website: www.ait.gov.uk
A leaflet, *A guide to appeals: an appellant's guide to procedures, roles and responsibilities*, can be downloaded from the same website.

Ensure you have taken your client's instructions prior to the specified start time – a delay to take further instructions might be granted but will not be looked upon happily. If you need time to take further instructions ensure you get to the hearing centre early. Most centres open at 9am and there are consulting rooms.

Ensure that you have copies of all documents that the client has. Check whether your client has other documents she or he intends or wishes to produce. Look at them. If she or he produces new documents you have not seen before check them carefully.

³See chapter 4, documents. A good explanation for the delay in submitting them and why they are relevant will be required for them to be admitted as evidence on the day of the hearing.³

Obtain copies for the respondent and the tribunal – if there are a large number of pages the tribunal may well not agree to provide copies and you will have to go to an external photocopying shop.

Children

In accordance with usual court procedure, children should not normally be in the hearing room while a person, whether related to them or not, is giving evidence. Their presence could distract the person giving evidence and/or it could be distressing for the child.

There are no crèche or child care facilities at the tribunal. If your witness needs time to get to the hearing, for example after taking children to school, ask the tribunal to note the file to hear the case at a later time than specified. Provided you give detail of why you need a delayed start this will normally be granted.

If you have no alternative but to have children in the hearing room try to ensure someone attends to look after them while the witness gives evidence. Babies, asleep in buggies, would not normally be objected to.

Ensure the tribunal staff are aware there are children attending. Ask for your case to be heard first if at all possible so that the children do not have to hang about.

Children giving evidence

You need to think carefully about whether it is in a child's best interests to give evidence either as an appellant or as a witness. Generally, court hearings can be very upsetting for children, and giving evidence can be traumatic. If a child is a witness, then his or her evidence can be given in written form. When representing a child appellant advisers should consult the ILPA children's guidelines and the adjudicator guidance.⁴

³ 2005 Procedure Rules, rule 51

⁴ Adjudicator Guidance Note 8 April 2004; Part 8, *Working with Children and Young People subject to immigration control: Guidelines for Best Practice*, Crawley, ILPA, November 2004

Who should attend the hearing

If your case is not heard first and the tribunal releases everyone to a specific time people can leave the hearing centre until that time. Otherwise they should remain in the building and in easy reach in case the earlier case is adjourned or finishes quicker than expected. The tribunal will be annoyed if it has to wait for you to come back.

During the hearing the following will be in the room:

- the immigration judge or judges
- non legal members of the tribunal (if any)
- the appellant unless he or she is not in the UK
- the legal representative
- the Home Office presenting officer
- an interpreter if one has been requested
- witnesses when giving their evidence and after they have completed their evidence
- possibly members of the public (unless they have been excluded)
- the court clerk may be in the room for some of the time.

Once the hearing has started the appellant should remain in the hearing room throughout the hearing. There may be circumstances where she or he wishes to leave, for example where evidence is being given about assaults or to look after a child while the spouse is giving evidence. The tribunal may request that an appellant remains in the hearing because it is his or her appeal.

If two or more related cases have been listed to be heard together all appellants should remain in the hearing room throughout all the evidence. Although the tribunal is required to consider each case on its own merits and on the basis of evidence heard in relation to that particular appellant, it may issue separate or joint determinations.

Witnesses should come into court at the start of the hearing while the tribunal is dealing with the order of cases, adjournments etc but should leave once the hearing in which they are due to give evidence starts. They should remain outside the court until called to give evidence. The value of their evidence will be greater if they are not in court while others give evidence. After they have given their evidence they can remain in court, unless you have already identified that the appellant does not wish them to hear any other evidence.

Expert witnesses are not required to leave the hearing. Their evidence is independent and should be given in the same terms irrespective of who instructs them. Their observation of witnesses may clarify some of their own expert evidence and they may be required by the tribunal to comment, as experts, on some of the oral evidence.

If supporters wish to come, ensure that your client is willing for them to hear all the evidence. If not arrange for them to leave the court while your client is giving evidence and during submissions. Consider how disruptive this will be; and whether it will annoy the tribunal if people are coming and going or whether it will distract witnesses.

Ensure that supporters know they cannot talk, interrupt, or give evidence from the back of the court. Supporters should not talk about the evidence given by one witness to another witness who is yet to give evidence. A number of supporters may be helpful in showing close community ties but if they are disruptive it may adversely affect the impression given to the tribunal. If you know there are supporters coming, notify the court as soon as possible so that a large enough hearing room can be arranged in advance.

If members of the press are expected, it is courteous to warn the hearing centre in advance.

In some cases very young children may be an asset where, for example, a close relationship is being claimed, the sight of a young child climbing all over a parent may assist the tribunal in holding that there is a close and loving relationship that would be damaged by removal – although of course even if there is a close relationship children cannot be relied upon to behave as you want them to.

Appeals may be adjourned before the appellant or a witness has completed giving evidence, for example, over lunchtime. Once a witness has started giving evidence an advocate must not communicate directly or indirectly with the witness about the case, save with the agreement of the HOPO, until the witness has finished giving evidence. This applies even if the witness is the client. There is a sensible reason behind this rule: if witnesses get the impression their evidence is not good enough, they may well tailor their later evidence to try and remedy this. Appellants will often ask how they are doing or how the case is going; you must resist responding.

The hearing

The overriding objective of the tribunal is to ensure that proceedings are handled fairly, quickly and efficiently.⁵

The tribunal can review any determination of fact by the primary decision maker – the Home Office or the entry clearance officer. It is not restricted to the evidence that was before the decision maker.

³See chapter 5, evidence.

- In entry clearance and certificate of entitlement appeals, the tribunal can take into account evidence produced subsequently that appertains to, that is relevant to, and sheds light on, the decision under appeal.
- In in-country cases there is no such restriction. If an appellant states that a decision was not in accordance with the rules then he or she is entitled to present evidence as to the position at the date of the appeal hearing even where it is clear that the requirements of the immigration rules were not met at the date of the decision.⁶

The tribunal cannot go behind findings of fact accepted by the Home Office or entry clearance officer that are favourable to the appellant.

⁵ 2005 Procedure Rules, rule 4

⁶ NIAA 2002, s85(4)

The Home Office or entry clearance officer cannot rely on a new ground of decision without notifying the appellant and enabling him or her to deal with it. There is no reference in the Procedure Rules to the Home Office or ECO requiring the leave of the tribunal to amend the decision, only to provide details. The practice directions⁷ require the respondent to provide the tribunal and the appellant with any such amendment at the CMR hearing, which at present relates only to asylum appeals.

An appellant can only vary grounds of appeal with the permission of the tribunal.

What the appellant has to prove

It depends on the nature of the case whether it is the appellant or the Home Office that has to prove particular elements of the case.⁸ This is called the burden of proof.⁹

In most appeals against refusal to grant entry clearance or a variation of leave to remain, the appellant will have to prove, through oral, documentary and other evidence, that she or he complies with the requirements of the immigration rules.¹⁰

Where the Home Office is seeking to remove someone,¹¹ the Secretary of State has to prove the fact or facts necessary for removal. This is also the case where one of the general grounds such as character, conduct, associations or criminal convictions is relied on by the Secretary of State.

If an appellant asserts that a statutory provision does not apply to him or her, it is for the appellant to prove that assertion.

If an appellant asserts a fact which, if it had been made to the primary decision maker, she or he would have had to prove to be true, it is for him or her to prove to the tribunal that the fact asserted is true.¹²

The standard to which the case has to be proved is 'on the balance of probabilities', the so-called civil standard. This standard is flexible and depends on the nature of the allegation and the potential consequences. For example, where an allegation of fraud or corruption is made by the respondent to justify removal, the consequences for the appellant are serious and so the standard will be high. ³ See chapter 8.

The lower standard of proof typified by the use of the words 'reasonable degree of likelihood', 'real risk', 'good grounds', 'real chance' in assessing the evidence applies in appeals against removals in cases where there is an alleged breach of Article 3, deportation appeals, asylum appeals. It is possible, although not yet established, that the standard of proof where a breach of Article 8 is alleged is the usual balance of probabilities.

The burden and standard of proof for vulnerable clients is neither different nor lower than for any other person.

7 2005 Practice Direction 6.4

8 Macdonald 6th edition p 1283 onwards for full details.

9 See also 2005 Procedure Rules, rule 53

10 Proving citizenship or right of abode varies and in some cases depends on whether the person is seeking entry or has been treated as an illegal entrant. See Macdonald *ibid* p 1283–1284

11 Grounds for removal are found in s10 NIAA 2002 and Schedule 2 paragraph 9 of the IA 1971.

12 2005 Procedure Rules, rule 53

What happens in the tribunal hearing

Ensure your mobile telephone is switched off. Do not take a camera into court. You cannot tape record the proceedings.

You should keep detailed notes of everything that happens at the hearing, for example:

- concessions made
- requests for amendments to decision/grounds of appeal and the immigration judge's decision
- adjournment requests and the immigration judge's decision
- objections to evidence
- cross examination
- submissions
- any intervention or questioning by the immigration judge
- any interpretation issues.

You may find it helpful, if your case is not heard first, to sit in court while other cases are heard – you may pick up advocacy tips but more importantly you will see how the tribunal is running the court, the type of reception you can expect and whether there are any difficulties that you had not otherwise foreseen.

The public may be excluded from the hearing¹³ for, among other reasons, to protect the private life of a party or the interests of a minor. If the tribunal does not exclude the public by its own decision you should consider whether the oral evidence is likely to be of a kind which should be heard in private, for example where there have been allegations of serious domestic violence. If the witness would feel inhibited from giving evidence, a hearing in camera should be sought. This application should be made in writing prior to the hearing date.
3 See chapter 4, directions pre-hearing.

If evidence is personally sensitive or could detrimentally affect others, apply for the determination to be anonymised. If possible this application should be made prior to the commencement of the hearing.
3 See chapter 4, directions pre-hearing.

Order of events¹⁴

- Most immigration judges will want all parties in all cases in the hearing room at the start time and then arrange the order in which they will be heard. If you have special requests to be heard first or last inform the court clerk prior to the hearing starting so that the immigration judge is aware of your request.
- The clerk, who brings the judge into the hearing room, may stay for all or part of the hearing and will provide assistance to the tribunal for example if the tribunal want documents copied. If there is only the judge and the appellant in the hearing room the clerk will remain throughout the hearing. Everyone in the hearing room should stand as the judge comes in and sit down after the judge has sat down.
- Advocates, the appellant and witnesses all sit down to give their evidence.
- The tribunal will check that the appellant and witnesses understand the interpreter if used. If it does not, you should.
- The tribunal will check that all parties have the same documents. If it does not you should ask the tribunal to check that it has the documents on which you wish to rely.
- A decision will be taken whether to admit as evidence any documents served in contravention of any directions made: written evidence that is not served in accordance with the directions must not be considered by the tribunal unless there is good reason for it to do so.¹⁵ In practice, provided a reasonable explanation is given for filing such evidence late, particularly if it consists of witness statements, it will be admitted. But do not assume that it will be accepted, particularly if objections are raised. Ensure you can identify why the documents are pertinent to your case. The case may be put back to later in the day to enable the opposing side to read the submitted document or take instructions.
- The tribunal will probably check to ensure that directions have been complied with and an explanation may be sought as to why they have not.
- Some tribunals will identify issues that are in dispute and those that are agreed.
- Some tribunals will require the witness to swear or affirm that the evidence they are giving is true.
- The appellant/witnesses adopt their statements and give oral evidence. ³See chapter 5, examination-in-chief, page 57.
- Initial questioning is by the appellant's representative, then the HOPO (cross examination), then the appellant's representative (re-examination) again. ³See chapter 5, examination-in-chief, re-examination, page 60.
- The tribunal may ask questions for clarification of issues at any time but these are usually raised on conclusion of re-examination. Some tribunals will interrupt and ask questions throughout.

¹⁴ There is a guide to appeals produced by and available from the AIT

¹⁵ 2005 Procedure Rules, rule 51(4)

- Once oral evidence has concluded, the appellant should not say anything more. If your client wishes you to ask particular questions of a witness, she or he should give you a note or tell you in advance. He or she should not interrupt the questioning or submissions. If your client (or a witness) persists in interrupting, the tribunal may direct that she or he be excluded from the remainder of the hearing. It may be that you should request a short adjournment to speak to the appellant or witness and identify and resolve any problems or issues.
- If there is a break in proceedings while a witness or the appellant is giving oral evidence, for example for lunch, neither the appellant nor the witness should discuss the evidence with you or with each other or with anyone who has yet to give evidence.
- On conclusion of the oral evidence both representatives make oral submissions. Submissions are made by the respondent first, then you. Neither the appellant nor you should interrupt the HOPO, even if there is disagreement, unless the HOPO is reciting incorrect evidence in support of a submission. ³See closing submissions, chapter 5, page 60.
- The tribunal may ask questions of either representative during or on conclusion of submissions.

If there is no oral evidence and the case is on submissions only, you should be asked if you wish to make an introductory statement, then the HOPO will make his or her submissions and you will then conclude with your submissions.

If there is no advocate

If an appellant does not have an advocate the procedure may differ depending on the tribunal and the confidence of the appellant or those giving evidence on behalf of the appellant. The appellant may be asked to make a statement on issues she or he wishes to raise, then be cross examined by the HOPO and then make a further statement; then submissions would be made by the HOPO and the appellant. Alternatively, the witnesses may simply want to be questioned by the tribunal and then cross examined by the HOPO and then make a statement. The tribunal should explain the case that the appellant has to meet, the standard and burden of proof and the issues in dispute and refer to the relevant immigration rules.¹⁶

If there is no Home Office advocate, the tribunal will usually outline the areas on which it wishes the appellant or witnesses to provide evidence. There may be more extensive questioning by the tribunal. This should not amount to cross examination but should enable all the areas of the appellant's case which need clarification to be identified and such evidence as there is put forward.

¹⁶ Adjudicator Guidance Note (August 2004) Unrepresented appellants who do not understand English

¹⁷ Adjudicator Guidance Note, Unrepresented Appellants Guidance Note, No 5, April 2003

If neither party has an advocate the tribunal will vary how they deal with this depending on the nature of the case and the confidence of the witnesses. The tribunal will outline the areas on which it wishes the appellant and witnesses to provide evidence and the tribunal should explain the case that has to be met.¹⁷

Evidence

A witness statement stands as evidence-in-chief.³ See chapter 4, preparing a witness statement, page 34. There may be cases where an appellant or witness will wish to supplement or add to the written statement. It may not be possible to obtain a witness statement from an appellant abroad and reliance will have to be placed on other witnesses, letters, the record of interview at the post abroad, and the grounds of appeal.

Where a witness statement is produced it may be appropriate for the witness to add to, update or supplement the information. Do not assume that the tribunal will permit extensive questioning as evidence-in-chief, as that is supposed to be the purpose of the witness statement.

The tribunal can receive oral, documentary or other factual evidence, including hearsay evidence that might not be admissible in other courts, for example a judge's summing up in a criminal trial or the sponsor giving evidence about what she or he has been told by the appellant.

Any documentary evidence on which you intend to rely should have been served in accordance with directions. The normal rule is that any document which is being taken into account should have been served on all the parties to the proceedings.

If a document is alleged to be a forgery, official verification undertaken by the Home Office or entry clearance officer does not have to be provided where disclosure would result in methods of detection being disclosed. If the verification states unequivocally that it is a forgery then it will be nigh on impossible to prove the opposite. If the Home Office or ECO does not provide such incontrovertible evidence the validity of the document may still be challenged by him or her on the basis that little weight should be placed on it when considered in the light of all the other evidence.³ See chapter 4.

The tribunal hears appeals against decisions already made. If the Home Office or ECO has not taken a decision the tribunal cannot take that decision for it.³ See chapter 3, what matters can the tribunal consider?

In entry clearance cases the relevant date for consideration of the merits of the appeal considered by the tribunal is the date of the decision. In an entry clearance appeal, evidence acquired after the decision but before the hearing can be taken into account provided it appertains to the decision under appeal. This means that in entry clearance or certificate of entitlement cases not all evidence after the decision can be admitted, but evidence that can be said to illuminate the circumstances at the time of the decision under appeal, as opposed to providing fresh evidence of a markedly different situation, can be admitted.¹⁸

In the case of in-country appeals, the relevant date for consideration of the evidence and compliance with the criteria of the rules is the date of the hearing. The tribunal can consider evidence about any matter it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.¹⁹

¹⁸ NIAA 2002, s85(5)

¹⁹ NIAA 2002, s85(4)

The appeal may succeed if the appellant did not meet the criteria of the immigration rules on the date of the decision but did by the time of the hearing.

Where the appellant had met the criteria at the time of the decision but no longer meets the criteria at the date of the hearing, (for example because the course on which he or she is studying has concluded) the tribunal will consider the evidence in relation to the substance of the decision. These appeals may well succeed.

If you obtain evidence after the conclusion of the hearing but before the determination has been promulgated consider whether to send it to the tribunal and request:

- the hearing be reconvened to consider the evidence or
- you and the Home Office be given, say, seven days to make written submissions on the evidence and its relevance to the matters under appeal
- you might send it to the tribunal with your comments and copy the Home Office in, suggesting they may like to submit comments as well
- in all cases you will have to state why it is necessary and important for the evidence to be taken into account and explain the delay in presentation.

The tribunal generally write up determinations within eight working days and they are supposed to be sent to the parties within ten working days.²⁰ There may well be delays if the hearing was in front of a panel. There are no penalties for delay. Unless the evidence is sent very quickly it may not reach the immigration judge prior to the decision having been taken. Unless there are very good reasons for it not being available prior to or at the hearing, it will probably be discounted.

You may in any event consider the evidence merits a fresh application in the event that the appeal is unsuccessful. ³See chapter 6.

The weight to be attached to oral and documentary evidence is a matter for the tribunal. Even if evidence has not been specifically challenged at a hearing, that does not prevent the tribunal from making an adverse finding on an appellant's or witness's credibility or placing very little or no weight on particular documentary or other evidence, for example medical reports.

²⁰ Procedure Rules 2005, rule 22(2)

Examination-in-chief

Examination-in-chief of the appellant or any witnesses is your opportunity to ask questions to elicit additional evidence to be relied on to support the appellant's case.

Extensive examination-in-chief of the appellant or other witnesses should not be necessary (or indeed may not be permitted by the tribunal) as the evidence should be in writing in the form of a witness statement. Ensure the witness has a copy of the witness statement. For the witness statement to be considered as evidence, its contents have to be 'adopted' by the witness. This simply means that the witness is given the opportunity to confirm that the contents of the statement are true to the best of his or her knowledge and belief.

While there is no set formula for doing this, a good starting point is to ask the witness for basic personal details – name, address and occupation. Even though these are not controversial matters it is normally better to put them to the witness in an open-ended form (e.g. 'please state your full name') rather than a closed form (is your name...?). This gets the witness accustomed to speaking in court by answering straightforward questions. The witness can then be referred to his or her witness statements and asked if he or she is aware of the statement and its contents.

Make sure that the witness is aware of the correct document that you are referring to; sometimes more than one statement may have been made. Appellants may confuse a witness statement with some other document, such as an application form or letter. Refer to the date of the statement and show the witness a copy.

If the witnesses are not fluent in English, ask them to confirm that the contents of the statement have been read to them in their own language (or that a written copy has been provided in their own language).

Assuming the witness confirms the truth of the statement, it can stand as his or her evidence-in-chief. However, some elaboration or clarification of the written evidence may be necessary and appropriate. This also helps to get the witness accustomed to speaking and answering questions before being cross-examined. It may also be necessary to remedy any omissions in the witness statement by asking relevant questions.

Unless you are dealing with points that are not in dispute or in any way controversial, you should not ask leading questions. This means questions in a form that 'lead' the witness to the answer that you are seeking. Instead, you may find it helpful to ask 'how, when, where, who and what' type questions. For example there is no point in asking a question like 'Did the interviewing officer confuse you by the way he phrased his questions?' This obviously prompts the answer 'yes.' Such questions will not normally be allowed; even if they are, no weight will be given to the answer. The same information could be elicited by asking 'how was the interview conducted?'

Strictly speaking this form of question is also leading in that it suggests to the witness that there were some problems at the interview, but it will be acceptable as the question leaves it up to the witness to describe and explain whether there were problems and what they were.

You are not allowed to cross-examine your own witness, that is to say, you cannot ask questions in a form that suggests the answers they have given are untruthful or simply wrong. This does not mean there is nothing you can do if a witness gives an answer you know to be wrong. While it would be improper to say something like 'that cannot be right, can it...?' there may be other ways of remedying or limiting any damage. For example, if the information given by a witness conflicts with information elsewhere in the documentation it will probably be permissible to refer the witness to that information and ask if he or she can account for the discrepancy – provided, of course, that you do not suggest that one version or the other is the correct or preferred one. Similarly, supplementary questions may help to show whether there was misunderstanding on the part of the witness.

Remember that if witnesses are giving information you know or believe to be incorrect it does not necessarily mean they are being deliberately untruthful; it is much more likely that there is some other reason for it. ³See chapter 4, credibility. Try and think what that reason might be. Has the witness understood the question? Is the witness thinking of some other occasion or incident so that you are at cross purposes? Precise guidance on the best approach cannot be given because it all depends on the specific context.

Ask questions in a form that can be understood and answered by the witness. Questions should always be appropriate to the communication skills of the witness. ³See chapter 1, translation and interpretation.

Cross-examination

Once examination-in-chief has been completed the HOPO has an opportunity to put questions by way of cross-examination. The restrictions that apply to examination-in-chief do not apply to cross-examination. The HOPO is entitled to put leading questions and indeed to suggest to the witnesses that they are not telling the truth. A common technique is to use closed questions, which are likely to lead to the answer 'yes' or 'no'. This might prevent a witness putting across his or her account fully.

This does not mean that the HOPO is entitled to badger the witness or ask questions in an offensive fashion or in a way calculated to confuse. Where appropriate you should object to a particular question, though it is normally prudent to confine objections to clear cases of impropriety: the conduct of trial lawyers in American legal dramas is not a model for immigration appeals.

There will be circumstances in which it would be right to raise an objection to a particular question in the interests of the witness not being misled. For example, the HOPO may ask a witness, who is sponsoring his mother for settlement, 'your mother never said anything to the entry clearance officer about having arthritis, why is that?' whereas you know very well that this was mentioned and is in the interview record. It is best to intervene politely and to point this out; if you do not the witness may take the question at face value, having forgotten that she told the ECO this, and desperately think of some explanation.

If the HOPO refers to a question and answer, ask for the specific reference and ensure the correct question/answer is read out, not just a summary which may be misleading. It may be that you need to request the earlier or later questions/answers to be read to set the context.

It is important to keep as good a written record as you can of the evidence given in cross-examination. Ideally, you should have a clerk with you whose task it is to take notes of the proceedings. However, the Legal Services Commission will not pay for two representatives to be present at court. The written record is both to help ensure that submissions are based on accurate references to the evidence and because re-examination is limited to matters raised in cross-examination. As cross-examination proceeds, try to identify (eg by highlighting the statement) any evidence given by the witness about which you may wish to re-examine (see below). You can then with a glance identify the potential areas for re-examination.

Re-examination

On completion of examination-in-chief and cross-examination the appellant's representative will have a chance to 're-examine' the witness. This is an opportunity to elicit further evidence from the witness with a view to putting a different perspective on any potentially damaging evidence that has been given on cross-examination.

This does not mean that you should ask the same questions in the hope of getting a better or different answer. What you can do is ask questions seeking further information that is related to the answers given in cross-examination.

■ EXAMPLE

The sponsor has agreed in cross-examination that he has not sent his mother in India any money for the last two years, but you know the reason for this is that he left a substantial sum of money for her support when he last visited her. You can ask the sponsor why he has not sent any money; his answer will put a quite different and more favourable perspective on the evidence.

Bear in mind that it is not compulsory to ask questions by way of re-examination. Remember there is always a risk of making the evidence worse rather than better, particularly if you are not sure what sort of answer the witness is going to give.

Closing submissions

Once all the evidence has been given the parties have the chance to make their closing submissions. The HOPO will make his or her submissions first. Make a careful note of the points being made. You will probably have been able to anticipate many of the points from preparation of the case and from the Home Office statement or decision letter. However additional points may be made that require an answer. The aim of your submissions should be to sum up the case from the perspective of the appellant. The following should be borne in mind:

- You have already submitted a skeleton argument which will have set out the substantial points you wish to raise. There is no need to read it out or repeat points you have already made there.
- Submissions are generally likely to be more persuasive if kept succinct and to the point.
- Try and focus on key points in the case rather than attempting to comment on each and every point made in evidence or in submissions by the HOPO.
- It is not usually necessary to go through passages in case law unless there is a disputed legal issue.

- It may be helpful to remind the tribunal of the legal test that has to be satisfied. ³See chapter 8, standard and burden of proof and page 51.
- There is generally no need to read out passages from country materials unless there is a specific point to be made.
- Address any weaknesses in the case as well as highlighting the positive factors; negative features of a case do not disappear simply because you have not mentioned them.
- Bear in mind that there may be negative points emerging from the evidence that have not been picked up by the HOPO. A judgement will have to be made as to whether to address such points. If you do not do so there is always the risk that the tribunal will pick up the point anyway and rely on it.
- Where credibility is in issue, point out the reasons why the tribunal should find that the witness was telling the truth. Was there anything in the witness's demeanour or manner of answering questions to support this? If a witness did not give a good account of him or herself one interpretation is that they were not truthful; think of and suggest possible alternative explanations.
- Be flexible enough to make sure your submissions take account of how the evidence has emerged at the hearing and of any concerns expressed by the tribunal in the course of the hearing. Reading out a prepared script verbatim is very unlikely to be persuasive. You need to make it clear that your submissions are based on the evidence and take account of the HOPO's submissions.
- Few immigration appeals succeed by reason of the oratorical powers of the representative. What is important is that you make the points that need to be made in a clear way that can be understood by the tribunal and are based on the evidence. Legal submissions should reflect any relevant case law or statutory provisions.
- Request any directions you would like. ³See chapter 5, directions you can seek to give effect to determinations.

If there has been no oral evidence, you have the opportunity to speak first and should outline your case and the documents on which you are relying. Refer to your skeleton argument but do not repeat what is set out in it. Closing submissions will then be made as above, the HOPO first and then you.

Decisions that can be taken by the tribunal

The tribunal must determine each issue before it.

The tribunal can allow an appeal or dismiss an appeal.

The tribunal cannot remit an appeal for reconsideration of the decision by the Home Office or entry clearance officer although the consequences of allowing (or dismissing) the appeal may have that effect. ³ See below, directions you can seek to give effect to determinations and chapter 8, human rights

Appeals against decisions not in accordance with the immigration rules

The tribunal must allow the appeal if the decision appealed against is not in accordance with the immigration rules. But it cannot allow an appeal on the basis that had the application been made under a different rule it would have succeeded.

Where the Home Office or entry clearance officer misinterprets the application and fails to apply the correct rule or applies only one of the correct rules, ask for the appeal to be allowed to the extent that the Home Office or ECO then considers the application under the correct rule (or outside the rules if that was the original application).

In some cases where it is apparent from the decision that the reference to the rule is in error and the substance of the decision is clear, an amendment to the decision may be appropriate and the hearing can proceed on an amended basis. This is to deal with the situation where there is an obvious slip or typing error.

■ EXAMPLE

If an application was made for a working holidaymaker visa (paragraphs 95–100 of HC395) and the application was refused by reference to paragraph 57 (students) but the body of the refusal refers to the working holidaymaker criteria, an amendment can be made on the day. If however the body of the refusal refers to the student criteria the appeal should be allowed, the effect of which is to cause the application to be referred back to the respondent for a decision under the correct criteria.

Where the application of an immigration rule involves the exercise of discretion, the tribunal can review the exercise of discretion on the merits i.e. they are required to consider whether the discretion should be exercised differently taking into account all the relevant facts. The tribunal may exercise discretion differently and allow the appeal. Alternatively, the tribunal may uphold the decision on different grounds.

Appeals against decisions 'otherwise not in accordance with the law'

Where there is a policy or concession (outside the immigration rules):

- If there is a policy or concession in existence (outside the immigration rules) that has not been considered by the Home Office or entry clearance officer in reaching the decision, the decision is not in accordance with the law. You should ask for the appeal to be allowed and for directions that the Home Office or ECO reconsider the decision.
- If the policy or concession has been considered and the application rejected on erroneous facts you should ask the tribunal to allow the appeal and for directions that the Home Office or ECO reconsider the decision on facts as found by the tribunal.
- Where the application of a policy depends solely on a particular factual situation and is not dependent on the exercise of discretion by the Home Office the tribunal can take the decision itself.
- If the policy or concession is not known to you or the tribunal, the Home Office should disclose it. There is a legitimate expectation that a policy in existence at the time of a decision will be applied to an applicant even if the applicant did not know of its existence. It may be that by the time an appeal is heard the factual situation is different and/or the policy no longer applies. Whether the tribunal will allow an appeal in these circumstances will depend on all the facts. ³See chapter 8, human rights. If a policy or concession comes to light after your appeal has been determined the only remedy may be judicial review.

Race discrimination

If there is a claim that the refusal discriminated on racial grounds, the tribunal is required to reach explicit findings and conclusions on race discrimination issues, whatever conclusion they reach on the other merits of the appeal.

Legitimate expectation

The tribunal can consider whether the behaviour of the Home Office or an entry clearance officer has given rise to a legitimate expectation to which effect should be given. If seeking to argue this, consideration has to be given to the extensive caselaw on legitimate expectation in relation to cases other than immigration.²¹ It is simply not sufficient to assert that there was a legitimate expectation.

²¹ Legitimate expectation is likely to be relevant in work permit and Association Agreement cases.

Directions you can seek to give effect to determinations

The tribunal can make directions for the purpose of giving effect to its decision.

- Any direction made is part of the determination for the purposes of any onward appeal rights.²²
- Directions will only be granted if requested and will not be given without both parties having had the opportunity to make submissions.

If an appeal is allowed on the basis that the Home Office has failed to give effect to a concession or policy:

- Request a direction that the Home Office consider the case in the light of the evidence and facts found.
- Consider asking for a direction that the further consideration by the Home Office is part of the original application and the date of the application remains unchanged.
- If the case involves entry clearance it is not appropriate for the grant of entry clearance to be directed because the requirement is for the case to be considered in the light of the policy.

If an appellant is not in the UK and an appeal is allowed:

- Consider requesting a direction requiring the entry clearance officer to issue an entry clearance. This is frequently appropriate where the appeal is, for example, in relation to settlement. It may not be ordered if the appeal relates to a temporary stay such as a visit or student application if considerable time has passed, or there has been a significant change of circumstances.²³

²² NIAA 2002, s87

²³ Macdonald *ibid* has a number of cases on this, all old but probably relevant.

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After the hearing

What you should do immediately after the hearing

Judgments in immigration appeals are called 'determinations'. Usually, the court will 'reserve the determination'. This means that the written decision is usually sent to the appellant and both representatives through the post within ten days.¹

Occasionally, the court will indicate what the result of the case is at the hearing, and will state that written reasons will be sent by post.

Explain to the appellant what has happened, and when the determination can be expected. Ideally, confirm this in writing. If the appellant is abroad, write to him or her to explain this.

The determination

If the appeal is allowed

- Tell the client and sponsor.
- Explain that the other side has the right to apply for reconsideration of the decision, and the time limits in which they have to do so. Diarise these and check with the tribunal a couple of days after the deadline to see if any application has been lodged.
- If it has, ensure that you comply with all the requirements and time limits in the rules in responding to it. See next section for details of the procedures.
- If no application has been lodged, check with the HOPO that he or she has passed the determination on to the Home Office or, in entry clearance cases, to UKVisas to pass on to the British post abroad, to implement the decision.
- If you do not hear back within the next two months, or sooner when there is real urgency, remind the Home Office/UKVisas and keep on reminding them. Emailing the post abroad can sometimes be effective in getting an appeal decision implemented.²

¹ 2005 Procedure Rules, rule 22, although special rules and time limits apply in asylum cases 2005 Procedure Rules, rule 23.

² Email addresses are available on the UKVisas website

- When delays in implementing the decision are excessive, contacting the client or sponsor's Member of Parliament and asking him or her to raise it with the Home Office or UKVisas may produce a result. It is also possible to threaten judicial review of the unreasonable delay in implementing a tribunal decision: this may precipitate action from the Home Office or the British post abroad.

If the appeal is dismissed

On receipt of the determination check the date the decision was promulgated, and keep a record of the date it was received in your office, as it may be necessary to prove the date of receipt. Make a diary note of the deadline for lodging the application for reconsideration.

³ See chapter 6, time limits.

Detailed and immediate thought must be given to:

- whether there is a possibility of challenging the determination
- whether there has been a significant change of circumstances to merit a fresh application taking into account any findings of fact made by the tribunal
- whether in the light of the tribunal's determination detailed representations should be submitted for leave to enter/remain to be granted because of the particular circumstances of the case and the findings of the tribunal.

It is essential to keep your client informed at this stage. Explain your thinking to the appellant and/or the sponsor. If your advice is that the matter cannot be challenged further, then you need to ensure that he or she has time to get advice elsewhere. This is all the more important if there are funding difficulties with the reconsideration. ³ See chapter 9.

Challenging the determination

The Asylum and Immigration Tribunal is a single tier tribunal. There is no appeal save to the Court of Appeal but, unless the case was heard by a three person legal panel, the determination can be challenged once, by a process called reconsideration, to the tribunal itself.

The determination of the tribunal can only be successfully challenged if there is an identifiable error of law **and** there is a real possibility that the tribunal would decide the appeal differently on reconsideration.³ It is not an appeal, but is a reconsideration within defined limits.

The challenge is a three stage process: a review⁴ followed by a two stage reconsideration.

The process only applies to the first determination of the tribunal and does not apply where the hearing was before a three person legal tribunal.

If a case has already been reconsidered by the tribunal once before or if it was before a three person legal tribunal the challenge is an appeal direct to the Court of Appeal.

³ 2005 Procedure Rules, rule 26(6)

⁴ NIAA 2002, s103A as amended by the AI(TC)A 2004. There are transitional provisions that delegate determination of the review application to an authorised immigration judge of the tribunal.

Applying for a review⁵

Time limits

There are strict time limits for making an application for review:

- five working days if the appellant is in the UK
- 28 days if the appellant is outside the UK
- five working days if the application is made by a party other than the appellant.

³ See also chapter 3, time limits.

The application form

An application for review will be considered on a written application and accompanying documents only. The application is to be submitted to the tribunal by no later than 4pm on the fifth working day after the decision was promulgated. The tribunal will normally send a copy of the application form with the determination, but if not, copies can be downloaded from the tribunal website, which also has guidance notes for completing the form. As well as identifying the error of law, the form requires the appellant to state whether he or she is seeking a funding order under s103 of 2004 Act. ³ See chapter 9.

Send the form to the tribunal at PO Box 6987, Leicester LE1 6ZX.

There is no oral hearing. There is no requirement for the reviewing judge to consider any grounds that do not appear in the application although there is no prohibition on considering any obvious ground that has not been raised in the appeal. The reviewing judge is to make a decision within ten days.

She or he may make an order for reconsideration or record that she or he does not make such an order. An order for reconsideration can only be made if there may be an identifiable error of law and there is a real possibility that the tribunal would decide the issue differently on reconsideration.

The decision on the review and reconsideration application must be given in writing with summary reasons and must be served on both parties. Directions may be given in relation to, for example, evidence or witness statements. It may specify whether the case is to be heard before a panel or a single judge.

If an order for reconsideration is not made, the application for review can be renewed to the Administrative Court.⁶

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After the hearing

⁵ 2005 Procedure Rules, part 3; 2005 Practice Direction 13.

⁶ The procedure for this is outside the scope of this guide and you should consider the appropriate Civil Procedure Rules.

Fresh evidence not before the first tribunal hearing

If you wish to adduce evidence that was not before the first tribunal, you must explain why the evidence was not before the first tribunal **and** the significance of the evidence in relation to both the alleged error of law **and** that there would be a real possibility that the tribunal would decide the case differently on reconsideration.

Out of time application for a reconsideration

If an application for review is submitted out of time it can still be considered provided the authorised immigration judge considers that the application could not reasonably have been made within the time required.

Reconsideration⁷

The reconsideration process appears complicated, but is not, once you realise that it is a two stage process, with the two stages being heard orally. Both stages may take place at the same hearing or in two separate hearings.

There is some duplication in the Practice Directions in relation to the task undertaken by the tribunal at review stage and the tribunal at the reconsideration stage. It appears from PD14.1 that where reconsideration has been ordered following review, the tribunal on reconsideration considers whether there has been a material error of law, but takes into account directions made by the tribunal that directed the review. Those directions will set out the extent of the evidence already heard that can be relied upon and the extent to which the matter should be reheard as opposed to reconsidered.

If the tribunal decides there has been no error of law, that is the end of the reconsideration process. Any challenge to that decision is an appeal to the Court of Appeal.⁸

If there has been an error of law, the tribunal will then decide whether, on the basis of the original tribunal's findings of fact, the appeal should be allowed or dismissed.

If the tribunal is not in a position to make that decision because findings of fact are required which the tribunal cannot at that stage make:

- either the tribunal may proceed to hear evidence if the parties are ready and any required witnesses are available
- or the hearing will be adjourned or transferred for hearing before a differently constituted tribunal. Any necessary directions for that hearing will be made.

The determination produced after an adjourned hearing will contain the tribunal's reasons for finding that the original tribunal made an error of law.⁹

⁷ 2005 Procedure Rules, part 3, s2. 2005 Practice Direction 14

⁸ NIAA 2002, s103B as amended by AI(TC)A 2004

⁹ 2005 Practice Direction 14.3

Where a hearing has been transferred, the transferring tribunal will prepare written reasons for its finding that the original tribunal made a material error of law and those reasons will be attached to or incorporated into the determination of the tribunal which undertakes the second stage of the reconsideration process.¹⁰ Those reasons should be disclosed in writing to the parties at the time of transfer.

If the other party to a reconsideration hearing alleges that the tribunal should uphold the first determination for different or additional reasons, it should serve a reply¹¹ on the tribunal and the other side not less than five days before the reconsideration hearing.

At the reconsideration hearing the normal procedure rules apply.

Evidence heard at the first hearing can be considered. If either party wishes to submit evidence¹² that was not before the tribunal on a previous occasion an application must be made in writing to the tribunal and served on the other side. The application must set out why the evidence was not before the first tribunal, the significance of the evidence in relation to both the alleged error of law, and that there would be a real possibility that the tribunal would decide the case differently on reconsideration.

What is an error of law?

The tribunal errs in law by:

- making perverse or irrational findings on a matter or matters that were material to the outcome ('material matters')
 - failing to give reasons or any adequate reasons for findings on material matters
 - failing to take into account and/or resolve conflicts of fact or opinion on material matters
 - giving weight to immaterial matters
 - making a material misdirection of law on any material matter
 - committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings
 - making a mistake as to a material fact which could be established by objective and non-contentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.
- ³See appendices 1 and 2 for legal resources.

The tribunal does not materially err in law if:

- it fails to take account of evidence not before it at the hearing
- a different tribunal might have come to a different decision
- although an error was made it, had it not been made the tribunal's decision would not have differed
- any inadequacy of reasoning does not raise a genuine doubt that a significant issue has been properly covered or even if it does there is no real doubt that the decision would have been the same.

¹⁰ 2005 Practice Direction 14.4

¹¹ 2005 Procedure Rules, rule 30

¹² 2005 Procedure Rules, rule 30

Appeal from tribunal instead of reconsideration¹³

Where an application for review is renewed to the High Court and the Court thinks the appeal raises a question of law of importance, it can refer the appeal to the Court of Appeal. The Court of Appeal can:

- affirm the decision
- remit the case to the tribunal
- make any decision the tribunal could have made.

The tribunal cannot refer the appeal to the Court of Appeal.

Appeal from tribunal sitting as legal panel¹⁴

Where the tribunal sits with three or more legally qualified members as a legal panel a party may only appeal on a point of law to the Court of Appeal.

Permission of the tribunal or the Court of Appeal is required.

There is no review and reconsideration process.

An application for leave to appeal must first be made to the tribunal¹⁵ where it will be determined (without a hearing) by a senior immigration judge. He or she will either grant or refuse permission to appeal.

If permission is granted, if there was an administrative error, the tribunal can set aside the tribunal's determination and order that it be reheard by the tribunal.

If the leave application is unsuccessful it can be renewed direct to the Court of Appeal.¹⁶

The time limits for submitting the application for permission to appeal are very short and there is no provision to extend the time limits:

- five days if the appellant is in detention
- ten days if the appellant is not in detention.

Written notice of the tribunal's determination will be served on every party, with a summary of reasons.

Funding the reconsideration hearing

Legal aid is not automatically available for reconsideration hearings, even if the appellant has been funded under the Controlled Legal Representation scheme for the initial hearing. ³See chapter 9, and appendices 1 and 2 for legal resources.

¹³ AI(TCetc)A 2004, s103C

¹⁴ AI(TCetc)A 2004, s103E

¹⁵ Form Tribunal 4 at the back of the 2005 Procedure Rules.

¹⁶ See Civil Procedure Rules Rule 52 for procedure.

New application

The client's circumstances may have changed so materially as to justify making a fresh application for leave to remain or where it will be quicker or more appropriate to make a new application rather than pursuing a reconsideration application or an appeal to the Court of Appeal. This may mean filling in a new application form and paying a new fee and writing a covering letter explaining the basis of a new application.

Circumstances to take into account in giving this advice include any change of circumstances for example a spouse is now pregnant, a student has commenced or completed an English language course thus enabling him or her to meet a language requirement. Full instructions will be required in addition to the likely time for an appeal to be heard compared with a fresh application determined. It will also be important to bear in mind that an appeal against a refusal of entry clearance can only consider the factual circumstances at the time of the decision, not the date of hearing as oppose to an in-country appeal which can consider the factual situation at the date of the hearing. A fresh application in-country may also not have a right of appeal if refused because it was submitted after the existing leave had expired.

It is also possible to write to the Home Office to urge that the previous application be reconsidered. Consider contacting the client's Member of Parliament to put new evidence to the Home Office. ³ See chapter 2, if the application is refused.

The Home Office Minister has stated:

*Ministers will not normally intervene to take a decision on a case while an appeal is outstanding and, unless there has been a significant change of circumstances, there is little point in making representations at this stage. Members may however make representations in cases in which either the right of appeal against a decision has not been exercised or if the law provides no right of appeal, although Ministers are unlikely to reverse the decision unless there are new and compelling factors which were not known when the decision was taken.*¹⁷

The Minister has an overriding discretion to take decisions outside the immigration rules so where there are strong reasons and new evidence, as well as good reasons why this was not put to the appeal, it is possible, though unusual, for him to make a different decision.

If an entry clearance appeal has been lost, it is probable that a fresh application, with full evidence of the circumstances and a covering letter, explaining how this is different from the earlier, failed, application is the only way forward. If the application could not now succeed, for example a child applying for entry clearance is now over 18, representations can be made, submitting any new evidence, but with no illusions about the chances of success.

¹⁷ See letter from Tony McNulty to MPs, 16 June 2005, available from ILPA

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Deportation and administrative removal

Decisions to make a deportation order are now limited and most people forced to leave the UK are removed by way of administrative orders. Many of the decisions in relation to deportation are on the grounds of criminal convictions.

Decision to make a deportation order

- Paragraph 364 of the immigration rules sets out the factors to be taken into account by the Home Office before deciding whether to take a decision to deport.
- There is an in-country appeal against the decision.
- If a deportation order is signed an applicant is restricted from returning to the UK while the deportation order remains in force.

Refusal to revoke a deportation order

- The immigration rules set out the factors to be taken into account by the Home Office before deciding whether to revoke a deportation order.
- There is no in-country appeal against the decision.
- If an allegation is raised that refusal to revoke would be contrary to the applicant's rights under the European Convention on Human Rights, an in-country appeal is triggered.
- In an appeal triggered by an allegation of a human rights breach the appellant is at liberty to raise not only ECHR points but also the factors which the Home Office has taken into account in reaching its decision.

Removal by way of administrative order

- In taking a decision to remove the Home Office is required to take into account all relevant factors and this includes those factors which would have been taken into account had the decision been a decision to make a deportation order.¹
- There is no in-country appeal against the decision.
- If an allegation is raised that removal would be contrary to the applicant's rights under the ECHR, an in-country appeal is triggered.
- In an appeal triggered by an allegation of a human rights breach the appellant is at liberty to raise not only ECHR points but also the factors which the Home Office has taken into account in reaching its decision.
- Factors that the Home Office must consider in accordance with the immigration rules are extensive and cover the whole of the applicant's social and family life. This can include not only the effect of removal/deportation on the applicant but also on other family members, friends and colleagues. It is probable that the factors in the rules have a wider remit than is available under Article 8.
3 See chapter 8, human rights.

¹ HC 395, Part 13, paras 395c, 395D

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Human rights

You should not automatically insert a ground of appeal that the European Convention on Human Rights has been breached or will be breached as a result of the Home Office decision. Ensure that the ground you are arguing is relevant and specific to your case. ³ See chapter 3, drafting the notice and grounds of appeal, and chapter 8, standard and burden of proof. Failure to do so will render the ground obsolete and may unnecessarily irritate the tribunal. Your client may pay large sums of money to pursue an appeal that is bound to fail.

Grounds of appeal arguing there has been a breach of human rights can be made against any of the appealable decisions.¹ ³ See chapter 3, is there a right of appeal?, page 20.

If the human rights allegation is not raised during an appeal when it could have been, you will have great difficulty raising it at a later appeal – if there is one. A decision which could otherwise have led to a human rights appeal may be certified if you have failed to raise such a ground as soon as you could.

Where an application for leave to remain was submitted when the applicant was an overstayer or an illegal entrant:

- Refusal to grant leave to remain is not an appealable decision.² ³ See chapter 3, who cannot appeal at all?, page 21.
- You have to make an allegation that the decision is incompatible with the ECHR.
- That in turn will trigger an appealable decision for example administrative removal.
- If an allegation is then made that removal would result in a breach of the ECHR, the appeal is heard prior to removal of the appellant – an in-country appeal.
- If removal is not imminent it is unlikely that the decision can be said to precipitate a breach of Article 3 or 8 which would only occur on removal.

¹ s6 of the Human Rights Act 1998 renders it unlawful for a public authority to act in a way that is incompatible with an ECHR right. Public authority includes any person whose functions are of a public nature and includes a court or tribunal.

² NIAA 2002, s82

Human rights grounds of appeal

For the decision to be unlawful as being incompatible with the appellant's Convention rights:³

- The breach of the Convention must be in the UK and as a consequence of the decision.

For the removal of the appellant from the UK in consequence of the immigration decision to be unlawful as being incompatible with the appellant's Convention rights:

- Removal must be imminent. If not imminent, it is unlikely that the decision can be said to precipitate a breach which would only occur on removal.
- A decision to refuse to vary leave to remain (or any other appealable decision) which includes a statement by the respondent that the applicant is expected or required to leave the UK is probably sufficient to conclude that removal is a consequence of the decision⁴ and thus enable the ECHR breach to be argued.

The two most frequently cited articles are Article 3 and Article 8.

The case law on these two articles develops constantly. You should ensure you are aware of the most recent cases when submitting any application and in preparation for an appeal.

³See appendix 1, sources of immigration law.

Article 3 ECHR and medical cases

The most common circumstances in which Article 3 will be relevant in a non-asylum case relate to the effect of removal on a person's medical (both physical and mental) condition.

- Article 3 does not require the UK to provide foreign nationals with medical treatment lacking in their own countries, whether because it does not exist or because the appellant cannot afford it. Such cases are highly unlikely to succeed unless the illness has reached such a stage (i.e. the person is dying) that it would be inhuman treatment to deprive the person of the opportunity to die in dignity.
- The test for the applicability of Article 3 in mental health cases is likely to be the same as for physical ill health.
- There are three stages in considering risk of a violation in mental health cases:
 - 1 when the appellant was informed that a final decision had been made to remove him from the UK (domestic)
 - 2 when physically removed from the UK (also domestic)
 - 3 after arrival in the country of origin (foreign).

In domestic cases the issue is whether the removing state has effective medical and practical systems in place or available to reduce or minimise the real risk of suicide.

³ NIAA 2002, s84(1)(c)

⁴ NIAA 2002, s84(1)(g)

In foreign cases the same considerations apply but in the context not only of minimising the real risk of suicide but also whether there were serious grounds for believing that the person, if returned, faced a real risk of torture, inhuman or degrading treatment or punishment.

You will need detailed and authoritative medical evidence relating to medical treatment the appellant requires together with detailed expert evidence of available medical treatment and facilities in the receiving country.

- The tribunal is bound to follow relevant case law.
- A broad appeal to humanity is not enough. You must address settled legal principles with evidence.

Article 8

In considering whether removal is likely to breach Article 8 the questions to be asked are:

- Will the proposed removal be an interference by a public authority with the applicant's right to respect for his private or family life?
- If so will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- If so is such interference in accordance with the law?
- If so is such interference necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- If so is such interference proportionate to the legitimate public end sought to be achieved?

Standard and burden of proof

The appellant must show:

- that Article 8 is engaged for the purposes of the appeal
- that removal will be an interference with his or her human rights.

The respondent must then establish that the interference will be justified.

The appellant must then prove that the interference is disproportionate.

The standard of proof is the ordinary civil standard, the balance of probabilities.

Family or private life

The appellant must establish that family or private life exists and that removal will interfere with the right to respect for that family or private life.

- If a family unit as a whole is removed or leaves voluntarily there is no interference with the right to respect for family life.
- There may be an interference with right to respect for private life.
- The impact on family members who are not subject to removal cannot be taken into account.⁵
- The impact on the appellant of separation including the consequences of family members' reactions on the appellant can be taken into account.

Interference

If the interference is in accordance with immigration law it is lawful and necessary in a democratic society. Interference may be for another lawful purpose for example the prevention of crime.

Proportionality

The starting point on proportionality is that the immigration rules are reasonable and legitimate and therefore requiring compliance is not disproportionate. An immigration judge's decision regarding proportionality is a decision on facts and degree. Such a decision would be unlawful solely if it involved an error of law and the fact that a differently constituted tribunal would have reached a different conclusion does not constitute in itself an error of law.

- If your client does not meet the criteria set out in the rules or policies it will usually be proportionate to remove him or her.
- If your client is on temporary admission and marries, she or he will usually be required to return home to seek entry clearance unless there are exceptional circumstances.
- You will need to show that your client's case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour even though he or she cannot succeed under the rules.
- If you are relying on mental or physical health you will need detailed medical and social evidence ³See chapter 4, expert witnesses, page 38
- Situations may arise where your client's appeal fails under the rules but had a policy or concession been properly considered in accordance with the facts as found, your client would have succeeded.

This could affect the issue of proportionality in removing your client. ³See chapter 5, decisions that can be taken by the tribunal, page 62

⁵ But they may have an independent right to apply or in certain circumstances, if subject to immigration control, they could apply to be joined to the appeal, or they may have a remedy within the county court

Entry clearance cases

The tribunal has taken two different approaches to human rights in entry clearance appeals.

- One approach is that the starting point is whether the decision to refuse entry amounts to a breach of the UK's positive obligation to respect private and family life rather than whether the decision interferes with a claimant's right to respect for private and family life.

This approach does not entail any significant difference in the underlying criteria: the relevant question is not whether the decision amounted to disproportionate interference but whether, in the particular circumstances of the case, failure to grant entry clearance amounted to a failure to comply with the positive obligation to facilitate family reunion.

- Another approach is that an applicant outside the UK can only invoke Article 8 for very limited family purposes; the Article 8 rights are those of the family members in the UK and thus the remedy is their remedy by way of judicial review and not through statutory appeal.

If there are insurmountable obstacles to the relevant family members enjoying their family life other than in the UK, provide evidence of this. There is no general obligation on the part of the UK to respect an appellant's choice of country of residence or to authorise family reunion in the UK.

9

Public funding and legal aid

Solicitors' firms and some not for profit organisations have contracts with the Legal Services Commission (LSC) to provide free legal aid to those requiring immigration law advice and assistance.

Such organisations have to comply with complex contract criteria. The following sets out conditions applying in November 2005.

There are three forms of legal aid:

- Legal Help – this covers the provision of advice and assistance.
- Controlled Legal Representation (CLR) – this covers representation at hearings before the Asylum and Immigration Tribunal.
- Public Funding Certificates – these are for proceedings in the High Court on judicial review and for appeals to the Court of Appeal.

Legal aid will only be granted if an applicant meets both the means and merits tests.

Means test

The applicant's income and savings are taken into account. If the applicant has a spouse or partner living with him or her, his or her income and savings are taken into account too. Deductions can be made for rent/mortgage to a certain level and an allowance is made for dependent children and the costs of working. If income or capital exceeds a certain amount then the means test is not met: legal aid is not available. For public funding certificates the amounts are higher and a contribution may be payable by the applicant.

Evidence of means must be provided.

Merits test

For legal help there must be a sufficient benefit to be gained by the provision of advice and assistance.

For controlled legal representation the prospects of success must be moderate or better (i.e. 50% or more).

- Where prospects of success are poor, legal aid will never be granted.
- Where the prospects of success are unclear or borderline, legal aid will not be granted unless the case is of overwhelming importance to the client, or it raises significant issues of human rights or the case has a significant wider public interest.

Full details of the various tests can be found at www.legalservices.gov.uk. This website allows you to calculate online your eligibility under the means test.

In immigration and asylum cases, only staff accredited by the Law Society can work on legal aid cases (if the organisation wants to be paid for that work). Organisations are paid a set hourly rate which varies according to the type of legal aid and the work done. A minority¹ of solicitors firms and some not for profit agencies are able to make some decisions about funding a case on behalf of the LSC. This is known as having 'devolved powers'. It includes the ability to grant or refuse controlled legal representation for immigration appeals. If a solicitors firm or a not for profit agency refuses to grant CLR then the firm or agency must tell the client that he or she has a right of appeal against this decision.

Funding the reconsideration hearing

Legal aid is not automatically available for reconsideration hearings, even if the appellant has been funded under the Controlled Legal Representation scheme for the initial hearing. The legal representatives concerned will only get paid for the reconsideration if, at the end of the process, the judge considers that at the time the application for the reconsideration was made there was a 'significant prospect of success.' The government has called this a 'no merit, no fee' scheme. The effect is that many law firms and not for profit agencies will not be able to risk applying for reconsideration of cases unless they are very certain that they will win the case. At the time of writing it appears that 'in the majority of cases' there will be no difference between the 'significant prospect' test under the Regulations and test of 'real possibility' of success which the tribunal must apply in determining whether to order a reconsideration under the 2005 Procedure Rules. This means that, in the majority of cases, the order for reconsideration implies that the test for funding will be satisfied. ³See appendix 1, sources of immigration law.

It is clear that if there is no order for review the legal representative will not get paid for making the application for the review.

¹ The LSC's intention is for all legal aid suppliers to have devolved powers in the future.

There is no right of appeal to the LSC if the legal representative refuses to act on the basis that she or he does not consider that there is a 'significant prospect of success.' However, there is nothing to prevent the client from approaching another legal aid supplier to take on the case.

The procedure is that at the time of lodging the application for the review, the appellant has to state whether he or she is seeking a funding order. At the end of the case, if a funding order² is made (either by the tribunal following a reconsideration or the High Court following a review) then the lawyer will be paid at an enhanced rate above that paid under Controlled Legal Representation.³

If a funding order is not granted then although the solicitor and barrister involved will not get paid, reasonable costs of interpreter and other disbursements can be claimed.⁴

Note that contract conditions may be amended frequently. The latest guidance for contract holders should be checked

Public funding in Scotland for immigration appeals

Advice and assistance (A&A) may be available from the Scottish Legal Aid Board (SLAB) to assist clients in immigration appeals before the tribunal sitting in Scotland. Advice and assistance is means tested, but not merits tested. If your client qualifies financially for A&A, an initial expenditure limit of £85 is applicable. Any work over this amount must be covered by applying to SLAB for an increase in authorised expenditure of A&A. The increase must be approved before further work commences. Although SLAB has produced a template increase application form which applies to both immigration and asylum appeals, increases for immigration appeals have been refused, so you may need to argue your case with SLAB. The client may be asked to pay a contribution towards legal aid costs.

Any appeal for reconsideration to the Court of Session can only be covered by civil legal aid. Civil legal aid is both means tested and merits tested. A successful application is likely to require a positive opinion from an advocate as to the merits of the case. Again, the client may be asked to pay a contribution towards the legal aid costs.

2 AI(TCetc)A 2004, s103D

3 LSC General Civil Contract
Rule 12.4.5/13.4.5

4 LSC General Civil Contract
Rule 12.4.6/13.4.6

Appendix 1

Sources of immigration law

One of the most challenging tasks facing busy immigration practitioners is to keep up with the rapid developments in immigration law. This is essential as the law impacts at every stage of the process. The sources of law are diverse and include statutes, statutory instruments, procedure rules, other rules, policies and concessions. The pace of change is quick.

Access to the internet is a prerequisite to effective representation.

Domestic law

A useful, but not exclusive, starting point is the domestic framework. The following list of statutes, statutory instruments and orders is not exhaustive but contains those to which you are most likely to need to refer.

Statutes

Immigration Act 1971	Human Rights Act 1998
Immigration Act 1988	Immigration and Asylum Act 1999
Asylum and Immigration Appeals Act 1993	British Overseas Territories Act 2002
Asylum and Immigration Act 1996	Nationality, Immigration and Asylum Act 2002
Special Immigration Appeals Commission Act 1997	Asylum and Immigration (Treatment of Claimants etc) Act 2004

In addition sections of the following will be needed:

Children Act 1989
Race Relations Act 1976
Race Relations (Amendment) Act 2000

All but the most recent of these statutes can be located on the web at www.opsi.gov.uk and in:

Macdonald's Immigration Law and Practice, 6th edition,
Ian Macdonald QC and Frances Webber, Butterworths 2005

Butterworths Immigration Law Service

Immigration Law Handbook, 4th edition,
Margaret Phelan and James Gillespie, Oxford University Press 2005

Statutory instruments and orders

This is not an exhaustive list. These, and others, can be found at www.opsi.gov.uk and in the texts mentioned above:

The Asylum and Immigration Tribunal (Procedure) Rules 2005	SI No 230
The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005	SI No 560
Immigration (Restricted Right of Appeal against Deportation) (Exemption) Order 1993	SI No 1656
The Immigration (European Economic Area) Regulations 2000	SI No 2326
The Immigration Appeals (Family Visitor) (No 2) Regulations 2000	SI N2446
The Immigration Appeals (Family Visitor) Regulations 2003	SI No 518
The Accession (Immigration and Worker Registration) Regulations 2004	SI No 1219
The Immigration (Procedure for Marriage) Regulations 2005	SI No 15
The Asylum and Immigration (Fast Track Time Limits) Order 2005	SI No 561

Other sources of domestic immigration law and practice

The above statutes and statutory instruments are only the starting point. The following are also essential:

The immigration rules HC395 which have been substantially amended on numerous occasions.

Published and unpublished Home Office policies, concessions and ministerial statements

The Immigration Directorate Instructions (IDIs), Nationality Instructions (NIs) and Operation Enforcement Manual (OEM) and European Directorate Instructions (EDIs) set out the instructions to officers on how to implement the rules together with most published concessions and practices outside the rules for in-country applications.

The DSPs (Diplomatic Service Procedures) set out the instructions to ECOs on how to implement the rules together with most concessions and practices outside the rules as they apply to entry clearance applications

The Immigration rules are to be found in the above mentioned texts as well as on the Home Office IND website www.ind.homeoffice.gov.uk Ensure you are looking at the most current version.

Home Office published and unpublished concessions and policies often contain rights and benefits for those seeking leave to remain over and above those contained in the statutory provisions or the immigration rules. Examples include the family reunion concession, and the HIV/AIDS policy. These policies and concessions are not always reflected in actual Home Office decisions and can often form the basis of an appeal.

These policies and concessions can be found in a variety of sources including:

ILPA monthly mailings

Butterworths Immigration Law Service

IND law and policy section at www.ind.homeoffice.gov.uk for IDIs, NIs, EDIs, OEM the UKVisas website (DSPs) www.ukvisas.gov.uk access through the DSP Index

Relevant ministerial statements that set out a favourable practice to be adopted by the Home Office can be found in Hansard at www.parliament.the-stationery-office.co.uk and in ILPA publications on ministerial statements made during the passage of various bills. See www.ilpa.org.uk for details of ILPA publications.

European Community law

Important sources of European Community law include:

The EC treaty (as amended)

Council Directive 64/221/EEC

Regulation (EEC) 1612/68 of the Council

various EC Association Agreements

These sources of European community law are referred to in the above mentioned texts and can be found in:

Free Movement of Persons in the Enlarged European Union, Nicola Rogers and Rick Scannell, Sweet and Maxwell, 2005

ILPA's website www.ilpa.org.uk also has a European section with ILPA responses to proposed directives and other EU developments.

International conventions and materials

It is essential to have a comprehensive understanding of the many international conventions that are the source of fundamental rights and obligations, many of which are reflected in domestic law. The text of an international convention may impact on the interpretation given by domestic courts to a domestic statutory provision. The following international conventions are likely to be relevant:

European Convention on Human Rights, 1951

International Convention on Civil and Political Rights (ICCPR) 1996

UN Convention on the Rights of the Child (CROC) 1989

UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW) 1979

As well as being in the various texts, international conventions and materials can be found on the following websites:

www.echr.coe.int

website of the European Court of Human Rights

www.umn.edu/humanrts

website of the University of Minnesota Human Rights Library which contains many international treaties

www.ein.org.uk

website of the Electronic Immigration Network. Also contains useful links to many websites containing international materials

Caselaw

Although the various statutes, statutory instruments, rules, policies and concessions, European and international treaties and conventions and materials are the starting point, they cannot be considered in isolation from the decisions of the various courts and the tribunal that seek to give them effect and interpret their meaning. The caselaw develops at a rapid pace. There are many sources of caselaw so there is no excuse for not being aware of recent developments.

The following subscription publications focus on developments in caselaw:
Immigration Appeals Reports (ImmAR) (known as the green books) HMSO
Immigration and Nationality Law Reports (INLR) (known as the blue books)
Jordans

The United Kingdom Human Rights Reports (UKHRR) Jordans
Immigration Law Update published fortnightly by the Legal Research Unit, Immigration Advisory Service, includes transcripts of reported cases.

The following websites and publications should also be considered useful and important sources of recent and relevant caselaw:

www.ait.gov.uk
the website of the AIT: reported tribunal decisions including starred cases, country guidance cases; practice directions.

www.bailii.org
database of case law including some decisions of IAT. Free.

www.casetrack.co.uk
commercial database of case law, searchable by case name, word or phrase, judge etc. Tribunal cases not included. Access by subscription.

www.ein.org.uk
database of case law and other materials. Can be searched by case name and keywords. Access by subscription.

www.hmcourts-service.gov.uk
Court of Appeal searchable database of all Court of Appeal judgments. Free.

www.westlaw.co.uk
an extensive database which provides access to statutory provisions, caselaw and articles. Access by subscription.

www.lawtel.co.uk
similar to Westlaw

LexisNexis Direct
similar to Westlaw and Lawtel.
Can be found at www.lexisnexis.co.uk

European caselaw

www.echr.coe.int
the website of the European Court of Human Rights. Free access.

www.europa.eu.int
the Europa site contains judgments and materials concerning European Community law.

Appendix 2

Other resources

The resources in appendix 1 are a starting point. You should be on the look out for new publications, websites and developments in the law. The ILPA mailings sent out to all its members are an effective way of keeping up to date.

You should be aware of these websites and publications:

Professional

ILPA
www.ilpa.org.uk

Asylum and Immigration Tribunal
www.ait.gov.uk

Bail for Immigration Detainees
www.biduk.org

Bar Council
www.barcouncil.org.uk

Civil Justice Council
www.civiljusticecouncil.gov.uk

Civil procedure rules
www.open.gov.uk/dca

Department for Education and Skills
www.dfes.gov.uk/providersregister
(for list of approved colleges)

Law Society
www.lawsociety.org.uk

Legal Services Commission
www.legalservices.gov.uk

OISC
www.oisc.org.uk

General

Legal Action Group monthly journal which every four months features recent developments in immigration law

A guide to appeals. An appellant's guide to procedures, roles and responsibilities, available on the AIT website

Immigration, Nationality and Refugee Law Handbook 2005, 6th edition, Joint Council for the Welfare of Immigrants, 2005

Best Practice Guide to Asylum and Human Rights Appeals, Mark Henderson, ILPA/Refugee Legal Group, 2003, available on ILPA website

Making an Asylum Application – a best practice guide, Coker, Kelly and Soorjoo, ILPA, May 2002, available on ILPA website

Immigration, Nationality and Asylum under the Human Rights Act 1998, edited by Blake and Fransman, Butterworths Law, 1999

Analysing Witness Testimony: A Guide for Legal Practitioners and Other Professionals, edited by Heaton-Armstrong, Shepherd and Wolchover, Blackstone Press, 1999

Children

Child First, Migrant Second: Ensuring that every child matters, Heaven Crawley, ILPA, 2005

Working with Children and Young People subject to immigration control: Guidelines for best practice, Heaven Crawley, ILPA, 2004

Adjudicator Guidance Note 8 April 2004 children

Putting Children First, Coker, Finch and Stanley, Legal Action Group, 2002

Detention

Immigration Advice at the Police Station, 3rd edition, Rosie Brennan, Law Society, 2006

Challenging Immigration Detention, a best practice guide, Emily Burnham, published by ILPA, the Law Society and Bail for Immigration Detainees, 2003

Bail guidance note to adjudicators

Practice and procedure

Adjudicator Guidance Note 3 May 2002, pre-hearing introduction

Adjudicator Guidance note (August 2004), Unrepresented appellants who do not understand English

Adjudicator Guidance Note 5 April 2003, Unrepresented appellants

Guidelines for immigration practitioners, Law Society, June 2001, September 2002 and July 2005 see www.lawsociety.org.uk/professional.law

Asylum and Immigration Tribunal Practice Directions, 2005

Protocol on the Instruction of Experts www.civiljusticecouncil.gov.uk
Part 35 Civil Procedure Rules

Key cases

Evidence

Ladd & Marshal
[1954] 1WLR 1489
E&R [2003]EWCA Civ 49
Ladji Diaby
CA 12 May 2005
Tanveer Ahmed
[2002] Imm AR 318
R v SSHD ex parte Singh
[1998] INLR 608

Unrepresented appellants

Surendran
IAT/21679, heard 2 June 1999, endorsed by IAT in MNM* [2000] INLR 546, quoted in Guidance Note 5 – although asylum, same principles.

Credibility

Horvath [1999] INLR 7
Chiver [1997] INLR 212
Pepin Gba CO–4185–99
Ibrahim Ali
[2002] UKIAT07001,
[2003] UKIAT00012B
Carcabuk & Bla
00/TH/01426, 18.05.00,
intended to be guidance
although not starred.
Immigration Law Update
Vol 6, no 13

Error of law

E&R [2003] EWCA Civ 49
Kausar [1998] INLR 141
R(Iran)
[2005] EWCA CIV 982

Race discrimination

VE (racial discrimination)
Nigeria [2005] UKIAT 00057
R (app Bibi) v IAT
[2005] EWHC386 (Admin)

Article 3

D v UK [1997] EHRR 423
N v SSHD [2005] UKHL 31
J v SSHD
[2005] EWCA Civ 629

Article 8

Razgar [2004] UKHL 27
AC v IAT and SSHD
[2003] EWHC 389 Admin
Huang, Abu-Qulbain
and Kashmiri
[2005] EWCA Civ
R (on the application
of Mahmood)
[2001] UKHRR307
Gul v Switzerland
(1996) 22EHRR 93

Funding

RS Iran
[2005] UKAIT 00138
EB Turkey
[2005] UKAIT 00145

Appendix 3

Glossary

Accreditation

Immigration advisers who seek payment under the Legal Help and Controlled Legal Representation schemes require accreditation, authorised through the Legal Services Commission.

Adjudicator

Previous name for an immigration judge, see below.

AIT

See Asylum and Immigration Tribunal

Appealable decision

An immigration decision listed under section 82(2) of the Nationality, Immigration and Asylum Act 2002, as amended, against which there is a right of appeal.

Appeals Group

IND department that deals with cases after an appeal has been filed against refusal. Formerly called the Appeals Support Section (ASS).

Appeals Procedure Rules

Rules published in the form of statutory instruments, which specify how an appeal should be conducted.

Appellant

A person appealing against an immigration decision.

Appellate Authority

The previous name given to the court structures that have been established to hear immigration appeals, replaced on 4 April 2005 with the Asylum and Immigration Tribunal.

Asylum and Immigration Tribunal

A single tier tribunal that hears immigration and asylum appeals which replaced the Immigration Appellate Authority on 4 April 2005.

Authorised immigration judge

An immigration judge authorised by the President of the tribunal to deal with applications for review of a first decision.

Bail

Release from detention. A person in detention is usually able to apply for bail either to the Chief Immigration Officer (CIO bail) or to the tribunal. Bail can be granted subject to reporting and residence restrictions.

Bundle

The documents prepared by the appellant in support of his or her case and submitted in advance to the tribunal.

Burden of proof

The legal responsibility for proving the case in order to win the appeal.

Chief Immigration Officer (CIO)

A member of the Immigration Service. Inspector is the rank above, immigration officer (IO) the rank below.

Chronology

A list of the main significant events and developments in the life of the appellant which are relevant to the case, in the order in which they happened.

Controlled Legal Representation

Means- and merits-tested free legal advice and representation before the tribunal given by legal advisers who hold a contract with the Legal Services Commission.

Court clerk

A person who assists the immigration judge by preparing the hearing room and ensuring that all people involved in the appeal are brought in to court at the correct time.

Designated immigration judge

See immigration judge

Devolved powers

The power (among other matters) to grant Controlled Legal Representation and emergency public funding certificates given by the Legal Services Commission to a minority of solicitors firms and not for profit agencies.

Directions

Orders given by the tribunal as to how the case is to be conducted, documents to be produced and timescales.

EC

See European Union

EC Association Agreements

Agreements between the EU and some other countries which provide for self-employment of the other country's nationals in the member states provided criteria are met.

ECHR

See European Convention on Human Rights

EEA

European Economic Area. The EU member states plus Iceland, Liechtenstein and Norway. Nationals of the EEA have freedom of movement rights within the EU states.

Enforcement action

Action that is taken by IND to enforce removal from the UK. May be preceded by detention.

Entry clearance

Prior authority to enter the UK. Sometimes in the form of a visa. Functions as leave to enter and includes details of any conditions and dates for which it is valid on a sticker in the passport.

Entry clearance officer (ECO)

The officer at the British post abroad who decides whether or not a person should be granted an entry clearance to come to the UK.

European Convention on Human Rights 1951 (ECHR)

International instrument of the Council of Europe. The ECHR was incorporated into UK law by the Human Rights Act 1998.

European Union (EU)

Previously the European Economic Community (EEC)/European Community (EC).

Countries are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. Nationals of these countries and their family dependants have full freedom of movement within the territory of the member states.

As from 1 May 2004 also includes Latvia, Estonia, Cyprus, Malta, Lithuania, Czech Republic, Slovakia, Slovenia, Hungary, Poland. Citizens of Malta and Cyprus have full freedom of movement rights throughout the EU. The other countries are subject to transitional provisions restricting access to residence permits and benefits, but have freedom of movement within the UK.

See also EEA. Note that Swiss nationals, while not being members of the EU, have certain freedom of movement rights.

Expert witness

A person giving evidence, either orally or in writing, at an appeal who has specialised knowledge of the country or the situation, but not of the facts of the appellant's case.

Family visitor

Someone who is seeking entry to visit a family member. Under the procedure rules, a family member is any of the following:

- a) the applicant's spouse, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother, sister, uncle, aunt, nephew, niece or first cousin;
- b) the father, mother, brother or sister of the applicant's spouse;
- c) the spouse of the applicant's son or daughter;
- d) the applicant's stepfather, stepmother, stepson, stepdaughter, stepbrother or stepsister; or
- e) a person with whom the applicant has lived as a member of an unmarried couple for at least two of the three years before the day on which his application for entry clearance was made.

Home Office presenting officer HOPO

The Home Office civil servant who represents the immigration authorities' case at the tribunal.

HRA Human Rights Act 1998

Came into force on 2 October 2000 when the ECHR was incorporated into United Kingdom law. Enables an appeal to be brought because removal would be a fundamental breach of an individual's human rights.

IA 1971

Immigration Act 1971

IAA 1999

Immigration and Asylum Act 1999

IAN

Immigration, Asylum and Nationality Bill 2005, under debate at the time of writing

Illegal entrant

A person physically in the UK who has entered in breach of immigration laws, e.g. a visitor who actually came intending to work or study, a student who actually came intending to work, as well as someone who entered clandestinely, e.g. in the back of a lorry.

'Illegal immigrant'

A term used by police and the tabloid press. Not a correct term in immigration law.

Immigration Appeal Tribunal (IAT)

see Asylum and Immigration Tribunal.

Immigration Appellate Authority (IAA)

See Asylum and Immigration Tribunal

Immigration decision

A decision against which there is a right of appeal under section 82(2) as amended of the Nationality, Immigration and Asylum Act 2002.

Immigration judge

Previously called adjudicators, the people who decide appeals made to the Asylum and Immigration Tribunal. There are also Designated Immigration Judges and Senior Immigration Judges

Immigration Officer (IO)

A member of the immigration service.

Immigration and Nationality Directorate (IND)

The branch of the Home Office that deals with immigration, asylum and nationality issues.

Immigration rules

Rules made by the Secretary of State under powers given to him by statute to control entry and stay in the UK of non-British nationals.

Immigration Service

Part of the Immigration and Nationality Directorate of the Home Office which deals with entry at ports and enforcement i.e. removal.

In-country appeal

An appeal during the course of which the appellant is permitted to remain in the UK.

In-country applicant

A person who applies for a change in immigration status while in the UK whether lawfully or unlawfully present.

Indefinite leave to remain/enter (ILR or ILE)

The grant of indefinite leave to remain following variation of stay in the UK in compliance with various immigration rules or the grant of indefinite leave to enter on arrival in the UK. No time limits attached to stay in the UK but remain subject to immigration control. Two years absence will usually result in removal of status but it can also be lost after shorter periods away. Can be revoked but on limited grounds. Also referred to as settled status, permanent residence.

Joint retainer

If you act for more than one person, you take instructions from all.

Judicial review

Administrative Court proceedings to challenge administrative decisions of the Home Office.

Leave to enter

The permission given to a person to enter the UK. It will normally be limited as to time and may have a prohibition on working or receiving public funds.

Leave to remain

The permission given to someone to extend an existing permission to stay in the UK. It may be limited as to time and may have a prohibition on working or claiming public funds.

Legal Help

The basic form of legal aid which enables a publicly funded lawyer to advise on immigration matters. It is subject to means and 'sufficient benefit' tests.

Legal panel

A three person panel of immigration judges, designated judges or senior immigration judges, any appeal from which is direct to the Court of Appeal rather than through reconsideration.

Limited leave

Permission to remain in the UK that is time-limited and sometimes with other conditions imposed, e.g. prohibition on working without permission.

LSC Legal Services Commission

The body responsible for administering public funding for asylum and immigration work by issuing contracts to solicitors and not-for-profit organisations to provide Legal Help and Controlled Legal Representation..

Lunar House, Croydon

The name of the IND office in Croydon that takes decisions on the vast majority of immigration matters except leave to enter at a port.

McKenzie friend

In most court proceedings, it is possible for a non-qualified, unpaid person to attend the hearing with a party to the proceedings, to sit next to him or her to take notes and to (whisper) advice/suggestions. This person is known as a McKenzie friend. The McKenzie friend has no right to address a court, but can be invited to do so. OISC regulated advisers cannot act as McKenzie friends (see OISC News, Issue 12, spring 2004), and although there has been no policy decision of the tribunal to prevent McKenzie friends in tribunal proceedings, the effect of s84 IAA 1999 is to make it unlikely.

NIAA 2002

Nationality, Immigration and Asylum Act 2002

Non legal member

A member of the tribunal who hears some cases with an immigration judge. They are not lawyers.

Non-suspensive appeal

An appeal that can only be commenced outside the UK; appeal papers lodged while in the UK will be invalid.

Overstayer

A person who was lawfully in the UK whose permission has now expired and remains in the UK in breach of immigration rules and liable to removal.

Panel

Tribunal hearings in front of two or more immigration judges, designated judges or senior immigration judges or a combination.

Permanent residence

The same as settled status. See indefinite leave to remain/enter.

Port

The point of entry to the UK, e.g. Heathrow, Dover, Waterloo.

Post abroad

The British Consulate/Embassy/High Commission to which applications for visas/entry clearance to permit entry to the UK are submitted.

Public Caller Unit/Public Enquiry Office

The IND office open to the public. Main office is in Croydon, other offices in Glasgow, Liverpool and Solihull.

Public funds

Defined by paragraph 6 of the immigration rules, as amended. They include (this is not an exhaustive list and the current paragraph should always be consulted) attendance allowance, child benefit, council tax benefit, disability living allowance, housing benefit, income-based jobseeker's allowance, income support, carer's allowance, severe disablement allowance, working tax credits, child tax credits, social fund payments and housing as homeless or public housing (provided under Housing Act 1996 Parts VI and VII). It does not at present include, for example, student grants or NHS treatment.

Reconsideration

The process by which an initial determination is considered by the AIT after a decision (review) that there has arguably been both an identifiable error of law and a realistic possibility that on reconsideration the decision will be different.

Removal

The administrative procedure by which a person is sent away from the UK. No appeal from within the UK except where asylum has been claimed and refused or where it is alleged that removal would breach the Human Rights Act 1998.

Removal centre

Formerly known as detention centres. Asylum applicants at all stages of procedure may be detained there.

Restriction order

A person who is liable to be detained and released on bail is issued with a restriction order.

Returning resident

Someone who has indefinite leave to enter/remain and is returning to the UK having been away for less than two years.

Review

An application to the tribunal for reconsideration, the first stage in the process. Will only be granted if there is both an identifiable error of law and the decision on reconsideration may be different.

Right of abode

The right to enter and remain in the UK free of immigration controls and conditions. British citizens have the right of abode, as do Commonwealth women who married a man with right of abode before 1 January 1983, and Commonwealth citizens with a parent born in the UK.

Senior immigration judge

See immigration judge.

Settlement/settled status

See indefinite leave to remain/enter.

Skeleton argument

A summary of the legal arguments which a representative plans to use in a case, submitted to the tribunal, preferably in advance of the hearing.

Sponsor

A person resident in the UK who is prepared to provide support and accommodation to someone who wishes to come to the UK.

Standard of proof

The level to which a case has to be proved. In immigration cases, this is usually the 'balance of probabilities', that something is more likely than not to be true.

Subject to immigration control

Any person who needs leave to enter or remain in the UK. The leave may be conditional on prohibiting recourse to public funds or working, or have been granted as a result of an undertaking in connection with maintenance.

Temporary admission (TA)

The person is permitted out of detention but is not considered to be in the UK for immigration purposes. Release from detention is authorised by the port and is often subject to conditions of residence, etc. A person on TA will be issued with an IS96 form and will usually be subject to conditions of residence and reporting.

Temporary release

The person is released from detention pending removal proceedings, such release usually being subject to conditions of residence and reporting.

Tribunal Asylum and Immigration Tribunal (AIT, the tribunal)

replaced the IAA and hears asylum and immigration appeals

Unlawfully resident

A person who is in the UK either after his or her leave to remain has expired or who is now awaiting the outcome of an appeal, or who has entered the UK illegally.

Variation application

An in-country application to vary or extend an existing leave to remain.

Visa

The same as entry clearance.

Visa national

Citizens of particular countries who always require a visa to come to the UK, whatever the purpose of the trip. The only exceptions are returning residents or those returning to the UK within a previous period of leave granted for more than six months. There is a list of visa nationals in the immigration rules.

Work permit

Permission to work in a particular job, for a particular employer, granted by Work Permits UK, part of the Home Office.

Other best practice guides

This guide is one in a series of ILPA best practice guides.

Other titles are:

Working with children and young people subject to immigration control: guidelines for best practice

Heaven Crawley with Gaenor Bruce, Jane Coker, Nadine Finch, Susan Rowlands, Sue Shutter and Alison Stanley; ILPA, 2004

Challenging immigration detention: a best practice guide

Emily Burnham; ILPA/BID, 2003

Best practice guide to asylum and human rights appeals

Mark Henderson; ILPA/Refugee Legal Group, 2003

Making an asylum application: a best practice guide

Jane Coker, Garry Kelly, Martin Soorjoo; ILPA, 2002

For further information

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