



Immigration Law Practitioners' Association

MAKING AN ASYLUM APPLICATION

a best practice guide

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

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Foreword

Access to early, good quality legal advice plays a key part in the effective and fair operation of the asylum system. If the asylum seeker's case is properly put forward this in turn allows the immigration services to make the best decision on that case. This has advantages not only for the particular client, but also for the system as a whole by reducing unnecessary appeals and uncertainty.

The Legal Services Commission is committed, through the civil contracting scheme and measures such as the solicitor's expansion package, to providing that access to quality legal advice.

The Immigration Law Practitioners' Association has the same strong commitment and I was therefore very happy to agree to their proposal to fund this latest Best Practice Guide. I would urge all immigration practitioners to read and employ the guide to the benefit of their clients.

S M Orchard

Chief Executive, Legal Services Commission

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Introduction

What is an asylum application?

If your client states that he is frightened to return to the country he was previously living in he may have a claim to enter or remain in the UK under the 1951 Refugee Convention or under Article 3 of the European Convention on Human Rights (or both). Your client may or may not use the word asylum. You should, however, investigate further any expression of fear: you should take a detailed statement and consider what sort of application, if any, should be made.

The statement will be the critical and often determining factor in any application for leave to remain that you make on your client's behalf (including one for asylum). It is incumbent on you, the legal representative, to take detailed instructions from your client in order for the statement to be made (in writing, orally, or both). The decision by the Immigration and Nationality Directorate of the Home Office (IND) to grant leave to enter or remain will be taken principally on the basis of the information provided in this statement and any additional information you will provide to explain the background to the claim or the situation in the country of origin and/or transit.

As legal representative, you should be aware that changes in your client's situation will occur during the period between the making of an asylum application and the setting of removal directions should the application and appeals be refused. For example, he may have a long-term settled relationship, may have children, may be working or have established a business. Your client should be asked to keep you informed of significant change in personal circumstances during the period of consideration of the claim. Whenever there are changes you should consider whether it is appropriate to submit a fresh application supported by relevant documentation.

What can this guide offer you?

This is a best practice guide on the essentials of the asylum process from arrival up to the submission of an appeal. It includes a brief outline of all the necessary steps for an appeal, for example preparing a bundle, instructing experts and briefing counsel.

This guide will assist you in identifying what has to be established in order for your client to be recognised as a refugee or to be granted exceptional leave to remain or enter. It will assist you in knowing how to obtain information, how to draft representations and how to advise your client about interviews, and it will identify some of the problems that arise during the course of a claim being determined.

However, this guide is not a detailed guide on how to run the appeal nor is it a detailed explanation of how to apply for bail. Commentary on other aspects of immigration law is beyond the scope of this best practice guide.

The guide has been produced following consultation with practitioners throughout the UK. Practitioners should aspire to the methods set out here. Although there is regional variation in the practices undertaken by IND, the basic requirements on how to take a comprehensive statement do not vary wherever you practice and whatever the nationality of your client.

You may find it helpful to set up informal networks of practitioners to exchange information by attending ILPA sub-committee meetings or establishing meetings similar to those of the Refugee Legal Group in London. You should ensure that you are aware of current immigration law and policies, for example by reading ILPA's mailings and attending training to update or expand your knowledge of the law and practice.

This guide does not deal with subsidiary issues that may arise for your client. For example, there is no detailed analysis of entitlement to NASS or eligibility for legal help, nor is there reference to discretionary IND policies. You need to be aware of these to advise your client properly. There are numerous other sources that may be consulted to obtain this information.

Points to note

Abbreviations

Throughout this guide we have used the term IND (the Immigration and Nationality Directorate of the Home Office) to include the Asylum Screening Units (ASU), the Integrated Casework Directorate (ICD), the Interview Booking Unit (IBU), and the Immigration Service (IS).¹

Gender

Throughout the text, representatives, clerks, interpreters and officials are referred to as female; all applicants as male. All legal representatives at interviews (whether solicitors or outdoor clerks) are referred to as clerks.

Currency

Some of the information set out here will inevitably change as IND issues new policies or changes its procedures. Telephone numbers, correspondence addresses and fax numbers are changed often and frequently without notice. It is therefore essential that you read, note and keep up to date with any changes.

The date of publication is May 2002 – any references in the text to current practice/procedure refer to this period.

¹ If you are in correspondence with both the ICD and the IS at a port, you should ensure that substantive documents relevant to your client's claim are copied to both.

1

What is asylum? The legal basis

Protection as a refugee

The legal basis of the protection given to refugees in the United Kingdom is the 1951 Convention Relating to the Status of Refugees read with the 1967 Protocol ('the Refugee Convention').¹ In order to be granted protection as a refugee,² individuals have to show that they have a well-founded fear of persecution on account of their race, religion, nationality, political opinion or membership of a particular social group. The acts of persecution or feared persecution must be committed by the state or by groups or individuals, which the state either cannot or will not control.³

The Refugee Convention consists of a series of articles in which the rights of refugees are set out. Broadly speaking, it can be divided into three parts:

- the preamble, which sets the agenda for the whole instrument
- the definition of a refugee (see below)
- the duties owed by the states to persons they recognise to be refugees (Articles 2–36).

The Refugee Convention is a living instrument, adopted by civilised countries for a humanitarian end, which is constant in nature but mutable in form.⁴ The application of Article 1 (the 'definition article') to the circumstances of the applicant determines whether an individual is recognised as a refugee. The rest of the Convention sets out the interpretation of Article 1 and the protection to which refugees are entitled. In particular, Article 32 gives refugees lawfully in a territory the right not to be expelled save on grounds of public order or national security and Article 33 sets out the most important duty of states, which is the prohibition on return to a territory where the individual's life or freedom may be threatened (*refoulement*).⁵

In 1992 the United Nations High Commission for Refugees published its handbook on procedure and criteria ('UNHCR handbook'). This sets out the procedure that the UNHCR considers should be used for determination of asylum claims and is an essential reference.

1 The general rules for interpretation of international treaties are set out in Article 31 of the Vienna Convention on the Law of Treaties.

2 See also Human Rights Act 1998

3 See *The refugee in international law*, G Goodwin Gill, Oxford University Press, 1996; *The law of refugee status*, J Hathaway, Butterworths, 1991; *Macdonald's Immigration Law and Practice*, Ian A Macdonald QC and Frances Webber, (5th Edition), Butterworths, 2001

4 See Mr Justice Sedley, as he then was, in *R v IAT ex parte Shah* [1997] Imm AR 145 (QBD)

5 'No Contracting State shall expel or return (*refoule*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

Preamble to the Refugee Convention

The preamble establishes that the purpose of the Refugee Convention is to provide protection. The Refugee Convention is to be read in the context of other human rights instruments and makes reference to, for example, the Universal Declaration of Human Rights and the need 'to assure refugees the widest possible exercise of these fundamental rights and freedoms.'

Definition of a refugee

It is essential to identify at as early a stage as possible whether your client has a claim for asylum. Failure to identify whether an individual has a claim for asylum in their own right can have serious implications for the way in which that person's asylum claim is assessed at a later date.

*'It is essential that women are given equal access to the refugee determination process from their initial application. Where a woman arrives as part of a family unit, regardless of whether she is the principal applicant or not, she should be interviewed by the representative.'*⁶

Representatives should give careful consideration as to whether or not they should interview dependent children.

In order to be recognised as a refugee an applicant must fall within the definition set out in Article 1 which defines a refugee as a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, unwilling to return to it.

The framework for the interpretation of Article 1 identifies six key elements:⁷

- being outside the country of origin or habitual residence
- genuine risk (credibility and standard of proof)
- serious harm (an element of persecution)
- failure of state protection (an element of persecution)
- grounds for persecution i.e. the five Convention reasons
- needs and deserves protection (the cessation and exclusion clauses).

Being outside the country of origin

It is fundamental that a person is outside his country owing to a fear of persecution. An asylum claim cannot be made from within the country from which he is fleeing. There is nothing to prevent a receiving state issuing a visa to enable a person to travel to that country and then claim asylum – although this would be very rare and such a visa application would be unlikely to be successful. Remember that the Refugee Convention applies to stateless people as well as those with a nationality.

⁶ *Refugee and Gender: Law and Process*, Dr Heaven Crawley, Jordans, 2001, p201. See also chapter 5, vulnerable applicants.

⁷ *The law of refugee status*, J Hathaway, Butterworths, 1991

At genuine risk

For an application for asylum to succeed it is necessary to establish the facts of your client's claim and that these facts place your client at genuine risk. Your client may be unable to adequately portray his case and consequently IND may be unable to comprehend the factors that have motivated your client's asylum application.

The following may affect your client's ability to disclose information:

- the stress felt by a person putting forward a case in which his life is threatened
- the formal atmosphere of interviews with the Home Office and appearances in court
- the gravity of the consequences if a claim is wrongly refused
- the fallibility of human memory over time
- the fact that an individual may only be able to give a partial account of events in a distant regime.

There has been considerable litigation around the standard of proof, and how to determine and apply this to the assessment of facts. Your client must show a well-founded fear of persecution.

It is now established that the Home Secretary is entitled to look at objective facts and ask whether there was a real and substantial risk or a real likelihood of persecution for a Convention reason.⁸ Just feeling fear is not enough. Showing a real likelihood of persecution is a lesser standard than proving that persecution will occur on a balance of probabilities.⁹ Lord Diplock considered that this could be shown by, for example, 'a reasonable chance', 'substantial grounds for thinking', 'a serious possibility'. This test applies to the assessment of risk for the whole of the claim.¹⁰

Evaluating the credibility of the claim

Credibility is inextricably linked with the standard of proof and is a substantial problem for nearly all asylum seekers. Many refusals of asylum are based on an assertion by IND of compromised credibility. Paragraph 341 of HC395 as amended sets out specific matters which will be deemed to adversely affect the assessment of credibility.

Credibility can be broken down into various elements:¹¹

- evidence the decision maker or court is certain about
- evidence the decision maker or court thinks is probably true
- evidence to which the decision maker or court is willing to attach some credence, even if they could not go so far as to say it is probably true
- evidence to which the decision maker or court is not willing to attach any credence.

⁸ *R v SSHD ex p Sivakumaran* [1988] AC 958

⁹ See *Macdonald's Immigration Law and Practice*, Ian A Macdonald QC and Frances Webber, (5th Edition), Butterworths, 2001, p482

¹⁰ *Fernandez v Government of Singapore* [1991] 2 AER 691

¹¹ *Karanakaran v SSHD for the Home Department* [2000] Imm AR 271

Timing of the application

An adverse inference may be drawn when there is delay in submitting an application for asylum.¹² An explanation should be provided for any delay. Paragraph 198 of the UNHCR handbook suggests possible explanations for an asylum seeker's failure to disclose relevant information: 'A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive *vis-a-vis* any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.' The Immigration Appellate Authority (IAA) Asylum Gender Guidelines state: 'Delay in claiming asylum or revealing full details of an asylum claim will not necessarily be due to the lack of credibility of a particular asylum claim or claimant.'¹³

Circumstances of the application

For many asylum seekers the first priority is to seek safety on a temporary basis. This may be a contributory factor in the submission of a delayed application. Torture and other persecutory treatment may induce in your client a feeling of profound shame and this may in turn account for delay and/or failure to disclose information.

Inability to provide information

This is not fatal to a claim, but any apparent lack of knowledge should be explained. In many cultures information regarding one family member's political activity may not be shared with other family members. This should not be taken to mean that other family members are not at risk. Your client's lack of knowledge concerning other family members should be explored and should not necessarily be taken to indicate compromised credibility.

Demeanour

This refers to how a person handles himself physically, for example, posture, eye contact or speech. All have an impact on the ability to provide information and testify. Cultural differences and trauma can play an important part in a person's demeanour. The Immigration Appeal Tribunal (IAT) has stressed the need for caution in relying upon the demeanour of a witness whose language and culture are different from the decision makers.¹⁴ Bingham J (as he was then) addressed the issue of demeanour by asking questions as to the interpretation of various types of behaviour. '...If the answer be given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when in truth there is no norm.'¹⁵

Inconsistency

A statement should if at all possible avoid inconsistency, inaccuracy or discrepancies. Where these occur it is essential that an explanation is given. An asylum seeker will frequently relate an account encompassing long periods of his life. There may be inconsistencies either within the asylum seeker's own statement or when compared to those of other family members or witnesses. These inconsistencies may include, for example, inaccurate recollection of dates or differences in interpretation or perception of events. Such inconsistencies do not necessarily mean that the asylum seeker's credibility is fundamentally compromised.

¹² HC395 as amended, para 341

¹³ IAA *Asylum Gender Guidelines*, November 2000, para 5.43. See also *R v. Uxbridge Magistrates Court ex p Adimi* [1999] Imm AR 560, [1999] INLR 490

¹⁴ *Daniel (unreported)* 2 July 1996 (13623) IAT

¹⁵ *R v SSHD ex parte Dhirubhai* [1986] Imm AR

The presence of discrepancies does not mean that the core account is unreliable. Inconsistencies can, however, properly lead to a finding of a lack of credibility.¹⁶

Dishonesty

A finding of dishonesty will count against the credibility of an asylum seeker, but dishonesty in one respect should not necessarily 'infect' the rest of their claim.¹⁷ For example, incorrect information about family members will not necessarily reflect the overall veracity of your client's claim.

Implausibility

Whilst an implausible account may well require greater scrutiny than a plausible account, it should not be rejected without consideration. It should not be assumed that events or activities by a repressive state that initially appear unreasonable or strange will lead to an adverse finding, particularly if there are other independent supporting documents.

Seeking asylum in first available country

An explanation as to why a claim was not submitted in a country that the asylum seeker passed through earlier should be given. There is no principle in international law that asylum has to be sought in the first available country.¹⁸ IND frequently asserts that failure to claim in the first country casts doubt on credibility.

Corroboration

An asylum seeker who can provide corroborative evidence will no doubt be in a better position than one who cannot do so. Paragraph 196 of the UNHCR handbook states:

Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

¹⁶ Chiver [1997] INLR 212 IAT

¹⁷ *R v Uxbridge Magistrates Court ex parte Adimi and others* [1999] Imm AR 560, INLR 490 (HC). 'The combined effect of visa requirements and carriers liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents.'

¹⁸ See *ex parte Adimi* for useful analysis of this issue.

Possession of a passport or exit through official channels

These issues are frequently identified as evidence that the asylum seeker is not at risk. Full details of acquisition of travel documents and an explanation of how the journey was undertaken should be given. Remember that in some cases the authorities are keen to facilitate the departure of political opponents. Official documents and departure can sometimes be facilitated by bribery.

Objective risk

The determination of most asylum applications depends on establishing an account of past facts, demonstrating that this is consonant with the objective evidence regarding the country and that there is a serious possibility (see 'at genuine risk' above) of the stated fear actually transpiring should your client be returned.

- *'The general human rights background of the country in question is important in assessing the objective foundation for the fear. Where human rights reports substantiate that a real risk of ill treatment exists, a genuine fear of persecution in a country is likely to be well founded if it relates to a Convention reason.'*¹⁹
- Information about human rights situations is available both from the state and non-governmental sources. ► See chapter 9.
- The fact of past persecution is a matter of great significance in the assessment of the risk of any recurrence. Therefore any evidence of past persecution must be put forward with the claim.²⁰

Serious harm and failure of state protection

Hathaway (1991) suggests that to understand whether persecution exists it is useful to examine two elements:²¹

- Does the harm apprehended by the asylum seeker amount to persecution, that is, does it constitute 'serious harm' within the meaning of persecution?
- Has there been a failure of state protection?

Persecution = serious harm + the failure of state protection

This framework has been examined in both *Shah and Islam*²² and *Horvath*²³. It is not clear from these judgments whether each element is to be treated as a discrete element or whether consideration of one element should be imported into consideration of the other. Legal argument as to the interpretation will no doubt continue. You need to be clear that at the very least the issues of serious harm and the availability of state protection have to be addressed by your client in order to assist in the determination of persecution.

Eligibility for asylum requires more than a well-founded fear of 'serious harm'; to constitute persecution the harm must be at the hands of the state or a force that the state cannot or will not control.

In *Gashi and Nikshiqi*²⁴ the Immigration Appeal Tribunal agreed with Hathaway's formulation that persecution is usually the 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection.'²⁵ Hathaway bases his definition of serious harm on human rights agreements that are accepted by virtually all states²⁶ and thus establishes a hierarchy of rights:

19 *Macdonald's Immigration Law and Practice*, Ian A Macdonald QC and Frances Webber, (5th Edition), Butterworths, 2001, p483. See also UNHCR handbook paras 196, 203 and 204 and *The law of refugee status*, J Hathaway, Butterworths, 1991, p80

20 *R v SSHD ex p Adan* [1999] Imm AR 114 and *Demirkaya v SSHD* [1999] Imm AR 498, [1999] INLR 441, CA

21 *Refugees and Gender: Law and Process*, Dr Heaven Crawley, Jordans, 2001, p38

22 *Islam v SSHD; R v IAT ex parte Shah* [1999] INLR 144 Imm AR 283 (HL)

23 *Horvath v SSHD* [2000] 3 WLR 379 (HL)

24 *Gashi and Nikshiqi* [1997] INLR 97

25 *The law of refugee status*, J Hathaway, Butterworths, 1991, pp 104–105

26 Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966)

- Examples of level 1 rights: freedom from arbitrary deprivation of life; protection against torture or cruel, inhuman or degrading punishment or treatment; freedom from slavery; freedom of thought, conscience and religion.
- Examples of level 2 rights: freedom from arbitrary arrest or detention; equal protection of the law; fair criminal proceedings; family privacy; freedom of internal movement; freedom of opinion, expression, assembly and association; rights to vote; access to public employment.
- Examples of level 3 rights: right to work; right to essential food, clothing and housing; health care; basic education; cultural expression.
- Examples of level 4 rights: private property; protection from unemployment.

Level 1 rights are inviolable human rights. A threat to these would always be a serious violation amounting to persecution.²⁷

Level 2 rights include those where limited derogation or curtailment by the state in times of public emergency can be justified. A threat to these rights may amount to persecution if the state cannot demonstrate any valid justification for their temporary curtailment. The measures will usually be accompanied by other forms of discriminatory treatment that, if assessed cumulatively, could amount to persecution.²⁸

Level 3 and 4 rights are those which, although binding upon states, reflect goals for social, economic or cultural development. Their realisation may be contingent upon the reasonable availability of adequate state resources but the state must nonetheless act in good faith in the pursuit of these goals and otherwise in a manner which does not violate customary norms of non-discrimination. In appropriate circumstances, a systemic and systematic denial of these rights may lead to cumulative 'consequences of a substantially prejudicial nature for the person concerned' of such severity as would amount to persecution within the meaning and spirit of the Convention. This would be particularly so where the state has adequate means to implement the rights but applies them in a selective and discriminatory manner.

In *Gashi and Nikshiqi* the IAT concluded 'there seems to be no doubt that [persecution] includes not only the first category but the second category as well and some aspects of the third category.' The IAT held in *Jonah*²⁹ that persecution should be given its ordinary meaning of 'to pursue with malignancy or injurious action'.

Despite the acknowledgement of Hathaway's framework, there are still problems in the interpretation of serious harm, particularly around the distinction between persecutory and discriminatory treatment. Violations of rights which might be seen to constitute discrimination and which may conceivably be more likely to affect women are often placed lower in the hierarchy of human rights. Such an interpretation can lead to more limited redress where there is a pervasive, structural denial of rights.³⁰ Practitioners should therefore be aware not only of the hierarchy but of the consequences of an accumulation of denial of rights.

²⁷ *Gashi and Nikshiqi*; see also UNHCR handbook, para 51

²⁸ *Gashi and Nikshiqi*

²⁹ *R v IAT ex parte Jonah* [1985] Imm AR 7 (QBD)

³⁰ *Refugee and Gender: Law and Process*, Dr Heaven Crawley, Jordans, 2001

Paragraph 52 of the UNHCR handbook states:

Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case... The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

Persecution will usually be persistent³¹ although if a single incident of persecution is recognised as sufficiently serious, the usual insistence upon persistency may be relaxed.³² There is no requirement that a person be singled out for persecution, so long as he is a member of a class similarly at risk.³³

Failure of state protection

Representatives must establish that there has been a failure of state protection rather than attempt to show that a state is responsible or accountable for the harm feared or sustained. The aim of the Refugee Convention is to ensure that effective surrogate protection is available; it is not to hold states responsible for their failure to protect.

A failure of state protection exists in the following situations:

- 1 *If 'serious harm' has been inflicted by the authorities or by associated organisations, groups or individuals:* the Refugee Convention does not specify from whom the claimant must fear persecution.
- 2 *If 'serious harm' has been committed by others and the authorities are unwilling to give effective protection, because they support the actions of the private persons concerned, because they tolerate them or because they have other priorities:* inability to obtain the protection of the state may be due to circumstances beyond the will of the individual concerned.
- 3 *If 'serious harm' has been committed by others and the authorities are unable to give effective protection:*³⁴ an unwillingness to avail himself of protection must be because of a fear of persecution rather than a wish to remain in the receiving state.

Asylum seekers usually fear persecution from their state or government but they may fear persecution from another source; for example, Tamil Tigers in Sri Lanka, guerilla groups in Columbia, skinheads in Eastern Europe, may be the agents of persecution.³⁵ The asylum seeker's perception of the protection available will form part of the arguments put forward. If state protection was not sought – or was sought but not obtained – details and an explanation will need to be included.

31 *Rajendrakumar v Immigration Appeal Tribunal & SSHD* [1996] Imm AR 97)

32 *Doymus* (OO TH 01748; 19 July 2000)

33 *Jeyakumaran v SSHD* [1994] Imm AR 45

34 See also *Refugee and Gender: Law and Process*, Dr Heaven Crawley, Jordans, 2001 pp 48–55

35 See UNHCR handbook, para 65

Internal flight/internal relocation

If the fear of persecution extends across the whole of the territory, then no question of 'internal flight' from potential harm can arise. Paragraph 91 of the UNHCR handbook provides that it is not necessary to prove that the persecution extends throughout the whole country if 'in all the circumstances it would not have been reasonable to expect' a person to have sought refuge in another part of the country.³⁶

The reasons for not relocating within a country include financial, logistic, social, educational, cultural, family unity, unreasonableness. An asylum seeker does not have to suffer from a well-founded fear of persecution in those areas of the country.³⁷

Prosecution

Prosecution is not persecution. 'Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim – or potential victim – of injustice, not a fugitive from justice.'³⁸

Nevertheless, the fact that an asylum seeker is subject to prosecution is not necessarily inconsistent with persecution, and may be evidence of it.

Laws or policies may be inherently persecutory, for example Pakistan's *Hudood* laws; or the law or policy, although having legitimate goals, may be applied through persecutory means, for example the 'one-child policy' in the People's Republic of China. The penalties for non-compliance with legislation may be disproportionately severe or unevenly applied, for example the punishments for adultery in some countries.³⁹ Excessive punishment may amount to persecution within the meaning of the definition. An individual may fear prosecution for exercising his fundamental human rights and in such cases, prosecution may very well shade into persecution.

Civil war

Asylum seekers fleeing civil war, as defined in *Adan*, must demonstrate that they face a 'differential impact' over and above the general risks of the civil war.⁴⁰ The forms of harm to be expected in a civil war are often serious enough to constitute persecution, and an individual will frequently sustain such harm for a Convention reason given that many civil wars are fought on political, racial, ethnic or religious grounds.⁴¹ *Adan* stated '[W]here a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show... a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare.'⁴²

Asylum seekers from countries where there is civil war or generalised violence are given exceptional leave to remain and are not recognised as refugees⁴³ in the UK. However, egregious breaches of international humanitarian law are not part of the ordinary risks of civil war.⁴⁴ If the conflict does not fall within the *Adan* definition of civil war, it can be argued in an asylum case that it is not a civil war.

36 See also *Robinson v SSHD and IAT* [1997] Imm AR 568 (CA)

37 See the Michigan Guidelines on the Internal Protection Alternative (April 1999) (www.refugeecaselaw.org/Refugee/index) and detailed analysis of Court of Appeal in *Karanakaran v SSHD* [2000] Imm AR 271

38 UNHCR handbook, para 56

39 UNHCR handbook, paras 57, 59

40 *R v SSHD ex parte Adan* [1998] Imm AR 338; [1998] INLR 325 (HL)

41 See Canadian Immigration Refugee Board, 1996, sC(c) 'A gender related claim cannot be rejected simply because the claimant comes from a country where women face generalised oppression and violence.'

42 *R v SSHD ex parte Adan* [1998] Imm AR 338; [1998] INLR 325 (HL)

43 See also UNHCR handbook, para 98

44 *Rudralingam* (00/TH/02264; 24 November 2000)

Refugee *sur place*

Refugee status is not limited to those whose fear existed when they left their country.⁴⁵ Subsequent events in the country of origin, or the activities of the asylum seeker themselves, might contribute to a legitimate fear which was not known of at the time of departure. There is no requirement of 'good faith' in the actions of an asylum seeker.

Grounds for persecution: the five Convention reasons

With the exception of 'membership of a social group', the persecution grounds set out in the Refugee Convention are relatively straightforward. In order to ensure that an asylum seeker's claim is properly presented, the representative needs detailed information about the social, political and legal position of the asylum seeker in his country of origin. A claim may encompass one or more Convention ground.

Political opinion

The overwhelming image of a political refugee is of a person fleeing persecution as a result of his direct involvement in political activity against the state, evidenced by, for example, meetings, speeches, leaflets or organisational activity. This assumption is reflected in the questions that are asked by IND at asylum interviews and in asylum questionnaires. They therefore frequently fail to elicit the appropriate information. Paragraphs 80 to 86 of the UNHCR handbook set out political opinion, actual or imputed, as it constitutes a ground for persecution.

*Holding political opinions different from those of government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant.*⁴⁶

Many asylum seekers, particularly women, are not involved in high profile political activity. Many may not even describe their roles as 'political' in the conventional sense of the word.

*Whether or not the state may infringe on the religious or political views citizens hold is a deeply political issue. Therefore questions of whether or not a woman is free to choose to wear a veil or not, to be circumcised, to exercise the human right to have an education, to be free from male violence are about the demarcation of the 'public' and 'private' sphere. Conflicts concerning the demarcation of privacy are conflicts of a most essentially political nature, and should be considered as such in evaluating a claim to refugee status.*⁴⁷

The experiences of the asylum seeker must be placed and argued within the political context in which they actually occur, not within a context assumed by the representative or decision maker (which may well incorporate inaccurate assumptions or interpretations of country conditions).⁴⁸

45 UNHCR handbook, para 94

46 UNHCR handbook, para 80

47 *Women and Refugee Status: Beyond the Public/Private Distinction*, Spijkerboer, Emancipation Council, The Hague, 1994, p46

48 Gomez [2000] INLR 549

An asylum seeker may not have been involved in political activity himself, whether high or low profile. However, the activity of his family members, relatives, friends, colleagues or associates may be attributed to him and result in persecution.⁴⁹ Political opinion may be attributed to a person suspected of having sought asylum abroad when he returns to his country.⁵⁰

Although consistency in expressing the political opinion is relevant, the UNHCR handbook acknowledges that there may be situations where an individual has not expressed an opinion until he left his country. In those circumstances the fear of persecution would be assessed on the basis of the consequences of return.⁵¹

Evasion of military service or conscientious objection to it may amount to sincerely held political (or religious) beliefs.⁵² It has been argued that punishment for such evasion or avoidance does not of itself amount to persecution.⁵³ However, extreme, disproportionate or degrading punishment, or punishment for refusal to undertake acts which have been internationally condemned or amount to human rights abuses, may be sufficient to constitute persecution. Very detailed instructions together with detailed supporting evidence will be required to sustain such claims.

Race

Race includes membership of ethnic groups.⁵⁴ Race discrimination can be an important element in determining the existence of persecution.

Religion

Persecution for religious reasons can take a variety of forms including the prohibition of worship or instruction as well as serious discrimination against those who choose to practise a religion.⁵⁵ The close linking of religion and politics in some countries – for example the interpretation of Islam through law, regulation and policy – can have a direct bearing on an asylum claim. A claim for asylum may therefore be made on the basis of persecution for religious reasons as well as political opinion.

Nationality

Nationality is interpreted broadly to include cultural or linguistic minorities and may overlap with race. The UNHCR handbook recognises that there may be overlap in terms of political opinion, particularly where political movements are defined or identified with particular nationalities.⁵⁶

Membership of a social group

The definition in the UNHCR handbook has been the subject of extensive debate.⁵⁷ *Acosta* has been widely cited:⁵⁸

We interpret the phrase to mean persecution that is directed towards an individual who is a member of a group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared characteristic that defines the group such as former military leadership or land ownership...

49 UNHCR handbook, para 80. See also *Hernandez-Ortiz v INS* 777 F.2d 509 (9th Cir)(1985) and *Bolanos-Hernandez v INS* 767 F.2d 1277 (9th Cir)(1984).

50 *R v IAT ex parte Senga* (unreported) 9 March 1994

51 UNHCR handbook, para 83

52 UNHCR handbook, paras 167–174

53 *Sepet and Bulbul* [2000] Imm AR 455 and [2001] EWCA Civ 681. Leave to petition the House of Lords has been granted.

54 UNHCR handbook, paras 68–69

55 UNHCR handbook, para 71; see also 'prosecution/persecution' above.

56 UNHCR handbook, paras 74–76

57 UNHCR handbook, paras 77–79

58 *Acosta v INS* [1985] Int Dec 2986 (BIA); Cited in *The law of refugee status*, J Hathaway, Butterworths, 1991, p160

Whatever the common characteristic that defines the group, it must be one that the members of the group cannot change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds for persecution.

In *Savchenkov* it was held that the term 'must have been intended to apply to social groups which exist independently of the persecution.'⁵⁹ There is no restriction on the size of a social group, although there is reluctance on the part of IND and the courts to identify large numbers as a social group. In reality the difficulties with large groups are the lack of actual cohesiveness of the group and their disparate make-up due to differences in class, race, education and culture.

Rigorous examination of the asylum seekers case may identify other grounds for the persecution, in particular political opinion (actual or imputed). It is important that representatives examine the case put forward carefully and in detail to ensure that all potential arguments are raised as soon as possible.

Needs and deserves protection

This element of the definition requires consideration of two elements:

- whether the asylum seeker, once recognised as a refugee, requires protection
- whether the asylum seeker, once recognised as a refugee, deserves protection.

Once the asylum seeker has been recognised as a refugee, the issue is whether the receiving state is required to provide the protection (or to continue to provide the protection), that is to permit the refugee to live in the receiving state and receive the benefits that accrue under the Refugee Convention to recognised refugees.

Cessation clauses

The SSHD does not at present argue that the Refugee Convention ceases to apply if the refugee falls within Article 1(c)⁶⁰; refugees are now granted indefinite leave to remain in the UK. The UNHCR handbook suggests that if the cessation provisions are applied, a refugee should not be returned if, for example, he had sustained severe persecution.⁶¹

In *Arif v SSHD*⁶² the Court of Appeal decided to proceed by analogy and held that since it was accepted that the appellant would have qualified for refugee status had his application been dealt with expeditiously, the burden now fell to IND to demonstrate that a significant change of circumstances had removed the basis for the claim.

⁵⁹ *SSHD v Savchenkov*
[1996] Imm AR 28 (CA)

⁶⁰ See Refugee Convention,
Article 1(c)i–v

⁶¹ See also UNHCR handbook,
para 136

⁶² *Arif v SSHD* [1999] Imm AR
271, [1999] INLR 327, CA

Exclusion clauses

The Refugee Convention does not apply to individuals for whom the protection of another state is unnecessary, for example if they are recognised as having the rights of a national of a country other than that from which they are fleeing.⁶³ This means that they must be fully protected from deportation or expulsion in another country; this would generally only apply to dual nationals.

A refugee does not have the protection of the Convention if there are serious reasons for considering that a refugee has committed:⁶⁴

- a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes⁶⁵
- a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee⁶⁶
- an act contrary to the purposes and principles of the United Nations.

Serious non-political crime has been the subject of litigation in the UK. In the case of *T v SSHD*⁶⁷ it was held insufficient to characterise an action as terrorist in order to apply the exclusion clause but consideration has to be given as to whether the use and extent of violence was so disproportionate to the political object as to remove it from the category of political offence. Recent legislation has changed the application of these clauses as they apply to terrorist acts. ►See 'terrorism' below.

The Human Rights Act 1998

Incorporation of the European Convention on Human Rights

European states adopted the European Convention on Human Rights in 1951. ECHR caselaw is not automatically binding on UK courts⁶⁸ but in interpreting UK law the Courts must take the caselaw into account and interpret so that it is compatible.⁶⁹ It was incorporated into United Kingdom law with the implementation of the Human Rights Act 1998, with effect from 2 October 2000. Since incorporation, breaches of the ECHR can be relied upon in appeals against adverse immigration or asylum appeals.⁷⁰ The Convention is to be considered a living instrument that responds to changing standards of protection;⁷¹ actions or inactions that in the past were considered not to breach the Convention may now fall within its scope. If all domestic remedies have been exhausted, an appeal to the European Court of Human Rights in Strasbourg may be considered.

How to assert a breach of ECHR

If an asylum seeker is refused asylum he will, at the same time as he is served with the notice of refusal of asylum and appeal papers, be served with a S74 notice requiring him to set out details of any alleged breach of the ECHR. The reply to the S74 notice should set out the factual basis of the alleged breach of the relevant article of the ECHR. It is not sufficient to merely state that there has been a breach of, for example, Article 3 without giving details of that alleged breach. ►See chapter 4, one stop notices.

63 Refugee Convention, Article 1(E)

64 Refugee Convention, Article 1(F) but note ECHR, Article 3

65 UNHCR handbook, Annex VI

66 Refugee Convention, Article 1(F)(b)

67 *T v SSHD* [1996] Imm 443 HL

68 Human Rights Act 1998, s2(1)

69 Human Rights Act 1998, s3(1)

70 But note also *Pardeepan* [2000] INLR 447, *Kariharan and others v SSHD* [2001] EWCA Admin 1004 and *Kumarakuraparan* [2002] EWHC 112 Admin

71 *Selmouni v France* 7 BHRC1

Rights under the ECHR

There are two types of rights under the ECHR. The first type provides an absolute right to protection and the second a qualified right to protection. **Absolute rights** apply even in times of war or other public emergency. The Secretary of state cannot apply to derogate i.e. limit the protection provided by these rights. **Qualified rights** can be proscribed, that is limited, in specific circumstances.

The articles that provide for absolute rights are:

- Article 3 – there is an absolute prohibition on torture and the infliction of inhuman and degrading treatment and punishment
- Article 4 – there is an absolute prohibition in relation to slavery
- Article 7 – there is an absolute prohibition to prosecuting a person for an act or omission that occurred before that behaviour amounted to a criminal offence.

All other articles are qualified in different ways. Some are qualified within the terms of the article itself,⁷² others permit an assertion that in specified circumstances the article does not apply.⁷³ Consideration of whether there has been a breach of qualified rights must be conducted methodically:

- Has a breach occurred or will it occur?
- If so, was the breach justified in the light of the ‘qualification’ to the article?
- Was the decision proportionate, ‘the issue of proportionality (being) a matter of judgment and balance, but not itself a matter of discretion’?⁷⁴

Can an anticipated breach outside the UK be relied upon in proceedings within the UK?

IND has often stated that, save for rights under Article 3, potential breaches of the ECHR outside the UK (i.e. after the person has been removed to their country of origin or habitual residence) do not have to be taken into account in deciding whether to proceed with removal i.e. that rights under the ECHR do not have extra territorial effect. There is a body of European Court of Human Rights (ECtHR) caselaw that suggests this is not the case and this has now been followed by the Immigration Appeal Tribunal.⁷⁵

In an immigration appeal the procedure for raising ECHR issues differs according to the status of the applicant at the time of application and decision.⁷⁶ An appeal should be allowed if:

- the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or
- the decision or action involved the exercise of a discretion by the SSHD or an officer and the discretion should have been exercised differently.

⁷² e.g. Human Rights Act 1998 Article 8

⁷³ e.g. the current derogation of Article 5 under s23 Anti-Terrorism, Crime and Security Act 2001

⁷⁴ *Norwa* starred IAT decision 11 December 2001 (00 TH 2345)

⁷⁵ *Kacaj* [2001] INLR 354. Although an appeal to the Court of Appeal on one ground was unsuccessful, the CA did not overturn the other findings of the IAT.

⁷⁶ Refer to the various standard textbooks for full details, see chapter 15.

Substantive rights

- Article 2 Right to life – to be read with Sixth Protocol, Articles 1 and 2
- Article 3 Prohibition of torture or inhuman or degrading treatment or punishment
- Article 4 Prohibition of slavery and forced labour
- Article 5 Right to liberty and security of the person
- Article 6 Right to a fair trial
- Article 7 Freedom from retrospective criminal offences and punishment – ‘no punishment without law’
- Article 8 Right to respect for private and family life
- Article 9 Freedom of thought, conscience and religion
- Article 10 Freedom of expression
- Article 11 Freedom of assembly and association
- Article 12 Right to marry and found a family
- Article 14 Prohibition of discrimination in the enjoyment of Convention rights

Human Rights Act 1998 Articles 1 and 13 are not incorporated because incorporation of ECHR into UK law now provides a domestic remedy.

First Protocol

- Article 1 Protection of property
- Article 2 Right to education
- Article 3 Right to free elections

ECHR rights in detail

Article 2

- 1 *Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
- 2 *Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*
 - a *in defence of any person from unlawful violence;*
 - b *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - c *in action lawfully taken for the purpose of quelling a riot or insurrection.*

This should be read with the Sixth Protocol

Article 1 *The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.*

Article 2 *A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.*

Cases involving Article 2 usually also engage Article 3. There are not many cases on Article 2.⁷⁷ If the ECtHR considers that there has been a breach of Article 3 it will not then go on to consider Article 2. The type of cases most likely to engage Article 2 include return to countries where paramilitaries operate; return to a country which still imposes the death penalty; return to a country of origin which could result in suicide.⁷⁸

The use of the death penalty is now prohibited except in times of war or imminent threat of war.⁷⁹

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The individual must establish that there are substantial grounds for believing that there is a real risk that treatment prohibited by this article will occur. There is no requirement that the alleged actions must be at the hands of the state in order to claim protection under this article. The standard of proof is comparable to that in asylum cases⁸⁰ although where the maltreatment does not occur as a result of state action, the ECtHR has held that the circumstances surrounding the case must be the subject of rigorous scrutiny and that the evidence must be more than speculative.⁸¹

Ill-treatment must attain a minimum level of severity. An assessment of this depends on all the circumstances of the case including the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects, the sex, age and state of health of the victim.

There is no requirement to find all the elements of the article in order to fall within it. An action may be held not to be inhuman punishment but may still be held to be degrading punishment and thus prohibited by Article 3. A sentence of three strokes of the birch imposed by an Isle of Man court on a 15 year old boy carried out by a police constable in a police station was held to be degrading punishment, despite being widely supported by Manx public opinion, but was not held to be inhuman punishment since the threshold level was not reached.⁸²

Torture has been defined as 'deliberate inhuman treatment causing very serious suffering.'⁸³ The treatment need not be physical provided that the suffering caused is sufficiently serious. There is a trend in international human rights law for the term torture to be applied only to actions by state officials.

The case of D held that where there was *no* suitable care and treatment for someone in the final stages of AIDS, removal would amount to inhuman treatment.⁸⁴ Degrading treatment has been held to include treatment that 'grossly humiliates' the victim – although it falls short of torture.⁸⁵ Discrimination based on race could, in certain circumstances, of itself amount to degrading treatment.⁸⁶

In many cases, where the client has been able to prove that he is a refugee as defined by the Refugee Convention, there will also be a breach of Article 3. There is no requirement to prove a Refugee Convention reason to show a breach of Article 3.

77 *McCann v United Kingdom* (shooting of three IRA members in 1988) [1995] 21 EHRR 97. The Court said that as human life is the subject of the article, 'the most careful scrutiny' is required.

78 *Thomas Re* 1 September 2000 NI HC

79 Optional Protocol 6, ratified by the UK 17.1.99

80 *SSH D v Kacaj* [2001] INLR 354

81 *Bensaid v United Kingdom* [2001] INLR 325

82 *Tyrer v United Kingdom* (1978) A 26; 2 EHRR 1

83 *Ireland v United Kingdom* (1978) A 25; 2 EHRR 25

84 *D v United Kingdom* (1997) 24 EHRR 423

85 *Hurtado v Switzerland* (1994) A 280-A where the applicant who had defecated in his trousers was not permitted to change until the following day.

86 *East African Asian Cases* (1973) 3 EHRR 76. See also Article 14.

There will therefore be occasions where an individual is not a refugee but removal from the UK would be a breach of Article 3 for example:

- removal of a young woman who has been trafficked to the UK for the purposes of prostitution which would place her in severe danger of inhuman treatment by traffickers in her own country
- removal of a child to a place where he would be on the streets with no responsible adult to look after him
- removal of a child who will be forced to join the army or militia in his country of origin.

Article 4

- 1 *No one shall be held in slavery or servitude.*
- 2 *No one shall be required to perform forced or compulsory labour.*
- 3 *For the purpose of this article the term 'forced or compulsory labour' shall not include:*
 - a *any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;*
 - b *any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;*
 - c *any service exacted in case of an emergency or calamity threatening the life or well-being of the community;*
 - d *any work or service which forms part of normal civic obligations.*

Slavery and servitude are prohibited absolutely. There is very little ECtHR or UK caselaw. It is most likely to be of relevance in connection with individuals and children trafficked for prostitution or domestic slavery. Article 4 is frequently linked to Article 3.

Article 5

- 1 *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...*
 - f *the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.*
- 2 *Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him*

...
- 4 *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*
- 5 *Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.*

The lawfulness of any detention may be fatally undermined if the person in question is a minor. The United Nations Commissioner for Refugees' view is that detention of an unaccompanied asylum seeker can never be justified and that where a child is accompanied by a parent an appropriate alternative to detention should be sought⁸⁷...the burden of proof lies on the child to prove that he is not an adult...'⁸⁸

In *SSHD v Saadi and Others*⁸⁹ the Court of Appeal held that the Home Office policy concerning detention being applied at Oakington did not contravene the provisions of the first limb of Article 5.

The UK has derogated from Article 5 in relation to those certified as international terrorists.⁹⁰ There is some argument that the derogation is unlawful.

Article 6

- 1 *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
- 2 *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
- 3 *Everyone charged with a criminal offence has the following minimum rights:*
 - a *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - b *to have adequate time and facilities for the preparation of his defence;*
 - c *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - d *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - e *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

This article applies in courts where an individual's civil rights and obligations are under consideration. It does not apply to administrative decisions to grant or refuse leave to enter or remain as there is no civil right to enter or remain in a country of which the individual is not a national.⁹¹ However the IAT has stated that it will apply the same test in considering any complaint that an appeal hearing has been unfairly conducted.⁹² There may be occasions when Article 6 can be invoked in conjunction with other proceedings for example where there are proceedings in the family courts engaging issues of family life.

87 UNHCR revised guidelines on applicable criteria and standards relating to detention of asylum seekers, February 1999, guideline 6

88 *Putting Children First: a guide for immigration practitioners*, LAG, May 2002

89 *SSHD v Saadi and Others* [2001] EWCA Civ 1512. Leave to petition the House of Lords has been granted.

90 Anti-Terrorism, Crime and Security Act 2001 s23; and 'terrorism' below.

91 *Maaouia v France* 9 BHRC 205

92 *MNM v SSHD* [2000] INLR 576

Article 7

- 1 *No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.*
- 2 *This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.*

This guards against criminal legislation operating retrospectively.

Article 8

- 1 *Everyone has the right to respect for his private and family life, his home and his correspondence.*
- 2 *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is 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.*

Article 8(1) sets out the four separate rights that are protected:

- respect for private life
- respect for family life
- respect for home
- respect for correspondence.

Private life includes a right to personal development, to establish relationships including same sex relationships, and respect for moral, physical and psychological integrity.⁹³

Family life arises between a child and either parent on conception.⁹⁴ Family life continues even if members of the family are not cohabiting.⁹⁵ Family life exists between family members (for example grandparents, siblings) and makes no distinction between 'legitimate' family relationships and 'non-legitimate' relationships.⁹⁶

Respect for home includes the right to re-establish home life. There is likely to be a requirement that the individual has no other 'home'.

Respect for correspondence is unlikely to arise in immigration matters save where the individual is detained.

Article 8(2) sets out the exceptions to these rights, that is the circumstances in which it is permitted to breach them.

⁹³ A lesser degree of harm will be required than under Article 3, although the interference may be justified.

⁹⁴ *Keegan v Ireland* [1994] 3 FCR 165. See also *Ciliz v Netherlands* [2000] 2 FLR 469

⁹⁵ *Berrehab v Netherlands* 11 EHRR 322. Where a child is young, contact will have to be direct to sustain a family relationship; it will be difficult to sustain a meaningful relationship if the only contact is by letter or telephone.

⁹⁶ *Marckx v Belgium* (1979) 2 EHRR 330

In order to identify whether there has been a breach, four questions must be answered:

- Has private or family life been established?
Has home or correspondence been identified?
- Has there been an interference with the right to respect for such private or family life, home or correspondence?
- Is any such interference in accordance with the law?
- Is any such interference necessary in a democratic society as being in the interests of one of the legitimate aims set out in Article 8(2)?

Each of these requirements must be considered before the court decides whether the interference was justified.⁹⁷ The issue of proportionality is a matter of law for the court to determine.

To establish an interference with its rights, a family must show that there are insurmountable obstacles to establishing family life in the country of origin of the non-national family member.⁹⁸ Another consideration will be the obstacles to re-admission to the UK by a family member who has been deported or removed. The case of *Mahmood*⁹⁹ (although a judicial review) sets out the approach to be taken in determining the potential conflict between the enforcement of immigration control and the ECHR.

- A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
- Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple.
- Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.
- Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
- Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
- Whether interference with family rights is justified in the interests of controlling immigration will depend on the facts of the particular case and the circumstances prevailing in the state whose actions are impugned.

Immigration control is lawful for the purposes of Article 8.

⁹⁷ *Nhundu and Chiwera* (01TH00613) 1 June 2001

⁹⁸ This could include, for example, where the person with leave to remain has exceptional leave to remain and fears return to the country of origin.

⁹⁹ *R on the application of Mahmood v SSHD* [2000] INLR 1

Article 9

- 1 *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
- 2 *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

This includes not only a right to have or change your religion (an absolute right) but also the right to practice openly or proselytise (not an absolute right).

Article 10

- 1 *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
- 2 *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crimes, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

This frequently raises freedom of the press issues. In immigration terms it will usually be argued alongside Articles 3 and 8, 9 and 11.

Article 11

- 1 *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
- 2 *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

This includes the right to have and join trade unions and political parties. This article will usually be argued alongside Articles 3 and 8 as well as 9 and 10.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

This applies to marriage between members of the opposite biological sex. It does not include a right to enter into the UK in order to marry, but can be used in conjunction with Article 8.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This is a 'piggy back' article. It cannot stand on its own but must be used in conjunction with another article. It is not necessary to show a breach of another article, merely that the assertion of a breach falls within the ambit of another article.¹⁰⁰ The list of prohibited forms of discrimination, although long, is not comprehensive and is not exhaustive. For example, age is not specifically mentioned but could come within 'other' status.

First Protocol, Article 2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

This is not an absolute right but provides a right to access to such educational establishments as may exist. The right is limited to education to the age of about 12 and is the right to effective but not the most effective education. *Holub* held that returning a Polish child to Poland causing her to suffer educational detriment was not a breach of the protocol.¹⁰¹

Other Conventions

The UK is a signatory to many international Conventions which are not incorporated into UK law. These include the Universal Declaration of Human Rights (1948), the International Convention on Civil and Political Rights (1966), the UN Convention on the Rights of the Child (1989), the Convention for the Elimination of Discrimination against Women (1979) and the Convention against Torture (1984). These conventions are indicators of human rights standards aspired to and, although not incorporated, if ignored by the UK can lead to successful challenges on grounds of irrationality or unreasonableness.¹⁰²

¹⁰⁰ *Belgian Linguistics Case (No 2)*
1 EHRR 252

¹⁰¹ *Holub and Holub v SSHD*
[2001] INLR 219

¹⁰² See chapter 15, resources
for useful books and
sources of information.

Terrorism

Where an individual has committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime outside the United Kingdom or has been guilty of acts contrary to the purposes and principles of the United Nations, the SSHD is no longer required to consider whether he has a well-founded fear of persecution for a Refugee Convention reason. Similarly, where there are reasonable grounds for regarding an applicant as a danger to the security of the United Kingdom or where he has been convicted of a particularly serious crime and therefore constitutes a danger to the community, the SSHD will not have to consider his application for asylum.¹⁰³

If an individual is certified as an international terrorist, he can be detained indefinitely in a high security prison. The decision to certify and detain him is not susceptible to judicial review or habeas corpus. Instead, the Special Immigration Appeals Commission has limited powers to review such decisions.¹⁰⁴ The SSHD can also issue a certificate that such a person is not entitled to the protection of Article 33(1) of the Refugee Convention, if Articles 1(f) or 33(2) apply and his removal from the United Kingdom would also be conducive to the public good.¹⁰⁵

These provisions do not prevent an individual relying on Article 3 of the ECHR if removal to the country of origin is intended.

Race discrimination

The Race Relations (Amendment) Act 2000 prohibits discrimination by all public authorities and imposes a duty to promote equality of opportunity and good race relations. The Home Office is bound by this save in the administration of immigration, asylum and nationality law.¹⁰⁶ Officials are permitted, under instructions from a minister or on a minister's personal decision, to discriminate on these grounds. On 27 March 2001 the first ministerial authorisation to discriminate was made under s19D(3)(a) permitting discrimination where IND intelligence suggested that significant numbers of a particular nationality have breached or will attempt to breach immigration laws. This has yet to be challenged.

Claims of unlawful discrimination in an individual case will be heard by the Immigration Appellate Authority as part of the one stop appeals procedure.

103 Anti-terrorism, Crime and Security Act 2001, s34

104 Anti-terrorism, Crime and Security Act 2001, s21 to s32

105 Anti-terrorism, Crime and Security Act 2001, s33

106 *Ministerial Statements – the immigration exemption in the Race Relations (amendment) Act 2000* Ann Dummett, ILPA, April 2001

2

Legal help and controlled legal representation

At the first meeting with your client you are under a professional obligation to advise him of the legal help and controlled legal representation (CLR) schemes¹ and assess whether or not he is eligible for advice under them.²

In order to be paid from public funds for advice and assistance in asylum and human rights law, practitioners must hold a category specific contract with the Legal Services Commission (LSC). The LSC manual sets out the requirements which need to be fulfilled in order to obtain such a contract.³ Immigration and asylum work cannot be done under tolerances.

If you do not hold an immigration contract you are under a professional duty to inform your client that he may be able to obtain legal advice without charge from specified providers. Failure to notify clients of this could lead to disciplinary action.

It is a requirement of the scheme that the form provided by the LSC, 'legal help and help at court', is completed at the first appointment, an assessment of means is made based on evidence provided, the client's details filled in, and save in a few specified circumstances the form signed in your presence. You will not be able to claim for work carried out prior to signature except in a few very limited circumstances. Full details of the scheme and the work that can be claimed for are set out in the LSC manual and subsequent circulars issued by the LSC.

It is critical that your client understands the limits on the work that you are able to undertake within the legal help scheme. You should therefore ensure that you understand the current guidance and that you explain the relevant issues to your client. Pay particular attention to the sufficient benefit test, the assessment of means, evidence of means and the work that can be undertaken.

The guidance is updated regularly and announcements of changes are made in *Focus* and by way of letters; those addressed to ILPA are distributed via ILPA mailings to members. As a general rule if work is done that is not allowed for in the guidance you may well not be paid for it. If you consider that work you intend to do should be paid for, it is advisable to seek written guidance in advance from the LSC. For example, the guidance at present does not permit attendance at the screening unit to be paid for unless accompanying a minor. There may be circumstances where you consider your non-minor client should be accompanied. In this case it may be advisable to seek authority from the LSC in advance or you may not be paid.

1 Guidelines for immigration practitioners, Law Society, June 2001, paras 2–4

2 Guidance on the assessment of costs for controlled work, Legal Services Commission, October 2001

3 Legal Services Commission manual, Sweet and Maxwell, 2001

Alternatively you should be prepared to justify your claim for payment during a costs compliance audit.

If a client has been refused asylum or leave to enter or remain on any other basis, representation throughout the appeal can be paid from public funds provided that the relevant application form for CLR is completed. There is a two pronged test for eligibility: financial and merit.⁴ Both prongs have to be satisfied before CLR can be utilised. If either is not satisfied you are under a duty to notify the client of their right to a review by the LSC.

⁴ Legal Services Commission manual, Sweet and Maxwell, 2001, vol 2, pp2(a)104–106

3

Taking instructions

It is critical that advisers have an understanding of all areas of immigration and asylum law in order to be able to identify who is subject to control, what the person's current immigration status is, what applications could be made, what the criteria are for those applications, and the extent of the interplay between legislation, rules and policy.¹ Without that overall knowledge, potential solutions will not be identified, inaccurate advice will be given, incorrect applications will be submitted and clients will not be referred for more specialist help when appropriate. Clients may well end up being unnecessarily detained or even removed.

Your client has sought advice on remaining in the UK.

What are the most important substantive matters to address initially?

- Establish the current and previous immigration status of your client and whether he has leave to remain or enter, and if so, when that leave expires.
- Check your client's passport or any other documents presented.
- Has your client any claim to remain in the UK by virtue of for example: EU citizenship, commonwealth or grandparental connection, spouse, length of residence?
- Establish the mode of entry to the UK.
- Establish whether your client has travelled through any other country en route to the UK and/or had a period of residence in another country.
- Establish whether a claim for asylum has been submitted previously either in the UK or elsewhere.
- Assess whether there is a possibility of removal to a third country without consideration of the substantive claim.
- Has your client indicated a fear or anxiety about returning to the country from which he has come? If so, more detailed questioning will be needed to discover the nature of the problems presented and whether lodging an asylum or Article 3 application is the appropriate course of action. ►See chapter 4.

You should consider whether your client is eligible for free legal advice. You 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 do not do assisted work, you are still under a duty to assess and offer referral.²

¹ Guidelines for immigration practitioners, Law Society, June 2001, para 1

² '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,' the guide to the professional conduct of solicitors, s5.01

Keeping records

Files should be maintained so that you can retrieve information quickly. The records should include details of:

- your client's name, address (living and correspondence if different), age, sex
- nature of problem
- whether interpreter is required and if so what language/dialect
- dependants e.g. children, spouse
- other family members in the UK and their immigration/citizenship status, for example grandparents, parents, siblings
- immigration history, for example dates of entry and departure, passport endorsements, length of stay in UK
- issues involved in the case in addition to asylum, for example an overstayer seeking ILR, marriage application, concessionary outside the rules application, appeal
- documents held by your client e.g. IS96, standard acknowledgement letter (SAL).

Files should be orderly and correspondence tagged and identifiable. Original documents should be identified and linked to your client. Photocopies of documents sent to IND should be identifiable. 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 or risk factors. 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 even if the client does not return.

Assessing whether an application for asylum is appropriate

You cannot assume that your client's most appropriate course of action is to claim asylum simply because he comes from a particular country. For example, an Iraqi asylum seeker is not a refugee simply because he is Iraqi. Similarly, you should avoid assumptions based on your client's ethnicity, for example simply because your client is a Turkish Kurd does not mean that his problems will stem from opposition to military service. You will have to take detailed instructions.

You need to establish whether or not your client can be defined as a refugee according to the criteria of the 1951 Convention. ►See chapter 1. In addition, you should examine whether or not there are grounds for arguing that removal of your client to his country of origin or residence would be in breach of the Human Rights Act 1998.

There is currently no prohibition on applying for leave to enter or remain in the UK on more than one basis. For example, an asylum seeker who marries a person settled in the UK can apply for leave to enter the UK as a spouse. That application will be considered and a decision taken. IND frequently asserts that it is not possible to have more than one application pending at the same time. However, the Immigration Directorate Instructions (IDIs) in force until about December 2001³ stated that where an in-country asylum applicant also had an application for leave to remain under another category, the non-asylum application should normally be considered before the asylum application; the possibility of more than one application is acknowledged in the current screening questionnaire.

At the first meeting with a client you should explain how an asylum application is assessed by IND, give an estimated length of time for a first decision to be taken, and give an outline of the appeal process. You should also discuss any documentation presented by your client, including any forms issued to him, such as a statement of evidence form (self-completion) (SEF) or any other self-completion form. Ideally, the SEF and/or supporting statement should not be completed at your first meeting, which should be dedicated to a discussion of the work you intend to do with your client. Pressure of time imposed by strict IND time limits may dictate that you have to take complete instructions and advise and prepare the statement/SEF during the course of one meeting with your client. ►See chapter 4.

At the first meeting you should provide a very clear explanation of the roles played by you, the interpreter and your client in the preparation of an asylum claim.

The role of the practitioner

Your client is unlikely to come to the first meeting with a full understanding of your role as a legal adviser. It is important that you explain as fully as possible the contract between you. Aim to provide correct legal advice efficiently and with impartiality. Your client should understand that the responsibility for presenting the claim to IND is shared between the two of you.⁴ Advise your client about the need for prompt and full disclosure and the very strict time limits that govern asylum applications, even though this may cause your client additional trauma and distress.

Aim to make the process of applying for asylum as transparent as possible, clarifying the distinction in roles between the Immigration Service (IS) and the Integrated Casework Directorate (ICD) and by explaining as fully as possible how IND assesses an asylum application. By the end of the first meeting your client should have a clear understanding of how his case may progress – from the submission of the statement/SEF to the grant of leave or the appeal against a refusal.

Who is the client?

Individuals, couples or family groups may seek advice. It is essential to identify the person who is the client and thus for whom you are acting in making the asylum claim. This does not necessarily mean that it should only be the person who talks and identifies himself. Other members of the family may well have sustainable asylum claims. It is essential that the actual client is identified to ensure that advice is given that is directed to that individual's problems and questions. Women asylum seekers may not put themselves forward for interview or to claim refugee status independently of their family for a variety of reasons which can include either a fear of information being disclosed to members of her family, which could bring her into disrepute, or a belief that she may achieve safety in other ways. As stated in the RWLG (Refugee Women's Legal Group) gender guidelines, 'women should be asked privately whether they want to be interviewed outside the hearing of other members of their family, especially male family members and children. The giving of information is a highly stressful experience for anyone. There may be circumstances where the mere discussion of incidents may become even more stressful for example, women may only be able to communicate experiences of sexual abuse or other kinds of harm when family members are not present.'⁵

Conflict between family members can arise at any stage of a case. If the client has not been identified and it is not clear to whom the advice is directed there will 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 advisers. In some cases you may have to refer all parties, for example where you are privy to information that could affect the outcome in favour of one or the other, but you would not otherwise be privy to that information.

⁴ UNHCR handbook, para 196

⁵ *Gender guidelines for the determination of asylum claims in the UK*, RWLG, July 1998, para 5.16

Conflict can also arise if, for example, a client discloses to you that his activities are the antithesis of those of other clients. For example one client may base his claim on the fact that as a policeman he used to torture people but now does not wish to and is claiming persecution from his former superiors. Another client may claim to have been tortured by that policeman or from someone at that police station. The extent to which you are able to physically segregate your clients for their personal ease will be an issue you have to take into account. You will also have to take into account that you cannot use information gained from one client for the benefit of another without their consent. 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.⁶

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

Confidentiality

Legal advice has to be given in accordance with current immigration law and policy. There is a duty to keep your client's affairs confidential. The duty of confidentiality applies to information about your client's affairs irrespective of the source of the information. The duty continues even if you cease to act for your client or if your client dies. Information can only be disclosed to a third party with your client's consent.

A breach of confidentiality can have severe consequences, including the wrongful detention or even removal of an individual. You should give a clear statement that no information will be disclosed without consent.

Your personal views on the merits or worthiness of your client's application are irrelevant. It is not your role to prejudge an application on the basis of your moral standards. The 'worthiness' of your client for assistance is not relevant. The issues are: what is your client's current and/or past problem, what are his current circumstances and how does the law and policy apply to them?

⁶ 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

Creating the right environment⁷

Tell your client who has responsibility for supervision of the application. If you are working with an interpreter ensure that you explain to your client the role played by the interpreter. ►See chapter 7.

Establish whether your client prefers a male or female adviser or interpreter, and adjourn if your client has indicated a preference which you are unable to attend to immediately. A representative may have to identify a reluctance on the part of the client to talk even though that reluctance is not articulated. For example, if the representative is a man, the female client may not want to talk to him about rape.

Stress both the confidentiality of the application and the need to make a prompt disclosure of fact. Your client may find these twin propositions to be contradictory, particularly if he is concerned about revealing sensitive political or personal information. It is essential at this stage that your client understands that withholding information may seriously damage credibility. ►See chapter 4.

It is important to recognise that communication is not simply a matter of translation between English and another language or dialect. Age, gender, social and cultural mores all play a part. The level and type of emotion displayed during the recounting of experiences is not necessarily an accurate test of the extent to which an asylum seeker can or should be considered credible. Assessing the demeanour of your client can be difficult where he is from a different country or giving instructions through an interpreter. It is essential that an accurate assessment is done of the need for an interpreter to ensure that you obtain full and accurate instructions. ►See chapter 7.

The purpose of any interview is to enable your client to explain his situation and then for you to advise on options. Interviews should be open and non-confrontational. Do not make assumptions about history, language or current and previous experience. Similarly, language and literacy ability should be established not assumed. There should be recognition of the difficulties of speaking through an interpreter.

The following procedures will help to alleviate your client's anxiety:

- aim to minimise interruptions
- avoid taking your client's instructions sitting behind a desk or in a posture which your client may find intimidating
- listen with sensitivity to what your client is saying
- ensure that your client understands each stage of your advice
- offer regular breaks for refreshment
- interview in private and without family members.

⁷ See also *Gender guidelines for the determination of asylum claims in the UK*, RWLG, July 1998, paras 5.23–5.32

Initial advice should always aim to convey all the possible outcomes to an application and what remedies are available including basic advice on the right of appeal, including *pro bono* alternatives for representation at appeal if your client is not eligible for Controlled Legal Representation (CLR). ►See chapter 2. Ideally, and if time permits, you should not attempt to take full instructions regarding your client's asylum application at the first meeting. Where the deadline for submission of a SEF or an IND interview is imminent you will have to take full instructions at the first meeting.

The role of the applicant

Your client has a responsibility to provide prompt and detailed instructions which establish the basis of the asylum application.⁸ Any fear of persecution should be explained in context.

It is important that your client is encouraged to become an active participant in the presentation of the claim. Stress that the responsibility for setting out the application is shared between you and your client.⁹ Where possible, your client should supply information or documents which will support the application. Remember that your client can often be an excellent source of information which may be unavailable to you (for example newspapers in original language gathered from community centre archives). Asylum claims that are presented to IND without the active participation of your client can often fail to establish the subjective element of fear which is the basis of the applicant's claim. Similarly, unless your client is fully involved in this stage of the application you may place an incorrect interpretation on your client's account, or a scenario may be invoked which is not entirely accurate. If information is presented to IND in a piecemeal fashion credibility will be impaired.

Health issues may not always be disclosed immediately or fully for a variety of reasons including shame, lack of knowledge, and lack of confidence in an adviser. ►See chapter 4. You should be aware of the potential impact on an application of poor health, whether physical or mental, as well as the possible impact of, for example, imminent childbirth. Be aware of the state of health of your client and the consequences this may have on his willingness to disclose information.

⁸ HC395 as amended, para 340

⁹ See UNHCR handbook, para 205

Initial instructions on claim

You will need comprehensive instructions concerning your client's mode of exit from his own country, the journey to the UK, and what happened on his entry to the UK. Be aware that there are a variety of ways in which your client may have claimed asylum and that the procedures may vary accordingly.

Your client may have claimed asylum by:

- claiming asylum immediately at the port of entry
- making a claim at Lunar House or elsewhere, or by post, during an existing period of leave
- instructing a solicitor or making an application in person, or by post, after arriving clandestinely in the UK
- instructing a solicitor or making an application in person, or by post, after being detected or arrested in the UK.

Find out if your client has family, or political colleagues who have been granted asylum in the UK or elsewhere as this may add a great deal of credence to the claim and may provide the basis of an Article 8 application. You should seek to obtain precise details of these people (IND reference numbers, names, dates of birth etc.)

Potential removal to a 'safe third country'

► See also chapter 13

Advise your client that it is extremely likely that IND will make adverse findings about his credibility if asylum was not sought in the first 'safe country' entered. Alternatively, IND may seek to remove your client before the application has been considered substantively if there is evidence that he has spent even a short amount of time en route to the UK in another country which is signatory to the 1951 Convention. If your client has passed through other countries you will need to establish why an asylum application was not lodged there. You should therefore endeavour to take comprehensive instructions on this point. There may be good reasons why your client was unwilling or unable to pursue an asylum claim in other countries.

If your client has travelled indirectly to the UK you should therefore establish the following:

- Is your client aware of which countries he travelled through? If not, why not?
- Was your client given the opportunity to approach an immigration or police official in any country traversed en route to the UK?
- If so, did your client apply for asylum in that country, and what was the result? If an application was not made, what motivated the reluctance to pursue a claim in that country?
- Did an agent accompany your client on the journey to the UK? If so, did the agent influence the decision about where your client's asylum application was to be made?
- If an agent did not arrange your client's journey, and your client specifically sought to come to the UK, what informed this decision?

You should be aware of IND procedures for dealing with 'third country' cases and of the remedies available. If you have reason to suspect that your client has not given you an accurate and full account of his journey to the UK you must advise that if it transpires that your client has taken a route which differs from the one described to you this will inevitably cause serious problems at a later stage. If you are concerned that your client may have passed through a 'safe country' then you should address this matter immediately. Check again your client's instructions about family based in the UK as this may be useful in arguing why it is reasonable for him to claim asylum in the UK.

If your client has submitted a claim for asylum in a third country which had not been determined prior to him coming to the UK, there may be additional problems with the application in the UK.

Transfer of refugee status

If your client has been recognised as a refugee elsewhere but is not fleeing the initial country of refuge for reasons that bring him within the Refugee Convention then it will be a matter of trying to obtain a transfer of asylum to the UK. This is technically possible but actually very difficult: you would be aiming to show good reasons for leaving the country of refuge and strong links with the UK.

Mode of exit/entry

Documents presented on arrival

Your client should be asked how he exited his own country and if documents were used to do this. If your client arrived in the UK with a visa he may have had to lie to obtain this. IND may later rely on this fact to suggest that he was not afraid to exit the country in the usual manner and thus does not have a well-founded fear of persecution.

Previous applications

Ask your client if he has applied for visas in the past and take detailed instructions regarding any past interviews conducted with embassy, consulate or UNHCR staff. If your client had to pay bribes to obtain either a passport or visa, take details of how much and to whom they were paid. Article 31 of the Refugee Convention sets out that a refugee should not be penalised for illegal entry to the UK, which would include entry on false documentation, so long as he can show good cause.

Entry without a document

If your client arrived in the UK without a travel document then you must have very clear instructions regarding how he was able to enter without either showing or retaining a travel document. Again, instructions that appear evasive or contradictory must be challenged at the earliest stage. Advise your client that IND often refuses asylum applications for the simple reason that the applicant's account of his journey to the UK is 'lacking in veracity' and is thus taken to be probative of an overall lack of credibility. If your client has destroyed his passport or ticket then the motivation for these actions must be explained as fully as possible.¹⁰

¹⁰ HC393 as amended, para 342iv

Failure to provide a convincing explanation for the destruction of documents may be interpreted negatively by IND. Be aware that possession of a passport does not in itself indicate that your client does not have a well-founded fear of persecution but you will need to account for its possession.

On conclusion of initial instructions

If, after taking initial instructions, you are of the view that there are no sustainable grounds for making an asylum application or an ECHR application advise your client of this immediately, providing a full explanation of why you are unwilling to assist. 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.

If your client has a sustainable claim agree a schedule of action with him. Check that you are leaving yourself enough time to interview, draft a statement/complete a form, amend and submit it to IND without putting your client at risk of refusal on grounds of non-compliance. Ensure that an interpreter is booked for your next meeting and that your client has a basic understanding of what information is required to complete fully the statement/SEF.

If your client has not already claimed asylum consider how the claim should be submitted i.e. by post or in person.

If your client comes from a country or falls within a particular category that is deemed appropriate for detention at Oakington¹¹ you must advise your client accordingly.¹² If detained at Oakington, your client will be interviewed rapidly (usually within two days) and then dispersed or detained elsewhere within about 7 days. Consider the extent to which your client needs to be advised prior to such detention and the extent to which you are able to continue to represent if you have to travel to Oakington. You should also be aware of the need for your client to maintain contact with you following dispersal or further detention.

► See chapter 11.

If your client attends in person to claim asylum you must explain the screening procedure fully.¹³ ► See chapter 6. Even if the claim is made by post your client will at some stage be required to attend for screening, ultimately to an induction centre. According to the White Paper *Secure borders, safe haven*¹⁴ all existing asylum seekers will eventually have their status checked.

If your client has already claimed asylum you should fax or post a letter by recorded delivery to Port Immigration Service or Integrated Casework Directorate (ICD) advising that you are instructed by your client in connection with his asylum claim.

11 Legal advice is available on site from the Refugee Legal Centre and the Immigration Advisory Service.

12 The countries and categories change regularly

13 The White Paper *Secure borders, safe haven* sets out the intended progress of an asylum seeker through induction, accommodation and removal centres.

14 para 4.51

Your letter should:

- quote your client's name, reference number, date of birth and nationality (unless stateless)
- confirm that you are instructed in connection with the application
- confirm your client's temporary admission address
- ask for third country interview notes to be forwarded if you are not already in receipt of them
- request clarification whether a SEF has been issued and the return date if this is unclear.

You should confirm your initial advice to your client and ensure that he has been given written confirmation that you are instructed and how to contact you. Advise your client to keep that letter with him at all times.

4

Statements, statement of evidence forms and one stop notices

Over the years IND has changed the procedures governing the submission, consideration and determination of a claim for asylum. In previous years asylum seekers were interviewed without a statement having been submitted. IND then introduced a variety of application forms which had to be completed and submitted. Face to face interviews of varying intensity and length were then conducted by IND.

At the time of writing IND is yet again changing the procedures for determining an asylum application. The procedure being introduced more and more widely is for no submission of a statement or statement of evidence form (SEF) before an interview by IND. The justification given for this is that there is no need for an interview form to be used because IND caseworkers are now so experienced that such mechanisms are not required to enable an asylum seeker to put forward his story.

Although it is likely that IND will determine asylum applications in the foreseeable future without the completion of a form, it is also likely, given the history of IND procedures, that eventually some type of form will be re-introduced. The exact nature of the form may differ, but the principles for its completion will be very similar to those required for the completion of the current SEF in its various formats.

The statement of evidence form (SEF)

There are still some asylum seekers whose claims are dealt with under the SEF scheme. This requires your client to complete and submit a SEF within a very strict time limit.

There are five types of form, a different form being used depending on whether your client is for example a port applicant, an in-country applicant, or a minor etc. An interview that takes place after a SEF has been submitted will generally be recorded on a SEF (interview) form.

Time limits: Where your client has been issued with a SEF¹ and a one stop notice,² these must be returned to IND within 10 working days³ of the date of issue to the correct post office box number by recorded or special delivery. The document must be completed in legible English. It is generally acceptable for the initial sections of the form to be completed in longhand. Any supporting statement should be typed. IND offers very little in the way of advice about how to complete a SEF. In theory, guidance is currently available to asylum seekers in 35 languages but your client will probably be issued with the English language version. The content of the SEF will be the basis on which a decision is taken whether to recognise your client as a refugee, grant exceptional leave or interview him.

IND is extremely reluctant to extend the time limit for submission of the SEF. It should be assumed that an application to extend the time limit will be refused. Failure to submit in time can lead to a serious risk of your client's application being refused on the grounds of non-compliance.

If you are instructed immediately before a SEF is due for submission, you should use your best endeavours to ensure that it is completed within the time limit. If this is not possible you should at least complete the first section of the SEF with your client's personal and family details and in the other boxes write 'statement to be submitted.' You should then submit this with a covering letter advising when you aim to submit a supporting statement, giving detailed reasons why it has not been possible to provide a fully completed SEF, and request an extension of time. If your client was ill and unable to attend promptly for interview at your office, obtain and submit a doctor's report.

Some practitioners, mindful that the submission of a SEF without a supporting statement could be construed as a failure to comply with IND instructions, submit a 'skeleton statement' (providing the basic details of arrests, detentions and political involvement etc) with the applicant's explanatory caveat that he has further information which he would like to submit at a later date. However, this approach does not guarantee that the application will not be refused because of failure to ensure 'prompt disclosure' of the basis of the claim, or that your request for an extension of time will be granted. There is little consensus amongst practitioners about how to tackle this particular dilemma save that all possible attempts should be made to submit a fully completed SEF in time if at all possible, with a detailed explanation if it is not possible.

1 Minors are given Self Completion Questionnaires (SCQ) up to the age of 16 and between 16 and 18 are given SEFs

2 See below

3 28 days for a minor

The SEF in use at the time of writing (and previous forms used by IND) consists of boxed questions with spaces for answers. Different sections deal with different areas, for example one section deals with personal details, another with family members. Each 'boxed' section of part C of the SEF is designed to elicit information that will establish whether an applicant is at risk of persecution or serious harm. It is debatable whether the 'key questions' posed are helpful in the construction of your client's claim. You should not feel constrained by the format of the form. Rather than trying to break down your client's narrative into headings, which may in any case overlap, you should write 'see attached statement' in the relevant sections of the form and then append a comprehensive statement explaining your client's reasons for claiming asylum in the UK.⁴

Non-compliance refusal decisions

Failure to submit the SEF within the requisite time, without permission to extend the original deadline, will result in your client's application for asylum being refused on the grounds of 'non-compliance'.⁵ In the recent past, some 7000 applications for asylum were refused erroneously on the grounds of 'non-compliance' because IND had failed to record applications which had been lodged correctly. In the light of administrative confusion, IND established a dedicated post box in Croydon for the receipt of SEFs and it is hoped that SEFs will now be received and recorded swiftly.

Appeal papers accompany notices refusing an application on the grounds of 'non-compliance'. ► See chapter 10. Even if, in your view, the refusal is defective you **must** submit an appeal. If your client's application was submitted correctly then the grounds of appeal must include a copy of the recorded delivery slip and covering letter which was submitted with the SEF. After lodging the appeal you should write separately to IND, providing evidence of correct submission and asking for the defective refusal notice to be withdrawn. It is essential that you lodge an appeal with full grounds and that you do not assume that IND will respond immediately to the request to rescind the defective refusal notice. Eventually IND will probably concede that the refusal was defective and make arrangements for your client's application to be considered substantively. Although the refusal has been withdrawn the appeal will remain on file, but will not be pursued until a further decision has been taken on the substantive merit of the case.⁶ If the application is granted the appeal will be withdrawn by consent; if your client is further refused you will be invited to submit further grounds of appeal. ► See chapter 10.

If your client was correctly refused on non-compliance grounds you should still appeal but ensure that a full statement is lodged as a matter of urgency along with a request that the refusal be reconsidered.

⁴ See below for content of the statement

⁵ HC395 as amended, para 340

⁶ This could cause problems for your client in terms of benefits. It is odd given that the appeal remains outstanding and yet the decision against which the appeal was lodged has been withdrawn. This arises particularly if a non-compliance decision has been wrongly taken.

The statement

If your client is not given a SEF to complete he will be interviewed in connection with the asylum claim. A decision has to be taken whether to submit a written statement either before or after interview. If a statement is submitted there will be a legible record of what your client has to say instead of a handwritten record of an interview which may not be particularly legible. This could assist the IND caseworker in coming to a decision on the claim.

Even if a decision is taken not to submit a written statement to IND it is advisable to prepare one. This will help your client to order his thoughts. It will also assist in the preparation of any subsequent appeal.

The function of a statement is to present the salient points of your client's claim in a coherent and concise way. The statement should clearly establish why your client is at risk of persecution, serious harm or some other human rights abuse. If the information contained in the statement is ambiguous it will fail to explain why your client is in need of international protection. At the outset therefore, think very carefully about what the statement is trying to communicate.

Statements are not speculative documents. Although an application for asylum may involve the articulation of a very particular subjective fear of persecution, practitioners should avoid packing statements with vague assertions and generalised arguments about human rights abuses in the applicant's country of origin. Discard any information in the statement which does not directly assist you in conveying your client's claim.

It is essential to remember that the burden of proof of establishing a well-founded fear of persecution remains with your applicant. Because the majority of asylum seekers are unable to adduce supporting material evidence (such as an arrest warrant or proof of detention) it is extremely important that written testimony clearly identifies the root cause of the stated fear of persecution. Practitioners should be fully aware of the possibility of creative interpretation of all articles of the Human Rights Act 1998 and not just Articles 3 and 8 which are the ones most frequently invoked. ►See also chapter 1.

The statement should reflect as directly as possible your client's idiom and experiences. There should be a clear distinction between your client's testimony and any written representations you may wish to forward with the statement. Try to ensure that your client's asylum claim is plausible and as coherently argued as possible. References in written representations to external research materials which you may choose to append to the statement must be pertinent.

Points to consider when preparing statements

You should have an outline knowledge of political problems and human rights abuses in your client's home country before you take detailed instructions. This can be obtained from consideration of, for example, Amnesty and CIPU (Country Information Policy Unit) reports before any instructions are taken. This would only be necessary if you are taking instructions in connection with a client from a country about which you know very little. You will need to assess your client's claim in context and this will be very difficult to do if you do not have a sense of what is 'happening on the ground'. It is important that you do not simply rely on 'background reports' to establish the context of your client's claim. Aim to strike a balance between the particularity of your client's story and the general context in which it is set. More detailed research may be required once you have taken your client's instructions.

Interviews conducted without some prior planning or knowledge will suffer. If you interview your client 'blind' you may not know how to recognise possible Convention grounds and you may be unable to identify information which will anchor the basis of a claim. In addition, valuable interview time may also be lost exploring background country details which you should already be familiar with. Your client may present you with information which may ultimately prove to be irrelevant to the asylum claim. You must be able to recognise what is germane, and what can be discarded. It will be difficult to make this assessment if you are unaware of the context of the claim.

Be sensitive to the fact that your client may be shy, or embarrassed to talk about certain events. Try to remember that for many applicants the invitation to narrate traumatic episodes in their lives may well constitute an unprecedented challenge.⁷ It may take several meetings for you to gain your client's confidence. Your client may come from a culture where lawyers are perceived to be 'figures of authority'.

You should be aware of the ways in which an applicant may feel inhibited about giving information and seek to minimise their occurrence. Problems may arise if:

- family members are present at the time of interview
- your interpreter is from a different clan, social group or political grouping; occasionally problems arise where your interpreter is from the same clan, social group or political grouping
- your client is concerned about confidentiality and fears repercussions from agents or family
- your client feels uncomfortable discussing his difficulties with a practitioner or interpreter of the opposite sex
- your client is tired or ill
- your client feels that you do not have an understanding of events in his home country.

⁷ See *Gender guidelines for the determination of asylum claims in the UK*, RWLG, s5 and IAA gender guidelines, s5

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 advocacy. 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 claim has not been adequately established will prevent you from successfully progressing an application. If your client's instructions raise issues which are not covered by research documents available to you consult a colleague or external agency with knowledge of political problems in the country of origin.⁸

Time limits imposed by IND are unlikely to allow for a leisurely consideration of how best to frame your client's claim for asylum. To work efficiently ensure that you have provided enough time for effective interviewing. Adjourned or fragmented meetings may disrupt your client's ability to concentrate or gain your confidence. Ideally, the second interview with your client should be conducted in one sitting, with adequate breaks for refreshments. This may not be the case with vulnerable clients who may require more frequent but shorter meetings. ►See chapter 5.

At the beginning of your meeting ensure that your client understands your interpreter. Ideally you should use the same interpreter as previously but this is not always going to be possible. To work efficiently your questions should be well-focused. Do not assume that words such as 'arrest', 'charged', 'detention' and 'torture' are self-evident or have universal meaning. Always try to get your client to explain what is meant by a particular phrase. For example, your client may feel that being held by the police for one day or more at a time qualifies as a 'detention', whereas the experience which lasts for several hours does not. Always ensure that you have provided thorough descriptions of key terms such as 'detention', 'arrest', 'charge' and 'maltreatment' and try to explore the possible meanings of these words as and when key episodes are narrated by your client.⁹

When taking instructions you should always keep in mind the fundamental questions:

- Is my client at risk of persecution?
- What is the Convention reason for such persecution? ►See chapter 1.

⁸ For example Amnesty International or the Refugee Legal Group, or circulate an enquiry via Asylum Aid

⁹ See IAA guidelines, paras 5.35–5.39

The statement should consist of a chronological narrative. If this is not possible you should provide an explanation (for example if your client is illiterate and finds it difficult to remember dates or to provide a linear narrative). A two-page, rambling first person narrative which does not identify the basis of persecution or a convention reason, which cites as a 'supporting document' an Amnesty International country report without directly connecting it to the particularities of the applicant's claim will not suffice. Similarly, a statement which merely consists of a list of detentions, without explanatory elucidation, will almost certainly fail to communicate your client's dilemma. Strike the right balance between the particular (the act or acts of persecution) and the general (the reasons for persecution) when establishing the context of an asylum application. The statement should accurately reflect your client's ability to remember his dilemma.

If a statement is submitted prior to interview, your client is likely to be tested at interview on the information contained in the statement. The statement should not normally refer to incidents which your client will later be unable to recount.

The information contained in the statement should be vivid and believable. Warn your client about the dangers of exaggerating any fear of harm or persecution. If your client has family in the UK who have provided information to IND, obtain permission from the family member to look at their applications and check whether accounts of shared experiences, family histories etc are consistent. Ensure that you obtain an explanation from your client regarding any significant 'variant' accounts.

The Immigration Rules¹⁰ require 'full and prompt disclosure' of an asylum claim but you should use your discretion when taking instructions, particularly where applicants present a very full history. You are not expected to present IND with an exhaustive 'life history'. As a general rule, the statement should seek to cover every problem experienced by the applicant which is germane to the asylum application. There is no limit to the amount of information you are allowed to submit in support of your client's claim but you should avoid 'narrative padding' and reference to irrelevant matters which do not advance an understanding of your client's dilemma.

¹⁰ HC395 as amended,
para 340

Building a profile

You are aiming to demonstrate that your client is a refugee as defined by the 1951 Convention, and/or that he is at risk of human rights abuse and should not be *refouled* contrary to Articles 32 and 33 of the Refugee Convention.¹¹ The statement should therefore cover the following:

- The type of persecution, harassment or harm experienced (including torture, ill treatment, threat of ill treatment, sexual abuse, threat to family members, etc).
- The reasons for persecution. Return to the definition of a refugee set out in the UNHCR handbook and consider the scope of possible definitions of persecution. Avoid focusing exclusively on the most obviously recognisable forms of persecution. Be aware that there are more oblique manifestations of persecution and harm. Remember that many seemingly trivial social acts may be imbued with complex meaning and that an assessment of the risk to your client will depend upon a reasonable understanding of the context of the claim.
- Be aware that IND often dismisses the risk of persecution on the grounds that, for example, an applicant's political involvement is at 'too low a level'. Be wary of ignoring apparently insignificant events or actions and consider whether limited or apparently trivial actions place your client in any danger in his home country.
- Establishing risk: try to show the link between actual and potential persecution, your client's fears for the future and the motivation for flight from home country. Aim to show that your client has been and/or will be persecuted rather than simply discriminated against or punished for something he has done. The boundary between 'persecution' and 'discrimination' is not easily defined. Evidence of discrimination or harassment may be relevant to show that persecution had taken place in the past or would take place in the future.¹² Numerous acts of discrimination may amount to persecution.
- The authorities in your client's country of origin may attribute characteristics to him, for example membership of an ethnic group, which may lead to an assumption of particular political opposition.
- The authorities conducting the persecution will normally be clearly defined agents of the state. However, in some cases it will be necessary to show that the perpetrators of persecution should be considered as government agents due to government tolerance or tacit approval of their acts, or an inability by the State to control their actions.
- Be aware that some clients will refrain from discussing some types of persecution because they are habituated to ill-treatment, or because they consider that these experiences, however brutal, are too 'everyday' to merit special consideration.

¹¹ This section should be read in conjunction with chapter 1, what is asylum, the legal basis.

¹² See UNHCR handbook, paras 51–55

If your client mentions that he was tortured or maltreated take full instructions concerning what has happened. Remember that torture may affect your client in a number of ways, some dramatic and immediately palpable (emotional distress, continuing pain from injuries sustained in torture) some less obvious (Post Traumatic Stress Disorder or more diffuse symptoms of distress such as loss of concentration, insomnia, irrational fears etc). Ask your client to describe his symptoms, injuries and any long term or permanent scars or psychological effects. Discuss referring your client to a specialist medical practitioner to obtain a medical report.

Be aware that your client may have been involved in activities which would bring him within the scope of the 'exclusion clauses' of Article 1F of the Refugee Convention.¹³ The fact of having committed crimes does not exclude your client from the right to claim asylum under the Refugee Convention but may affect the obligations of the UK to offer protection. The Anti-Terrorism Crime and Security Act 2001 may have a bearing on how your client's claim is determined.

Anticipate possible IND objections to your client's claim and ensure that these issues are adequately addressed in your statement.

These may include:

Internal flight

IND frequently challenges the credibility of applicants who have not demonstrated that they have attempted to live in another region of their home country away from their place of persecution. Similarly, if your client has resided in other areas without encountering persecution IND is likely to suggest that it is reasonable to expect your client to be able to successfully relocate away from the place of persecution. You do not need to demonstrate that it would have been impossible for your client to do so. Rather, you need to show that your client has actively considered this option, and the reasons why it has not been pursued.¹⁴

Possession of national passport

Check whether your client has at any point possessed a national passport and whether he has used it for travel or identity purposes.¹⁵ If your client did possess a national passport you should ask whether he obtained it through the normal 'channels', or whether a bribe was paid. If he has used a passport to leave his home country, either in the past or en route to claim asylum in the UK, you need to establish whether your client experienced any problems at the time of exit. If your client is claiming asylum after entry to the UK you should examine his passport, if it is still available to you, and note any visas or exit/entry stamps. Ensure that you obtain full instructions regarding these endorsements. If IND or the port retains your client's passport request a copy immediately.

13 See UNHCR handbook, paras 140–163

14 See UNHCR handbook, paras 89–93, and the Michigan guidelines

15 See UNHCR handbook, para 93

Delay in lodging the claim

If there has been a delay in claiming asylum you should always provide an explanation.¹⁶ If your client has other claims under the immigration rules, such as to remain as a spouse of someone permanently resident in the UK or to remain as a student, then consider making concurrent applications. An asylum claim should only be submitted where the client has expressed a fear of persecution if he had to return to his country of origin or habitual residence. If such fear has not been expressed a claim for asylum should not be made. A claim for asylum, if determined prior to the end of an existing leave, can lead to that existing leave being curtailed with no right of appeal against curtailment¹⁷ although there would of course be an appeal on asylum/HRA grounds.

Delay in leaving country of origin

If your client did not leave his country of origin immediately after the act which it is claimed led to the decision to flee, an explanation for the delay must be given. A failure to provide an appropriate explanation will be viewed by IND as an indication that there was no persecution.

Application as a refugee *sur place*

This is a term that has to be used where your client's claim for asylum arises in the UK as result of events in their country of origin.¹⁸

You need to explain very clearly why your client's circumstances have changed. For example:

- a particular political allegiance may have become dangerous following developments in your client's country of origin
- your client may now be at risk of persecution because of activities which he has been engaged in in the UK.

The danger of dwelling on activities in the UK is that IND may regard these as being 'self-serving'. The Immigration Rules state that anyone who engages in activities in the UK 'which are inconsistent with his previous beliefs and behaviour and calculated to create or substantially enhance his claim to refugee status'¹⁹ will be seen as having damaged the credibility of his claim, unless this can be adequately and fully explained.

Military service

Evasion of military service or conscientious objection to military service will rarely, on its own, found a successful claim for asylum.²⁰ It is important to ensure that these aspects of your client's case are covered in detail to ensure that they are put into the context of the claim for asylum as a whole and are not seen as the sole justification for claiming asylum.

Refusal to disclose sensitive information

Discuss with your client problems associated with withholding information and how this will be interpreted by IND. Your client may consider the information to be politically sensitive. If your client is unwilling to divulge information you should discuss with him why this is so. It could be a fear of compromising political colleagues, wanting to protect friends and family or instructions from those who assisted in his passage to the UK and a fear of what might happen to family if information is disclosed in contravention of those instructions.

16 RWLG gender guidelines, para 5.34

17 Immigration and Asylum Act 1999, s10

18 See UNHCR handbook, paras 94–105

19 HC395 as amended, para 341vi

20 See UNHCR handbook, paras 167–174

An apparent unwillingness to disclose information is not necessarily a sign that he is lying or does not have a sustainable claim. It may be that your client is willing to provide information using code names. If he is not prepared to give names or detailed information then the reasons for this should be explained in detail in the statement, for example due to fear of breaches of confidentiality and to protect people still in the home country.

Escape from detention

It is very important that any escape from detention is described in the greatest possible detail since many asylum seekers' escape stories are not believed. If a detailed substantiated description of the escape is given this will add credibility to the rest of your client's claim. It will also provide important evidence of your client's subjective fear of persecution.

Family members left behind

If your client has a spouse and children or other dependent family members, instructions should be obtained as to why they were left behind and whether your client thinks they will be at any risk. Remember that not all information need be put in the statement and if this information is unlikely to add anything to the basis of claim then it should be omitted.

Terrorism legislation and proscribed organisations

If your client bases his claim on involvement in an organisation that is proscribed under the terrorism legislation this raises issues about disclosure of information in the asylum claim. There is a contradiction between the requirement to provide a full and frank disclosure of all activities and matters that are relevant to an asylum claim and the possibility that such disclosure could lead to potential criminal proceedings. This dilemma is not resolved. IND has been asked to disclose its guidelines on dealing with such matters but claims that none have yet been written. Practitioners must be aware of the potential risks to the client. It is unlikely, at present, that relatively low-level involvement in proscribed organisations will lead to criminal prosecution in the UK, yet such activity remains sufficient to found a successful asylum application. You must be aware of the potential for prosecution in the UK and if you are of the opinion that there is a real risk of prosecution you must advise your client accordingly. He will have to consider the extent to which he wishes to disclose information in his statement and the possible adverse effect of limited or non-disclosure on the likelihood of success of the claim for asylum.

What to include in the statement

Whether or not you decide to provide the statement to IND will depend on the circumstances of the case. ►See chapter 8. Even if the statement is not given to IND, both you and your client will find future conduct of the case easier if a statement has been prepared as early as possible.

Your initial instructions should have included detailed information concerning your client's journey to the UK. This should now be incorporated into the statement. Include a full account of how your client left his home country, information about whether a travel document was used and whether any problems were encountered on exit. The statement should explain precisely how your client travelled to the UK and whether asylum was sought en route. If so, what was the outcome? If not, why not?

It is essential that you supply full information regarding family members, ensuring that names and dates of births are correct as failure to do so may cause problems for your client at a later date (for example with family reunion).

Your client's statement should be presented, to the extent to which it is possible, as a chronological narrative. Key events such as dates of arrest, detention etc should be clearly explained. Your client's last period in their home country and the events which motivated his departure will be of particular interest to IND. The final portion of your client's statement should therefore provide an unambiguous summary of the factors which motivated departure.

The statement should clearly provide a context within which the elements required to prove a sustainable asylum claim are evident. Unless your client uses the words of the Refugee Convention himself you should not refer in terms in the statement. It is your duty to ensure that the statement is ordered in such a way that each and every element that has to be established in an asylum claim can be ascertained from the statement.

After drafting a statement meet your client to allow him to amend and approve the draft. Where possible, provide a written translation of this draft statement in advance. ►See chapter 7. If your client is illiterate it is important that you go through the statement carefully with him. It may be appropriate to provide your client with a translation for a friend or relative to read to him. Any amendments to the statement should be clearly agreed with your client who should be fully aware of the statement that will be submitted to IND as the basis of his asylum claim. You should not submit information which has not been approved by your client. Ensure that your client signs and dates the statement.

Any supporting documents should be properly indexed and clear reference should be made to their relevance in your covering letter to IND.

If you anticipate submitting a medical report (►see chapter 9) you should consider notifying IND to that effect and request a delay in the taking of any decision pending receipt of the report.²¹ Try to give an indication of when the report will be forwarded. Not all reports obtained will be of positive benefit to your client. If you have notified IND that you intend to submit a report but the report, when it arrives, is of no assistance to your client, you may then be in a difficult position if IND requests to see it.

21 See appendix 2

If you decide to submit the statement to IND send it to any notified post office box by recorded or special delivery. Write to your client confirming that it has been forwarded to IND, enclosing a translation of the submitted statement if you have not provided one already. You should also confirm any verbal advice to your client about the strengths and weaknesses of his claim.

If a SEF or statement has already been submitted

Your client may have already completed and submitted a SEF or a statement with the assistance of a friend or previous legal adviser. It is essential that all the information already submitted to IND is checked with your client. If incomplete or inaccurate information has been submitted it is extremely important to ensure that a full account is now submitted with an explanation as to why this did not happen previously. An additional explanatory statement from the client should be submitted. If mistakes and misunderstandings have taken place in the past, due to fear on the part of your client or problems with previous advisers, then this must be explained rather than ignored. A failure to provide an explanation for what could be seen as substantial discrepancies may well have an adverse effect on your client's perceived credibility. 'False representations' are now made explicitly a factor affecting credibility.²²

If your client has already been interviewed

If IND or the Immigration Service has already interviewed your client but a decision has not yet been taken, ensure that you obtain copies of all the interview notes and any SEF or statement submitted. If a SEF or statement has not yet been submitted ensure that the statement submitted by your client with your assistance either endorses or amends (or both) the record of the interview. Do not assume that information obtained previously in connection with your client's immigration status (e.g. third country, entry clearance or previous asylum application interview notes) is correct or that your client was given the opportunity at the time of the interview to check their testimony. Check everything with your client. You should also take clear instructions regarding the conduct of any interview with your client. If your client's instructions differ from information given discuss any discrepancies and discover why accounts differ. **Any** differences in your client's testimonies, however minor or seemingly trivial, should be addressed immediately. IND frequently rejects asylum applications where the omission or addition of detail (or sometimes merely a shift in emphasis between contrasted accounts) is taken to indicate that an applicant's credibility has been compromised.

²² HC395 as amended, para 341iv

One stop notices

The intention of this procedure is to reduce the number of appeals and to ensure that all human rights grounds have been brought to the attention of IND.

A one stop notice requiring your client to state any grounds to remain in the UK in addition to the asylum claim will be served on your client along with a form, the statement of additional grounds (SAG). The timing of this depends on whether your client is an in country asylum applicant or not.

Under section 75 of the Immigration and Asylum Act (IAA) 1999 the one stop notice and SAG will be served on asylum applicants at the time they make their claim if they are:

- port applicants
- illegal entrants
- persons liable to be removed as an overstayer under s10 of IAA 1999
- relevant family members of those in the above categories.

Under section 74 of the IAA 1999, the one stop notice and SAG will be served on all other asylum applicants at the same time as their asylum application is refused and they are served with appeal papers. If your client has been served with a refusal notice on grounds other than asylum and wishes to claim asylum, he should raise the asylum grounds in the SAG.

Your client will be sent a one stop notice at other times as well, even though he may have already completed one. Sometimes clients may complete one and receive another by return! You can choose whether to return the subsequent SAGs referring to the previous one or whether to ignore it but be careful to ensure the previous form was completed and returned before ignoring the new one.

The SAG is intended to allow your client to present information which would enable IND to consider granting your client leave to enter or remain in the UK on grounds other than asylum. Failure to set out such grounds either at all or in sufficient detail will limit the extent to which those matters can be relied upon in any subsequent appeal. The content of the SAG should be similar, whether your client has been served in accordance with s74 or s75.

The SAG should set out in clear terms the facts on which any human rights or race discrimination claim is asserted, or any other grounds on which leave to remain in the UK is sought. It should refer to the relevant articles of the ECHR that are engaged, the discrimination alleged and the factual basis of your client's claim. It should be consistent with your client's SEF or statement or interview. If your client has not previously submitted a statement, you could attach the statement to the SAG. A failure to identify the factual basis of the claim may result in the grounds not being considered in any subsequent appeal unless the applicant was not aware of them at the time the SAG was completed.

It is not sufficient to, for example, simply assert that removal would breach Articles 3 and 8 of the ECHR. The reasons for such a breach must be set out in terms of your client's personal circumstances.

If your client's statement makes comprehensive reference to possible human rights violations, or reference has been made in earlier correspondence to such violations, you can complete the SAG by reference to those documents for example by writing 'see letter dated...and attached' or 'see accompanying statement'.

The SAG must be fully completed in English and must be signed either by you or your client. If you require more time to obtain evidence to support your client's claim you are obliged to explain why this is so, and when you anticipate forwarding the completed form.

If you submit further information after the deadline imposed for the return of the SAG you will need to explain as fully as possible why this information has not been disclosed previously.

The completed SAG should be returned in accordance with the accompanying instructions. Send it by recorded delivery. Be aware that fax numbers given may not work!

Once an appeal has been determined, human rights or discrimination issues cannot be raised in another appeal if the SSHD certifies that the matter could have been included in response to the original one stop notice and that the matter has only been raised to delay removal.²³ This draconian power illustrates the importance of ensuring that relevant issues are set out with sufficient detail at the earliest opportunity.

²³ Immigration and Asylum Act 1999, s73(2)

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Vulnerable clients

All asylum seekers are vulnerable. They may have been tortured, maltreated, abandoned. Many will feel isolated. They will have financial and accommodation difficulties. Many will miss their families or will have domestic problems if they are with their families, such difficulties being exacerbated by the conditions in which they are living and the uncertainty around their status. The fear of detention and the fear of removal will add to these traumas.

All asylum seekers experience trauma, but there are some individuals who are more vulnerable than others. Practitioners must be aware of the additional care that should be given to these applicants and the implications of their vulnerability on the determination of the claim. You should advise fully and ensure that confidentiality is not breached. The three groups who are most vulnerable are those with mental health problems, children (whether or not accompanied) and women.

Detention increases the vulnerability of all asylum seekers and sustained effort should be made to secure the release of detained clients.

► See chapter 11.

The burden of proof for these groups is neither different nor lower than for anyone else. It is essential that the particular problems faced by the individual concerned are taken into account in any assessment of the relevant issues. These may include the impact of internal flight for an individual in the circumstances of your client, the particular impact of state practices or indeed the manner in which your client behaves when faced with particular situations. The relevance of expert medical or other evidence as it specifically relates to your client has to be assessed, both in terms for example of the relationship of your client to the agents of persecution as well as how your client's behaviour would be perceived by those in authority. Practitioners should not make assumptions based on their own perceptions of how these individual claims fit within the Refugee Convention or Article 3 ECHR. You must take instructions and consider the claim within the context of the individual and the country conditions, not in terms of the stereotypical refugee who all too frequently is male and overtly politically active in the conventional sense of organising, writing or speaking in opposition to the prevailing government or state authority.

Clients with mental health problems

Practitioners may find it very difficult to identify if a client has mental health problems sufficient to render the taking of full and accurate instructions problematic. In some cases it will be difficult to ascertain whether the client lacks formal education or whether the problem in processing information is due to trauma either as a result of persecution or for some other psychological reason. In some cases assistance in identifying the apparent onset of the mental health problems may be obtained from other family members. In certain cases your client may have been persecuted because of a mental health problem.

It may be the case that the trauma has acted to 'block' or disrupt memory and reduce accurate recall. Expert evidence may well be required to ascertain the nature of the problem and indeed the extent to which the client is able to give instructions.

There are no guidelines for the determination of the claim of asylum seekers with mental health problems. The UNHCR handbook refers specifically to those with mental health difficulties¹ but the lack of specific guidelines means that there can be considerable confusion over the extent to which issues are relevant to assessment of the claim or the extent to which mental health problems have resulted in difficulties in instructing a representative.

Children

The UNHCR published *Guidelines for Refugee Children* in 1988 and in 1994 published *Refugee Children Guidelines on Protection and Care*.² There will be a special UNHCR meeting between 8 and 10 May 2002 in order to review 10 years of work with refugee children.

The UNHCR states that guidelines are 'not mere suggestions that can be ignored when it is not convenient to follow them'. There is reference to the UN Convention on the Rights of the Child 1989 setting international standards, which should be complied with, in particular Article 3 which states that the 'interest of the child shall be a primary consideration.'

Although the UK has derogated from the Convention on the Rights of the Child in so far as it relates to children who are subject to immigration control, there are specific provisions in the rules for dealing with applications for asylum by children, both accompanied and unaccompanied.³ In particular:

- a child is defined as a person who is under the age of 18 or who appears to be under 18
- more weight should be given to objective indications of risk than to the child's state of mind
- an application cannot be refused solely because the child is too young to understand his situation
- an unaccompanied child, or a child who becomes unaccompanied, should be referred to the Refugee Council's Unaccompanied Children's Panel of Advisers

1 UNHCR Handbook, paras 206–212

2 See www.unhcr.ch/cgi-bin/texis/vtx/home

3 HC395 as amended, paras 349–352; APIs chapter 2, s5

- consideration of the application will receive priority and should be determined within 6 months
- a child should not be interviewed unless it is impossible to obtain information in any other way although children do have to attend screening⁴
- an unaccompanied child is not to be removed unless there are adequate reception facilities in the receiving country
- if a child becomes 18 prior to determination of the claim he is to continue to be treated as a minor unless a decision to remove is taken. There is no requirement to ensure there are adequate reception facilities
- if the age of the child is disputed the burden of proof will normally be on the applicant but it is appropriate to give the applicant the benefit of the doubt unless physical appearance strongly suggests that he is over 18
- in the case of disputed age it is open to the applicant to obtain medical evidence but this should not be insisted upon
- children should not be detained (but this applies only to those IND recognises as minors)⁵
- The White Paper *Secure borders, safe haven*⁶ proposes amending existing policy and permitting detention of children and more extensive interviewing.

Women⁷

The UNHCR has recognised the particular vulnerability of women. Guidelines were first drafted by the UNHCR⁸ and in January 2000 it published a position paper on gender-related persecution. The guidelines have been developed by a number of countries. In 1998 the Refugee Women's Legal Group (RWLG)⁹ published their gender guidelines and these have been incorporated into guidelines issued by the Immigration Appellate Authority (IAA)¹⁰ in November 2000.

Gender guidelines are more up to date than those for other vulnerable groups and policies have been adopted by a number of countries to ensure that by following the guidelines proper consideration is given to claims by women. The Asylum Policy Instructions (APIs) do not refer specifically to women's applications but IND claims to have incorporated many of the issues raised by both the IAA and RWLG guidelines. This is not the case and practitioners should refer directly to these guidelines in assessing cases. The guidance on interviewing and the consideration of claims should be followed closely to ensure that claims are properly recorded and argued.

4 The LSC will pay for minors to be accompanied. Attendance at screening requires a responsible adult as well as a representative. A representative cannot be a responsible adult at the same time as representing.

5 The IND position is that as the 'child' in their view is over 18 they are not detaining a minor!

6 Paras 4.54–4.60

7 See in particular *Refugees and Gender: Law and Process*, Dr Heaven Crawley, Jordans, 2001

8 Current version dated July 1991

9 RWLG website www.rwlg.org.uk

10 IAA website www.iaa.gov.uk

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Screening

Screening is the name given to the process whereby IND takes an asylum seeker's personal details and records the application for asylum. It is usually undertaken prior to consideration of the substantive asylum application or consideration of whether to treat the asylum seeker as a third country case. Once screened, the asylum seeker will be issued with an application registration card (ARC) which will replace the SAL (standard acknowledgement letter). Most asylum seekers (not all) were issued with a SAL until 21 January 2002 when the ARC was introduced. It will eventually replace all SALs but initially will only be issued to new applicants. Dependants will have their own ARC which will be cross-referenced to the main applicant. Your client will need to produce it if seeking assistance from any government or local authority agency. The ARC confirms that your client has been admitted into the asylum determination procedure.¹

The screening process changes often and rapidly and is subject to regional variation. There is frequently no notice given of changes in procedure or information sought. The process in operation at a screening unit² may also vary according to the nationality, age or suspected age of the applicant.

It is essential that you are aware of changing practices and procedures. Your advice to clients will have to vary depending on such changes. You should be aware of the following possibilities of detention:

- in accordance with Schedule 2, Immigration Act 1971
- at Oakington
- referral to an induction centre.³

The list of nationalities liable to be detained at Oakington is extended regularly. It is important that nationals on the Oakington list are advised about the risk of transfer and detention there.

1 It is intended that all asylum seekers will be issued with an ARC by the end of 2002.

2 Applicants can be screened in IND offices and at ports of entry.

3 The White Paper *Secure borders, safe haven* chapter 4 sets out the proposed asylum regime including induction, accommodation and removal centres, and other support.

Attendance at an asylum screening unit (ASU)

Screening can take place on arrival at a port in the UK, following submission of an application by post to IND or on personal attendance at a screening unit to apply for asylum. In all cases IND is entitled to take fingerprints and photographs and to retain original identity documents or other documents providing proof of address.

As a result of a statement by IND that no questions that relate to the substance of an asylum claim will be asked at a screening interview, the Legal Services Commission (LSC) stated that attendance at screening unit appointments would not be covered under Legal Help, except for minors.⁴ However, at the time of writing IND is not complying with this procedure. A screening interview process has been introduced which allows interviewing officers to ask questions which aim to identify whether an individual falls into a category deemed appropriate for detention in Oakington and to ask applicants about their substantive asylum claim. In the process of this 'enhanced' screening procedure, details are obtained which could have a bearing on the outcome of the substantive determination of the application.⁵ Very detailed biographical information is taken with a view to the issue of a travel document to facilitate rapid removal in the event that the asylum application is unsuccessful.

In some cases the screening interview is followed on the same day by a substantive interview and an interview under caution (to determine whether the applicant is an illegal entrant). This is particularly likely if an applicant is unrepresented. This may happen despite IND stating that if an asylum seeker is represented he will not be substantively interviewed immediately after screening.⁶ If you do not accompany your client to screening you should ensure that he is given a letter from you confirming that you are instructed and that your client should not be interviewed in connection with their claim for asylum in your absence. If an attempt is made to interview substantively at this time this should be challenged. Your client should be warned of this possibility and you should discuss the extent to which he should answer questions and how to ensure that scope is left for a statement to be submitted afterwards or for a further interview to be demanded. If the interview proceeds a formal complaint should be lodged. You should also consider whether to try and have the interview content disallowed and a new interview fixed.

The version of the form used at screening at the time of writing is not available from the IND website. It is essential that you maintain up to date knowledge of the changing process so that you can advise your client fully on what to expect. You will have to take a decision whether to accompany your client, even though there is, under current LSC policy, a substantial risk that you may not be paid for such attendance. You may wish to correspond with the LSC about your particular case or note the special circumstances on file.

⁴ This is a problem for particularly vulnerable clients.

⁵ At the time of writing, discussions are underway with the LSC to amend its guidance.

⁶ See appendix 3

Ensure that your client understands the nature and purpose of the screening interview. You must establish in advance whether your client will be considered for the Oakington procedure and ensure that a representative attends the interview if this is the case. If you wish to contest transfer to Oakington (for example because you have evidence, such as a medical report, that your client has been tortured or that he does not fall within one of the specified categories) then you should be present at this interview.⁷ If there is a possibility of your client being deemed to fall within the Oakington criteria you should consider sending a clerk, even though under current LSC guidance you may not be paid.

Your client should take the following to the screening interview:

- 3 passport photographs of himself
- 3 passport photos of a spouse
- 2 passport photos of each dependant
- proof of address such as bills, tenancy agreement, letter from person with whom staying
- passport, identity card, birth certificate.

You should be firm with Screening Unit staff: when all available evidence has been supplied it is then up to them to issue the ARC. If they do not issue the ARC, consider speaking to a supervisor, making a complaint or, in extreme cases of repeated failure by the screening unit to issue documents, consider judicial review. IND has agreed that clients should not be required to obtain evidence from their home countries. Where the Screening Unit staff are not satisfied as to your client's nationality they may resort to testing your client about the country of which he claims to be a national.

If your client loses the ARC the loss should be reported to the police and an application for a replacement should be made. The procedure for re-issue is not known at the time of writing.

After screening, IND will deal with your client in a number of different ways according to the country of origin or habitual residence.

Your client will be either:

- given a statement of evidence form/SEF to complete and return within 10 working days⁸ or
- detained pending removal to a safe third country or
- released pending a decision whether to remove to a safe third country or
- interviewed either immediately or later that day or
- given a date to return for a substantive interview or
- transferred to Oakington or
- referred to an induction centre.

Your client may be interviewed on the day of screening with a view to treating him as an illegal entrant. If you think that this may happen ensure your client is aware that he should telephone you immediately so that you can organise representation. Such an interview will be conducted under caution and in accordance with PACE and may result in your client being served with an illegal entry decision and having reporting requirements imposed.

⁷ In order to be paid for this attendance you will have to negotiate with the LSC or be prepared to justify such attendance at the costs compliance audit.

⁸ 28 days if a minor

The White Paper proposals

Chapter 4 of the White Paper *Secure borders, safe haven*⁹ sets out the substantial changes proposed for processing asylum claims. It is the intention of the government that all asylum applicants will initially be sent to an induction centre where they will remain for between one and seven days. During that time the asylum process will be explained to them, they will be assessed for support and advised on return to their country of origin. There will then be four options:

- those who do not require support will be given temporary admission to a friend or relative's address, usually within a day
- those who require support will be dispersed to an approved address outside the South East, within a couple of days
- those considered appropriate for referral to an accommodation centre will be sent there within about 7 days
- some will be detained.

The Oakington reception procedure will continue to operate.

The government has already started implementing some of the proposals. It is essential therefore that you keep up to date with current procedures to ensure that your client is aware of what to expect on screening.

⁹ *Secure borders, safe haven, integration with diversity in modern Britain*, Home Office, February 2002

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Clerks, interpreters and translations

Clerks

It has been accepted practice for many years that a client may have a clerk¹ from his legal advisers present at substantive interviews with IND officials. There is no right to legal representation at interview and it remains within the discretion of the interviewing officer to admit or exclude clerks and independent interpreters. In general, IND accepts that clerks and independent interpreters have valid roles to play in the interview and in practice interviewing officers will not seek to exclude either at the beginning of an interview unless a specific objection has been made.²

There is currently no consensus between IND and practitioners as to how to define the responsibilities of those attending interview and in recent years the role of the clerk has been fiercely disputed.³

IND regards the interview as an opportunity for the interviewing officer to clarify information contained in the statement of evidence form (SEF) or statement, to take details of the applicant's case and to test the veracity of its content or to establish the client's claim. Interviewing officers are reluctant to depart from a prepared schedule of supposedly 'key' questions. Applicants are explicitly instructed that they do not need to provide information that has already been set out in the SEF or statement. This advice can be confusing to applicants who may have approached the interview as an opportunity to explain the basis of their claim for asylum in the UK. Asylum applicants are often disappointed by the brevity and limited scope of a SEF interview. They may find, if there has been no SEF, that the time given to describe their claim is equally brief.⁴

IND does accept that it is the role of the clerk to 'protect and advance the legal rights of the client' as it is not an interview conducted under PACE.⁵

1 ILPA runs specialist training courses for clerks.

2 For example if the interpreter is an asylum seeker or family member.

3 A protocol is about to be issued following many years discussion of the different perceptions of responsibility.

4 Letter from IND to the Asylum Stakeholders Group, February 2002, reporting on the intended change to SEFless interviews throughout states 'the length of interviews was broadly comparable with SEF case interviews'.

5 See *Immigration advice at the police station*, Rosie Brennan, the Law Society, 2002

The current IND approach is very clearly:

- The clerk is an ‘observer’ rather than an active participant in the interview process.
- The interviewing officer alone has responsibility for the conduct of the interview.
- Clerks are merely allowed to accompany their clients to interview and to take notes of the proceedings.
- Clerks should refrain from influencing the course of the interview (e.g. attempting to answer questions on the client’s behalf).
- Clerks should not advise their client during the course of the interview.
- At the end of interview clerks will be invited to make ‘observations’ about the interview and will be asked to sign a declaration that the applicant was given an opportunity to answer questions posed by the interviewing officer.
- ‘Observers’ who persist in interrupting during the course of the interview may be asked to leave the interview.
- Any dispute of interpretation should be raised at the end of the interview.

On the other hand the clerk should approach the interview with the following aims:

- to actively **represent**, rather than merely passively ‘observe’, the interview
- to ensure that the client is able to give a full account. This can include trying to ensure that the physical arrangements for the interview are conducive to enable full discussion and ensuring there are no disturbances⁶
- to assist the client, the official interpreter and the immigration officer or IND officer in ascertaining any relevant information, facts and evidence which may have a bearing on the application⁷
- to clarify questions or comments made by the interviewing officer if they are unclear, ambiguous or misleading
- to prompt the interviewing officer when relevant enquiries are being curtailed or have not been pursued
- to ensure that independent interpreters are present if the interview is not being undertaken in English
- to ensure that the official interpreter undertakes the role of interpreter only
- to intervene where appropriate for example where there is an unresolved misunderstanding or confusion or where there are significant problems with interpreting which cannot be left until the end of the interview or where the interview is being conducted in an improper manner
- to ensure that the interview record is accurate and contains statements made by the client and that he has had the opportunity to amend or add to the record
- to ensure fair conduct, appropriate breaks, refreshments at relevant points in the interview
- to submit documents that it has been agreed with the client should be submitted

⁶ IAA asylum gender guidelines, November 2000, para 5.18

⁷ UNHCR handbook, paras 192, 196 and 250b

- to keep a verbatim record of the interview and events surrounding the interview
- to provide support and reassurance to the client
- to make any appropriate observations or representations in connection with the conduct, interpretation or content of the interview on its completion
- to attempt to obtain a read-back of the interview and if there is none then to advise the client not to sign
- to raise issues following the conclusion of the interview in connection with bail, temporary admission or detention
- to collect a copy of the IND interview notes
- to try and ensure that the interview is rescheduled if the client cannot continue or it was a completely unsatisfactory interview.

These differences in approach mean that there is a substantial risk of conflict during the course of the interview. IND has indicated that it is unlikely to accept the more active definition of the clerk's role. It is certainly the case that IND is more keen to use the ultimate sanction, the removal of the clerk, if a dispute arises in the course of an interview. The client may be afraid that any intervention will be prejudicial to the successful outcome of their case. It is essential that the clerk continues to explain to the client what is happening if there are difficulties during an interview. During the course of any dispute the clerk should remain polite and mindful of her professional duties towards the client. It is not the clerk's pride at stake but what is in the best interests of the client. The clerk should aim to keep a complete verbatim record of everything that is said and done during the course of the interview.⁸

⁸ The LSC will not pay for attendance at interviews if a verbatim note has not been kept.

Interpreters

Taking instructions in the office

An interpreter will be essential unless the client understands and speaks fluent English.

Some individuals may understand more than they can speak. Some may be able to write and read reasonably fluently but oral communication may be restricted. Some individuals may think they understand and speak fluently but in fact do not.

Age, cultural, religious, race and gender differences will all play a part in the way in which the adviser and the client are able to communicate.

The combination of one or more of these factors will determine whether an interpreter is required for each and every interview, for substantive interviews only, or not at all. If you do not speak your client's language you will be unable to assess what is being discussed. Therefore you must ensure that:

- Selection of an interpreter includes an assessment of their ability to interpret accurately both from English to the particular language/dialect and from the language/dialect to English. (As a general rule it is appropriate to use a native language speaker for oral interpretation.)⁹
- Throughout the interview there is a more or less equivalent amount of time spent in the client's language as in English. (If there is not this should raise questions about the extent to which the interpreter is translating, summarising or advising).
- Both practitioner and interpreter have a very clear understanding of their respective roles and that these have been discussed before instructions are taken. The interpreter is a conduit between the practitioner and the applicant. You should ensure that your interpreter is aware of their responsibilities, (to interpret questions and answers without addition, omission or personal inflection) and that they possess a suitably extensive vocabulary.
- Interpreters do not ask questions which have not been asked by the practitioner.
- Interpretation is in the first person.

Unless it is absolutely unavoidable, for example because you do not have time to arrange an interpreter before your first meeting with your client, you should not take instructions from your client using a family member or friend as interpreter. The presence of someone who is known to your client may be inhibiting. In addition, a friend or family member may be less likely to remain 'neutral', particularly when difficult subjects such as torture or sexual harassment are addressed.

It is essential that you remain in control of the interview.

If it becomes apparent during the course of your interview that your client does not understand your interpreter, or vice versa, then you should abandon the interview immediately. You should ascertain the source of the problem (e.g. client's accent or regional dialect, interpreter's insufficient vocabulary, gender etc) and reschedule with another interpreter who is better placed

⁹ This may not be the case for translations, see below.

to comprehend your client. A deficient interpreter will prohibit you from taking clear instructions and information taken at this stage may cause irreparable damage to your client's claim. If in doubt, abandon the interview.

At interviews with IND

In 1989 the then Home Office minister conceded that independent interpreters¹⁰ could be present at interviews conducted by IND, in addition to the official interpreter provided by them. Historically there have been many problems arising out of the quality of interpreters provided by IND. The concession since 1989 has meant that many of the worst abuses have reduced. An independent interpreter should always be present at any asylum interview where the asylum seeker does not speak fluent English. IND may check the interpreter's immigration status. They must have leave to remain in the United Kingdom with no prohibition on working, or be a British or EU citizen. Asylum seekers and family members are not permitted to act as independent interpreters and will, if discovered, be refused entry to an interview.

The role of the independent interpreter is to ensure that the official interpreter translates accurately and without bias or prejudice.

The independent interpreter should look out for:

- a failure on the part of the official interpreter to translate the interviewing officer's questions or the client's answers fully and accurately
- the official interpreter amending the interviewing officers questions
- the official interpreter asking questions instead of the interviewing officer, commenting on answers given or otherwise interfering in the interview
- a lack of knowledge of political, cultural or other relevant issues resulting in an inability to translate properly (this can arise where the translator is a non-national or has not been in the country of origin for many years)
- any aggression or impatience towards the client
- an over-friendly attitude or comments of a personal nature which can result in the client feeling that what he is saying may not be kept confidential.

The interpreter should not raise problems directly with the official interpreter or the interviewing officer. The problems should be reported to the representative who will decide whether to intervene immediately or at the end of the interview. The independent interpreter will need to take notes. Records of all the problems will be required to decide whether they amount to incompetence which may necessitate a challenge to the interview.

If the IND interpreter does not attend for whatever reason, the independent interpreter should not take the IND interpreter's place. This would compromise their position as independent interpreters. The interview should be abandoned and a further date set.

¹⁰ That is interpreters brought by the client.

The interpreter provided by IND¹¹

The role of the official interpreter is to translate accurately the questions asked by the interviewing officer and the replies by the client in a language and dialect understood by the client. The interpreter should:

- act in an impartial and professional manner
- respect confidentiality at all times
- interpret into direct, first person speech the questions asked by the interviewing officer and the applicant's response
- interpret all other comments made during the interview
- disclose any difficulties encountered with interpretation
- not enter into the discussion
- 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
- not offer advice or express any opinions (remember that the interpreter might, without your or your client's knowledge, pass opinions to the interviewing officer after the conclusion of the interview).

In the event that the interpreter does not behave appropriately objections should be raised to the continuation of the interview with this interpreter.

Translations

Any statement that is handed to IND should be given in written translation to your client, preferably before it is handed in in support of the asylum application. Refusal letters and other important documents should be given to the client in translation. Interview notes should be translated after refusal in preparation for the appeal.

You will usually find that translations are more accurate if the first language of the translator is the language into which you are translating the document.

If your client provides you with documents in his language, you should first check the usefulness of the document with the assistance of an interpreter before you get a translation. Check the veracity of the document carefully. Any document submitted to IND or to the court should be accompanied by an English translation and, if necessary, a statement of authenticity.

The guidance issued by the Legal Services Commission permits translations of relevant documents to be obtained.

¹¹ The official interpreter. IND has recently disclosed guidelines for such interpreters.

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Substantive asylum interviews

The vast majority of applicants submitting an asylum application, a statement of evidence form (SEF) or a statement are later called to interview by IND (if the application has been refused on the grounds of non-compliance your client will be denied an interview). In taking detailed instructions in the preparation of the SEF or statement you will have already built up a detailed understanding of your client's case. However, the interview in these cases poses a very particular test to an asylum applicant and it is very important that your client is given clear advice about the format and purpose of the interview. Ideally, this should be done immediately prior to the interview.

When neither a SEF nor a statement has been submitted

If your client has not submitted a SEF or statement in advance of an interview, the interview conducted by IND or the port is intended to cover all the information that would otherwise have been in the SEF or statement. The process of taking instructions and completing the SEF or statement still has to be undertaken with your client. ► See chapters 3 and 4.

Without a statement or SEF your client may have a lengthier and more traumatic interview. You should consider whether a statement needs to be prepared for your client to hand in at interview (either before or after), or whether your client will rely on being able to provide comprehensive information at the interview. This decision will have to be taken by your client in the light of your advice, which will be based on your assessment of your client's ability to remember everything that has happened to him (which could be difficult given the nature of the interview and your client's likely nervousness), whether your client will be able to give a good and coherent account of what has happened and whether the interview will in fact provide an adequate opportunity for your client to fully explain the basis of his claim.

You will in any event have to hand in a completed one stop notice.
► See chapter 4.

Preparing your client for interview where there has been no pre-submission of a statement or SEF should therefore follow the same preparation as for an interview following submission of a statement or SEF, the difference being that the interviewing officer will not have seen even an outline of your client's case. You will also have to ensure that your client knows to raise issues that are not asylum issues, i.e. other claims to remain that do not fall within the Refugee Convention.

Illegal entry interviews

Your client may be interviewed separately from his asylum claim in connection with the mode of entry to the UK. This interview is to determine whether your client is an illegal entrant and is conducted under caution and in accordance with PACE. If it is decided that your client is to be treated as an illegal entrant he will be served with the relevant illegal entrant notices and reporting restrictions. The power to detain an illegal entrant is not precluded by the making of an asylum claim.

Before the interview

On receipt of the notice informing you of the time and date of the interview, check that IND has allocated the correct language and dialect group interpreter for your client.

If your client is unwell and you wish to reschedule the interview, obtain a medical certificate and forward this to IND **before** the interview if possible.

If your client is due to be interviewed in Croydon, it is extremely unlikely that you will be able to contact IND via the 'general enquiries' telephone number on the day of interview. If your client is being interviewed in Leeds or Liverpool there is a greater chance that you will immediately be able to alert the Immigration Booking Unit (IBU) to the fact that the interview may have to be rescheduled. Practitioners should note that failure to attend an interview without providing an adequate explanation will result in refusal. At present it is virtually impossible to contact Croydon about urgent matters and you may have to sort the issue out on the day, either with or without your client present.

Vulnerable clients

If your client has mental health problems or is in some other way vulnerable explain in writing to IND why you think that it is inappropriate for your client to be interviewed or what issues should be avoided during the interview. ► See chapter 5. If appropriate forward a medical report to IND. If you think that your client has a long-term disability you can request that the application is determined 'on the papers'.

Minors

It is current IND policy to avoid interviewing minors in connection with asylum claims if information concerning the application can be obtained in another way, for example, by the submission of a comprehensive statement. ► See chapter 5. If your minor client is called to attend for interview you should write and ask why IND thinks it is appropriate for this interview to take place. The White Paper *Secure border, safe haven* states that IND intends to call more children for interview.¹

If your minor client is called for interview you should request confirmation that the interviewing officer has been specially trained in interviewing minors. Request details of that training and how long ago it was undertaken; request also details of the officer's experience – how much and how recent.²

¹ para 4.58

² See also *Putting Children First. a guide for immigration practitioners*, LAG, May 2002

If a self completion questionnaire (SCQ) and supporting statement have already been submitted to IND you should argue that there is sufficient information available to allow IND to make a substantive assessment of the claim without an interview being conducted.

If IND insists that your client must attend, arrange for a clerk and a social worker to accompany your client. The clerk should make further representations at the time of interview that the interview should not proceed. Refusal to participate in the interview may result in your client's application being refused.

You should also note that where IND disputes that your client is a minor he will be interviewed. It remains important to maintain arguments for not interviewing but again, be aware that refusal to participate in the interview can lead to a refusal on the basis of non-compliance.

Special arrangements

There are times when it is appropriate to ask IND to make special arrangements for interviews.³ If you have a client who has been traumatised or sexually abused they may find it difficult to discuss this in front of someone of the opposite sex. In this instance it may be appropriate to request an all female or male panel at your client's interview. IND should be advised as soon as possible of any sensitive issues which you would like to be addressed (or avoided) at interview, or any special requirements or interview arrangements required due to the client's vulnerability or circumstances.

Clerks and interpreters for interview

► See also chapter 7.

It is essential that your client is accompanied to interview by a trained and competent clerk and, where the interview is not being conducted in English, an independent interpreter. The clerk and interpreter must possess knowledge of current interview procedures. Ideally, the person attending interview as your clerk will have received ILPA training and will thus be fully aware of their responsibilities at interview.

You should **not** send a clerk who 'doubles up' as an independent interpreter. Clerks and independent interpreters have quite separate responsibilities and duties; one person cannot discharge both responsibilities simultaneously. It is inappropriate for your client's friends or family members to attend an IND interview, either as a clerk or interpreter.

In order to gain access to an IND building the clerk and interpreter will need to show a letter of authority and a recognised form of ID such as a passport, driving licence or credit card.

You must discuss your client's case with the clerk who will be attending the interview to ensure that she is properly briefed on the case and any potential problems, difficulties or requirements.

³ APIs chapter 16.3 refers to interviewing (this is frequently updated).

Interview with client prior to IND interview

If your client has not already submitted a statement the following procedure applies but account will be taken of the fact that IND does not know the contents of your client's claim.

In many cases your client's statement/SEF will already have been sent to IND. IND will use the interview to test your client's statement and to ask questions on areas that appear unclear or contradictory.

Although your client will of course be aware of the basis of his claim it is essential that you go through the statement again. If your client wishes to add information at the interview which does not appear in the statement, an explanation must be obtained for why it was not disclosed earlier. If your client produces documents which you have not previously seen, an explanation should be sought and they should not be handed into IND unless they have been checked and verified. You should discuss with your client the extent to which information should be provided. In general if a statement has already been submitted there should be little need to provide further information.

The extent to which a client provides information where there has been no prior submission of a statement relies on you having discussed with the client the need to ensure that they use the opportunity of questions to disclose all the relevant matters in their case.

Your client will understandably be very nervous at the thought of being interviewed. It is essential that as full an explanation as possible is given about the practicalities of the interview.

You should draw to his attention the following points:

- Explain how he will have a clerk from your firm and an independent interpreter present at the interview and ensure that he understands the arrangements for meeting up. Ensure that your client understands that if by any chance the clerk is late he should not go into the interview without the clerk but should wait at the agreed meeting point.
- Advise your client that if by any chance the clerk does not attend, or if the clerk is excluded, he should repeatedly ask for the interview to be rescheduled to a time when he can be represented.
- If the interviewing officer does not agree to a rescheduling of the interview ensure that you have agreed with your client in advance that he will either refuse to answer questions (thus running the risk of a non-compliance refusal) or will answer questions. If the latter, you will not have an independent verbatim record of the interview which will make it difficult for you to assess.
- Explain that the clerk and the interpreter will sit with the client and the IND interpreter will probably sit opposite.
- Describe the limitations on the roles of the clerk and the independent interpreter. ►See chapter 7.
- Advise that he will be told that he does not have to provide information that has already been provided but questions may be asked about information in the SEF or statement.

- Advise that the interviewing officer may be reluctant to depart from her prepared questions and thus your client may be unable to elaborate on issues set out in his SEF or statement.
- Explain that the clerk will try to ensure that your client has an opportunity to say all that he wishes.
- Explain that he can seek advice from the clerk during the course of the interview, but that alongside this there is a risk that the clerk will be excluded if the client takes advantage of this too frequently.
- Advise your client that if he is distressed or wishes to have a break during the course of the interview then he is entitled to ask for this.
- Explain that the clerk will take a full verbatim note of everything that is said during the course of the interview and will check that the interviewing officer is doing likewise.
- Advise that if your client has difficulty understanding the IND interpreter he must notify the clerk through the independent interpreter.
- Explain that if the clerk perceives that there are problems, she will intervene at an appropriate point in order to try to resolve the difficulty.
- If the problem cannot be resolved the clerk will consider whether a more senior officer should be called, whether the interview should be terminated, or whether the interview should continue and the matter be dealt with by way of comment and/or complaint on conclusion of the interview. The clerk will advise the client accordingly.
- Explain that the clerk will only intervene if she considers it essential to the proper conduct of the interview.
- If it has been agreed that documents will be handed over, this should be done.
- Ensure that your client understands that he will be asked to sign the interview note as a correct and accurate record on conclusion of the interview. The clerk will ask for the notes to be read back, which will almost invariably be refused. In that case the client should not sign the record of interview and the clerk will explain to the interviewing officer that should the notes be read back so that the client has an opportunity to check their accuracy then they would be signed. The clerk will not sign the notes even if they are read back.

There will sometimes be a period of a few days after the interview when any additional information or material can be submitted. If appropriate, a further statement from the client should be drawn up and submitted.

At the end of this appointment arrange another appointment with your client for after the IND interview, at which you will discuss the interview and determine if any additional information needs to be submitted.

The interview

Prior to the recent major increase in Integrated Casework Directorate (ICD) caseworker numbers, asylum interviews were conducted in the most part by port immigration officers. Most interviews are now conducted at ICD offices in Croydon, Liverpool and Leeds.

In previous years, it was not uncommon for asylum interviews to take a whole working day to complete. It is now rare for SEF interviews to last for longer than an hour and SEFless interviews may not take much longer.

As stated earlier it is essential that a clerk accompany your client to interview. This is critical for the progress of the interview. ►See chapter 7.

If IND proceeds with its stated intention to interview children it will be extremely important to ensure that the interviewing arrangements are appropriate for child interviews.⁴

Interventions

At the beginning of the interview, the interviewing officer will read a statement advising that the clerk should not interrupt and that observations should be made at the end of the interview. It is inappropriate for the clerk to state to the interviewing officer that she agrees with this statement.

If there are substantial difficulties affecting the ability of your client to participate fully and properly in the interview the clerk should ensure that she intervenes immediately. For example, if the interviewing officer is failing to keep full notes of the interview, or is preventing your client from answering questions in their own time, then it is **not** best practice to wait until the end of the interview to address these matters. If the clerk does have cause to intervene, her comments must be clearly focused and demonstrably pertinent. If the interviewing officer refuses to address problems raised, then the clerk should ask to speak to a senior caseworker – or Chief Immigration Officer (CIO) if at a port.

The clerk should also advise your client via your own interpreter of the difficulties that she is encountering and explain that a resolution is being sought. If the interviewing officer insists on proceeding without consulting a senior officer repeat your request. It is not in your client's best interests to proceed with a defective interview. If the interviewing officer refuses to allow the clerk to speak to a senior during the course of the interview raise the matter once more at the end of the interview and insist again on speaking to a senior officer. If the clerk is refused access to a senior, ask for a full explanation as to why.

If any problems occur which are insufficient to merit immediate intervention, the clerk should keep a note and raise the issues on conclusion of the interview. All issues raised and all responses should be recorded.

⁴ See also *Putting Children First. a guide for immigration practitioners*, LAG, May 2002

Conduct of the interview

The interview should be conducted in a relaxed and impartial manner. If the interviewing officer has adopted an aggressive, obtuse or otherwise intimidating manner the clerk should object immediately. If the interviewing officer expresses any inappropriate personal opinion about your client's case an immediate objection should be raised.

If the interview has been superficial, or if your client has been prevented from discussing matters which are important to the claim, the clerk may consider asking the interviewing officer to ask the client supplementary questions.

The interviewing officer should keep a full verbatim record rather than an abbreviated note thereby being sure to record all pertinent information.

Inaccurate interpretation

It is always essential to ensure that an independent interpreter attends if your client is being interviewed in a language other than English. It is not uncommon for interviews to deteriorate because of inaccurate interpretation on the part of the official interpreter. The role of the interpreter and how to deal with issues that may arise is set out in chapter 7. If a defective interview is allowed to continue unchecked then it may be more difficult after the interview to deal with the problems generated during the course of the interview.

Interview arrangements

There have unfortunately been some cases reported to ILPA where IND has attempted to ensure that the clerk and independent interpreter are seated at a distance from the interviewing officer, applicant and IND interpreter. Any attempt to suggest such an arrangement should be strongly resisted. It should be explained that it is the clerk's duty to represent the client and this cannot be done if she is being asked to sit in a place where she is unable to take part in the proceedings. Ideally, the clerk should be seated between the independent interpreter and your client. The interviewing officer and official interpreter should be seated opposite your client. If the interviewing officer refuses to accede to this reasonable request, the clerk should ask to speak to a senior officer. In most instances this matter can then be addressed quite quickly. The clerk should not proceed with the interview unless she can fulfil a proper role: if the clerk cannot hear what is going on, or cannot see how much of the interview the interviewing officer is writing down, she will not be able to assist your client.

Conclusion of the interview

IND 'abolished' some years ago the practice of interviewing officers reading interview notes back to applicants at the conclusion of the interview. Applicants are now requested at the end of the interview to sign a document confirming that the purpose of the interview was to obtain further details concerning information provided in the SEF or statement or to establish the basis of the claim and that he has understood the questions put to him and was given the opportunity at the end of the interview to make further comments. Unfortunately, IND does not accept that a 'read over' (which was previously accepted as being an integral part of the interview) is now necessary. IND does not accept that the invitation to endorse an unapproved statement is extremely bad practice. IND has indicated that in certain circumstances, (where the client is illiterate, vulnerable or unstable), it will consider a 'read over' and that in any case it remains within the discretion of each interviewing officer to decide whether it is appropriate to allow the notes of the interview to be read back to the applicant. In practice this means that the interviewing officer will routinely decline any such request.

It is essential that neither the clerk nor your client sign the declaration on completion of the interview. The clerk should explain that your client would consider endorsing the notes of interview if he is given the opportunity to have the notes read back. Even if the notes are read back the clerk should refrain from signing the notes. The clerk's signature may be interpreted as an endorsement of the interview and may compromise later attempts to question the conduct or content of the interview.

It is essential that the clerk raise any matters at the end of the interview which have not been raised previously.

At the end of the interview, the clerk may also need to discuss with the interviewing officer issues of temporary admission, bail or detention. The clerk must be in a position to advise your client if these matters arise. It is therefore best practice to anticipate any problems that may occur before the interview commences.

It is essential that the clerk obtain a photocopy of the interview record notes and that she retains a notice of any further interviews that your client is requested to attend.

IND may advise, on conclusion of an interview, that any further information in support can be sent within a certain number of days. In some cases, even though time for submission of additional material has been given, IND may take a decision to refuse before the time limit has expired. A complaint should be raised.

After the interview

You should examine both the clerk's notes and the interviewing officer's notes of the interview and any comments on the conduct of the interview with your client as soon as possible in order to decide:

- Should any additional statement be submitted?
- Should any further evidence or written representations be submitted?
- Should an expert's report be submitted?
- Should any complaint as to the conduct of the interview be made?

If you feel that your client has answered questions ambiguously or has given information at interview which departs from his previous instructions you should address this immediately by way of an explanatory statement from the client or a written submission from you setting the information given by the client into the context of the country information and/or the requirements of the Refugee Convention.

If you feel that there are reasons to complain about the conduct of the interview you should write immediately to the Briefing and Complaints Section, 5th Floor, Lunar House, Wellesley Road, Croydon CR9 2BY.⁵ Your letter should make clear reference to the matters that have caused you concern by referring to the relevant passages in the interview notes (or where appropriate your representative's notes).

If you feel that your client's evidence was impaired at interview because of serious psychological or emotional disturbance you should:

- Discuss with your client the possibility of referring him to an appropriate healthcare professional.
- Inform IND that you are seeking a professional opinion which may result in the submission of medical or other report.
- Request that no decision is taken on your client's application pending the submission of a medical report.⁶
- Arrange for your client to be assessed by a specialist immediately. If you are requesting a report rather than arranging counselling it is important that you ask the practitioner concerned to provide you with an estimate of how long a report is likely to take.
- Keep IND informed of all subsequent appointment dates and other matters which may affect the report's date of submission.

If your client gives you documents after any time limit for post-interview submissions has passed, or where there was no time given for submissions but the application has not yet been determined, these must be sent to IND or the Port Immigration Service immediately. It is advisable to send all representations (particularly where original documents are sent as enclosures) by recorded delivery.

⁵ As with all IND addresses, this may change in future.

⁶ See appendix 2

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Expert evidence

*'An expert is a person with a high degree of skill and knowledge in a particular subject, who has relevant and up to date expertise with regard to issues in the case, and sufficient education and communication skills to produce a clear written report and, if necessary, to provide helpful oral evidence to the court.'*¹

Part 35 of the Civil Procedure Rules (CPR) governs the use of and instruction of experts in litigation generally. The Expert Witness Institute² produced a code of guidance on expert evidence in December 2001 setting out the procedure to be followed in instructing an expert. Although the CPR are not directly applicable to immigration hearings or to the presentation of expert evidence in support of your client's case to the Home Office, it is advisable to instruct an expert in accordance with these rules and guidance.

Is an expert report required?

It will be appropriate to consider whether additional documentary evidence, including specialist reports in support of an application, should be obtained and submitted either at the time that the statement is submitted or shortly thereafter. An assessment of the need for such a report or the collating of supporting documentation will need to be undertaken whilst instructions are being obtained. It may well be that your client's statement is sufficient on its own and there is no need for further supporting documentation or written submissions to be made at this time. Alternatively, it may well be that the information available from various non-governmental organisations (NGOs), or country reports produced by IND or the US State Department for example, add sufficient weight to the asylum seeker's claim and set it within sufficient context, without the necessity of a report specifically about the client or the client's situation.

If you decide to commission a report, it is extremely important that you identify the nature of the report required and instruct an appropriate expert. In order to provide a valid opinion the expert must be properly instructed and provided with the necessary information with which to produce a report and the report, once produced, must make clear the extent to which the expert does in fact have the expertise to provide the opinion given.

¹ Civil Procedure Rules 35.2.1

² The Expert Witness Institute, Africa House, 64–78 Kingsway, London WC2B 6BD www.ewi.org.uk

The use of expert evidence in asylum appeals is often an effective method of bolstering your client's claim both in terms of the application to the Home Office and the appeal before an adjudicator. It may assist in terms of the historical assessment of fact and prospective assessment of risk. Unfortunately, the increased use of expert evidence in asylum appeals appears to have been matched by a more restrictive approach by the courts and tribunal to the circumstances in which such evidence may be adduced³ or relied upon. It is important to ensure that the context within which the expert report is adduced is clearly set out and that the expert's qualifications are annexed. If an expert opinion is tendered by someone without the appropriate skills and knowledge then the report will not add weight to your client's claim.

Circumstances in which the use of expert evidence may be beneficial

The following are examples of the circumstances in which the need for expert evidence most commonly arises:

- to establish that your client has previously suffered physical abuse or torture
- to establish that your client is suffering from psychological damage, for example post traumatic stress disorder (PTSD)
- to deal with the conditions in the country to which your client faces removal, for example the attitude and practice of the security forces towards certain minority groups.

All of the above are likely to be directly relevant to the assessment of your client's credibility.

Establishing physical abuse or torture

If your client's account of what happened indicates that they have suffered physical abuse or torture consideration should be given to instructing an expert who can corroborate this. It may well be that there is no physical evidence of the abuse or torture, as is often the case following rape or sexual violence,⁴ and that it may be more appropriate to instruct an expert who can comment on your client's psychological condition. If it appears that your client may have suffered rape or sexual violence it is preferable that this issue is explored by someone of the same gender.⁵

The fact that there may be no visible physical marks does not mean that it is not appropriate to instruct an expert. It may be that your client has suffered internal injuries which will only become apparent when your client is appropriately examined. Equally, as many adjudicators and IND are quick to point out, the presence of marks does not necessarily suggest abuse or torture. It is not uncommon for an adjudicator to reject an appellant's account of how the injury occurred, substituting an innocent explanation for the injury. Plainly this will depend on the circumstances of each case.

³ See in particular *Slimani* (01 TH 00092) unreported, IAT

⁴ See further IAA asylum gender guidelines para 5.57

⁵ IAA asylum gender guidelines paras 5.15–5.40

Establishing psychological harm or post traumatic stress disorder

Needless to say this issue must be approached sensitively. Your client may indicate that they are suffering from psychological damage or PTSD by stating that they feel stressed or depressed. It may be that this is due to the stress arising out of claiming asylum⁶ but it may be a direct consequence of events that occurred in your client's country of origin. An inability to recall events is often a consequence of PTSD.

In addition to instructing an expert to comment on your client's condition, you should also consider urging your client to obtain psychological treatment or counselling. Your client's GP should be made aware of this.

It may be necessary for the expert examining your client to take a full history of what led to the trauma, but you should insist that the history is not reproduced in the final report. It is unnecessary and can give hostages to fortune.

Country of origin expert evidence

A key issue in most asylum cases is the human rights conditions in the country of origin. This may be the case even if your client's account of what occurred is accepted by the Home Office which may seek to argue that conditions in the country of origin have changed to such an extent that although there was past persecution there is no future risk.

IND will usually rely on its own Country Information Policy Unit (CIPU) reports to demonstrate that there is no risk to your client if removed to their country of origin.⁷ The picture portrayed in CIPU reports frequently contrasts with that contained in Amnesty and other NGO reports.

In addition to obtaining general reports such as those from Amnesty, Human Rights Watch and the US State Department, it may be of value to your client's case to obtain an expert report dealing with specific issues that arise in his case. The following are examples of when this may be appropriate:

- if internal flight is an issue (the more general reports do not always address this issue sufficiently or at all)
- the effectiveness of state protection where your client faces the risk of persecution at the hands of non-state agents
- if your client is a supporter or member of a political group or member of an ethnic or religious minority which is not covered in detail or at all in the general reports
- if your client has been the victim of domestic violence and the attitudes and practices of the state authorities in terms of providing protection is an issue
- if your client is vulnerable, for example has mental health problems, is a child or a woman, this may raise specific issues in connection with the availability of state protection, internal flight or analysis of the Convention reason.

⁶ This may of itself be relevant to an application for exceptional leave to remain where it is clear that removal of your client may lead to further psychological trauma that reaches the Article 3 ECHR threshold.

⁷ The Home Office rarely supplies these reports in advance however they can and should be obtained from the IND website.

Competence of experts

The competence of experts is a matter which is increasingly being scrutinised by the Home Office and adjudicators. In *Slimani*⁸ the Tribunal in a starred decision commented:

- 17 We would add a few words about expert evidence such as that given by Mr. Joffe. Adjudicators and the tribunal regularly have placed before them opinions of individuals about the situation in the country from which the appellant has come and, more importantly, about what is likely to happen to the appellant should he or she be returned. Often those opinions are in letters or statements and the writer is not called to give evidence or cross-examined. Some such experts are highly respected (and we are happy to place Mr. Joffe in this category) and at the very least their evidence can be said to have been given in good faith and to be based on reliable sources. Others range from the generally reasonable to the unacceptable and even venal. But all suffer from the difficulty that very rarely are they entirely objective in their approach and the sources relied on are frequently (and no doubt sometimes with good reason) unidentified. Many have fixed opinions about the regime in a particular country and will be inclined to accept anything which is detrimental to that regime. This means that more often than not the expert in question, even if he has the credentials which qualify him in that role, will be acting more as an advocate than an expert witness. While the principles which apply to expert witnesses called in High Court actions are not directly applicable, they give guidance when the weight to be attached to such evidence is considered. The most important are the need for independent assistance to the adjudicator or tribunal, the prohibition against assuming the role of an advocate and the need to specify the facts upon which an opinion is based: see *National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep. 68 at 81–82 per Cresswell, J.
- 18 The tribunal and adjudicators have sometimes been criticised by the Court of Appeal for apparently failing to take proper account of experts' opinions. Thus in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449 at p472 Brooke LJ referred to the tribunal's dismissal of considerations 'put forward by experts of the quality who wrote opinions in this case' as 'completely wrong'. Certainly the tribunal was wrong to fail to explain why it did not place any weight upon the opinions, but, as the subsequent analysis when the case was reconsidered by the tribunal showed, the opinions were contradictory and unsatisfactory. The reality is that the tribunal is frequently aware from experience of the reliability of the various experts whose reports are produced. But the situation in any country has to be assessed upon a consideration of all relevant material which will include any reports of experts. The adjudicator or tribunal must then decide what weight to attach to those opinions.
- 19 What we have said is not an attempt at self-justification or an attack upon the Court of Appeal. The tribunal was clearly in error in failing to explain why it rejected the experts' views and in all cases reasons should be given for so doing. So here the adjudicator and the tribunal should have given reasons for rejecting Mr. Joffe's opinion and could not assume that it would be appreciated that the absence of any supporting material in the Country reports was without spelling it out a sufficient reason. It is important that in an appropriate case adjudicators and the tribunal should not spare an expert's feelings and should state clearly that his evidence is for whatever reason unacceptable.
- 20 We would add that all too often reports prepared for a specific case are relied on in other cases in which appellants from the same country are represented by the same advisers. This should not happen unless the report is stated to be general and to be valid for all cases or the author is asked to confirm that he is content for it to be relied on. Apart from anything else, conditions change and views which may have been valid when the report was written might not be 12 months later.

It is essential that the report starts with a detailed explanation of the writer's credentials and experience. The expert should only be asked to provide an opinion about which they are qualified to comment. When dealing with psychological trauma it will rarely be sufficient to rely on the opinion of a GP. Either a psychologist or psychiatrist should be consulted.

The following are matters that should be included in the expert's account of their credentials:

- qualifications
- research experience
- publications
- current and previous posts
- examples where evidence has been previously accepted by a court or Tribunal
- previous experience as an expert witness.

Instructing an expert

Once you are satisfied that a particular expert is appropriately qualified and sufficiently experienced to comment on the issues arising in your client's case consideration must be given to providing detailed instructions. A failure to do so may lead to the production of an extremely informative but highly irrelevant report.

Your instructions must specify the issue(s) the expert is expected to deal with and the particular questions that need to be answered. It is often helpful to have a conversation with the expert in addition to sending detailed written instructions.

Letter of instruction to professionals

Detailed guidance in drafting letters of instruction is given in children's proceedings by the Expert Witness Institute.

In brief the letter of instruction should:

- summarise the current immigration status of the asylum seeker
- detail the issues that should be placed before the Home Office
- give an indication of the wishes of asylum seeker to remain in the UK
- provide a chronology
- enclose relevant immigration or other documents, for example medical reports, statements made in support of the asylum application, any court orders
- set out the specific questions/issues you wish the professional to address
- set out the time scale for the production of the report
- confirm that you wish the professional to restrict herself to a professional opinion and not provide opinions that she would not be able to sustain under cross-examination

- request the professional qualifications be included as an annex to the report
- confirm estimate/payment of fees.

In order to assist your expert in preparing the report you should send the following with your instructions:

- SEF or statement
- records of interview
- statement(s) of client
- Home Office refusal letter.

You should insist that the expert provides you with a draft report before it is finalised. You may feel that the report is not presented in the most helpful manner and would want to suggest changes to format or style, or the removal of irrelevant or emotive comment. There is nothing unethical in this as long as you are not inviting the expert to misrepresent her opinion.

Finally there is no obligation to disclose an unfavourable report to the court or the other side.

In some circumstances it may be appropriate to call the expert to give oral evidence at an appeal. This may be difficult because of the manner in which asylum appeals are listed and difficulties in obtaining public funding.

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The refusal letter, drafting grounds of appeal and additional grounds

Section 69 of the Immigration and Asylum Act (IAA) 1999 deals with asylum appeals and the Convention referred to is the Refugee Convention. If your client has been refused asylum but no removal directions have been set it had been thought that your client would not have an effective appeal, for example where refused asylum but granted exceptional leave. The case of *Saad, Diriye and Osorio*¹ held that the client will be able to appeal the refusal of asylum despite removal directions not being set. Where the client asserts that removal would breach his human rights or is racially discriminatory there is an appeal under s65 of the IAA 1999.

Refusal letters

The 'annex B' letter

In many cases IND will notify you in writing that it has fully considered your client's claim and that it is now in a position to make a decision on the application for leave to enter the UK. This letter is known as an 'annex B' letter. It requests submission of any further information which you feel may affect an application for leave to remain in the UK 'other than as an asylum seeker'. The 'annex B' letter stipulates that you should not submit information which has already been forwarded to IND and you are required to respond within seven working days.

On receipt of an 'annex B' letter you should:

- Re-interview your client immediately. You may not be aware of recent changes in your client's circumstances (for example, your client may now be cohabiting with a partner whose immigration status may trigger a further application for leave to remain in the UK).
- Note any serious health problems experienced by your client and/or dependants.
- Note if your client and/or dependants are engaged in full time education.
- Take detailed instructions regarding the nature of the relationship your client may have with other family members or relatives domiciled in the UK.

You should reply to an 'annex B' letter disclosing pertinent information regarding your client's circumstances.

The 'annex B' letter is not an appealable decision.

¹ *Saad, Diriye and Osorio*
[2001] EWCA Civ 2008

Notification from the Benefits Agency

For certain categories of older claims, applicants may receive notification of a negative asylum decision from the Benefits Agency (attached to a refusal of income support payment) weeks or months before notification of a decision by IND. If your client is a port applicant you should check whether or not IND has forwarded a refusal notice and appeal papers to the Immigration Service. Where an applicant has a legal representative then papers notifying a decision should be served on both parties.

Advise your client that this letter is a precursor to a refusal letter. Confirm that the information provided by your client will be used to reply to the 'annex B' letter and may be used in drafting the grounds of appeal. Ensure that you receive consent to incorporate relevant information in the grounds of appeal.

Notification of refusal

In some cases you will not receive an 'annex B' letter but another letter stating that your client has been refused asylum and details will be sent later. This is not an appealable decision.

Sometimes you will receive this letter as well as an 'annex B' letter.

The reasons for refusal letter

Details of a negative decision on an asylum application are communicated in a letter known as a 'reasons for refusal letter'. This should be based upon an assessment of information contained in your client's statement of evidence form (SEF), statement, interview and any other representations or supporting documents that you will have sent to IND in the course of the application.

In response to criticism from practitioners that refusal letters were sometimes constructed around vague and poorly reasoned *pro forma* paragraphs, IND has instigated a continuous training and assessment programme for caseworkers. They are now instructed to compose refusal letters that address, analyse and assess the salient points of your client's claim. According to IND, the refusal letter should inform the applicant precisely why the SSHD does not accept that he has established either a well-founded fear of persecution for a Convention reason or that there are grounds for seeking protection under the provisions of the ECHR.

Unfortunately, the vague, incoherent or factually incorrect refusal letter is not a thing of the past. In reaching a decision on an application IND is heavily reliant upon the IND country information documents and it is not uncommon for the reasons for refusal letter to consist of a string of standard paragraphs 'cut and pasted' from the relevant Country Information Policy Unit report, grafted to an often inaccurate précis and assessment of your client's claim.

IND has indicated that in future all notices of decision will be served from a 'virtual port' in Croydon. It is anticipated that this will eliminate some of the difficulties encountered when there is a delay between the decision being taken by the Home Office and the decision being delivered by the Immigration Service to port applicants.

On refusal your client will receive the following documents:

- reasons for refusal letter
- notice of removal directions
- appeal papers for appeal to an adjudicator
- one stop notice
- statement of additional grounds form (SAG).

Your client may also be given a temporary admission notice and/or notice to an illegal entrant.

Applicants and their representatives are given 10 working days in which to submit an appeal. The 10 days are deemed to commence two working days after the date on which refusal papers were posted.² In the past, there has been some confusion as to whether the appeal should be submitted directly to IND or to the Port Immigration Service. Ensure that you send the appeal to the correct address as set out on the papers served.

- At present all appeals and accompanying SAG must be sent to the Appeals Support Section, PO Box 1275, Croydon CR9 1HL.
- Appeal papers should always be sent by recorded delivery.
- It is advisable to notify the port that an appeal has been filed and to request an extension of temporary admission accordingly.

Drafting grounds of appeal

If your client received an 'annex B' letter you will already have taken detailed instructions and it may not be necessary to re-interview him in order to complete the notice of appeal and SAG. If you have not interviewed your client you will have to do so to be able to complete these forms properly. It is advisable to interview your client concerning the grounds of appeal: if you sign the notice of appeal on behalf of your client you are signing to confirm that your client agrees with the grounds of appeal and you cannot sign this if you do not have your client's consent.

Your grounds of appeal must address **all** the points raised in the reasons for refusal letter. Even where IND appears to have relied upon standard arguments – which may appear and re-appear with alarming regularity in other refusal letters – you must still address these arguments. In the past, some practitioners have relied upon standard short 'skeleton' arguments when appealing against the refusal letter. It is advisable to lodge grounds of appeal which tackle every contentious issue contained in the refusal letter and which frame, in the most direct and detailed way, the basis for your assertion that your client's application has been misconstrued. You should contest procedural assertions by IND that have resulted in, for example, refusal on the basis of non-compliance. Similarly, you should refute an assertion by IND of non-compliance if your client's interview was curtailed for any reason or if your client refused to answer questions in your absence.

² Immigration and Asylum Act 1999, s10(4)

A generalised *pro forma* response to the refusal letter will fail to identify the grounds of appeal in the detail required by the IAA.

When responding to the refusal letter you should, where possible, cite the research material which you have relied upon in your rebuttal.

The statement of additional grounds

When asserting that your client's human rights may be infringed if returned to his home country, it is essential that you demonstrate **why** you are making that assertion. It is not enough to merely assert that removal of your client would be in breach of Article 8 of the ECHR without explaining in detail, and with clear reference to the particularities of your client's circumstances, why this is so. If you make a blanket and unqualified assertion of future human rights abuses you are likely to receive a letter from IND requiring elucidation.

► See chapter 4 for further information on SAGs and one stop notices.

Response to grounds of appeal

The IND response to your SAG or grounds of appeal (sometimes confusingly referred to as 'supplementary refusal letters') may prove to be more detailed than the original refusal letter.

You are usually given five working days to amend or supplement your original grounds of appeal in the light of such a response. Again, your response, if any, should be minutely focused and all references to additional material should be germane. In some cases this additional refusal does not in fact add anything to the original refusal.

Your grounds of appeal may already have dealt with the issues raised by IND. You are not required to respond, but you may consider it appropriate to reply referring to your original grounds of appeal or other documentation submitted, or simply rebutting their assertions or correcting their errors in interpretation of your grounds.

Certified refusals

Your client's application may be certified³ because, for example, IND alleges that your client's application is manifestly unfounded and your client's claim is not one to which paragraph 9(7) applies because your client has not adduced any evidence relating to torture.

If faced with certification of your client's claim, it is essential that you challenge this decision.

Be aware that if your client does exercise his right of appeal of a certified refusal, then this will be subject to an 'accelerated appeals procedure'. If the certificate is upheld by the adjudicator your client will not be able to pursue an appeal to the Immigration Appeal Tribunal.

³ Immigration and Asylum Act 1999, schedule 2, para 9(4)

If the certificate is upheld, the current procedure rules require the determination to be sent to the respondent initially rather than to both parties; the Home Office will then serve the determination on the appellant.⁴

The White Paper *Secure borders, safe haven* states that the certification procedure is to be repealed⁵ but no detail of the proposed repeal has yet been published.

Controlled legal representation assessment and the merits test

When you receive a refusal notice, it is essential to discuss with your client whether or not he is eligible for assistance under CLR. You should **not** assume that you can automatically proceed to signing a CLR simply because you have represented your client in the past. Aside from conducting a financial eligibility test, you will also need to assess whether representation at appeal satisfies the merits test. ► See chapter 2.

Perverse decisions

Occasionally IND issues refusal letters that are so wide of the mark that it is worth writing directly to the IND chief caseworker⁶ to ask for the decision to be reviewed. IND has indicated that, in exceptional circumstances, it is willing to consider representations from practitioners who feel a particular refusal letter is manifestly perverse. IND has warned practitioners that this mechanism for a 'second opinion' should not be abused and this pre-appeal review will be withdrawn if practitioners bombard IND with complaints concerning every refusal notice. IND does occasionally withdraw negative decisions where there is clear evidence that the decision is manifestly unsustainable. You should therefore use your discretion to decide whether or not to utilise this option. In any event you should lodge an appeal, drawing attention to the complete nonsense of the decision in the grounds of appeal.

After the appeal has been lodged

An outline of the requirements to prepare an appeal is set out in chapter 14.

⁴ The Immigration and Asylum Appeals (Procedure) (Amendment Rules) Act 2002

⁵ Para 4.65

⁶ David Dunford in Croydon; Nigel Hills if the decision has been made by Leeds or Liverpool ICD

Detention

The Immigration Act 1971 Schedule 2, paragraph 16 sets out the powers of immigration officers to detain. The SSHD also has powers to detain.¹ The following are liable for detention:

- those seeking leave to enter
- those refused leave to enter
- those who have entered in breach of a deportation order
- those who have been served with a decision to deport
- those subject to a deportation order following a court recommendation for deportation
- those who are illegal entrants
- those who have breached their conditions of stay.

The IND operational enforcement manual² sets out the criteria for detention. In brief terms the policy is 'to grant temporary admission/release whenever possible and to authorise detention only where there is no alternative. The aim is to free detention space for those who have shown a real disregard for immigration laws and whom we can expect to remove within a realistic timetable'. In reality practitioners will be aware that this policy is not strictly followed.

The White Paper *Secure borders, safe haven* sets out the intention to establish a regime of induction³, accommodation⁴ and removal centres⁵. The intention is that all asylum seekers will attend an induction centre for between one and seven days. On conclusion of an initial interview they will then either be permitted to go and live with friends or relatives, dispersed to allocated accommodation, sent to an accommodation centre or detained in accordance with the usual detention criteria. The Home Office does not intend to amend the Oakington reception procedure.

The incorporation of the ECHR and in particular Articles 3 and 5 have a bearing on arguments against detention.

If a decision is taken to detain an asylum seeker or members of the family of an asylum seeker, the immigration officer is obliged to state the reasons for the detention. The accuracy or lack of detail of such reasons can form part of the arguments for an application for temporary admission/release or bail.

1 Immigration Act 1971, schedule 3, para 2

2 IND operational enforcement manual, chapters 38 and 29 give guidance to IND on bail procedures, copies can be obtained from BID.

3 Paras 4.20–4.24

4 Paras 4.28–4.41

5 Paras 4.74–4.82

A further basis for short-term detention occurs where your client falls within the criteria of those deemed to be appropriate for the Oakington procedure. Oakington reception centre is a detention centre but is not subject to the usual criteria that normally have to be applied in determining whether to detain someone. The criteria for Oakington detention are largely based on nationality and on an assessment of the claim. The criteria change frequently and reference should be made to ILPA mailings for current criteria. You must be aware of the current nationalities and criteria when advising your client.

Some seven or so days after detention your client will be dispersed to accommodation allocated under NASS or will be able to go and live with friends or relatives or will be detained elsewhere.

There has been a challenge to detention at Oakington on the basis, *inter alia*, that such detention breaches Article 5.⁶ The case, although initially successful, was lost in the Court of Appeal and is due to be heard by the House of Lords. The induction and accommodation centre regimes are not designated as detention regimes. It is not possible to identify whether such regimes will be open to challenge under Article 5 until the detailed criteria and conditions are published.

Temporary admission/release

Pending a decision whether to grant leave to enter the Immigration Service will decide whether or not to detain the applicant. In the latter case they grant temporary admission (TA). Temporary release (TR) can be given if a decision to refuse has already been taken but a decision not to detain is also taken. Temporary release can also be granted if the applicant lawfully entered the UK and has overstayed permission to stay.

TA/TR is granted normally for a limited period of a few days or weeks (three or six months or one year for asylum seekers).

Oral and written arguments can be put contesting the reasons for detention irrespective of whether a bail application is made.

If granted temporary admission the applicant will be given an IS96 which sets out the conditions of admission. The conditions may include: a condition of residence, a prohibition on employment, a requirement to report on a regular basis and the address to which the person must report; details of next interview. A failure to comply with the conditions imposed renders the person liable to detention.

He will also be given an application registration card (ARC). Any changes of address must be notified to the issuing authority otherwise the applicant becomes liable to detention. You should also notify any changes of address to the appellate authorities, if any, for which there is a dedicated post box.

⁶ *R (on the app of Saadi & ors) v Secretary of State for the Home Dept* [2001] EWCA Civ 1512

Bail⁷

An application for bail can be made either to a Chief Immigration Officer⁸ (CIO) or to the Immigration Appellate Authority⁹ (IAA) or both if the CIO takes a long time to come to a decision or makes an adverse decision. There is no restriction on the number of bail applications that can be made.

The current direction from the Chief Adjudicator¹⁰ states that bail hearings must be listed within three days of the application being submitted. There is no requirement for sureties although it may be easier to obtain bail if sureties are available.

Representatives should ensure that:

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

Assistance in making bail applications can be obtained from Bail for Immigration Detainees (BID).¹¹

7 The Immigration and Asylum Act 1999 Part III which has not been implemented introduced two routine bail hearings for immigration detainees. *Secure borders, safe haven, Home Office, February 2002* states that part III will be substantially repealed.

8 The White Paper *Secure borders, safe haven* para 4.84 states that the power to grant bail will be widened to include 'staff...outside the immigration service'.

9 In some limited circumstances a bail application cannot be made to the IAA and has to be made to the Administrative Court e.g. if a person has a deportation order signed against them.

10 Bail Guidance notes for Adjudicators from the Chief Adjudicator, issued February 2002.

11 BID, 28 Commercial Street, London EC1 6LS, tel. 020 7247 3590

This section is a brief outline of current process and procedure about work and benefits. It is not a full analysis of the problems that your client will or may have. It is essential that you seek expert advice and assistance when dealing with issues that fall outside your competence.¹ You must keep up to date with changes.

Work

Current Home Office policy² is to allow asylum seekers to take employment if no decision has been taken on their claim within six months of the date of the application. Once an adverse decision has been taken, permission to work will not be granted. If permission to work was granted and the asylum application was subsequently refused, the permission to work will not usually be withdrawn until any appeal has been finally determined and the negative decision upheld. If your client does not come within either of the above categories it may be possible to argue that exceptional circumstances render it appropriate to grant permission to work, but this is very difficult to win.

It is necessary to ensure that permission has been obtained from IND and is reflected by an endorsement on the IS96 (or the standard acknowledgement letter (SAL) or application registration card (ARC)) or a letter from IND stating there is no restriction on working.³

IND will not confirm an entitlement to work to an employer over the telephone.

Where the Immigration Appellate Authority (IAA) has granted your client bail there will be no specific reference to permission to work. In some cases it is possible to persuade IND to issue a separate letter, alternatively the court may be persuaded to note on the grant of bail that there is no prohibition on working, however, there is no obligation or requirement for either. You may have to provide a letter to your client referring to an IND letter confirming that there is no prohibition on working in the grant of bail, in such a case your client may work.⁴

Dependants are not permitted to work unless there are wholly exceptional or compassionate circumstances.

¹ See *Support for Asylum Seekers*, Willman, Knafler and Pierce, LAG 2001

² Asylum Policy Instructions chapter 8, s3. It is not known at the time of writing whether there will be any changes to asylum seekers' ability to work.

³ See Immigration (Restrictions of Employment) Order 1996

⁴ See appendix 4

NASS (National Asylum Support Service)

An applicant for asylum (or for leave to enter or remain on the basis that removal would be a breach of Article 3 of ECHR) who has no means of support may apply to NASS for support.

Those who applied for asylum before 4 February 1996 were entitled to income support. Those who applied after that were not unless they applied for asylum at the port at the time of entry. On 6 December 1999 the Immigration and Asylum Act 1999 created NASS. Some clients may still fall under some of the old provisions.

Under the current system, the asylum seeker will be referred to a reception assistant, who is an employee of a voluntary sector organisation acting under a contract from NASS, for the completion, in English, of a long and complex NASS application form.⁵ He will also be found temporary accommodation if he has nowhere to stay.

From mid-February 2002 it is intended that all new asylum applicants claiming in London (i.e. Croydon) will be sent to Heathrow or Crawley Emergency Accommodation and then dispersed outside London. Migrant Helpline will run a service in Croydon from February 2002 to take people to the emergency centres. The Refugee Council will run a one-stop shop in Brixton for those asylum seekers who do not require accommodation.

NASS will determine whether the applicant is destitute and if so whether entitled to support. If support is considered necessary he will be allocated accommodation, if required, and vouchers redeemable for cash. Your client may be dispersed outside London.⁶ Vouchers are due to be phased out by the autumn of 2002 and replaced with a smart card. This card will contain biometric information to identify the asylum seeker and will be used to access cash and other support. In the White Paper *Secure borders, safe haven*, the Government has stated that the current option of support without accommodation will be phased out.⁷

There will also be an increased use of induction centres followed by compulsory residence in accommodation centres. The White Paper⁸ states that health, education and legal services will be provided, either on or off site, at the accommodation centres. Families both with and without children will also be treated in this way.⁹

The current emergency centres may become induction centres. The first induction centre has opened in Dover. It is intended that there will initially be four centres, not all in Dover. NASS staff will take a decision on support on the basis of information provided by the Immigration Service, customs and the voluntary sector.

⁵ See *Support for asylum seekers*, Willman, Knafler & Pierce, LAG 2001 for essential advice and assistance on current scheme.

⁶ The vast majority of accommodation is outside London. Existing asylum seekers who are receiving treatment from the Medical Foundation for the Care of Victims of Torture or other medical or psychiatric treatment which is not available outside London, or have a child who has been settled in school for more than a year, can usually successfully argue against dispersal.

⁷ Para 4.53

⁸ Paras 4.31 and 4.36

⁹ Paras 4.24 and 4.34

Currently it is intended that asylum seekers will spend one to seven days in an induction centre. Thereafter asylum seekers will:

- if not reliant on support from NASS, move to an agreed address under the terms of their temporary admission or
- be accommodated at an accommodation centre or
- if reliant on support from NASS be dispersed to allocated accommodation throughout the United Kingdom or
- be detained.

When an asylum seeker has special needs arising from age, illness or disability

It should be noted that the Immigration and Asylum Act 1999 removed responsibility from local authorities under s21 of the National Assistance Act 1948.¹⁰ But local authorities are still required to provide support if the need for care and assistance does not arise solely because, for example, the person is without the financial resources to obtain accommodation and maintenance. Where someone qualifies under both NASS and s21, the local authority must provide assistance.¹¹

Unaccompanied minors (or separated children)

NASS is not responsible for supporting unaccompanied children who have claimed asylum. The social services department of the local authority area where they arrive or where they are when they make an asylum application should accommodate them. At 18 they fall under NASS and therefore become at risk of dispersal. But if they are still studying at 18, it could be argued that it is unreasonable to disperse on the basis that their situation is similar to the one where a family has a child who has been in school for more than one year.

Benefits

Transitional provisions protect entitlement to benefit for those who claimed asylum before 6 February 1996¹² or 3 April 2000¹³. There may also be others who have been permitted to work, for example as an asylum seeker, and have accrued sufficient national insurance contributions to qualify for entitlement to contribution based benefits, such as contribution based jobseeker's allowance, incapacity benefit, maternity allowance, widow's payment, widowed mother's allowance, widow's pension or category A or B retirement pension.¹⁴

There are also some asylum seekers who, although they have no entitlement to benefits, retain benefits (for example housing benefit) because the system has not yet caught up with them. Any challenge to the amount being received could lead to removal of the benefit. Advice should therefore only be given if you are sure of the effect on your client.¹⁵

10 *Westminster v NASS*
[2001] ECWA CIV 512 CA

11 *R v Wandsworth London Borough Council ex parte O*
[2000] 4 ALL ER 590 CA

12 Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, s1 2000/636, reg 2(4)(a)

13 *ibid* reg 2(4)(b)

14 See generally CPAG's migration and social security handbook, 3rd edition, 2001

15 Essential resources are given in chapter 15.

13

Third country cases

Asylum applicants who face potential removal on third country grounds may be detained. Representations may have to be made very quickly to try to prevent removal. If the representations fail, consideration will have to be given to a challenge by way of judicial review although the circumstances in which this would be successful are very limited.

This chapter provides an overview of the law and practice concerning third country cases.¹

The most dramatic consequence of section 11 of the Immigration and Asylum Act 1999 is that asylum seekers facing removal to an EU member state generally no longer have either a third country right of appeal or the right to challenge removal by way of judicial review on third country grounds. Section 11(1) provides that an EU member state is to be regarded as a place where life and liberty is not threatened for a Refugee Convention reason. A statutory presumption of safety is created which renders it virtually impossible to challenge the removal by way of judicial review.²

Sections 11 and 12 set out the criteria to be applied in determining whether an asylum seeker should be removed from the UK without substantive consideration of his asylum claim. Section 11 governs removal to an EU member state in accordance with the standing arrangements³ agreed between member states and section 12 governs removal to an EU country not in accordance with the standing arrangements or to a non EU state. The circumstances in which an asylum seeker can appeal from within the UK when faced with removal on third country grounds are limited. In some cases it may be possible to appeal under section 65 of the IAA.

Paragraph 345(2) of HC395 (as amended) provides that an asylum applicant shall not be removed without substantive consideration of his claim unless:

- 1 the asylum applicant has not arrived in the UK directly from the country of feared persecution and has had an opportunity at the border, or within a third country or territory, to make contact with the authorities of that third country or territory in order to seek their protection; or
- 2 there is other clear evidence of admissibility to a third country.

1 For a detailed analysis see *Macdonald's Immigration Law and Practice*, Ian A Macdonald QC and Frances Webber (5th edition), Butterworths, 2001, paras 12.125–12.159

2 In *R (Ahadi) v SSHD*, 6 July 2001 CO/1149/01 Turner J granted permission to claim judicial review to seek a declaration under s4(s) HRA 1998 that s11 IAA 1999 is incompatible with the ECHR. At the time of writing the full hearing of this claim has not been heard.

3 The Dublin Convention – convention determining the state responsible for examining applications for asylum lodged in one of the member states of the European communities.

Sections 11 and 12 of the Immigration and Asylum Act 1999 replace the comparable provisions of the 1993 and 1996 Acts. These sections apply to:

- removal to EU member states under standing arrangements
- removal to EU member states otherwise than under standing arrangements
- removal to designated countries⁴
- removal to non-EU and non-designated countries.

The Dublin Convention has no direct effect in the UK but is a mechanism whereby state responsibility for determining an asylum application is agreed. Dublin 2, which has not yet been agreed between member states, proposes an increased element of choice for an individual in determining where the asylum claim should be determined, but both Dublin and Dublin 2 remain concerned with the state's duties and responsibilities rather than enforcement of an individual's rights.

Even if a case falls under the criteria of the Dublin Convention to be determined by one member state as opposed to another, there is nothing in the Convention which prevents a member state from agreeing to take responsibility for the determination of a claim. This can be exploited in representations where, for example, there are numerous family members in one country but none in another, or where there is possibility of *refoulement*.

An asylum seeker facing removal to an EU member state third country in accordance with the Dublin Convention will, in theory, still have a Human Rights Act 1998 (HRA) right of appeal under section 65 of the 1999 Act. An asylum seeker could argue that he should not be removed to the member state since the member state will remove him to the country of feared persecution, contrary to Article 3 ECHR.⁵ IND practice however is to certify the appeal (if not immediately, then after representations) under section 72(2)(a) of the 1999 Act, on the basis that section 11 provides that the EU country is 'safe' and thus the allegation that the removal is a breach of human rights is 'manifestly unfounded'. Therefore, the in-country appeal right is not exercisable.

In *R on the applications of Yogathas and Thangarasa* [2001] EWCA Civ 1611 the Court of Appeal approved the definition of 'manifestly unfounded' advanced by the SSHD. Laws LJ held:

The Secretary of State may in my judgment properly issue a certificate if he is satisfied that there is plainly nothing of substance in the case. Certainly he does not conduct a deep or exhaustive examination of the merits... the process is qualitatively different from that of an actual trial or final examination or decision... but the process he adopts must respond to the nature and volume of the case which is put to him

If there is evidence that indicates that the member state to which removal is proposed may *refoule* the asylum seeker back to the country of feared persecution this may prevent the Secretary of State from successfully certifying the claim under section 72(2)(a) of the 1999 Act.

⁴ Canada, Norway, Switzerland and the US are at present the only designated countries: Asylum (Designated Third Countries) Order 2000, SI 2000/2245

⁵ *Tl v United Kingdom* [2000] INLR 211

Any challenge to the certificate would be made by judicial review, contending that the decision to certify the claim as being 'manifestly unfounded' was unlawful. A successful judicial review claim would lead to the restoration of the asylum seeker's appeal under section 65 of the 1999 Act where he could additionally raise other human rights arguments, for example family or private life arguments, under Article 8 ECHR.

In cases involving removal to EU member states not in accordance with section 11 (i.e. non Dublin Convention removals) there is no statutory presumption of safety and therefore arguments concerning the interpretation of the Convention by the third country can be considered on a section 65 appeal. The in-country right of appeal is also preserved where the proposed removal is to a non-EU, non-designated country.⁶

IND policy reflects, to a certain extent, the provisos within the Dublin Convention on removal. One element of the Convention that is not reflected in IND policy is that an asylum seeker may retain an element of choice where to seek asylum, allowing him to make an assessment about his future integration in the country of asylum. IND policy does take into account that an asylum seeker will not normally be removed if:

- he has a spouse or minor children living in the UK
- he is a minor with relatives living in the UK on whom he is dependent.

Practice

If IND considers that your client should be removed to a third country they will serve a notice on that third country requesting confirmation that your client will be accepted. You will normally be informed that such a request has been sent but you should already be aware of that possibility from initial instructions taken from your client. ►See chapter 3.

You should immediately send written representations setting out why you consider your client should not be returned to a third country but should remain in the UK.

The representations will fall into two parts. The first, drawing upon your client's personal circumstances, should include details of

- your client's close ties with the UK
- the extent of family and other relations
- the length of time in the UK
- age and vulnerability
- availability of witnesses to the asylum seeker on support of his claim
- the lack of support in the proposed third country.

The second part of the argument should be based on an objective consideration of the third country, including:

- how asylum applications are determined
- whether your client will be treated differently i.e. more harshly than other asylum seekers (on the basis of for example age, sex or basis of claim)
- whether your client will be prejudiced or discriminated against in any way.

⁶ Immigration and Asylum Act 1999, s12(7)

Background material

Since the basis of your client's fear would not be in issue in a third country case (unless it is a non-state agent case going to Germany or France⁷) the preparation is necessarily different. Rather than focussing on your client's experiences and why he believes he will face further persecution if returned to the country from which he fled, the focus is on the asylum law and practice of the third country, the likelihood of the third country *refouling* your client back to the country of feared persecution and your client's personal circumstances in the UK as opposed to the potential receiving country.

The type of evidence necessary to challenge a third country decision is different to that relied upon in a non third country asylum appeal. Interpretations of the Refugee Convention vary from country to country as does the extent to which international obligations are honoured.⁸ It will frequently be necessary to contact refugee lawyers or organisations representing the rights of refugees in the third country in order to ascertain what interpretation is given to the Convention and what the current practice is. You should obtain detailed statements or letters explaining what is likely to happen to your client if returned to the third country.

If your client's case raises issues concerning differing interpretations of the Refugee Convention, it will usually be necessary to instruct an expert to provide a report focussing on the consequences of the difference in interpretation.⁹

⁷ *Adan and Aitsegeur*
[2001] INLR 44 HL

⁸ In *Adan v SSHD*
[1999] 1 AC 293 the House of Lords held that the meaning of the words 'otherwise than in accordance with the Convention' in s2(2)(c) of the 1996 Act refers to the meaning of the Refugee Convention as properly interpreted and not as reasonably or legitimately interpreted by the third country concerned. There is therefore, only one autonomous meaning of the Convention.

⁹ For an example of this and relevant principles to be applied see *SSHD v Adan, SSHD v Aitseguer*
[2001] INLR 44 HL.

14

Preparing for appeal

This chapter does not profess to be a comprehensive guide to the preparation of an appeal. It is anticipated that a new edition of the ILPA/RLG/Law Society *best practice guide to appeals* will be published in the near future.

The quality of the preparation for an appeal can have a dramatic impact on the prospects of success. ►See chapter 10. Your client's case may well move very quickly after refusal and it is essential that there is no delay in preparing the appeal.

It is not simply a matter of how the client and advocate perform on the day; a well constructed appeal bundle may lead to IND conceding on the day of the appeal or may cause an adjudicator to take a more favourable view of your client's case.

It is essential that your client is thoroughly informed about how the appeal will be heard by the IAA. You should explain the roles played by the adjudicator, the Home Office presenting officer, the official interpreter and the advocate/counsel for the appellant. Your client may find it instructive to attend an asylum appeal at the IAA beforehand. This may help diminish anxiety about what will happen at his own hearing.

Remind your client that the preparation for the forthcoming appeal depends upon their active participation. The client should be made aware of the ways in which your legal and evidential submissions will attempt to complement information already submitted. It is essential that your client understands that the possibility of success at court is not wholly dependent upon the victory of one abstract legal argument over another.

Documents

The refusal letter and other documents

Your client should be given translations of the refusal letter, the statement of evidence form (SEF) or statement (if he was not given one prior to it being submitted) and any interview notes. This should be done as soon as possible after receipt of the refusal letter to enable you to take instructions and start preparing for the appeal.

Although you will have taken instructions sufficient to draft the grounds of appeal, it is crucial that you take your client's detailed instructions on the refusal letter as soon as possible. This is in order to give him as much time as possible to understand the nature of the case against him.

The witness statement

You will have to prepare a witness statement on behalf of your client for the appeal. This may do no more than adopt statements already submitted. If the refusal letter raises new points that have not already been addressed in the original statement these should be addressed now.

Refusal letters frequently include a number of *pro forma* reasons which you may have addressed in the grounds of appeal. These should be addressed in the witness statement if they are issues which fall within the personal knowledge of your client. The witness statement should not incorporate complex legal argument or matters that your client does not know from his own perspective. IND or the adjudicator may raise matters not contained in the refusal letter. You should be alert to this in the preparation of your client's witness statement.

It is essential that any new witness statement taken from your client is consonant with evidence which has already been submitted to IND. Your client's statement should always be thoroughly checked, and a written translation obtained, before your client endorses it. Even minor differences in testimony are likely to be noticed by the presenting officer and may result in findings of adverse credibility. Any differences in testimony should be explained in the witness statement.

Additional witness statements

Discuss with your client the possibility of calling witnesses who may be able to corroborate information already provided by your client. There is no limit on the number of witnesses you may call at an appeal hearing but ensure that any information provided by a witness is pertinent and has been thoroughly checked prior to the hearing.

Consider whether family members can be called upon to support your client's case. It may be that some or all have been recognised as refugees and their statements may be of assistance if you can demonstrate their relevance to the case. Remember that to use statements or other documents from other individuals or clients will require their express authorisation.

Other documents

Legal submissions supported by authorities, country information and human rights reports (see below) will also be required to address issues raised in the refusal letter.

If your client's claim has been certified,¹ you will have to explain that appeal rights are truncated and the case will be listed for hearing more quickly than usual.²

First and full hearings

Preparing for the first hearing

You will receive a notice of first hearing from the Immigration Appellate Authority (IAA) advising you of a hearing date and inviting you to complete a 'reply to directions' which must be returned to the IAA one week before the date of the first hearing. This may also include a notice of the full hearing date.

Your reply should include details of:

- whether or not you intend to call oral evidence
- how many witnesses (including the appellant) you intend to call
- whether or not your client needs an interpreter, specifying dialect where relevant
- an estimated duration of the hearing
- whether or not you intend to adduce further documentary evidence.

If you are not ready to attend a hearing you must explain why. You should not state that you are ready to proceed if this is not correct.

If you are not ready to proceed, your client or a representative must attend the first hearing. If you or counsel are unable to attend in person (or the circumstances do not require an attendance), you should provide your client with a letter which explains to the court why you are unable to proceed at present but providing a reply to each of the questions asked. You should not send your client to the first hearing without a letter of explanation, or without having complied with the directions contained in the notice of first hearing letter.

If you are unable to proceed because, for example, you are waiting for a medical report, then you must provide evidence indicating when the report is likely to be produced.

1 e.g. under the Immigration and Asylum Act 1999, schedule 4, para 9, fear of persecution is manifestly unfounded.

2 *Secure borders, safe haven*, Home Office, February 2002, para 4.65 proposes the amendment of the certification process although the detail of this has not been published.

Complying with directions

It is the norm for the IAA to serve on the appellant and their representative directions for the conduct of the hearing.³ The directions are likely to require that the following are served within specified time limits:

- witness statement(s)
- a chronology
- a skeleton argument
- a bundle of documentary evidence to be relied on
- an essential reading list

The Chief Adjudicator has recently directed that an appellant's witness statement should stand as his evidence in chief. An adjudicator has discretion to allow an appellant to give evidence in chief additional to that contained in his statement. It is usually desirable for the appellant to give some evidence in chief, to enable him to get comfortable with giving evidence before he is cross-examined.

An adjudicator may dismiss or allow an appeal without consideration of the merits if either party has failed to comply with directions.⁴ If you have been unable to comply with directions you should ensure that the advocate at the appeal hearing knows the reasons for the failure. If IND has failed to comply with directions, you may want to request that the adjudicator allows the appeal without consideration of the merits. Obviously the more significant the failure to comply with the directions, the more likely an adjudicator is to allow the appeal without consideration of the merits.

Preparing a bundle of supporting material

It will almost always be necessary to prepare a bundle of materials that supports your client's case. It is advisable that the bundle includes:

- witness statement(s)
- chronology
- skeleton argument
- country information and human rights reports
- expert reports which may deal with matters ranging from human rights issues/country conditions to physical or psychological trauma that your client may have suffered
- other documentary evidence e.g. copies of an arrest warrant.

It is essential that the bundle is paginated and indexed. This requirement is usually referred to in the directions. In addition, the Chief Adjudicator has issued guidance notes for good practice on the preparation of appeal bundles (February 2000). The guidance notes state that:

- Illegible or handwritten documents or translations should be typed.
- The bundle should be indexed and paginated and preferably agreed between the parties.⁵ You should not submit 'standard country bundles'.
- Each appeal addresses particular issues and your bundle of indexed documents should reflect this.

³ Immigration and Asylum (Procedure) Rules 2000, rule 13

⁴ The Procedural Rules, rule 33(2)(a)

⁵ Although trying to obtain agreement with IND will be virtually impossible

- The skeleton and chronology or summary should be cross-referenced to the relevant pages of the bundle, which should include (if not in the Home Office bundle) SEF, interview record, asylum statement, refusal letter, explanatory statement, notice of decision, medical reports and responses to them, relevant country reports, other necessary and relevant documents.
- Adjudicators will take judicial notice of reports from the US State Department, the IND Country Information Policy Unit, Amnesty International and Human Rights Watch annual reports and Europa World yearbooks, so only the relevant pages of these should be included.
- Bundles must be lodged at least 7 days before the hearing.

If you are not conducting the advocacy on behalf of your client, you should discuss with the advocate, if possible, the form and content of the bundle. This will avoid further documentation being served at the last minute which at worst may lead to confusion and not be taken into account and may also irritate the adjudicator hearing the appeal.

Skeleton arguments

A skeleton argument should 'identify all relevant issues including human rights claims and cite all the authorities to be relied on.'⁶ You may wish to instruct counsel to draft the skeleton.

It is not necessary, and indeed might be considered a waste of resources, to cite **every** possible relevant authority for every legal issue that might arise. For example, it should not be necessary to refer to the standard of proof and the cases of *Sivakumaran and Kaja*. A skeleton argument should be viewed as a vehicle for summarising the key legal submissions which are not likely to be taken as read. The sorts of issues that may need to be specifically dealt with include:

- whether or not there is a Refugee Convention reason
- whether or not the ill-treatment suffered by your client amounts to persecution or treatment contrary to Articles 3 and 8 ECHR
- whether or not prosecution amounts to persecution
- internal flight
- certification
- sufficiency of state protection.

You may also wish to consider a written submission, which would include a chronology, in addition to witness statements and a skeleton argument. This can analyse factual errors in IND's case by reference to your client's statement, other witness statements, supporting documentary evidence and country information, and point to areas where IND has not disputed your client's version of events. This does not replace the skeleton argument but is supplementary to it, with the skeleton argument concentrating on the legal submission.

► See chapter 15 for resources to assist with the preparation of the bundle and skeleton argument.

Briefing counsel

If you brief counsel for your client's appeal it is essential that you do this as soon as possible after receiving the refusal letter. This will ensure that all concerned have the greatest possible time to prepare your client's case effectively. Briefing counsel at the last minute before your client's appeal is completely against your client's best interests.

Your brief should indicate precisely what you want counsel to do. Typically counsel will be instructed to:

- advise in conference
- prepare a skeleton argument (with or without a chronology)
- advise generally (this may include advising on what should go in the bundle and any other evidence that should be obtained)
- represent at the hearing

If your client is in receipt of Controlled Legal Representation (CLR) your covering letter should include a schedule setting out how long you consider each task is likely to take and thus your cost limit (or asking counsel to indicate how long each task is likely to take to ensure CLR will cover it, or you can apply for an extension in time).

Wherever possible you should brief counsel to advise in conference. One purpose of the conference should be for counsel to test your client's evidence by going through any points that are likely to be raised against him at the appeal. Again, the conference should not take place at the last minute since it is not uncommon for conferences to require further work to be carried out or enquiries made. Counsel may wish to advise on the content of the witness statement.

Finally, you should ensure that your client is prepared for the conference. Make sure that your client reads his statement(s), record of interview, the refusal letter and any other significant documents relevant to the facts of his case.⁷ If your client does not speak and read fluent English these documents should be translated for him. Remember to provide an interpreter at the conference if your client does not speak English.

⁷ Translation of these documents will be reclaimable under CLR.

Adjournments

It may be necessary for you to seek an adjournment of the appeal. This should be done in writing as soon as it is known that an adjournment is required. Delay in asking for an adjournment will not increase the possibility of it being granted. Where possible the agreement of the IND representative should be obtained. The procedure rules contain a presumption against the granting of an adjournment, stating that an adjudicator may not adjourn an appeal unless the refusal of the adjournment would prevent the just disposal of the appeal.⁸ Do not assume that a refusal of your written application before the date of the appeal will mean that a renewed application for an adjournment on the day of the hearing will be granted. The representative presenting the appeal should go prepared for the appeal to go ahead.

The courts and Tribunal have held that an adjournment should have been granted in the following circumstances:

- if counsel was taken ill at the last minute⁹
- if a representative withdraws at a hearing¹⁰
- if a refusal on non-compliance grounds was erroneous¹¹
- if a party wishes to rely on evidence not previously sent to the other party to the appeal¹²
- in order for a party to adduce relevant evidence not reasonably available at the hearing¹³
- if a new binding decision on a point of law at issue in the appeal is imminent.¹⁴

8 The Procedure Rules 2000, rule 31(1)

9 *Okiji* (13079)

10 *Kandeepan* (15124)

11 *Busuulaw* (01 TH 00239)

12 *Macharia v IAT* [2000] INLR 156, CA

13 *Kondo* (10413) and *Sarica* (151363)

14 *Glowacki* (R.16139)

15

Sources of immigration and refugee law

One of the most challenging tasks facing a busy immigration practitioner is keeping on top of the rapid developments that occur in immigration and refugee law. This is essential since the law impacts at every stage of the process. It is perhaps in the arena of immigration and refugee law that the sources of law are most diverse, the implications most unclear and the pace of change quickest.

Access to the internet is increasingly becoming a prerequisite to effective representation of those fleeing persecution or conditions that violate human rights standards.

Domestic law

A useful but by no means necessarily correct starting point for an understanding of immigration and refugee law is the domestic framework. The following list of statutes, statutory instruments and orders is not exhaustive, but contains those you are most likely to need to refer to.

Statutes

Immigration Act 1971	Special Immigration Appeals Commission Act 1997
Immigration Act 1988	Human Rights Act 1998
Asylum and Immigration Appeals Act 1993	Immigration and Asylum Act 1999
Asylum and Immigration Act 1996	(Nationality, Immigration and Asylum Bill 2002) ¹

In addition, particular sections of the following will be needed:

National Assistance Act 1948	Race Relations Act 1976
Children Act 1989	The Race Relations (Amendment) Act 2000
National Health Service and Community Care Act 1990	Terrorism Act 2000
Social Security Contributions and Benefits Act 1992	Anti-Terrorism, Crime and Security Act 2001
Housing Act 1996	

¹ This is likely to be enacted in October 2002.

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

- *Macdonald's Immigration Law and Practice*, Ian A Macdonald QC and Frances Webber (5th edition), Butterworths, 2001
- Butterworths Immigration Law Service
- *Immigration Law Handbook* (2nd edition), Margaret Phelan, Blackstone Press, 2001

Statutory instruments and orders

These can be found at www.hmso.gov.uk and in the texts mentioned above:

Immigration and Asylum Appeals (Procedure) Rules 2000
 Immigration and Asylum Appeals (One-Stop Procedure) Regulations 2000
 Asylum (Designated Safe Third Countries) Order 2000
 Immigration and Asylum Appeals (Notices) Regulations 2000
 Special Immigration Appeals Commission (Procedure) Rules 1998
 Immigration (Regularisation Period for Overstayers) Regulations 2000
 Asylum Support Appeals (Procedure) Rules 2000
 Asylum Support Regulations 2000
 Immigration (European Economic Area) Regulations 2000
 Immigration Appeals (Family Visitor) (No 2) Regulations 2000
 Human Rights Act 1998 (Designated Derogation) Order 2001
 Immigration and Asylum Appeals (Procedure) (Amendment) Rules 2001

Other sources of domestic immigration and asylum law and practice

The above statutes and statutory instruments are only the starting point. The following are also of great importance:

- the Immigration Rules HC393 which have been substantially amended on numerous occasions – it is essential that the current version is consulted
- published and unpublished Home Office policies, concessions and ministerial statements
- the Asylum Policy Instructions (APIs), the Immigration Directorate Instructions (IDIs) and the Nationality Instructions (NIs).

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

Home Office published and unpublished policies and concessions often contain rights and benefits to those seeking asylum or leave to remain on human rights grounds over and above those contained in the relevant statutory provisions or the immigration rules. Examples include the 'long residence concession' and the HIV/AIDS policy. These policies and concessions are not always reflected in Home Office practice and decisions and can often form the basis of a legal challenge.

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

- Butterworths' Immigration Law Service
- the Home Office website (APIs, IDIs and NIs)
www.homeoffice.gov.uk

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 through Parliament, for example *Ministerial statements – The Human Rights Act 1998*.

European Community law

Whilst European Community law is less likely to be relevant to the rights of persons fleeing persecution or other treatment contrary to the European Convention on Human Rights, there may be circumstances where it provides an additional source of rights. For example, your client is an asylum seeker from Eastern Europe whose asylum claim is not particularly strong however, he may have a right to remain pursuant to an EC Association Agreement. Equally, your client may be a third country national who is the dependent relative of an EC national living and working in the UK.

Important sources of European Community law include:

the EC Treaty (as amended)

Council Directive (64/221/EEC)

Regulation (EEC) 1612/68 of the Council

the Dublin Convention

(and the proposed regulation to replace the Dublin Convention²)

Various EC Association Agreements

the directive on temporary protection

These sources of European community law are contained in the texts already referred to. A useful website is <http://europa.eu.int>

ILPA's website also has a European section which includes recent proposed directives (including those on reception conditions, asylum procedures and the definition of a refugee) and ILPA's responses.

² The proposal for a Council Regulation establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third country national. Brussels 26.01.2001, COM (2001) 447 final, 2001/0182 (CNS)

International conventions and materials

It is impossible to represent those fleeing persecution effectively without having 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 the courts to a domestic statutory provision,³ therefore it is not sufficient to be familiar with domestic legislative provisions alone. The following international conventions and materials are likely to be relevant:

the 1951 Convention relating to the status of refugees and the 1967 Protocol

UNHCR handbook on procedures and criteria relating to the status of refugees

European Convention on Human Rights, 1951

Convention relating to the status of stateless persons, 1954

International Covenant on Civil and Political Rights (ICCPR), 1996

Convention against torture and other cruel, inhuman or degrading treatment (UNCAT), 1984

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

Universal Declaration of Human Rights (UDHR), 1948

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

As well as being contained 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 primarily used for obtaining determinations of the Immigration Appeal Tribunal; it also contains useful links to many websites containing international materials.

Caselaw

Although the various statutes, statutory instruments, rules, policies and European and international conventions and materials are the starting point for determining a client's rights and a state's obligations, they cannot be considered in isolation from the decisions of the various courts and tribunals that seek to give them effect and interpret their meaning. The caselaw in the arena of asylum and human rights has always developed at a rapid pace and, up until fairly recently, was usually difficult to locate and keep abreast of.

³ For a recent example of this see decision of CA in *Saad, Diriye and Osorio* [2001] EWCA Civ 2008

The commencement of the Human Rights Act 1998, the introduction of Controlled Legal Representation, the increase in the number of asylum appeals being heard and the introduction of human rights appeals⁴ has been matched by an increase in the number of sources of relevant caselaw. There is no longer any excuse for not being aware of recent developments.

The following subscription publications focus on developments in the caselaw of asylum and immigration law:

- Immigration Appeals Reports (Imm AR) (the green books)
- Immigration and Nationality Law Reports (INLR) (the blue books)

Additionally, the United Kingdom Human Rights Reports (UKHRR) contain many useful decisions but they do not focus exclusively on asylum and immigration.

The Refugee Legal Centre (RLC) produces a fortnightly bulletin which provides summaries of recent relevant decisions ranging from determinations of adjudicators to judgments of the European Court of Human Rights. In addition, the RLC produces a CD ROM containing an extensive database of decisions going back over a period of many years.

The Immigration Advisory Service (IAS) publishes a fortnightly Immigration Law Update which includes transcripts of reported cases.

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

www.ein.org Electronic Immigration Network's site provides access to determinations of the Immigration Appeal Tribunal

The Times Law Reports available as a paper subscription service or free at www.thetimes.co.uk

International Journal of Refugee Law (IJRL)

www.casetrack.com this web based service provides access to all approved judgments of the High Court and Court of Appeal
(Casetrack)

www.westlaw.co.uk this website contains an extensive database which provides access to statutory provisions, caselaw and articles
(Westlaw)

www.lawtel.co.uk another website similar to Westlaw
(Lawtel)

LexisNexis Direct similar to Westlaw and Lawtel which can be found at www.butterworths.co.uk

www.justis.com this website contains the reports of the Incorporated Council of Law Reporting
(Justis)

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

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

⁴ Asylum and Immigration Act 1999, Section 65

Country information reports

Compiling a bundle of country information and human rights reports is an essential step in the process of preparing your client's case. Such reports are not only required for appeals but should be used at the outset in order that you fully understand the context of your client's case. Without such an understanding any statement you prepare, or written representations you make to the Home Office, are likely to be inadequate.

The most effective way to obtain up to date reports is by using the internet. All of the main organisations who produce the reports which are most frequently relied upon by representatives have their own websites including:

www.amnesty.org	Amnesty International
www.hrw.org	Human Rights Watch
www.unhcr.ch	UNHCR
www.state.gov	US State Department
www.ind.homeoffice.gov.uk	Home Office country assessments (CIPU reports)
www.hjt-research.com	Immigration Consortium Country Information Database (ICCID) produced by Injit Research
www.ecre.org	European Council on Refugees and Exiles (ECRE)

Other resources

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

Here are some websites and publications that representatives should be aware of:

www.iaa.gov.uk	Immigration Appellate Authority
www.ilpa.org.uk	Immigration Law Practitioners' Association
www.legalservices.gov	Legal Services Commission
www.open.gov.uk/lcd/	Civil Procedure Rules civil/procrules_fin/index

The law of refugee status, James C Hathaway, Butterworths, 1991

The Refugee in International Law, Guy Goodwin-Gill,
Oxford University Press, 1996

Refugees and gender: law and process, Heaven Crawley, Jordans, 2001

Gender guidelines for the determination of asylum claims in the UK,
Refugee Women's Legal Group, 1998

Asylum gender guidelines, Immigration Appellate Authority, 2000

Immigration, nationality and asylum under the Human Rights Act 1998
edited by Blake and Fransman, 1999

Caselaw on the Refugee Convention, Mark Symes, Refugee Legal Centre
LAG monthly journal which every four months features recent
developments in immigration law

Key cases and materials

It should be noted that this is not an exhaustive list. You must keep up to date with changes in caselaw. The cases referred to here are for information on some of the basic principles but are not the only cases to which you may need to refer.

Well founded fear

Sivakumaran [1988] AC 958
SSHD v Adan [1998] Imm AR 338
Ravichandran [1996] Imm AR 97
 UNHCR handbook paras 37–38
Kaja v SSHD [1995] Imm AR 1

Burden/standard of proof

Sivakumaran [1988] AC 958
Kaja v SSHD [1995] Imm AR 1
Karanakaran v SSHD [2000] INLR 122

Persecution

UNHCR handbook paras 51–53
Gashi [1997] INLR 96
Horvath [2000] 3 WLR 379
Demirkaya v SSHD [1999] INLR 441
Jeyakumaran [1994] Imm AR 45

Past persecution

Demirkaya v SSHD [1999] INLR 441
SSHD v Adan [1998] Imm AR 338
Doymus (00 TH 01748) 19 July 2000
Katrinak [2001] INLR 499

Persecution v prosecution

UNHCR handbook, paras 56–60
Sepet and Bulbul [2001] INLR 376⁵
Zaitz [2000] INLR 346
Islam [1999] INLR 144
Singh, Gurpreet (10866) 22 April 1994
Benmoussa (14626) 7 April 2000

Non-state agents

UNHCR handbook, para 65
Horvath [2000] 3 WLR 379
SSHD v Adan [1998] Imm AR 338
Noune [2001] INLR 526
Fadli [2001] 02 Ls Gaz R 40, CA
Haddadi (00/TH/02141) 3 Oct 2000
Kacaj [2001] INLR 354
Svazas [2002] EWCA Civ 74

Convention reason⁶

UNHCR handbook, paras 66–86

1 Political opinion

Gomez [2001] INLR 549
Shah and Islam [1999] Imm AR 238
Adan and Lazarevic [1997] Imm AR 251
Asante [1991] Imm AR 78

2 Social group

Shah and Islam [1999] Imm AR 238
Jain [2000] INLR 71
Montoya (00 TH 00161)
Ouanes [1998] Imm AR 76
Quijano [1997] Imm AR 227
 RWLG gender guidelines
 IAA gender guidelines
Refugees and gender: law and process,
 Heaven Crawley, Jordans, 2001

3 Religion

Ahmed [2000] INLR 1
Kazmi [1994] Imm AR 94

Military service

UNHCR handbook, paras 167–174
Sepet and Bulbul [2001] INLR 376
Foughali (00 TH 01513)
Zaitz [2000] INLR 346
Adan and Lazarevic [1997] Imm AR 251

Credibility

RWLG gender guidelines
 IAA gender guidelines
 UNHCR handbook, paras 189–219
Karanakaran v SSHD [2000] INLR 122
Horvath [1999] INLR 7 (Tribunal)
Ex p Ahmed [1999] INLR 473
Mirani [1990] Imm AR 132
Kasolo (13190)
Kaleem Ahmed (12774)
Ex p Gunn, 22 January 1998
Ahmed [1994] Imm AR 457
Daniel (13623)
Chiver [1997] INLR 212

⁵ On appeal to the House of Lords at time of writing.

⁶ Cases concerning the Convention reasons of race and nationality have not been included since their interpretation and application is rarely a matter of dispute.

Internal flight

UNHCR handbook, para 91
 Michigan guidelines, 1999
Robinson [1997] INLR 182
Karanakaran v SSHD [2000] INLR 122
Dyli [2000] INLR 372
Kumaran (00 TH 01459)
Canaj and Vallaj [2001] INLR 342

Cessation clauses

UNHCR handbook, paras 111–139
Arif v SSHD [1999] INLR 327
Hoxha v SSHD [2001] All ER (D) 316⁷

Exclusion clauses

UNHCR handbook, paras 140–163
T [1996] AC 742
Sivayogan (22437) 9 December 1999
Hua (G0077) 21 April 1999

Third country cases

Adan and Aitsegeur [2001] INLR 44
Besnik Gashi [1999] INLR 276
Martinas [1995] Imm AR 190
Ex p Bouheraoua 8 May 2001, CA
Ex p Kandasamy [1994] Imm AR 333
Yassine [1990] Imm AR 354
Thangarasa [2001] EWCA Civ 1611

Detention

Saadi v SSHD [2001] EWCA Civ 1512
Ex p Quaquah [2000] INLR 196
Kerrouche v SSHD [1998] INLR 88
Chahal v UK (1996) 23 EHRR 413
Hardial Singh [1983] Imm AR 198
Glowacka and Brezinski (1997)

Article 3 ECHR

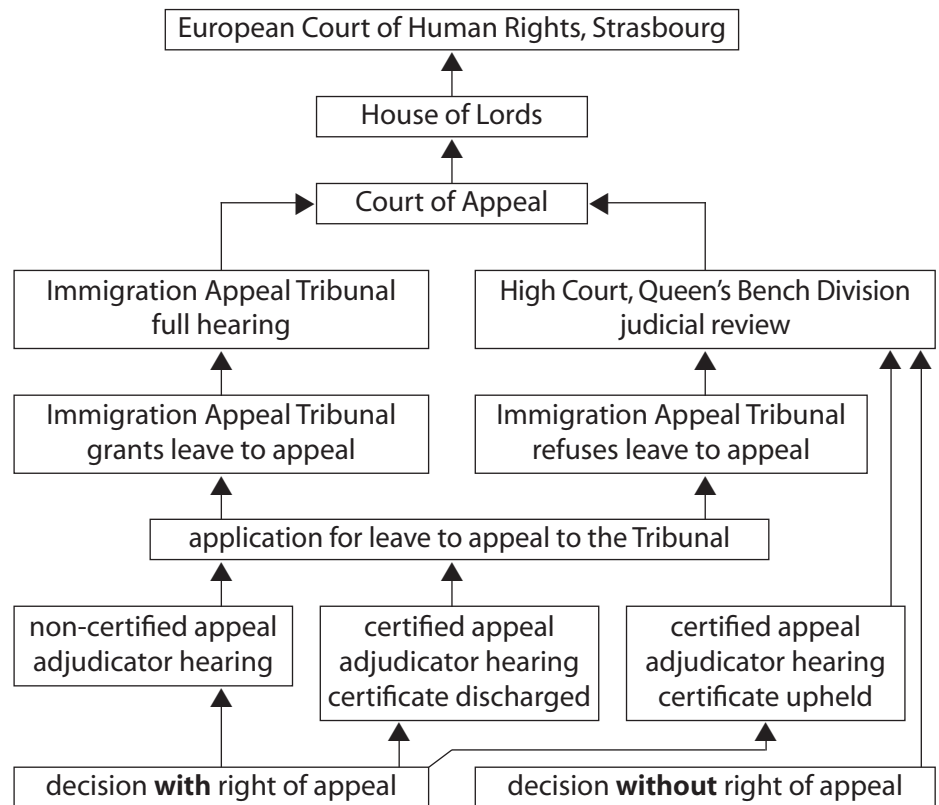
Soering v UK (1989) 11 EHRR 439
Ireland v UK (1979–80) 11 EHRR 439
HLR v France (1998) 26 EHRR 29
D v UK (1997) EHRR 423
Kacaj [2001] INLR 354

⁷ On appeal to the Court of Appeal at time of writing.

Appendix 1

Appeals flowchart

as at May 2002



Changes to the appeal system are proposed in the Nationality, Immigration and Asylum bill. It is expected to be enacted in October 2002.

Appendix 2

Extract from letter about statement of evidence forms

from IND to ILPA, 28 June 2000

From: Chris Hudson
Home Office, Immigration and Nationality Directorate
Major Projects Team
3rd Floor, Leon House, 233 High Street, Croydon CR0 9XT

To: Susan Rowlands, General Secretary
Immigration Law Practitioners' Association

Date: 28 June 2000

Statement of evidence forms

I am sorry to have taken so long to reply to your letter of 28 March. There have been changes on the ICD operational side since you wrote and since the last Asylum Stakeholder Processes Group meeting. One advantage in replying late is that this letter sets out the most up-to-date position on your concerns about various aspects of the use of the Statement of Evidence Form (SEF). We will have the opportunity to discuss any further comments you may have at the next Stakeholder Group meeting on 13 July.

Time limits

I know that your view is that 14 days is insufficient time for applications to complete and return the SEF to IND, especially if they have difficulty in engaging early legal advice. As I said at the last Stakeholder Group meeting, we consider, following legal advice, that 14 days is a reasonable period for an applicant to submit the basis of his claim, and that the decision-making process should be able to move forward after this. However, we have the discretion to be flexible on the 14 day limit where there are exceptional circumstances, such as the need to obtain evidence to support a torture claim. This time limit applies to all claimants irrespective of where the SEF was issued. On the point of legal representation, I can only re-iterate that it is not our view that legal representation is essential for completing the SEF.

Both in-country and port claimants receive a covering letter with the SEF. This shows the date by which the SEF should be returned as well as the return address.

[letter continues]

Appendix 3

Letter about substantive interviews in the Asylum Screening Unit

from IND to ILPA, December 2000

From: Jackie Morey, Group Leader, Public Callers' Unit
Home Office, Immigration and Nationality Directorate
Integrated Casework Directorate
Block C, Whitgift Centre, Croydon CR9 2AT

To: Susan Rowlands
Immigration Law Practitioners' Association

Date: December 2000

Dear Susan,

Substantive interviews in the Asylum Screening Unit

Thank you for your letter of 15 November concerning recent interviewing practice in the Asylum Screening Unit. I apologise for the delay in responding to you and for the confusion which has arisen. You have drawn to our attention the fact that some applicants have been substantively interviewed in the absence of their previously engaged representatives. I confirm that this should not have happened and our present policy is (principally) as Kathy Casey outlined in her letter of 9 May 2000.

In summary therefore, substantive interviews will take place following screening in the ASU in the following circumstances: if an applicant has not already engaged a representative or if the instructed representative has accompanied the applicant we will proceed with the interview on the same day, resources permitting. Applicants who are interviewed in this way will have 5 days following the interview in which to seek legal advice and/or submit further material in support of their asylum application before a decision is made.

I confirm that a substantive interview will not take place straight after screening in the case of an applicant who has engaged a representative who is not present. Such applicants will not be interviewed on the same day even if they express a willingness to be.

Thank you for drawing the recent mistakes to our attention. I have reminded staff to ensure that interviewing is consistent with this stated policy. Please contact me if you or your members experience any further difficulties.

Yours sincerely

Jackie Morey
Group Leader, Public Callers' Unit

Appendix 4

Letter about bail and permission to work

from IND to Gill and Co, 11 December 2000

From: D E P Miller, Chief Immigration Officer,
Home Office, Immigration and Nationality Directorate, UK Immigration Service,
Terminal 1, Heathrow Airport, Hounslow, Middlesex TW6 1BN

To: Gill and Co Solicitors
37 Gray's Inn Road, London WC1X 8PP

Date: 11 December 2000

Dear Sirs

Thank you for your letter of 28 November. I am sorry that we have not replied sooner.

You are quite right in your assertion that when a person is on bail granted by an adjudicator, if no condition has been set prohibiting that person from taking employment, then they are free to do so. Our earlier advice to you was in error, and was based on the inaccurate assumption that your client was on temporary admission. I apologise for any confusion caused. In order to clarify matters further for us, could you please send us a copy of your client's current bail conditions. Having seen that, a definitive answer for your client's case could easily be given.

As for giving your client written permission to work, this is not necessary. As you have said, it is the absence of a prohibition that allows a person to work: 'everyone can work, unless prohibited', not 'everyone is not allowed to work, unless given specific permission to do so'.

Thank you for your assistance,

Yours faithfully

D E P Miller
Chief Immigration Officer

Useful contacts

Amnesty International

99–119 Rosebery Avenue
London EC1R 4RE
Tel 020 7814 6200
www.amnesty.org.uk

Advice Services Alliance

4 Deans Court, St Pauls Churchyard
London EC4V 5AA
Tel 020 7236 6022
www.asa.mcmail.com

Asylum Aid

28 Commercial Street, London E1 6LS
Tel 020 7377 5123
www.asylumaid.org.uk

Bail for Immigration Detainees (BID)

28 Commercial Street, London EC1 6LS
Tel 020 7247 3590

Commission for Racial Equality (CRE)

Elliot House, 10–12 Allington Street
London SW1E 5EH
Tel 020 7828 7022
www.cre.gov.uk

Detention Advice Service (DAS)

308 Seven Sisters Road, London N4 2AG
Tel 020 8802 3422
das@das.ndirect.co.uk

The Expert Witness Institute

Africa House, 64–78 Kingsway
London WC2B 6BD
www.ewi.org.uk

Immigration Advisory Service (IAS)

County House, 190 Great Dover Street
London SE1 4YB
Tel 020 7357 6917
advice@iasuk.org

Immigration Law Practitioners' Association (ILPA)

Lindsey House, 40–42 Charterhouse Street
London EC1M 6JN
Tel 020 7251 8383
www.ilpa.org.uk

Joint Council for the Welfare of Immigrants (JCWI)

115 Old Street, London EC1V 9RT
Tel 020 7251 8706
www.jcwi.org.uk

Language Line

Swallow House
11–21 Northdown Street
London N1 9BN
Tel 0800 169 2879
www.language-line.co.uk

London Advice Services Alliance (Lasa)

Universal House, 88/94 Wentworth Street
London E1 7SA
www.lasa.org.uk
info@lasa.org.uk

NASS

Voyager House, 30 Wellesley Road
Croydon CR0 2AD
Tel 0845 602 1739 (helpline)
Tel 0845 6000 914 (voucher helpline)
Fax 020 8633 0129

Refugee Council

3 Bondway, London SW8 1SJ
Tel 020 7820 3085
www.refugeecouncil.org.uk

Refugee Legal Centre (RLC)

Sussex House
39–45 Bermondsey Street
London SE1 3XF
Tel 020 7378 6242

Refugee Women's Legal Group (RWLG)

c/o ILPA
Lindsey House, 40–42 Charterhouse Street
London EC1M 6JN
www.rwlg.org.uk

Refugee Women's Resource Centre

28 Commercial Street
London E1 6LS
020 7377 5123
www.asylumaid.org.uk

Glossary

Adjudicator

Arbiter at first level of appeal structure for appeals against refusal of asylum, refusals against variation of leave, appeals where a breach of the Human Rights Act 1998 is alleged and against a decision of NASS to refuse support. There are appeals centres throughout the UK.

After entry applicant

See in country applicant

APIs

Asylum policy instructions to immigration officers and other IND officials dealing with asylum claims.

Appeals Procedure Rules

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

Appellate authority

The name given to the court structures that have been established to hear immigration appeals.

Appropriate adult

An adult, usually a parent or relative, but where necessary another adult such as a social worker or member of the Refugee Council's Unaccompanied Minor Asylum Seeker Panel, who supports a child or person with learning difficulties at official interviews. This person's role should not be confused with that of a legal adviser.

ARC

Application registration card. The credit card sized card given to asylum seekers giving biographical details. Due to be phased in for all asylum seekers during 2002.

ASS

Appeals Support Section. IND department that deals with cases after an appeal has been filed against a refusal.

Association agreements

Agreements between, for example, Poland, Rumania, Bulgaria and the EEA that permit entry and residence in the EEA territory states for purposes of self-employment.

ASU

See Asylum Screening Unit

Asylum

One of the words used to mean 'to seek refuge in accordance with the 1951 UN Convention on Refugees'.

Asylum Screening Unit

The Home Office department where a new in country asylum seeker registers his claim for asylum. Fingerprints and photographs are taken and checks carried out as to the person's identity and means of entry into the UK. There is an increasing tendency for questions pertaining to the substantive claim to be asked at ASU appointment.

Asylum seeker

A person who has applied for asylum including those who may be entitled to protection under Article 3 of the European Convention on Human Rights.

Asylum appellant

A person whose asylum claim has been refused but has an appeal pending.

Bail

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

Becket House/Status Park

Two of the immigration service enforcement offices. Their duties include all aspects of enforcement: arrests, detention and release from custody, marriage interviews and reporting.

Ceasing to be an asylum seeker

A person who had claimed asylum but has been refused and whose appeal has been finally determined.

Certified case

An asylum seeker whose asylum application has been refused and, for example, where SSHD has certified the asylum claim is manifestly fraudulent. Certified claims are known as 'fast track' appeals as the appeal before the adjudicator is heard relatively quickly and there is no further right to apply for leave to appeal to the Immigration Appeal Tribunal if the certificate is upheld.

Cessation clauses

The Refugee Convention Article 1(C) prescribes a number of circumstances where a refugee may cease to qualify for international recognition.

Chief Immigration Officer

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

CIO

See Chief Immigration Officer

CIPU

IND's Country Information and Policy Unit

Clandestine entry

Illegal entrants who enter the UK without passing through any form of immigration control (for example in the back of a lorry).

CLR

Controlled legal representation

Convention grounds

A refugee has to have a well founded fear of persecution for one of the five grounds set out in the Refugee Convention: race, religion, nationality, membership of a particular social group or political opinion.

Country in upheaval

A country declared as such by the Secretary of State. A declaration has implications for nationals of that country who claim asylum.

Curtailement

Where a person is served with a notice curtailing, i.e. bringing an end to current leave. In the past it was usually accompanied with a decision to make a deportation order but is now likely to be accompanied by removal directions.

Deportation order

An order signed by the Secretary of State that a person be deported and prohibited from re-entering the UK. Since the coming into force of the Immigration and Asylum Act 1999 overstayers, and those in breach of conditions, are no longer deported but are served instead with removal orders save where an application was made under the Regularisation Scheme for Overstayers prior to October 2000.

Decision to deport

A decision by an immigration officer or by the Secretary of State through his officials in Croydon that a person should be deported.

Deportation

The procedure by which those convicted of criminal offences and recommended for deportation, and those whose deportation is deemed conducive to the public good, and their families, (and previously an overstayer or a person who has breached conditions of entry) used to be sent away from the UK.

The procedure no longer applies to overstayers and those in breach of conditions where a decision has been taken after 2 October 2000 save in some limited circumstances i.e. where an application had previously been submitted under the Regularisation Scheme for Overstayers. In those cases the person threatened with deportation will normally have an appeal although this may in some circumstances be restricted. Crucial time period is 7 years or longer presence in the UK. The latter means that full rights of appeal ensue in the course of which the adjudicator can look at all the circumstances.

Designated country

A country designated by the Secretary of State as safe for an asylum seeker to be returned to without his asylum application having been considered in the UK, if he travelled through that country on his way to the UK. Currently Norway, Switzerland, USA and Canada are designated countries.

Directions

Orders given by an adjudicator or the Immigration Appeal Tribunal as to how the case is to be conducted. For example, which documents are to be produced and timescales for their production, or timescales for allowing an appeal to give effect to the determination.

Dispersal

Since the coming into force of the Immigration and Asylum Act 1999 applicants for asylum who need financial support and accommodation have to apply to the National Asylum Support Service and can be sent to places outside London.

Dublin Convention

An agreement between all EU member states to delineate responsibility for determining asylum applications.

ECHR

See European Convention on Human Rights

ECO

See entry clearance officer

EEA

See European Economic Area

ELTE

See exceptional leave to enter

ELTR

See exceptional leave to remain

Enforcement action

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

Entry certificate

See entry clearance

Entry clearance

Prior authority to enter the UK. Also called a visa. Functions as a leave to enter and includes details of any conditions and dates for which it is valid.

Entry clearance officer

The officer at the post abroad who decides whether or not a person should be granted an entry clearance to come to the UK. They can grant or refuse leave to enter prior to the person physically arriving in the UK; the conditions of leave will be imposed on the passport.

EU

See European Union

European Convention on Human Rights 1951

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

European Union

Previously the European Economic Community (EEC)/European Community (EC). Countries are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the UK. Nationals of these countries and their family dependants have freedom of movement within the territory states.

European Economic Area

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

Exceptional leave to enter/remain (ELTE or ELTR)

Permission given by the port or Home Office outside the immigration rules. It can be for differing lengths of time and can have different conditions attached. Most frequently a second class asylum status in which case it is granted for a period of 1 year or 4 years depending on age and nationality. On completion of 4 years the person may apply for and will probably be granted indefinite leave to remain.

Exclusion clauses

The Refugee Convention Articles 1(D)–1(F) set out a number of circumstances where a person is not entitled to protection notwithstanding the fact that they may have a well-founded fear of persecution.

Family visit appeal

A right of appeal for people refused entry who wish to visit relatives.

Fast track appeals

See certified case

Fast track procedure

See certified case

Geneva Convention

See Refugee Convention

HOPO

Home Office Presenting Officer

HRA

See Human Rights Act

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 on the grounds that removal would be a breach of an individual's fundamental human rights.

IAA

See Immigration Appellate Authority

IAT

See Immigration Appeal Tribunal

IBU

Interview booking unit

ICD

Integrated Casework Directorate. The part of IND that takes the decision on an application for leave to remain or asylum.

IDIs

Immigration directorate instructions. Statements to immigration officers on application of rules and policies, parts of which are published on the IND website.

Illegal entrant

A person who is 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 arrived in the back of a lorry or someone arriving on a false passport.

Illegal immigrant

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

ILE

See indefinite leave to enter

ILPA

Immigration Law Practitioners' Association. Provides training, produces regular mailings and keeps practitioners up to date on changes in IND policy etc.

ILR

See indefinite leave to remain

Immigration Appellate Authority (IAA)

The branch of the Court Service that runs the immigration court system. There are hearing centres throughout the UK.

Immigration Appeal Tribunal (IAT)

The second level of the appeal structure. Either party can apply for leave to appeal i.e. permission to appeal against the adjudicator (the first) decision *except* in certified cases when only the respondent i.e. the Home Office can apply.

Immigration and Nationality Directorate (IND)

The Home Office directorate 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 IND, which deals with entry at ports and enforcement i.e. removal.

In country appeal

An appeal pending under which the appellant is permitted to remain in the UK.

In country applicant

A person who applies for a change in immigration status whilst in the UK whether lawfully or unlawfully present. Also used to identify an asylum applicant who has applied after having already entered the UK. Such asylum applicants are, save for a few exceptions, not eligible for benefits other than that provided under NASS.

IND

See Immigration and Nationality Directorate

Indefinite leave to remain (ILR) or enter (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. ILR can be revoked but on limited grounds. ILR is also referred to as 'settled status' or 'permanent residence'. Those recognised as refugees are granted ILR immediately; those granted ELR get ILR after four years.

Internal flight

Where a person facing persecution in one part of their country may be able to relocate to another part of the country without facing similar treatment, they may be said to have an 'internal flight' option which may preclude them from an entitlement to refugee status. Also referred to as 'internal relocation'.

IO

Immigration officer, an immigration service official

IS96

See temporary admission.

Judicial review

Administrative Court proceedings to challenge administrative decisions of the Home Office or lower court decisions. Frequently issued to challenge a decision that a person is an illegal entrant or to challenge a refusal to grant leave to appeal to the Immigration Appeal Tribunal. Section 11 of the Immigration and Asylum Act 1999 has limited its use in third country cases.

Lawfully resident

A person who has current permission to remain in the UK or is in the UK awaiting the outcome of an appeal.

Leave to enter

The permission given at a port or beforehand 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 or vary an existing permission to stay in the UK. It may be limited as to time and may have a prohibition on working or receiving public funds.

Legal Aid Franchise Quality Assurance Standard (LAFQAS)

The standards that the Legal Services Commission requires from suppliers of legal services under the franchise scheme. Those who meet these standards will have a contract to supply legal services free of charge to individuals subject to a means and merits test.

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

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.

NASS

National Asylum Support System established under the Immigration and Asylum Act 1999. Responsible for destitute asylum seekers who applied for asylum and/or became destitute after conclusion of all appeal procedures. Provides financial support and accommodation. The eligibility rules are very complex.

National assistance

A short-hand term for the limited financial assistance that used to be administered by local authorities for asylum applicants who were not eligible for benefits administered by the DSS. Very few asylum applicants now receive this assistance.

NIs

Nationality instructions. Internal Home Office instructions, published on IND website.

Non-compliance refusal

A refusal of asylum on the grounds that the asylum seeker has failed to comply with a direction made by the Home Office. If served with a refusal on non-compliance grounds he will have a right of appeal.

Non-state agent

An agent of persecution who is not connected with the state e.g. a member of the local populace.

One stop appeal

From 2 October 2000 an asylum seeker who is refused asylum is served with a one stop appeal notice on which he has to set out the grounds of appeal against removal on human rights grounds. The appeal on human rights grounds is heard at the same time as the asylum appeal. There are strict deadlines for lodging the appeal notice.

One stop notice

A notice served on an asylum seeker or on any person who has been refused leave with appeal rights requiring him to set out details of any human rights breaches he wishes to assert. There are strict deadlines for compliance. Failure to give details could mean the person is prevented from raising the issues at a later date.

Overstayer

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

PACE

Police and Criminal Evidence. The codes which must be complied with in interviews under caution.

PEO

See public caller unit/
public enquiry office

Permanent residence

Used to signify settled status. See indefinite leave to remain/enter.

Permission to work

Asylum seekers are presently able to apply for permission to work after their claim for asylum has been outstanding for a period in excess of 6 months.

Port

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

Port applicant

A short hand term usually used to signify an asylum applicant who applied for asylum at the port on entry. Used to be important in that eligibility for benefits used to arise from claiming at the port rather than incountry. Now relevant in terms of entry to NASS although after 25 September 2000 all new destitute asylum applicants are covered by NASS.

Post abroad

The British High Commission or Consulate abroad 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 are at various airports outside London.

Public funds

Income support, job seekers allowance, family credit, child benefit, council tax benefit, emergency housing (i.e. housing provided under the homelessness provisions of the Housing Acts), housing benefit, disability living allowance, attendance allowance, invalid care allowance, severe disablement allowance, disability working allowance. It does not include, for example, student grants, NHS treatment, CLR.

Refugee

Recognition by the Home Office as a refugee under the 1951 Convention leads to the grant of indefinite leave to remain/enter. Bestows various rights for example family reunion, issue of travel documents.

Refugee Convention

The 1951 Convention relating to the Status of Refugees (as amended by the 1967 Protocol), referred to in this guide as the Refugee Convention

Removal

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

RFRL

Reasons for refusal letter

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.

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.

Safe third country

An asylum seeker who has travelled to the UK through a third country that is considered safe can be returned to that third country with very restricted rights of appeal.

SAG

Statement of additional grounds incorporated on the one stop notice. Must be completed with known information or may lead to the applicant being precluded, on appeal, from relying on issues not previously raised.

SAL (Standard acknowledgment letter)

An A4 size certificate with a photo of the holder issued to an asylum seeker. Dependants listed and photos on the reverse. Likely to be phased out with the introduction of ARCs.

SCQ

Self completion questionnaire

Section 17 money

A short hand term used by immigration lawyers to identify support under s17 of the Children Act 1989 from Local Authorities to individuals with children.

Settlement/settled status

See indefinite leave to remain/enter

SEF

Statement of Evidence Form. The form that is completed with details of the basis of claim for asylum. There are very strict time limits and failure to complete on time can lead to refusal on non-compliance grounds. This is likely to be phased out during 2002.

Subject to immigration control

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

SSHD

Secretary of State for the Home Department

TA

See temporary admission

Temporary admission (TA)

TA is the alternative to detention for those who are awaiting a decision on the grant of leave to enter, or who have been refused leave to enter, but are 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.

Temporary release (TR)

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

Third country

A country which an asylum seeker has travelled through in order to get to the UK which is not the asylum seeker's country of origin, for example, a Turkish asylum seeker travelling by rail to Waterloo, London, will have come through the third country of France.

Third country national

A national of a non-member state of the EU who is resident in a member state.

UDHR

Universal Declaration of Human Rights

UNHCR

United Nations High Commission (or Commissioner) for Refugees

Unlawfully resident

A person who is in the UK either after their leave to remain has expired and they are not awaiting the outcome of an appeal, or as an illegal entrant.

Variation application

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

Visa

The same as entry clearance.

Visa national

Citizen of particular countries who always require a visa to come to the UK, whatever the purpose of the trip. Only exceptions are returning residents or those returning to the UK within a previous period of leave granted for more than six months.

White Paper

Secure Borders, Safe Haven, Integration with diversity in modern Britain, Home Office, February 2002

Work permit

Permission to work granted by Work Permits UK (formerly the Overseas Labour service and part of the Department for Education and Employment but now part of the Home Office). This should not be confused with the permission to work that asylum seekers could or can apply for after they have or had been awaiting a decision on their asylum application for more than six months.