

ILPA comments on Guidance for legal representatives on further submissions

General

As ILPA made clear at the meeting on 14 August 2009 we consider that the answer to difficulties with further submissions is not to be found in pro forma and guidance but in the UK Border Agency's improving its own procedures. Ms Amelia Wright stated at the meeting, when asked why it was felt that the UK Border Agency were not coping with further submissions:

- Volume – the UK Border Agency is not set up in a way to cope
- Culture problem – further submissions are not the subject of targets and are not prioritised.
- The way in which further submissions are received is not consistent, they vary in quality.
- Responses to further submissions tend to try to recreate refusal letters rather than being shorter.
- There is a backlog

(taken from ILPA's note of the meeting)

ILPA placed on record at the meeting its view that the answer to these difficulties lay in the UK Border Agency getting its own house in order, rather than with representatives. We none of us want to send further submissions into the void. At the moment that is what often seems to happen with further submissions, however carefully presented they are.

It is likely to influence representatives' behaviour if further submissions that are of good quality receive prompt, good quality responses, while those that are hard to make head or tail of receive a request for clarification. As indicated at the meeting, we cannot see why it should be difficult to respond rapidly to further submissions that do not, taken at their highest, provide a basis on which to reconsider a decision.

ILPA placed on record at the meeting its view that a pro forma form for further submissions appeared to be designed to deter and failed to make explicit on its face that it was not a mandatory form. We urged, and continue to urge, the UK Border Agency to abandon the idea of a pro forma form for further submissions. The form circulated for the meeting seems designed to confuse people into thinking it mandatory; ILPA will of course have no hesitation in pointing out that, as a matter of law, the form cannot be mandatory.

We were willing to explore at the meeting the notion that there may be guidance that the UK Border Agency could issue to indicate what its caseowners find helpful in further submissions, taking as its starting point Ms Wright's powerpoint at the meeting. However, the way in which this has translated into the draft guidance on which we are now commenting gives us cause for much concern.

It was agreed at the meeting that the notion of 'minimum standards' was inappropriate but that there might be a place for the UK Border Agency setting out what it would find helpful in further submissions in a condensed form that would be

accessible to unrepresented applicants who are unable to grapple with the Asylum Process Instruction on further submissions. We also acknowledge that further submissions from representatives are of varying quality and that a short document that would steer them toward the more detailed Asylum Process Guidance and highlight the main features of this, could be helpful. On other matters, the UK Border Agency may prefer a different presentation to that which a representative would normally provide; one example was that if the UK Border Agency does not wish to receive large bundles of documents then it could indicate that it was content to receive only those extracts relevant to the client's case.

However, what we have got looks much closer to a set of minimum standards or to the UK Border Agency issuing mandatory guidance to representatives or unrepresented appellants. This is not the Agency's role and nor, to judge by the document with which we have been presented, is it something that the Agency is able to do accurately. Nothing in the document makes clear that it is intended to assist the UK Border Agency (and by extension applicants) rather than being mandatory with non-compliance resulting in rejection, and it contains errors of law.

The document fails accurately to reflect paragraph 353 of the immigration rules. This is grave because any 'guidance' the UKBA issues is in danger of replacing paragraph 353 in practice, in that there is a danger that UK Border Agency staff would read the guidance rather than the rule, and that some representatives and possibly most unrepresented appellants, would also do so. The difficulty is that the draft gets the law wrong.

As was emphasised at the meeting, if the intention is to produce guidance directed at unrepresented applicants then it is important that this is translated into a language that they understand.

We have illustrated the above with specific comments on the different parts of the draft guidance for practitioners below. We have done this in the form of annotations (in italic text) to the draft guidance. We have not repeated these annotations in our annotations on the draft guidance to unrepresented applicants, which we have cut and pasted into this same document, but have picked up in our comments on that form matters relating to that form only. When we put these together, we can only come to the conclusion that this guidance is not appropriate.

Draft Guidance directed at representatives

What the UK Border Agency wants to see from your client's further submission:

ILPA annotation: *It would be more accurate to say 'would like'. Nothing makes clear that the purpose of the document is to indicate what would be helpful for caseworkers and that it does not constitute instructions, let alone mandatory instructions, to representatives.*

Further submissions should be based on new material, not mere repetition of a previous claim or submission,

NEW, NOT OLD

unless there has been a change in legislation or in policy since your client's last submission. If material has been considered by UKBA or at appeal, it will have been considered already for the purposes of paragraph 353 of the Immigration Rules, and there will be no fresh claim. This means that your client will not have any right of appeal.

ILPA annotation: *This is not accurate as a matter of law. See our comments on 'Not previously available' below which are relevant here.*

*Moreover, the reference to 'changes in policy or legislation' is not accurate as a matter of law. Changes in the law are brought about not only by legislation but also by caselaw. A good example is that many people might have (and some were successful in establishing) a fresh claim following *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, where their article 8 claim had previously been considered on the basis of *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 and an expectation that they make an entry clearance application abroad. Many other examples could be given (*Huang v Secretary of State for the Home Department*, *Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11, *Elgafaji and another v Staatssecretaris van Justitie (Case C-465/07)*; [2009] WLR (D) 59, etc). The above guidance appears to exclude this possibility.*

We are mindful of the frequency with which law (legislation and caselaw) and policy change and that there is a question of whether the change is relevant to the particular case. We also described in the meeting the situation where previous representatives have not made the case clearly enough and new representatives are endeavouring to make the case more clearly. The guidance suggests that such representations cannot be made; we suggest that they assist in the UK Border Agency in meeting its obligations under national and international law.

The reference to 'based on' new material/material that has not been previously considered (see notes on 'not previously available' below) also appears inaccurate and a more accurate word would be 'includes'. It is sufficient that further submissions include material that has not previously been considered.

BE SIGNIFICANT

The new material should be significant. This means that there should be sufficient information in the new material for there to be a realistic prospect of the UK Border Agency or an immigration judge deciding either that your client:

- should be granted asylum, humanitarian protection or discretionary leave, or
- should be granted leave on the basis that removal would breach **your** human rights or
- should be granted leave on the basis of compassionate circumstances.

Paragraph 353 of the Immigration Rules states that submissions will amount to a fresh claim if they are "significantly different" from the material that has

already been considered. Submissions will only be significantly different if the content:

- has not already been considered; and
- taken together with the previously considered material, creates a realistic prospect of success.

If the material put forward in the further submissions has not previously been considered, the case owner should then decide whether the new information, taken together with the material previously considered, raises a realistic prospect of success. Please note that the threshold with regard to a “realistic prospect of success” is a low one. The Court of Appeal has described the test as “somewhat modest”. The test is described as somewhat modest for three reasons.

- Firstly, the question is whether there is a realistic prospect of success in an application before an immigration judge, but not more than that.
- Second, the immigration judge **himself** does not have to reach a position of certainty, but only to think that there is a real risk of the applicant being persecuted on return.
- Finally, since asylum is in issue, the consideration of all the decision makers, the Secretary of State, the immigration judge and the court, must be informed by the anxious scrutiny of the material.

***ILPA annotation:** If the document is addressed to representatives, the word ‘your’ (our highlight added above) is not accurate. We also note the word ‘himself’ (our highlight added above); not all immigration judges are men.*

**RELEVANT TO
YOUR CLIENT**

The new material should be relevant to your client, and the further submissions should explain how the material is relevant to your client. Copies of reports from organisations such as Amnesty International, newspapers etc are not sufficient on their own without an explanation of the relevance to your client’s own case. If a report is available in the public domain, you could, for example, submit the title and date of a report and reference the part that applies to your client’s own case. In such circumstances you would not need to submit a hard copy of the report itself.

**NOT
PREVIOUSLY**

Material should not have been available prior to the most recent decision on your client’s case, whether that decision is an initial decision, an appeal or a decision on previous further submissions. This is in

AVAILABLE

line with **the obligation** under section 96 of the Nationality, Immigration and Asylum Act 2002 of an individual to keep UKBA informed of any developments in his or her case as they happen.

ILPA annotation – *this misstates the law. It seems to be an attempt to reintroduce the old test in Regina v Secretary of State for the Home Department Ex Parte Onibiyo [1996] QB 768; [1996] EWCA Civ 1338 under which you had to show that the material was previously not reasonably available, which is not now a requirement of paragraph 353. The Asylum Process Instruction on further submissions gets this right, placing the emphasis on whether the material has not previously been considered rather than on whether it was previously available.*

The question is not whether the material was available, but whether it has been considered. If it has not been considered, for example because the appellant was unrepresented or not well represented, then it may well have to be considered for the UK to fulfil its obligations under the 1951 UN Convention relating to the Status of Refugees and the Optional Protocol thereto of 1967 or under the Human Rights Act 1998. This paragraph could dissuade people from submitting material that the UK Border Agency should be considering.

This, taken with the ‘New not old’ section above implies that material already considered as not amounting to a fresh claim cannot be new material under rule 353. This is wrong as a matter of law. Under paragraph 353, new material is that submitted after the last UK Border Agency or appeal decision on a claim. Whenever any new material is submitted, the UK Border Agency must make its paragraph 353 assessment based on all the new (i.e. post appeal) material. In other words, consecutive representations can accumulate to be a single fresh claim.

It is also wrong as a matter of law to refer to “the obligation under section 96 of the Nationality, Immigration and Asylum Act 2002 of an individual to keep UKBA informed of any developments in his or her case as they happen.” Section 96 relates only to matters which occur before an appeal is concluded or before a statement of additional grounds is given. If a person is making fresh claim representations, then that point is already passed.

It is also wrong as a matter of law to refer to the ‘obligation’ under section 96. Section 96 creates no obligations. It provides a discretion to certify.

NOW, NOT LATER

Further submissions should be made as soon as is reasonably practicable. Where submissions have not been raised as soon as is practicable, UKBA is likely to certify the case under s.96 of the Nationality, Immigration and Asylum Act 2002. The effect of a certificate is to prevent the applicant from exercising the right of appeal against refusal.

ILPA annotation – *this does not seem to take any account of the discussion at the meeting at which it was stated that this paragraph was unhelpful. For example, medical evidence can go out of date, or it may be unclear that a new relationship will in time form*

the basis of an application to remain. It is just going to lead to a 'legacy questionnaire' situation all over again with people rushing to put in representations because they fear being too late.

If you would like more information regarding further submissions, the Asylum Instruction (which sets out the full policy, processes and procedures followed by the UK Border Agency when considering further submissions) is available here:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/furtherrepresentations.pdf?view=Binary>

Draft Guidance directed at unrepresented applicants

What the UK Border Agency wants to see from your further submission:

NEW, NOT OLD

Further submissions should be based on new material, not mere repetition of a previous claim or submission, unless there has been a change in legislation or in policy since your last submission.

***ILPA annotation:** this language is not simple for those whose main language is not English, for example a phrase such as 'mere repetition'.*

Unrepresented appellants will not necessarily know whether there has been a change in law or policy.

BE SIGNIFICANT

The new material should be significant. This means that there should be sufficient information in the new material for there to be a realistic prospect of the UK Border Agency or an immigration judge deciding either:

- that you should be granted asylum, humanitarian protection or discretionary leave, or
- be granted leave on the basis that removal would breach your human rights or
- be granted leave on the basis of compassionate circumstances.

RELEVANT TO YOU

The new material should be relevant to you, and the further submissions should explain how the material is relevant to you. Copies of reports from organisations such as Amnesty International, newspapers etc are not sufficient on their own without an explanation of the

relevance to your own case. If a report is available in the public domain, you could, for example, submit the title and date of a report and reference the part that applies to your own case. In such circumstances you would not need to submit a hard copy of the report itself.

ILPA annotation: *Again, the language is difficult. Phrases such as 'in such circumstances you would not need...etc.' are rather heavy going.*

**NOT
PREVIOUSLY
AVAILABLE**

Material should not have been available prior to the most recent decision on your case, whether that decision is an initial decision, an appeal or a decision on previous further submissions.

NOW, NOT LATER

Further submissions should be made as soon as is reasonably practicable.

If you do not currently have a legal advisor, it is strongly advised that you take legal advice to assist you with your further submission.

ILPA annotation: *It would be helpful to expand this terse reference, for example making reference to the Community Legal Services Direct site.*

Text annotated provided by the UK Border Agency.

Introduction and Annotations, ILPA,

Alasdair Mackenzie
Acting Chair, ILPA
4 September 2009