

**THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008 –
CONSULTATION ON RULE AMENDMENTS FOR ASYLUM AND
IMMIGRATION UPPER TRIBUNAL CHAMBER**

**RESPONSE OF THE IMMIGRATION LAW PRACTITIONERS
ASSOCIATION (ILPA)**

1. ILPA is a professional association with some 1000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on a wide range of government and other public body stakeholder and advisory groups.
2. ILPA strongly opposed the Government's original proposal that the Lord Chancellor should continue to make procedure rules for asylum and immigration appeals,¹ notwithstanding that the rules governing all other appeals before the new tribunals would be the responsibility of the Procedure Rules Committee ('the Committee'). It is pleased that the Government withdrew that proposal² in light of the overwhelming criticism of respondents to the consultation.³ ILPA welcomes the fact that procedure rules for immigration and asylum appeals, which often involve important human rights challenges to the Government, are now in the hands of an independent Committee.
3. ILPA gives its responses to the questions posed by the Committee below, and

¹ *Consultation: Immigration Appeals: Fair Decisions, Faster Justice* UK Border Agency 21 January 2009

² *Immigration Appeals: Response to Consultation Fair Decisions, Faster Justice* UK Border Agency and Tribunals Service, undated.

³ *Op. cit.*

is happy to clarify any matter or address any further questions at the Committee's request.

4. ILPA has indicated particular concerns about the proposed Practice Directions and Statements in response to the Committee's question about whether the rules and practice directions as a whole constitute a suitable framework. The practice in the Asylum and Immigration Tribunal (AIT) was to consult upon changes to its Practice Directions. If the Committee does not address the Practice Directions and Statements in the context of its question about whether they constitute a suitable framework, ILPA submits that the importance of the provisions contained therein, together with the practice of consultation in the AIT, means that there should be a consultation on the Practice Directions and Statements before they come into effect.

Question 1: Are the general powers and provisions sufficient for immigration and asylum appeals?

Question 2: Are any additional rules are required?

5. While ILPA accepts that some amendments are required to the existing rules, it strongly opposes amendments which are inconsistent with basic fairness and the Tribunal's independence, e.g. those relating to service of determinations and fast track procedure (see below).
6. When the incorporation of asylum and immigration appeals into the new tribunal structure was first mooted, ILPA identified the main potential benefit as being the application of norms of fairness from other jurisdictions to immigration and asylum appeals whereas previously, procedures favoured the Home Office over the opposing party. It follows that ILPA considers that as a matter of fairness and equal treatment, rules that apply across other chambers should also apply to the Immigration and Asylum Chamber in the absence of exceptional reasons.

Question 3: Is the exclusion of immigration and asylum appeals from rule 7(2)(d) and Rule 8, except 8(2), an appropriate one?

7. Yes: it would potentially be inconsistent with the UK's international obligations to strike out an appeal which was meritorious.

8. However, there is a long history in the AIT and its predecessor tribunals of practices by the Home Office as a litigant that would be unacceptable in any other jurisdiction, e.g. repeated failure to respond to correspondence, allocate an official to address case management issues with the other side, or comply with directions. We regret to say that the AIT and its predecessors failed to address these practices and allowed their attempts to improve case management to be blocked, in effect, by the Home Office's unwillingness and/or inability to engage with the case management process. That has included a reluctance on the part of immigration judges to make directions against the Home Office, because of a perception that the Home Office will take no notice, and a reluctance to take any action when the Home Office fails to comply with any directions which are set. The results include unfairness to appellants; unnecessary adjournments; significant delays in resolving appeals; and unnecessary complication of hearings, in particular because of the Home Office's frequent failure to set out its case fully in advance of hearings, leading to longer and more costly hearings than should be necessary (see also in this respect, para. 45 below).

9. In the Administrative Court, the role of the Treasury Solicitor reduces this problem but ILPA understands that Home Office presenting officers will present the majority of appeals in both the First Tier and Upper Tribunals. In those circumstances, ILPA hopes that the Tribunal will make more constructive and robust use of its case management powers than has hitherto been the case.

Question 4: Do respondents agree that a permission application granted by the First-tier Tribunal should be treated as notice of appeal by the Upper Tribunal?

10. Yes.

Question 5: Do respondents agree that bail applications should be made to either, but not both, the First-tier Tribunal and Upper Tribunal where permission to appeal can be sought from the Upper Tribunal?

11. ILPA understands the proposal to be that during the time limit for renewing an application for permission to appeal to the Upper Tribunal, a bail application can be made to either Tribunal but not both. On that understanding, ILPA agrees.

12. ILPA also agrees that bail should ordinarily be sought from the Upper Tribunal after proceedings have been commenced before it. However, if bail has been sought from the First-tier Tribunal and proceedings are commenced in the Upper Tribunal before that bail application has been decided, the First-tier Tribunal should decide it to avoid delay. Where bail has been refused by the First-tier Tribunal, a subsequent application to the Upper Tribunal should not be precluded in the same way as subsequent applications to the same tribunal are not precluded.

Question 6: Views are sought on the process for applying for permission to appeal to the Court of Appeal/Inner House of the Court of Session and the powers of the Tribunal in relation to applications made under the provisions of Part 7 of the rules?

13. The consultation document states:

11.2 The procedure rules allow for current practice in the AIT and High Court for the respondent to serve decisions on asylum appeals on the appellant to continue. This procedure reflects established Government policy in asylum appeals. TPC note that the response to the consultation “Immigration Appeals, Fair decisions: Faster justice” states that UKBA and the Tribunals Service ‘will take action to address any unnecessary delays, including looking at the practice of UKBA serving asylum decisions on appellants’ (consultation response: page 12), and have made the decision to retain respondent service pending this. The Committee would support changes to Government policy to return responsibility for service to the Tribunals Service but do not think it appropriate to take any steps until the outcome of the government's review.

14. The Government's original intention to retain control of the procedures rules governing immigration and asylum appeals⁴ was the subject of widespread criticism from all sides.⁵ ILPA commented that:

The suggestion that despite being incorporated in the new tribunals, the procedure rules will continue to be made by the old system undermines yet further confidence in the intentions behind the proposals. The procedure rules made by the Government tend to favour the Home Office and have on a number of occasions been found to be unlawful.⁶

15. The provisions of the existing procedure rules requiring the AIT to serve only the Home Office with its decision are the most notorious example of the Government using the rules to depart from basic principles. They brought the system into disrepute and meant that asylum seekers often did not see the tribunal as fully independent from the Home Office.
16. It is wrong in principle that one party to an appeal should be able to serve the decision on the appeal on the other party and in the meantime, the Tribunal is not permitted to disclose the result of the appeal to the other party. (In response to requests by ILPA and other organisations, the AIT said that the Procedure Rules precluded the tribunal from disclosing its decision to the asylum seeker even though it had been served on the Home Office.)
17. If an appellant has an appeal heard by an independent tribunal then basic principles indicate that he is entitled to be told by the Tribunal what the outcome of the appeal is. Equally there is a responsibility on the Tribunal to ensure that an appellant is informed of the result. The proposed arrangement is an abdication of this responsibility to suit the convenience of the opposing party to the appeal.

⁴ *Consultation: Immigration Appeals: Fair Decisions, Faster Justice* UK Border Agency 21 January 2009

⁵ See the documents *Consultation responses from individuals* and *Consultation Responses from organisations* on www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/, the page of the UK Border Agency website devoted to the *Immigration Appeals: Fair Decisions, Faster Justice* consultation.

⁶ *Fair Decisions, Faster Justice*, ILPA response October 2008.

18. Even were there evidence that it assisted faster removal of significant numbers of asylum seekers, this would not justify measures that means that the Tribunal does not treat the parties equally and acts in a way that undermines its independence, and the appearance of independence.
19. The Committee states in the consultation paper that it would “support changes to Government policy to return responsibility for service to the Tribunals Service”. ILPA welcomes the Committee’s view of the merits of the issue. However, this is a matter for the Committee to decide according to the merits of the issue. It is no longer a matter for the Government.
20. ILPA is concerned that the Committee propose awaiting a ‘review’ by the Government. The only reference in the Government’s response to reviewing procedure was in the following terms:

...the UK Border Agency and the Tribunals Service will keep the end-to-end process under review and will take action to address any unnecessary delays, including looking at the practice of the UK Border Agency serving asylum decisions on appellants, as well as the time required to promulgate decisions. As part of this process, we will also consider whether any changes to legislation or procedure rules are required.
21. ILPA has made enquiries with the Home Office about the status of this ‘review’, what stage it has reached, and when it will be completed. ILPA has established that there is in reality no review in existence. The Home Office has confirmed that the intention is simply to review the process in the future and this will not be before summer 2010.⁷
22. The experience of ILPA members is that the requirement upon the AIT to send determinations to the Home Office for service on appellants merely adds to delays, and the Home Office has proved incapable of doing this efficiently, as shown, for example, by its inability to accurately indicate the date of service by post for the purposes of subsequent calculations of time by the Tribunal.

⁷ Email communication to Alison Harvey, General Secretary ILPA from the head of the Guidance, Litigation and Appeals Directorate, UK Border Agency 23 September 2009.

This has been a matter of ongoing concern between stakeholders and the AIT.⁸

23. The Home Office has also used the unfair and unequal procedure to its advantage in important public interest litigation. For example, during the Zimbabwean test case litigation which prevented removals to that country from 2005 until its conclusion in 2008, and where decisions were a matter of great public interest, it insisted on the procedure with the result that it was able to consider its response to test case decisions before giving them to those representing the Zimbabwean community.
24. Even were a review currently underway, the incompetence and added delays caused by the Home Office in serving determinations is an added objection but it is not the fundamental objection. The fundamental objection is one of principle which relates to the independence of the Tribunal.
25. ILPA asks the Committee not to introduce this unfair procedure into the Upper Tribunal Procedure Rules. Alternatively, now that the Home Office has disclosed that there is in reality no review underway and none planned before summer 2010, ILPA asks the Committee to immediately invite views upon the proposed amendment from interested parties including the Government.
26. It would be especially unfortunate if such a controversial provision said to undermine independence were inserted into the rules of the Upper Tribunal as a superior court of record without a decision by the Committee about whether it was justified.
27. If the Home Office is to be entitled to receive the Tribunal's decision before the other party, then there should obviously be the same provision preventing it withholding the determination beyond the dates that it applies either for permission to appeal or to set aside a decision (see para 11.3 of the consultation).

Question 7: Do respondents consider that the rules for the First-tier, proposed

⁸ See, *inter alia*, the minutes of the Asylum and Immigration Tribunal Stakeholder Group, *passim*.

rules for the Upper Tribunal, and the draft Practice Directions/Practice Statements, provide a suitable framework for this jurisdiction?

28. As well as the answers above and below, ILPA considers that the following provisions are unsuitable for this jurisdiction.

Reporting determinations

29. ILPA has expressed repeated concern about the way in which certain decisions are selected for 'reporting' whereas representatives are prevented from citing other decisions. In its submissions on a consultation on the AIT's Practice Directions in 2006, ILPA stated that:

We strongly submit that the criteria by which it is determined whether a determination is reported and the procedure by which this is done should be formalised in the Practice Directions. The only previous guidance offered is that many determinations are only of interest to the parties. ILPA agrees. However, ILPA has also seen many determinations which assess issues which are of relevance to other cases which are unreported; whereas determinations of no more apparent relevance *are* reported. ILPA understands that previously, it was a matter for the individual discretion of panel chairs whether the determination was reported but that there is now a system in place for determining this. Given the legal significance in terms of citation of determinations, ILPA submits that the criteria and process must be transparent.

30. Only in response to a Freedom of Information Act (FOIA) request in December 2007⁹ was the existence of a Reporting Committee formally disclosed and that:

The Reporting Committee (under the general guidance of the President, and chaired by a Deputy President) decides whether a determination (whether country guidance or not) is to be reported.

31. Nothing is presently known about the criteria that the Reporting Committee applies, including how it deals with conflicting determinations. Other tribunals such as the Social Security Commissioners had a system for reporting determinations but the criteria for publishing determinations were published

⁹ Ministry of Justice to Mr R Low-Beer 21 December 2007.

and there was no rule restricting the citation of unreported determinations.

32. The notes to the original version of the Practice Direction (IAT PD No. 10) stated that

3 By restricting the number of determinations capable of being cited at either level, the Tribunal intends both to promote consistency of decision-making and to give a reliable indicator of the current judicial thinking on frequently (and less-frequently) occurring issues. Determinations will not, however, be reported if in the Tribunal's view they contain no new principle of law or matter of real and generally-applicable guidance to parties, Adjudicators or the Tribunal, and no assessment of facts of such generality that others ought to have regard to it.

4 It should be emphasised that both Adjudicators and the Tribunal remain open to arguments that the reported decision or decisions should not be applied or followed. The effect of the Practice Direction is that such arguments will need to be supported by sound reasons, rather than by some previous decision.

33. ILPA understands that there is no procedure comparable to that which was operated by the Social Security Commissioners whereby decisions which it is proposed to report are circulated amongst the Commissioners to determine whether 'the decision commands the broad assent of the majority of the Commissioners'. While it is obvious why cases are not reported if they reach no conclusion on issues of any interest beyond the parties to the appeal, ILPA has repeatedly expressed concern that many determinations of wider interest have not been reported for no obvious reason. ILPA members have also expressed concern that a small number of Senior immigration judges are disproportionately represented in the reported cases. The absence of transparency in the criteria for reporting determinations has contributed to a perception that they may not be fully representative of the Tribunal's caselaw.
34. The rules for citing an unreported determination include that the party should provide a 'summary analysis of all other decisions of the Tribunal and all available decisions of higher authority, relating to the same issue' for the last six months. The Practice Direction states that 'This analysis is intended to show the trend of Tribunal decisions on the issue.' The response to the FOIA request referred to above stated that

Unreported determinations following hearings in which a Senior Immigration Judge sat are put on the 'unreported cases' part of the AIT website principally for purposes

of comparison.

35. Whereas reported determinations are searchable on the Tribunal's website,¹⁰ the AIT has so far failed to make unreported determinations available in a searchable form. As long as this remains the position, the Tribunal cannot reasonably expect the analysis required by the Practice Direction to encompass other unreported determinations. If such a requirement is to remain, then at a minimum, the Tribunal Service must enable these determinations to be searched in the same way as reported determinations. It is unreasonable and unworkable to require parties to search for additional decisions in a database which they are prevented from searching electronically.
36. Procedures for highlighting particular decisions may be reasonable so long as the process of selection is fair and transparent. However, ILPA considers that it is especially inappropriate for a court of record to implement a system whereby the majority of its decisions cannot be cited and there is no transparency (or even published criteria) about the selection of those that can be cited.

References to the European Court of Justice

37. ILPA is concerned that it is not compatible with the discretion under Article 234 of Consolidated Treaty given to 'any court or Tribunal' of a member State to make a reference to the European Court of Justice to ask for a preliminary ruling to permit only some immigration judges to make such a reference.
38. It considers that the reference to 'any court or tribunal' is not a reference to for example 'the Asylum or Immigration Tribunal' as a body (or, e.g. to 'the Court of Appeal' as a body) but to a court or tribunal constituted to hear a particular case. We do not consider that draft practice direction 2.1(8) is compatible with this. It could give rise to a situation where the tribunal hearing the case is of the view that it should make a reference but the Senior President or Chamber President disagreed. ILPA considers that it would be unlawful to

¹⁰ www.ait.gov.uk

prevent the tribunal making the reference in those circumstances.

Evidence

39. ILPA considers that rule 15(2A) is unnecessary. There is no indication in the consultation document why the Upper Tribunal's existing powers to deal with evidence are not considered sufficient. Similarly, the draft Practice Directions state that:

4.1 UT rule 15(2A) imposes important procedural requirements where the Upper Tribunal is asked to consider evidence that was not before the First-tier Tribunal. UT rule 15(2A) must be complied with in every case where permission to appeal is granted and a party wishes the Upper Tribunal to consider such evidence. Notice under rule 15(2A)(a), indicating the nature of the evidence and explaining why it was not submitted to the First-tier Tribunal, must be filed with the Upper Tribunal and served on the other party as soon as practicable after permission to appeal has been granted. [Emphasis added]

40. While a similar provision exists in the AIT's Practice Direction in relation to Evidence on reconsideration,¹¹ it is not consistently applied. Evidence is not usually concluded especially from second stage reconsiderations so long as it is served in compliance with standard directions.
41. Clearly, fresh evidence will be relevant to an appeal on a point of law in limited circumstances. Where an error of law is established but further findings are required, up to date evidence will often be relevant. That should be served in good time and in accordance with directions. But a provision that requires each individual piece of evidence (e.g. country reports) to be served individually as soon as it becomes available is wasteful and impractical and serves no obvious purpose.

Fast track provisions

42. ILPA's general concerns about the fast track have been set out in various documents. The Committee is referred to ILPA's *The Detained Fast-Track*

¹¹ Asylum and Immigration Tribunal, Practice Directions (Consolidated version as at 30 April 2007), 14A Evidence on Reconsideration

*Process: a best practice guide*¹² and ILPA responses and submissions.¹³

43. ILPA recognises that the Committee has not yet consulted about the Fast Track procedure rules themselves and it would urge it to do so as soon as possible when ILPA will set out its wider concerns in detail.
44. However, ILPA strongly submits that the Committee should not insert new provisions into the Upper Tribunal rules without concluding that they are fair. The time limits are manifestly unfair. It is obvious that it is unreasonable to provide only one working days notice of the hearing (r.36(2)(aa)). The fact that the appellant is detained cannot justify preventing him/her having a fair opportunity to prepare and present his case (see consultation paper, para 10.2). If it is suggested that the time limit is in the interest of the detained person, ILPA would be pleased to explain to the Committee in detail why this is not the case.

Question 8: Do respondents consider that anything currently proposed for inclusion in the practice directions/statements should more appropriately be included in procedure rules?

Provision for requiring permission to amend the reasons for refusal letter

45. Many Appellants are publicly funded. All Appellants deserve to know the case against them. It is frequently the case that at Case Management Review Hearings and other preliminary hearings, Presenting Officers representing the original decision maker will state that they cannot give any indication of the approach to be taken by the Presenting Officer who will appear at the full hearing. An Appellant faced with a change of approach by the Presenting Officer at the hearing may be seriously disadvantaged if an adjournment is not

¹² ILPA, 2008, available online at www.ilpa.org.uk/pub.html

¹³ See e.g. ILPA's 28 February 2005 response to the Department of Constitutional Affairs consultation *Asylum and Immigration Tribunal* Fast Track procedure rules; ILPA's submission to the Joint Committee on Human Rights Inquiry into the Treatment of Asylum Seekers, October 2006 and ILPA's further submission to the Committee following the publication of its report, in the form of a memorandum dated September 2007. See also ILPA's February 2008 and March 2009 submissions to the Home Affairs Committee Inquiry into Human Trafficking. All these are available on www.ilpa.org.uk/submissions/menu.html

granted in the face of a change of approach: publicly funded Appellants cannot justify to the Legal Services Commission the preparation of points other than those in the decision appealed against.

46. In the circumstances, the imposition of a Rule requiring variation of the reasons in relation to the decision against which the appeal is brought would provide discipline upon the Respondent to appeals, and save judicial time. This would add force to the provision at part 7 of the Practice Directions in relation to the case management review whereby both appellant and decision maker are required to provide details of the case they intend to present at hearing and the decision maker must provide details of any amendment to his refusal letter. At present, the decision maker may fail to do so yet seek to amend his case at the hearing.
47. ILPA would therefore propose a new rule 14 of the First-tier Tribunal rules:
Variation of grounds of appeal and refusal
14. Subject to section 85(2) of the 2002 Act, the following steps may be taken by a party only with the permission of the Tribunal.
(a) a variation of the grounds of appeal by the appellant;
(b) a variation of the reasons for the decision to which the notice of appeal relates.

Question 9: Are there any other areas of procedure or process that respondents consider should be set out in either a) procedure rules, or b) practice directions?

48. ILPA would propose the following additions

Representation

49. Rule 48(1) of the existing AIT Procedure Rules appear to restrict representation of appellants to representation by those permitted by s 84 of the Immigration and Act 1999 Act to provide such representation. As worded, new Rule 11 does not seem to do so. ILPA considers that the existing restriction should be reflected in the proposed Rules for the avoidance of

doubt.

Bail

50. The AIT's Practice Direction¹⁴ directs that immigration judges should have regard to guidance notes including the Bail Guidance Notes for Adjudicators (May 2003). Although aspects of this are out of date, ILPA considers that the procedural guidance therein is valuable and should be reissued in a new practice statement.

Children and vulnerable adult witnesses and the question of litigation friends

51. ILPA supports the good practice directed by the existing Practice Direction on Child, Vulnerable Adult and Sensitive Witnesses.¹⁵ ILPA has invited the AIT to apply it.¹⁶ However, the proposed practice directions and statements do not include the provisions in the Chief Adjudicator's Guidance Note 8 on Unaccompanied Children¹⁷ (which was applied to the AIT by its Practice Direction).
52. Children involved in asylum appeals are likely to have experienced serious physical and psychological harm and ILPA considers that their treatment should be addressed by a further practice statement in the immigration and asylum chamber of both tribunals.
53. As a ratifying state to the United Nations Convention on the Rights of the Child, (UNCRC) as a member state of the European Union and Council of Europe and as a matter of domestic and European jurisprudence and laws relating to the welfare and safeguarding of children, the United Kingdom and its public institutions, in all decisions affecting a child must treat the best interests of the child as a primary consideration (Article 3 UNCRC), must act without discrimination on the grounds of a child's status (Article 2 UNCRC)

¹⁴ Asylum and Immigration Tribunal, Practice Directions (Consolidated version as at 30 April 2007).

¹⁵ Tribunals Judiciary, First Tier and Upper Tier, undated.

¹⁶ ILPA to the President of the Asylum and Immigration Tribunal, 6 January 2009.

¹⁷ April 2004.

and must enable a child's wishes and feelings to be taken into account and to be enabled to participate effectively in all decisions affecting that child (Article 12 UNCRC). States must also put into effect measures to implement fully all the rights of children established under the Convention on the Rights of the Child and report these measure periodically the UN Committee on the Rights of the Child. The most recent UK report¹⁸ and corresponding UN Committee on the Rights of the Child's Concluding Observations in 2009¹⁹ raised concerns about the UK's practices on the detention of children subject to immigration control²⁰ and the lack of guardianship provisions for this group of children.²¹

54. In all decisions affecting children, whether directly or indirectly, the Tribunal must ensure that its procedures satisfy the highest standards in relation to children's rights. This should apply both to practical measures to ensure that court precincts and the judicial arena are appropriate to meet the needs of children as appellants and witnesses and for the parents, carers and representatives of children accompanying them in court.
55. This should also apply to all judicial administrative procedures and judgecraft in court, for example in listing and marshalling cases involving children pastoral considerations, the rules governing the conduct of appeals by Immigration and Senior Immigration Judges and representatives and the consideration of evidence of the child in person and through child expert witnesses and guardianship arrangements.
56. All new procedure rules should be written, interpreted and applied in such a manner as to be sufficiently flexible to give positive effect to the rights of children in terms of their immediate and longer term best interests, principles of non-discrimination and effective participation rights.

¹⁸ Consolidated third and fourth periodic report to the UN Convention on the Rights of the Child, 15 July 2007 CRC/C/GBR/4

¹⁹ *Consideration of reports submitted by States parties under Article 44 of the Convention: United Kingdom of Great Britain and Northern Ireland*, 20 October 2008 CRC/C/GBR/CO/4.

²⁰ CRC/GBR/CO/4 *op. cit.* paras 70(a) and 71(a).

²¹ CRC/GBR/CO/4 *op. cit.* paras 70(c) and 71(c).

57. Practice Directions, Statements and Guidance where given should be practical and clear as to the needs of children as particularly vulnerable appellants, taking into account the varying age, maturity and experiences of children, including those whose age is not established or is disputed.
58. This guidance should be consistent with other domestic and international guidance on the rights and needs of children involved in court proceedings. The authoritative UN Committee on the Rights of the Child has so far issued 12 General Comments on the interpretation and application of the UNCRC including General Comment Number 6 on the Treatment of Unaccompanied Children and General Comment Number 12 on the Rights of the Child to Be Heard.²² The Family Division of the High Court and the Criminal Courts have issued useful practice directions to facilitate the rights of children within those jurisdictions and should also be considered when drafting guidance to support the new procedure rules.²³
59. ILPA considers that provision should be made in the rules or practice directions for the appointment of a litigation friend in cases of appellants who lack capacity (in particular children and mentally ill adults). We are aware of cases where a litigation friend was appointed by the then Immigration Appellate Authority (predecessor to the Asylum and Immigration Tribunal) or the Court of Protection but at the moment there appears to be no express power to make such an appointment. ILPA is concerned that this is a significant lacuna, because there are inevitably many cases in this jurisdiction involving people with mental health problems, as well as a significant number of cases of children.
60. ILPA would be happy to provide more detailed proposals when consideration is given to further rules or practice directions direction dealing with children, vulnerable adults and the appointment of litigation friends.

²² CRC/C/GC/12 20 July 2009.

²³ See e.g. The Principal Registry of the Family Division, Representation of Children in family proceedings President's Direction Pursuant to rule 9.5 of the Family Proceedings Rules, 22 April 2004; Crown Court Practice Direction Trial of Children and Young Persons in the Crown Court, 16 February 2000.

Gender guidance

61. The predecessor to the AIT, the Immigration Appellate Authority, also published Gender Guidance²⁴ which provided valuable guidance on dealing with gender specific issues and with vulnerable witnesses generally including children. ILPA proposes that the procedural guidance from the Immigration Appellate Authority's Gender Guidance be included in a further practice statement. Many issues relating to children's cases also contain gender specific considerations.

Alasdair Mackenzie

Acting Chair, ILPA

29 September 2009

²⁴ *Immigration Appellate Authority Asylum Gender Guidelines*, Crown Copyright November 2000, previously available on the website of the Immigration Appellate Authority.