

## **Asylum and Immigration (Treatment of Claimants, etc.) Bill, 2004 Briefing for the House of Lords at Report Stage**

### **Clause 14: Unification of Appeal System**

1. Fair and effective asylum procedures are central to achieving the protection aims of the 1951 Convention. International standards of fairness demand that an appeal system must reflect the highest principles of justice, due process and the rule of law, with particular regard to judicial independence, assurance to applicants of the widest possible exercise of their legal and human rights entitlements, and a scrupulous commitment to the quality of decisions. These principles and precepts are at the heart of the UK's proud legal, judicial and constitutional traditions and they are without question integral to all areas of English law and all aspects of UK legal procedures. Asylum law should be no exception. Indeed, given that an erroneous or unjust decision can cause a refugee to be returned to a country where he or she faces persecution or death, the imperatives of justice, due process and the rule of law should apply with special urgency to asylum law and procedures.
2. UNHCR is very concerned that the appeal system envisaged by amendments 46A and 58 curtails the entitlements of asylum applicants and thus does not meet international standards of fairness and due process. In this briefing, we offer our views on section 103A 3-4 (review of the Tribunal's decision); section 103D (costs on reconsideration: legal aid) and schedule 2, section 2 (1)(c) – amendment 58 (specified Tribunal decisions to be treated as authoritative). This briefing should be read with UNHCR's briefing papers of 15 December 2003 and 12 March 2004. UNHCR wishes to endorse in its entirety ILPA's *Briefing on the government amendments to clause 14* dated 30 April 2004.

### **Amendment 46A, section 103A 3-4 - Review of Tribunal's decision**

3. UNHCR has strong reservations about amendment 46A (103A 3-4), which proposes to replace with a five-day time limit the ten days currently allowed to lodge an application for judicial oversight by the High Court.<sup>1</sup> This proposal falls short of international standards of fairness by seriously compromising the ability of asylum applicants to access their rights of appeal. Also, there is no logical or practical connection between the amendment and its stated aim of reducing delays in the appeal procedure.

#### *Amendment 46A falls short of international standards*

4. UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* makes clear that one of the basic requirements in respect of an appeal is that the

---

<sup>1</sup> The Immigration and Asylum Appeals (Procedure) Rules 2003, Rule 28 (1) (b).

asylum seeker be given a 'reasonable time to appeal'.<sup>2</sup> In UNHCR's view, the five-day limit does not fulfil the standard of reasonableness and the proposed amendment does not accord with UNHCR's view of basic procedural practices required by the Convention.<sup>3</sup>

*Amendment 46A seriously compromises access to appeal rights*

5. It is the global experience of UNHCR that access to legal assistance can be problematic for asylum-seekers. These difficulties will clearly be heightened for an asylum-seeker suffering from trauma or mental illness as a result of past experiences, or experiencing material deprivation in the UK<sup>4</sup>.
6. In light of these and other relevant considerations, UNHCR considers that five days is simply too short a duration of time for an asylum-seeker and his or her legal representative to study a legal determination, marshal the necessary evidence and legal submissions, and lodge proceedings in the High Court. A five-day time limit may result in deserving cases for asylum being denied, with an ultimate consequence of removals in contravention of the fundamental principle of non-*refoulement* contained in Article 33 of the 1951 Convention Relating to the Status of Refugees. Given the particular vulnerabilities experienced by asylum applicants, they, rather than the Secretary of State, will be prejudiced by this amendment.

*Amendment 46A does not serve the stated purpose of reducing delays*

7. Reducing the time limit to five days will not significantly address the problem of delay. Such delays can logically have little to do with the time limit for lodging an appeal, a factor which is set by statute at ten days. Reducing the time limit for making an application to the High Court to five days will not therefore significantly impact upon delays in the proceedings.
8. UNHCR considers that the main effect of the proposed time limit will be to hinder the ability of asylum applicants and their legal representatives to prepare adequately for a reconsideration stage. It is likely to lead to applications for reconsideration being submitted as a matter of course, increased requests for adjournment, and more frequent requests for consideration of out-of-time appeals. Thus, the proposed time limit of five days may well contribute to delays rather than reduce them.
9. We note that section 103(4)(b) empowers a court to permit an application outside the proposed limit. This does not adequately address our concerns, as the principle of affording asylum applicants access to their appeal rights should be expressly incorporated in primary legislation, and not left to the discretion of the

---

<sup>2</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, January 1992), paragraph 192 (vi).

<sup>3</sup> In this respect, UNHCR is aware of jurisprudence from the European Court of Human Rights finding a rigid limit of five days not to be a sufficient time period for submitting applications in respect of an asylum claim, albeit in the context of the specific procedures operating in Turkey (*Jabari vs Turkey*, 11 July 2000, Appl. No. 40035/98).

<sup>4</sup> Many asylum-seekers may experience difficulty understanding the procedural complexities of asylum procedures, and may also be beset by significant practical obstacles. Asylum procedure in the UK itself – such as dispersal, or denial of state support under section 55 Nationality, Immigration and Asylum Act 2002 – contributes to the difficulties asylum-seekers may face in accessing legal representation.

courts. At present, asylum-seekers already have only ten days to lodge applications for judicial oversight by the High Court. This compares extremely unfavourably with the three-month time limit for such applications in all other fields of law. UNHCR urges the government not to erode further the access to appeal rights for this already vulnerable group of court users, particularly given that the proposed amendment is not a proportionate or logical means of achieving the stated aim. UNHCR recommends that the five-day time limit should be abandoned.

**Amendment 46A, section 103D - Costs on reconsideration: legal aid**

10. UNHCR understands the Government's aim to reduce the number of unmeritorious asylum applications. However, careful consideration must be given to the criteria by which this objective is accomplished and UNHCR would caution against measures that will deter meritorious cases from applying for reconsideration.
11. UNHCR appreciates that the Legal Services Commission (LSC) is currently charged with assessing funding eligibility for individual cases, a process which already includes an assessment of merit-worthiness. UNHCR suggests that the Government endeavours to make the LSC more efficient and expeditious, rather than fundamentally altering the system and passing the funding decision out of the hands of the current body of specialist decision-makers, and into the hands of the judiciary, under regulation of the Secretary of State.
12. UNHCR opposes the suggested amendment. Should the amendment be pursued, UNHCR recommends that it be re-worded to provide clearer criteria for the implementation of the funding regulations, and to define more rigidly the principles to which the Secretary of State will be required to adhere, when forming the regulations. Without clearly defined guidelines, there would appear to be unreasonably high potential for an unfair application of the regulations, to the detriment of the asylum applicant.
13. To prohibit meritorious applicants from being discouraged from seeking reconsideration, UNHCR recommends that the Bill should reflect the principle that all asylum applicants are presumed eligible to have their reconsideration costs paid, and only in rare and unmistakably unmeritorious cases will funding be withheld.

**Amendment 58, schedule 2, section 22(1)(c) – Authoritative Tribunal decisions**

14. This section, as amended, states that "*a practice direction may, in particular, require the Tribunal to treat a specified decision of a Tribunal as authoritative in respect of a particular matter*". UNHCR recommends that this amendment should distinguish between questions of fact and questions of law, and that a decision on a matter of fact should not bind other Tribunals.

*Matters of Fact*

15. The proposed amendment could detract from the fundamental premise of refugee status determination, namely that every refugee's experience is unique,

and that each asylum application should be assessed on its individual merits<sup>5</sup>. UNHCR considers that this proposal, if binding on matters of fact, could limit a refugee's fundamental right to individual status determination.

16. It is well-known that persecution takes different forms, that country situations evolve rapidly, and that the determination of refugee claims requires full consideration to be given both to up-to-date country information and to the specific facts of the individual's claim including all subjective elements. For this reason, UNHCR considers that it is not helpful for determinations of country-specific fact to be binding on other asylum determinations
17. The amendment proposes that appeals are to be allowed only where there has been an "error of law". However, if the Tribunal's determinations on matters of fact are to be taken as authoritative, UNHCR would strongly recommend that there be a right of appeal on the basis of these facts.

#### *Matters of Law*

18. Whilst it is undesirable to apply binding precedents of fact to refugee status determination, a precedent system can be useful in establishing consistent approaches to matters of law. However, UNHCR questions the practicalities of a system in which the determinations of one Tribunal are binding on the decisions of others at the same level, and would welcome more guidance on how this will operate. We note that this section has recently been amended to remove reference to the President being the person who decides which cases are to be authoritative, and we would seek clarification on who it is now envisaged will make such decisions. We would therefore urge the government to publish clear guidelines outlining the procedure that will be followed in selecting authoritative cases.
19. In general UNHCR recommends that a precedent-setting case should always be heard by Tribunals of at least three members and that such a case should always be deemed to "*raise a question of law of such importance that it should be decided by the appropriate appellate court*". As such, UNHCR would like to see the legislation include provision for such 'authoritative' cases to have an automatic and expedited right of appeal to the Court of Appeal or other appropriate appellate court.

**UNHCR LONDON, 13 MAY 2004**

---

<sup>5</sup> UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, January 1992), paragraph 43: "*The situation of each person must [...] be assessed on its own merits*".