



HOUSE OF COMMONS SELECT COMMITTEE ON CONSTITUTIONAL AFFAIRS

1 On 21 March Mr Justice Hodge (Sir Henry Hodge), President of the Asylum and Immigration Tribunal (AIT) and Mr Justice Collins (Sir Andrew Collins), lead judge in the Administrative Court and former President of the now defunct Immigration Appeal Tribunal, gave evidence before this committee. The evidence given by these same two judges aroused some public interest in the recent report of the Home Affairs Committee when they jointly expressed their dissatisfaction at the poor record of the Home Office in removing failed asylum seekers. It appears to have been their evidence to that Committee together with a recent report of the Public Accounts Committee, to which reference is made later, which prompted the Committee on Constitutional Affairs to summon them. Their evidence before the Committee covered a wide range of topics relating to the functioning of the asylum and immigration appeals process and related review hearings in the Administrative Court – part of the High Court. I have endeavoured to summarise the evidence on those topics of most general interest.

2 Numbers and backlog

The AIT was established under provisions of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 which came into force in April 2005. It replaced the previous two tier appeal machinery of adjudicators and the Immigration Appeal Tribunal. Previously all appeals against adverse Home Office decisions in asylum and immigration cases went first to the Home Office and thence to the adjudicators. Now all appeals go direct to the Tribunal. The process of transferring all the old files relating to outstanding appeals from the Home Office is not yet complete. It is estimated that there are some 42,000 such files. The total number of outstanding appeals was estimated by Mr Justice Hodge at 80,000 and it is expected that these will be cleared by the spring of 2007. 78,000 cases were disposed of during 2005. It is estimated that during 2006 175,000 appeals will be received, of which 30,000 will be asylum. It is possible that the introduction of a new points based system for issuing visas may result in a diminution of 25-30,000 appeals a year in relation to students.

Mr Justice Collins made reference to the volume of work imposed on the Administrative Court and said that of 10,500 applications for judicial review or other remedies made to that court during 2005, 7500 were applications for reconsideration of decisions by the AIT or otherwise immigration related – e.g. last minute applications against removal of failed asylum seekers. Reconsideration applications are on paper only and do not involve oral hearings. Three judges dealing with such

applications throughout the year are each expected to deal with around 12 of these daily. The Immigration, Asylum and Nationality Bill currently completing its passage through Parliament will remove appeal rights from students and work permit holders. The effect of that when it comes into effect as an Act will be inevitably to increase the volume of judicial review applications.

3 Quality of decisions

Mr Justice Hodge claimed that the quality of decision making had been improving. In the past, when the present writer was sitting as an immigration adjudicator (the previous title by which immigration judges were known) there was considerable pressure on clearing the backlog at the time and adjudicators were expected to handle 3-4 asylum appeals daily. At that time asylum appeals constituted the great bulk of the work, but that is no longer the case. In the past Migration Watch has expressed doubts about the quality of the administration of justice in the appeals process. A few years ago successful appeals numbered about 5-10% of the total, but for the past several years the figure has been a little over 20%. There has been an automatic tendency in ministerial and other official quarters to attribute the increase to a deterioration in the quality of initial decision making by Home Office staff and assume by implication that the working of the appeals process cannot be faulted. We very much doubt this conclusion. All the relevant figures show that there has over the past few years been a huge increase in the workload imposed on adjudicators, now restyled immigration judges. It has been necessary greatly to increase their numbers, which may well mean that their average intellectual calibre has declined and at the same time, as mentioned above, there has at times been inordinate pressure on them to increase their productivity, without too fine a regard for the quality of decision making. When we now see from the transcript that the success rate of appeals before the new AIT continues to be 20+ %, we feel that there are grounds for scepticism about the assurances from Mr Justice Hodge.

4 Representatives and legal aid

New and more restrictive rules on legal aid in asylum and immigration appeals came into force concurrently with the launch of the AIT in April 2005. The main provision which caused concern among immigration practitioners was what is called the merits test – i.e. the award of legal aid is conditional on the practitioner's being able to satisfy the Legal Services Commission (the body responsible for administering legal aid) that before initiating the appeal he had good ground for concluding that his client's case had a reasonable prospect of success. This has seriously discouraged practitioners from taking on many appeals and in consequences many appellants who might in the past have been able to secure representation paid out of legal aid funds now represent themselves. This inevitably adds to the difficulties of hearing appeals and to the length of hearings. For the same reason very few of the applications for reconsideration which go to the Administrative Court are prepared by lawyers. Such applications have to be based on an error of law and most have no merit, but are made in order to delay the possibility of removal from the United Kingdom.

5 The Inquisitorial approach

The traditional method of conducting civil proceedings in this country is by what is known as the adversarial approach. This means that the parties in court present their evidence to the judge and argue their respective cases. The judge

remains strictly impartial and as far as possible refrains from intervening himself other than possibly to seek clarification of particular points of evidence or to make interim rulings in the course of the proceedings when so requested by one or other of the parties or when it otherwise becomes necessary. Within Migration Watch we have long argued that while this approach may be appropriate in civil litigation, it is not appropriate in asylum or immigration appeals because there is a public interest in ensuring that a correct result is reached. To take asylum appeals as an example, it is notorious that many appellants do not tell the truth. It is often necessary to test their evidence by comprehensive questioning. If the strict tenets of the adversarial approach were to be observed, this could mean that if an asylum appellant were to tell a *prima facie* plausible story based on falsehood and there was no effective cross examination by the Home Office representative or questioning by the immigration judge, his appeal might be successful and he would be wrongly allowed indefinite leave to remain in the United Kingdom, possibly at considerable public expense. In 2004 this issue was considered by the House of Commons Constitutional Affairs Committee, to whom we gave evidence. A problem which has been experienced for years and continues in varying degrees to be experienced from time to time is that the Home Office often has difficulty in ensuring that it is represented at appeal hearings. It is normally represented by experienced immigration officers known as Home Office Presenting Officers. If, as often happens, no such officer is available, this places an extra burden on the immigration judge. The Committee took due note of the evidence which we submitted on this point, which was supported by other evidence submitted by the Immigration Advisory Service and the Council of Immigration Judges. Its recommendation at paragraph 30 of its report, HC 211-1, states:

“If the Home Office remains unable to ensure that Presenting Officers are present at appeals before the ..Asylum and Immigration Tribunal, the judge in charge of the proceedings should have the discretion to take a more actively inquisitorial approach in order to ensure that justice is done and that proceedings are conducted with necessary fairness. Such a change may have to be implemented by statute to ensure certainty.”

There has been no legislation or other action on that recommendation since 2004 and the problem has in the meantime been exacerbated by the restrictions on legal aid referred to above, the result of which is that more and more appellants now come before the Tribunal unrepresented and impose an even greater burden on the immigration judges. It is possible that in some cases appellants appear before an immigration judge with no representative of their own and there is no opposing representative of the Home Office. One of the members of the Committee referred to the earlier recommendation asked the two judges as to their current view on the subject. Both judges acknowledged the problem but appeared reluctant to come down wholeheartedly in favour of allowing more latitude to the immigration judges on the ground that this is not the way we do things here. They did however concede that in Canada, Australia and New Zealand, all countries following the same common law system as the United Kingdom, asylum and immigration appeals are dealt with in accordance with an inquisitorial system.

6 Removals

The same two judges gave evidence recently to the House of Commons Home Affairs Committee and expressed considerable frustration at the failure of the

Home Office to remove all but a small proportion of failed asylum seekers. This has been a common complaint on the part of all immigration judges for years. Adverse decisions are taken in the first instance by Home Office officials and are then unsuccessfully appealed. The asylum seekers exhaust all their appeal rights but no action is then taken to deport them. There has recently been a highly critical report by the House of Commons Committee of Public Accounts, "Returning failed asylum applicants", HC 620. The opening paragraph of that report states:

"The United Kingdom's asylum policy has been undermined by the inability of the Home Office's Immigration and Nationality Directorate...to deal promptly with asylum seekers whose initial application to stay in the United Kingdom fails. The Directorate does not know how many failed asylum applicants remain in the country or where the majority are located, including over 400 criminals released from prison into the community."

Early in the proceedings the Chairman of the Constitutional Affairs Committee referred to the report of the Public Accounts Committee and asked the two judges:"is it really worth the time and expenditure and effort that you are all engaged in if the rate of removal casts doubt upon the whole process?" That question encapsulates the frustration which immigration judges have felt for years and continue to feel at seeing no tangible result for their labours to do justice. In response to the question Mr Justice Collins admitted that this had always been a problem and that when he had been President of the former Immigration Appeal Tribunal he had often wondered what was the point of all the effort.

7 Numbers of judges

Mr Justice Hodge told the Committee that there were currently enough judges for 120 courts to sit daily. There were now 183 salaried (full time) immigration judges and 383 fee paid (part time). He was currently recruiting more judges and hoped to increase these numbers to 200 and 500 respectively. The numbers of judges engaged in this work have increased hugely in recent years and the continuing growth in their numbers, together with more severe restrictions on the availability of legal aid, almost certainly mean that some immigration practitioners find it hard to make a living and seek to become immigration judges.

Harry Mitchell QC
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