AN UPDATE ON THE IMMIGRATION APPEALS SYSTEM

1 A summary of the way the appeals system works under the provisions of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 appears in another paper on this website, “The Immigration Appeals System revised”. Section 26 of the Act brought the new single tier appellate system into operation with effect from 4 April 2005. The main statutory provisions regulating asylum and immigration appeals are contained in Part V, sections 81 – 108 of the Nationality, Immigration and Asylum Act 2002, sections which were extensively amended by the 2004 Act.

2 In principle the single tier Asylum and Immigration Tribunal (AIT) created by the 2004 Act replaced the previous two tier appeal system, consisting of an initial appeal to an adjudicator followed by a further possible appeal to the Immigration Appeal Tribunal. When the Bill which became the 2004 Act was first introduced in Parliament it contained what became known as an ouster clause, i.e. a clause which barred any possible appeal or judicial review beyond the new Tribunal to the High Court. It was the original intention of the government that the AIT should have the power to review its own decisions and that there should be no recourse to the higher courts by way of appeal, judicial review or otherwise from any decision of the AIT. This would have given the AIT a unique position among the UK’s many administrative tribunals, set up over the years to perform a variety of functions under Acts of Parliament. This ouster clause aroused considerable opposition in the House of Lords and much adverse comment elsewhere. The government backed down and the Bill was amended to provide for a special form of review of cases by the High Court in England and Wales, the Court of Session in Scotland and the High Court of Northern Ireland for that province, on the grounds that the AIT made an error of law. An application for review seeks an order requiring the AIT to reconsider its decision on the appeal and is to be determined only on the basis of written submissions, so no oral hearings, and the High Court's decision will be final, subject however to the possibility of a further appeal to the Court of Appeal or the corresponding courts in Scotland and Northern Ireland.

3 Appended to this paper are two flow charts showing how the new appeals system works as contrasted with the old one.
Comments by two High Court judges

4 In January 2006 two High Court judges gave evidence to a session of the Home Affairs Select Committee of the House of Commons in which they were very critical of the working of the revised appeal system. One of them Sir Henry Hodge (Mr Justice Hodge) is the current President of the Asylum and Immigration Tribunal and was Chief Adjudicator under the old system. The other, Sir Andrew Collins (Mr Justice Collins) was President of the previous Immigration Appeal Tribunal and is now a senior judge in the High Court with responsibility for cases on asylum and immigration matters which come before that court. Sir Andrew Collins in particular was sceptical as to whether the avowed purpose of the 2004 Act, to create a single tier appeal system, had been achieved. I quote from the transcript of his evidence:

“…[W]hat you have got now is although in one form a one tier-system, in reality you have got all the disadvantages of the two-tier system because of the right to apply for reconsideration. If reconsideration is allowed ………..then there is a fresh hearing [by the AIT] and there is a right of appeal direct to the Court of Appeal after that fresh hearing. As things stand there has not been any difference”.

We have reason to believe that, there have been some improvements in the disposal of appeals, but largely because of severe cutbacks in legal aid available to appellants. According to our information the High Court judges who have to deal with applications for reconsideration may often have little or no knowledge of immigration and may therefore tend to err on the side of caution by granting reconsideration.

5 At the hearing before the Select Committee Sir Henry Hodge took a rather more optimistic view than Sir Andrew Collins:

“The numbers are down in comparison to what was there previously, but the speed with which they are dealt with is significantly up and that is primarily because the procedural rules require people to act much more quickly than they did before. ….We are certainly now concluding cases, either allowing or dismissing the appeals, much more quickly than we did when the Immigration Appeal Tribunal was in existence.”

Some cheer may be derived from the fact that Sir Henry, as President of the AIT, is more closely in touch with what is happening day by day than Sir Andrew.

6 The session before the Select Committee ranged over a number of other matters and the two judges expressed the frustration commonly felt by themselves and their fellow immigration judges at the failure to remove many asylum seekers who have appealed unsuccessfully and have no legal right to remain in the United Kingdom. Sir Henry Hodge alluded to the problem of persuading many countries to take back their nationals, particularly if they had destroyed their passports before arrival in the United Kingdom. He felt that much more effort was needed on the part of the Home Office and Foreign Office to improve the rate of removals.
Sir Andrew Collins was asked why so many appellants in asylum cases applied for judicial review. He replied that in many cases the motive was delay, so that the appellant could stay longer in the United Kingdom while proceedings were pending:

“It is a concern certainly of the Home Office – and the number of cases which are entirely lacking in merit gives us some indication that this may be the case – that these are tactics in order to achieve delay and certainly that happens. On the other hand I think one must appreciate that even though they have had their asylum appeal dismissed and, in reality, are economic migrants, I suspect all of us would do everything we could to try to achieve an improvement of the pretty awful conditions in which these people live, whether or not they are, strictly speaking, to be regarded as refugees.”

In what we may politely refer to as the immigration industry there is an unwillingness to accept that asylum seekers are for the most part not genuine and are in fact economic migrants seeking to improve their lot by making claims for asylum which are not based on any fear of persecution in their countries of origin and which in the end fail. In 2004 75% of asylum applications and appeals failed.
APPENDIX
IMMIGRATION APPEALS
DIAGRAMS OF OLD AND NEW SYSTEMS

Abbreviations

AIT – Asylum and Immigration Tribunal – (established 4 April 2005)
AITC – Asylum and Immigration (Treatment of Claimants etc.) Act 2004
IAT – Immigration Appeal Tribunal – (abolished 3 April 2005)
IND – Immigration and Nationality Directorate (part of Home Office)
JR - Judicial Review – (a High Court function)
NIAA– Nationality, Immigration and Asylum Act 2002

OLD SYSTEM UP TO 3 APRIL 2005

Adverse decision by IND

Appeal as of right to adjudicator

If adjudicator dismisses appeal, further possible appeal with leave to IAT

If IAT refuses leave to appeal, possible application to High Court for JR. Leave needed to apply for JR.

If appeal is heard and dismissed by IAT, further possible appeal, with leave, to Court of Appeal on a point of law only.

If High Court refuses leave, possible renewed application for JR to Court of Appeal. Leave of Court of Appeal needed to apply.

If application for JR is successful at either stage, back to IAT which will now normally grant leave to appeal.
NEW SYSTEM AS FROM 4 APRIL 2005

Adverse decision by IND

Appeal as of right to immigration judge (AIT)

If immigration judge dismisses appeal, the appellant can apply to the High Court for reconsideration. This can only be written submission. The High Court may make an order for reconsideration if it thinks that the immigration judge may have made an error of law. Such an order may be made only once in relation to any appeal.

Following an order for reconsideration the AIT arranges for the original appeal to be reheard, to the extent that the High Court order so requires, and either dismisses or allows the appeal.

Thereafter either party to the reheard appeal may, with leave of AIT or of the Court of Appeal itself, bring a further appeal on a point of law to the Court of Appeal – section 103B NIAA.

Notes
1. In the diagrams references are made to the High Court and Court of Appeal, which have jurisdiction in England and Wales. In Scotland the same jurisdiction is exercised by the Court of Session and in Northern Ireland by the High Court and Court of Appeal of Northern Ireland.
2. From time to time asylum or immigration appeals reach the House of Lords when a major point of law falls to be settled. This is a rare possibility and has been omitted from the diagrams in the interest of simplicity.
3. Paragraph 30, Schedule 2 of AITC makes transitional provision for the functions of the High Court in hearing applications for reconsideration to be discharged by members of AIT itself. In practice such applications are heard by senior immigration judges. The provisions on reconsideration were introduced at a late
stage in the passage of AITC through Parliament and this transitional provision was incorporated in order to prevent the High Court being swamped by applications. The transitional provisions can be terminated by the Lord Chancellor at any time, but it is not expected that that will happen in the near future.

4. Section 103A of NIAA states that decision on an application for reconsideration shall be final – JR is excluded, but as noted above, there is a possibility of appeal with leave on a point of law to the Court of Appeal pursuant to section 103B NIAA.

5. Under the old system the IAT was notorious for ordering rehearings of appeals already heard by an adjudicator. Sometimes rehearings would be ordered more than once, thus extending the duration of appeals for years. Section 103A(2) NIAA states expressly that an order for reconsideration may be made only once for a particular appeal.

Harry Mitchell QC
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