ASYLUM AND IMMIGRATION ACT 2004

MIGRATION WATCH UK SUMMARY

1 This summary is not intended to be a comprehensive guide to the provisions of the Act, which received Royal Assent on 22 July 2004, nor does it aim to provide a legally authoritative interpretation. Its purpose is to draw attention to the Act's more significant provisions for the benefit of the general reader.

Legislative history

2 The following Acts of Parliament are specifically concerned with asylum and immigration:

- Immigration Act 1971
- Immigration Act 1988
- Asylum and Immigration Appeals Act 1993
- Asylum and Immigration Act 1996
- Special Immigration Appeals Commission Act 1997
- Immigration and Asylum Act 1999
- Nationality, Immigration and Asylum Act 2002
- Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

The obligations of the United Kingdom and many other countries in relation to asylum are contained in the 1951 Geneva Convention Relating to the Status of Refugees as amended by a 1967 Protocol. Article 33 of the Convention prohibits *refoulement*, i.e. the expulsion by states which are signatories of the Convention of refugees in any manner to territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. The territories in question are normally the countries of origin of the refugees. Those who seek to be accorded protection as refugees must demonstrate that they have a well-founded fear of persecution for one or other of the reasons stated in the Convention.

3 Before 1993, although the United Kingdom was a signatory to the Convention, it had not been formally incorporated into UK law, but the provisions of the Immigration Rules, made by
the Home Secretary under powers contained in the Immigration Act 1971 required immigration officers and immigration adjudicators hearing appeals to take account of the Convention. The growing numbers of asylum applicants in the early nineties made it necessary to put the United Kingdom's obligations on a more formal footing, which was done by the 1993 Act. Since then the trickle of applicants has become a flood and Parliament has been called upon to pass six substantial Acts in eleven years, trying to cope with the increasing numbers and progressively tighten up procedures at the application and appeal stages. Those Acts have dealt with general immigration matters (and nationality in the case of the 2002 Act) as well as asylum, but the main concern of all these Acts has been asylum. The 1999 Act established the National Asylum Support Service, a branch of the Home Office having responsibility for housing and generally looking after the ever increasing numbers of asylum seekers in the United Kingdom. The 1999 and subsequent Acts have also been concerned with the entitlement of asylum seekers to claim social security benefits. The need for provision on these subjects is an indication of the huge and growing cost to the taxpayer of the large numbers of asylum seekers.

4 Mention must also be made of the Human Rights Act 1998, which came into effect in October 2000, at the same time as the 1999 Act. This Act makes the European Human Rights Convention directly enforceable in the courts of the United Kingdom. It is of general application, but very relevant to all asylum applications and appeals.

The appeals system

5 Up to now there has been a complex system of appeals against refusals of asylum and other adverse decisions on applications for leave to enter or remain in the United Kingdom, also against decisions to deport. Appeals go in the first instance to an immigration adjudicator, usually a barrister or solicitor. There is then the possibility of a further appeal with leave to the Immigration Appeal Tribunal, consisting of a legally qualified chairman and two lay members. An appellant seeking leave must show that he has an arguable case, otherwise leave is refused. Beyond that there is the possibility of a third appeal to the Court of Appeal, or the Court of Session in Scotland, again with leave, and of a fourth appeal to the House of Lords. It is rare for cases to go as far as the House of Lords, but it does happen from time to time. There is a detailed description of the workings of the appeal system in Briefing Paper 8.3.

6 It has long been the view of Migrationwatch that the provision of so many levels of appeal is excessive and that it leads to undue delay, sometimes of many years, in the disposal of cases, as well as being inordinately costly. We have advocated the abolition of the Immigration Appeal Tribunal as an obvious way of speeding up the process and reducing costs. The new Act does just that and introduces a drastically revised system of appeals by sections 26-32. It would be presumptuous of us to claim credit for having persuaded the government to take this long overdue step, but we believe that we have influenced opinion in that direction.

7 Section 26 abolishes adjudicators and the Immigration Appeal Tribunal. In their place it establishes a new Asylum and Immigration Tribunal (AIT) which will provide a single tier of appeal against adverse asylum or non-asylum decisions. 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 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. This ouster clause, as it became known, 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 the decisions of the new Tribunal. An aggrieved party to an appeal may apply in England and Wales to the High Court or in certain cases to the Court of Appeal, on the grounds that the AIT made an error of law. Similar application may be made to the corresponding courts in Scotland and Northern Ireland. The application will be for 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 court's decision will be final.

8 Because of concerns that in the early stages of the operation of the Act the higher courts may be swamped by applications for review, there are transitional provisions in Schedule 2 of the 2004 Act for the power of review otherwise vested in the higher courts of the UK to be exercised by a member of the AIT to be appointed for the purpose by the President of the AIT. This is intended as a temporary measure to be kept in force only for such period as the Lord Chancellor determines. We do not at present know how long that period is likely to be.

9 Section 94 of the 2002 Act empowers the Home Secretary to certify certain asylum or human rights claims as clearly unfounded and he must so certify if he is satisfied that the applicant is entitled to reside in one of the countries on what is colloquially known as the "white list". The list includes all 10 countries which became Member States of the European Union on 1 May 2004 as well as Bulgaria, Serbia, Jamaica, Macedonia, Moldova, Romania, Bangladesh, Bolivia, Brazil, Ecuador, Sri Lanka, South Africa and Ukraine. When section 27 of the 2004 Act comes into force the 10 new Member States of the EU will be deleted from the list in section 94 of the 2002 Act and the position of nationals of those states as regards asylum claims will be governed by other legislation, the Immigration (European Economic Area) Regulations 2000. In practice this should become of academic interest, as nationals from those states are now entitled to come to the UK for the purposes of employment without leave, though there are restrictions on their rights to claim social security benefits. The Home Secretary is stated in the 2004 Act to be satisfied in respect of all the countries listed in section 94 of the 2002 Act that no serious risk of persecution or of human rights contraventions exists. He may from time to time by statutory instrument add countries to or remove them from the list. The only right of appeal against the Home Secretary's decision is from outside the United Kingdom. Section 27 of the 2004 Act further refines the Home Secretary's powers in that as well as or instead of adding or removing countries he may add or remove parts of countries or specified categories of individuals. Sections 28-31 of the 2004 Act impose further detailed restrictions on rights of appeal.

Removal to safe countries

10 Section 33 of the 2004 Act brings into effect Schedule 3 which is concerned with the removal of asylum seekers to countries known to protect refugees and to respect human rights. The Schedule lists as countries thus known all the Member States of the European Union plus Norway and Iceland, but not Switzerland, a country whose record on observance of human rights has sometimes left much to be desired. This part of the Schedule may be amended only by a future Act of Parliament. The Schedule then makes provision for the Home Secretary to have
power to make statutory instruments listing other countries as safe in varying degrees and to remove such countries from the list. Asylum seekers may be removed from the United Kingdom to any state on any of these lists provided they are not nationals or citizens of the state in question. There is no appeal against removal. These provisions are intended to make it easier to remove asylum seekers from the UK to other countries through which they passed on the way here without claiming asylum. In practice their effectiveness is likely to be dependent on agreement with the destination states, but the denial of a right of appeal should facilitate and speed up the process.

Credibility

11 Section 8 of the 2004 Act sets out the obligations of decision takers at both application (i.e. Home Office) and appeal stages to take account of the credibility of persons making asylum or human rights claims. Credibility has always been a central factor in dealing with claims and appeals, most of which are rejected or dismissed because the applicant's appellant's story is not believable. Briefing Paper 8.3 explains the central importance of credibility and gives examples of the kinds of inconsistencies in evidence put forward in support of claims/appeals which result in rejection or dismissal. The section is therefore largely incorporating existing law and practice but statutory backing of the obligation to consider credibility will no doubt be found useful by decision takers. The following are examples of the kind of behaviour mentioned in the section as damaging the claimant's credibility:

(i) failure without reasonable explanation to produce a passport on request;
(ii) tendering an invalid passport as if it were valid;
(iii) destruction, alteration or disposal of a passport without reasonable explanation;
(iv) failure without reasonable explanation to answer a question from a decision taker;
(v) failure to take advantage of a reasonable opportunity to make an asylum or human rights claim while in a safe country;
(vi) failure to make an asylum or human rights claim before being notified of an immigration decision;
(vii) failure to make such a claim before being arrested for an immigration offence.

It has always been common for persons who are e.g. notified of a decision to deport or arrested as illegal immigrants to claim asylum at that stage so as to prolong their stay in the United Kingdom. Such claims are almost invariably bogus and (vi) and (vii) recognise and emphasise this.

Procedure on marriage

12 Sections 19-25 of the 2004 Act modify the procedures to be followed on marriage in England and Wales, Scotland and Northern Ireland as a means of combating the practice which has become prevalent in recent years of foreign nationals going through ceremonies of marriage with persons resident in the United Kingdom solely for the purpose of enabling the former to
prolong their stay here. It has become notorious that some residents have been happy to oblige complete strangers by going through a ceremony of marriage with them for a fee and if necessary to commit bigamy. There was some time ago a case of a British woman who was gaol for committing multiple bigamy by going through seven separate ceremonies with different men. Registrars have reported cases in which the behaviour of one party to the marriage showed a lack of confidence in being able to recognise which of the persons he or she was supposed to be marrying

13 These sections apply to any marriage contracted under UK law to which a person subject to immigration control is a party. A person is subject to immigration control if he is not a national of a Member State of the European Economic Area (EEA) and under the Immigration Act 1971 he requires leave to enter or remain in the United Kingdom. Notice of such a marriage may be given only to a superintendent registrar of a registration district specified for the purpose by regulations made by the Home Secretary. The purpose of this restriction is to make it easier for immigration staff to keep checks on this kind of marriage. Each party must have been resident in a registration district- not necessarily the district in which notice has been given - for seven days before notice is given and both parties must deliver notice to the superintendent registrar in person. The superintendent registrar may not enter the notice in the marriage book unless he is satisfied that the party subject to immigration control has an entry clearance issued under the Immigration Rules for the express purpose of enabling him to marry in the United Kingdom or is otherwise so authorised by the Home Secretary. These provisions should make it easier to identify sham marriages and to pursue those taking part in them.

Criminal offences

14 Section 2 of the 2004 Act creates a new offence of failing to produce at an interview with an immigration officer or other official for leave to enter or remain or for asylum an immigration document which (a) is in force and (b) satisfactorily establishes the identity and nationality or citizenship of the person concerned. It has long been the practice for persons coming to the United Kingdom with the intention of claiming asylum to destroy their passports or other travel documents so as to make it more difficult for them to be identified and in due course be returned to their countries of origin. The criminals in many countries who make large profits out of organising the travel of asylum seekers regularly advise them to destroy their passports in the aircraft before arrival. Many asylum applicants make false claims as to their countries of origin so as to improve their chances of being allowed to remain - e.g. Kenyans claim to be Somalis, Pakistanis claim to be Afghans and Nigerians claim to be Liberrians. It will be a defence to a criminal charge under this section to prove that the person had a reasonable excuse for not being in possession of a travel document. However, the definition of "reasonable excuse" specifically excludes attempts to delay the process of dealing with the application, increasing its chances of success or complying with the instructions of the people smugglers. The offence carries a maximum sentence of two years’ imprisonment, a fine or both.

15 Section 4 of the 2004 Act introduces a new criminal offence of trafficking people into, inside or out of the United Kingdom for the purpose of exploitation, a word defined in the section as covering:
(a) Subjection of persons to slavery or forced labour. There have been cases where people have been brought into the United Kingdom as domestic servants but who have been treated as slaves.

(b) Pressure on persons to commit criminal offences under legislation relating to human organ transplants - e.g. to offer their own organs for sale.

(c) Subjection of persons to force, threats or deception to induce them to provide services such as prostitution.

(d) Using undue influence on persons who are mentally or physically ill, are young or are close family relations to induce them to undertake any activity which a person not subject to any of these disabilities would be likely to refuse to undertake.

This offence carries a maximum sentence of 14 years' imprisonment, a fine or both.

**Commencement**

16 Section 2, summarised in paragraph 13 above, and two other provisions not mentioned in this summary come into effect two months after the date of Royal Assent, i.e. on 22 September 2004. Other provisions of the Act are to be brought into force by order of the Lord Chancellor in relation to the sections dealing with the appeals system and by the Home Secretary in relation to other sections. As at today's date, no Commencement Orders have yet been made.

Harry Mitchell QC
19 August 2004