



**JUSTICE**

# **Inquiry into Asylum and Immigration Appeals**

**Committee on the Lord Chancellor's Department**

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1. JUSTICE is an all-party, law reform and human rights organisation, whose purpose is to advance justice, human rights and the rule of law. It is the British section of the International Commission of Jurists.
2. This submission has been prepared specifically for the Committee on the Lord Chancellor's Department inquiry into asylum and immigration appeals.

## Introduction

3. The Nationality, Immigration and Asylum Act 2002 ('NIAA') introduced substantial changes to the asylum appeals process with the stated purpose of ensuring that appeals progressed through the system without unnecessary delays.<sup>1</sup> The relevant provisions were implemented by the Immigration and Asylum Appeals (Procedure) Rules 2003 and the Civil Procedure (Amendment) Rules 2003 (both of which entered into force on 1 April 2003). In addition, the Immigration and Appeals (Fast Track Procedure) Rules 2003 came into force on 10 April 2003.
4. The passage of the Bill was not without its controversies. One of the most far-reaching changes - the introduction of non-suspensive appeals for certain asylum claims - was not mentioned in the 2002 White Paper but rather introduced by way of amendment at Report Stage in the House of Lords. As we note below, we are concerned that the late introduction of the provisions relating to non-suspensive appeals may have prevented adequate scrutiny of such a sweeping measure.
5. This submission presents JUSTICE's views on the principal changes to the immigration and asylum appeal system, specifically in relation to:
  - non-suspensive appeals
  - the new time limit for appealing in detained cases
  - the new closure date introduced
  - the right to apply for permission to appeal against the adjudicators determination to the IAT on a point of law only
  - the new statutory review in replacement of judicial review of IAT decisions to refuse leave to appeal
  - the new fast track appeals procedure

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<sup>1</sup> 2002 White Paper *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, para.4.66.

## Non-suspensive appeals

6. JUSTICE is concerned by the concept of non-suspensive appeals introduced by the NIAA.<sup>2</sup> The general procedure laid down by section 94(2) of the Act allows the Secretary of State to certify an asylum claim or human rights claim as “clearly unfounded”. Section 94(4) lists certain countries to which persons can be removed under the non-suspensive procedure if the Secretary of State is satisfied they are entitled to reside there.<sup>3</sup> Following certification, the claimant is then removable to that country notwithstanding that any further appeal (or judicial review of certification) has not yet been determined.<sup>4</sup>
7. The abolition of in-country appeal rights for certain classes of asylum seekers is a sweeping measure which – whilst allowing them to continue their appeal from abroad - precludes any effective judicial oversight of the decision to refuse their original claim. In the asylum context, ‘effective judicial oversight’ means the ability of a higher tribunal or court to correct an unlawful decision to remove *before* the decision is carried out. Once a person has been returned to a country where they allege persecution, even the most successful appeal may be too late.
8. Another practical concern is the fact that most successful appeals to asylum adjudicators involve adverse findings of credibility by the first-instance decision maker that were reversed on appeal. Since a person from abroad cannot give evidence in front of an adjudicator, it follows that the main practical effect of the non-suspensive procedure will be to deprive certain asylum-seekers of the benefit of an assessment of their credibility by independent and impartial decision-maker.
9. In addition to our concern over the non-suspensive concept, JUSTICE is also concerned at the related practice of designating certain countries as ‘safe’.<sup>5</sup> The

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<sup>2</sup> ss94 and 115, NIAA.

<sup>3</sup> s94(5) sets out the criteria according to which the Secretary of State may add countries to the list in subsection (4).

<sup>4</sup> See ss94(9), 115 (4) and (5).

<sup>5</sup> See ss 94(5) and 115(8), establishing the concept that a country is ‘safe’ where “there is in general in that State ... no serious risk of persecution of persons entitled to reside in that State” nor would “removal to that State ... of persons entitled to reside there” in general contravene the UK’s obligations under the ECHR.

original list set out in s94(4) were EU accession countries.<sup>6</sup> We harbour some doubts whether EU acceptance criteria – however stringent – could sensibly amount to a guarantee of safety for all individuals and groups therein. In particular, we note evidence from the European Commission’s own reports on the accession countries,<sup>7</sup> together with successful complaints before the European Court of Human Rights,<sup>8</sup> indicating widespread incidents of discrimination and abuse against certain groups within several accession countries.

10. Of even greater concern is the power of the Secretary of State to add countries to the safe list.<sup>9</sup> JUSTICE has addressed this point previously,<sup>10</sup> offering our view that any country-based approach is at odds with the obligation to consider each case individually on its merits. In addition, we have strong practical reservations about the ‘safety’ of recent additions to the list by the Home Office. In relation to some of these countries the Home Office own assessments record a high degree of human rights abuses by police and other internal security forces, which belies any presumption of safety.<sup>11</sup> For instance, the Home Office’s own CIPU report for Jamaica refers to widespread police brutality and acute intolerance of homosexuality.<sup>12</sup> The country assessment for Romania refers to serious human rights abuses by police officers towards members of the Roma minority, as reported by the European Commission and confirmed by other reliable sources.<sup>13</sup>

11. Misgivings about the recent additions to the list of countries presumed safe are also raised by the fact that the advisory panel on country information, introduced under NIAA to address concerns over the use of the ‘safe country’ concept, has yet to be

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<sup>6</sup> Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia. 2002 s94(4), 115(7).

<sup>7</sup> See Commission of the European Communities, *2002 Regular Reports on Progress towards Accession*, October 2002.

<sup>8</sup> See e.g. *Lavents v. Latvia* (N° 58442/00) 28 November 2002, raising serious concerns regarding the criminal justice system in Latvia.

<sup>9</sup> ss 94(5), 115(8).

<sup>10</sup> See e.g. JUSTICE submission to the Home Affairs Committee Inquiry into Asylum Applications, March 2003, para 16.

<sup>11</sup> Albania, Bulgaria, Jamaica, Macedonia, Moldova, Romania, Serbia and Montenegro (including Kosovo). Asylum (Designated States) Order 2003.

<sup>12</sup> CIPU (IND), Jamaica Assessment, October 2002.

<sup>13</sup> CIPU (IND), Romania Assessment, October 2002. See also US Department of State, *Country Report: Romania*, March 2002; Commission of the European Communities, *Regular Report 2002*, October 2002; Amnesty International, *Report 2002: Romania*, May 2002.

established.<sup>14</sup> It is regrettable, therefore, that the Home Office should have used its power to add to the list of countries presumed safe, breaking its own commitment to seek the advice of the panel prior to any such decision.<sup>15</sup>

12. Lastly, we have concerns over the effect of non-suspensive appeals on the general system of asylum appeals. One effect of removing the right to appeal to an adjudicator will be to increase reliance upon judicial review. Moreover, we note the recent decision of the Legal Services Commission to remove emergency devolved powers from non-suspensive appeal cases.<sup>16</sup> In our view, the combined effect of removing the right to appeal to an adjudicator, together with the reduced ability of asylum-seekers to obtain legal aid funding for judicial review applications in non-suspensive cases, is inconsistent with the obligation of the UK to provide a fair and impartial system of asylum appeals.

13. In our view, the non-suspensive procedure has negative implications for the efficiency of the appellate system as a whole. Leaving large numbers of appellants outside the IAA's jurisdiction increases the use of judicial review as the only way of challenging the administrative decision. At the same time, continuing the power to certify cases for fast-track treatment and denial access to substantive review by an adjudicator undermines the rights guaranteed by the 1951 Refugee Convention and article 3 ECHR.

14. JUSTICE considers that a reasoned dispute over the safety of country of origin should always attract an in-country right of appeal. Out-of-country appeals do not constitute adequate safeguards in cases where erroneous decisions may lead to unfair removals that put people's life at risk. It is consistent, moreover, with the government's policy of seeking to restrict the need for judicial review that such review should fall to the appellate authorities in the first instance.

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<sup>14</sup> s142.

<sup>15</sup> HL Debs, 31 March 2003, c.1117.

<sup>16</sup> Legal Service Commission, *Urgent note on the use of Devolved Powers in cases falling within the non-suspensive appeal process*, October 2002.

## **Time limits for appealing in detained cases**

15. The new rules have reduced the appeal time limits for people detained under the Immigration Act from 10 working days to 5 working days.<sup>17</sup> While the measure is intended to ensure that detainees - especially those who do not qualify for bail - are not detained for longer periods than is necessary, JUSTICE is concerned that such a tight deadline for submitting appeals in detained cases will lead to inadequate representation. Immigration detainees already experience considerable obstacles in obtaining adequate legal representation. We do not accept that the speed of the decision-making should prevail over the ability to get competent and effective legal advice, prepare and present their applications in an informed and proper fashion, and obtain representation for an appeal.
16. JUSTICE concurs with ILPA that, in view of the ongoing expansion of the detention estate, this measure will put further strain on limited legal advice and representation resources and will be detrimental to the quality of advice and representation provided for detained appellants, as well as prolonging litigation.<sup>18</sup>

## **Statutory closure date**

17. The new rules also include a requirement for adjudicator to set a closure date by which appeals must be determined.<sup>19</sup> The intention is that the appeal should be determined at a normal hearing on or before the closure date and, if necessary, in the absence of a party or on the papers. It is stated that this rule should assist the adjudicator in maintaining effective control of the proceedings and help counter requests for multiple adjournments, which can serve to frustrate the process.
18. We understand the Home Office had suggested that most requests for adjournments were dilatory in nature and made to prevent the removal of failed asylum seekers.<sup>20</sup> The evidence, however, shows that many adjournments are not at the request of the

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<sup>17</sup> Immigration and Asylum Appeals (Procedure) Rules 2003, rule 7, 16 and 28.

<sup>18</sup> See ILPA's response to the Lord Chancellor's Department consultation paper CPL 01/03.

<sup>19</sup> The Immigration and Asylum Appeals (Procedure) Rules 2003, rule 13.

<sup>20</sup> 2002 White Paper para.4.66.

appellant. Rather, amongst the most common reasons for adjournments are a lack of court time and that the Home Office is reconsidering its decision.<sup>21</sup>

19. We note that adjudicators already have extensive powers to prevent unnecessary adjournments and can penalise parties that fail to comply with the provision of the appeals rules or a direction of the appellate authority (e.g. determine appeal without a hearing, rule 45). Nor is there any evidence to suggest that adjournments are being granted unnecessarily.

20. Whatever the justification, though, we are concerned that the requirement to set a closing date emphasizes speed over substantive fairness. The restriction of adjournments is particularly inappropriate where expert evidence or a medical report is to be supplied. Granting adjournments in these circumstances is essential to ensure fair and accurate decision-making.<sup>22</sup>

21. Similarly, we are concerned that statutory mechanisms aimed solely at speedier appeals procedures negatively impact on judicial independence. We are especially concerned that primary legislation should be used to reduce the IAA's independent decision-making powers or its powers to govern its own procedures.

### **Loss of the IAT's factual jurisdiction**

22. The new procedure rules provide for the right to apply for permission to appeal against the adjudicators' determination to the IAT on a point of law only.<sup>24</sup> JUSTICE expressed concerns about the loss of the IAT's factual jurisdiction during the passage of the Act.<sup>26</sup> In a jurisdiction in which the human rights situation in foreign countries can change on a day-to-day basis, factual questions are typically complex and important, assessed with limited accurate evidence, and with grave consequences for the individual asylum seeker. As such, the suggestion that the current factual jurisdiction clogs up the IAT appears perverse. Indeed, given the mixed fact/law basis

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<sup>21</sup> House of Commons *Hansard*, 27.6.2002, col. 1066W (Rosie Winterton MP).

<sup>22</sup> *Ibid.* The need to supply further evidence and medical reports are also among the main reasons for adjournments.

<sup>24</sup> NIA Act 2002 s101(1) and Immigration and Asylum Appeals (Procedure) Rules 2003, rule 17.

of much immigration law, it seems plausible to argue that retaining its factual jurisdiction can only enhance the IAT's ability to apply the law correctly. More generally, the Tribunal ought to be trusted to take independent decisions about when to grant leave to appeal on factual basis. There is certainly no evidence to suggest that the power is not exercised properly. Instead, such a diminution of the tribunal's power will only serve to encourage judicial review (something which, in other respects, the government clearly considers to be a vice).

### **Statutory Review**

23. The NIAA 2002 also removes judicial review against refusal to grant leave to appeal to the Tribunal and introduces a statutory review process whereby the decision by the IAT refusing an application for permission to appeal can only be reviewed by the High Court, where a single judge makes a final decision on the basis of written submissions only.<sup>27</sup>

24. It is arguable that the new statutory review procedure is unlikely to offer the same degree of judicial protection as judicial review as oral argument is specifically excluded. This is of particular concern given the current success rate in asylum cases of renewed oral applications for permission for judicial review following a negative decision on the papers.<sup>29</sup>

25. Similarly, JUSTICE notes that the shift from judicial review to statutory review has the further effect of depriving asylum seekers of the benefit of the provisions of CPR Part 54.5(1), which affords an outer limit of 3 months for the filing of claims. By contrast, the period of time for seeking statutory review set down by the new rules is a mere 14 days. JUSTICE submits 14 days is too short, particularly in cases where the grounds for challenge relate to a purely procedural refusal of an asylum claim as a

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<sup>26</sup> Nationality, Immigration and Asylum Bill, JUSTICE Briefing for the House of Lords Second Reading, June 2002.

<sup>27</sup> NIA Act 2002 s101(2) and 101(3) and procedure rules in the Civil Procedure (Amendment) Rules 2003, new section II Part 54.

<sup>28</sup> NIA Act 2002 s101(2) and 101(3) and procedure rules in the Civil Procedure (Amendment) Rules 2003, new section II Part 54.

<sup>29</sup> See e.g. HL Debates, *Hansard*, 29 June 2002 Col 710 (Lord Mayhew): "since January [2002] the High Court has granted permission for judicial review of the tribunal on 62 occasions—29 on perusal of the papers only *and* 33 on oral hearing after the original application on the papers has been refused [emphasis added]."

consequence of solicitor's negligence. As Mr Justice Ouseley noted in *R (Sadik Haby) v SSHD*:<sup>30</sup>

[O]versight by the Home Office, or oversight or professional negligence by solicitors or other advisers, together with the summary powers of disposal of appeals, can lead to an asylum seeker's appeal being dealt with without any hearing of the substance of the claim. This is a matter of particular anxiety because the normal remedy in damages for professional negligence against the solicitor would provide a decreasingly useful remedy for an asylum seeker the more meritorious his claim [emphasis added].

JUSTICE submits that were the above case dealt with by way of statutory review with a 14 day time limit, it is highly unlikely that the Claimant would have had sufficient time to obtain fresh representation to mount a successful challenge.

### **Fast-track appeals**

26. The Immigration and Appeals (Fast Track Procedure) Rules 2003 came into force on 10 April 2003, without forewarning or consultation with groups and individuals with an interest in immigration and asylum appeals in the UK. These rules prescribe a fast track procedure to be followed for appeals to an adjudicator or the Immigration Appeal Tribunal against immigration decisions, where the appellant is in detention under the Immigration Acts at a specified location. The Rules will initially only apply to appellants who are detained at Harmondsworth Immigration Removal Centre, but it is intended that they may subsequently be amended to apply to appellants who are detained at other locations.

27. Under the Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003 the tracking of cases will now in part be statutory. The rules provide for extremely tight time limits within which an appeal is to be lodged (two days after notice of decision), heard by an adjudicator (within two days after the respondent's filing of documents) and determination served (one day after the hearing). Thereafter, there will be two days to make an application for leave to appeal to the Tribunal. An expedited process is then designed to ensure that the application is determined within three weeks of

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<sup>30</sup> [2002] EWHC 2315 Admin at para 17.

the initial claim. Any further application to the Court of Appeal is to be completed and determined within three days.

28. Asylum seekers will be detained in Harmondsworth throughout the initial decision-making and appeals process, unlike those detained at Oakington where the majority of asylum seekers are granted temporary admission after the initial decision. It is a matter of serious concern that asylum seekers should now be detained for a relatively prolonged time for the sake of administrative convenience.
29. JUSTICE considers that the extremely tight timescales are unrealistic and encourage a pro forma appeal. They are not sufficient to enable the asylum seekers to make their case, document their need for protection, receive meaningful advice from a lawyer, or effectively challenge a negative decision on appeal. In sum, the process is not one that can deliver fair decisions. Applicants should be given adequate time to prepare appeals. Strict time limits may not be in the interests of effective decision-making. In view of the poor quality of initial decision-making, it is inappropriate, in our view, to seek to fast-track certain appeals, particularly where humanitarian concerns or complex legal or factual questions are involved.

## **Conclusion**

30. JUSTICE is not convinced that the recent reforms have produced any significant efficiency saving or improved the quality of the appeals process, nor that the new changes will deliver sufficient procedural fairness to applicants. One way in which the Immigration Appellate Authority could be made more efficient, without sacrificing fairness, is by improving the pre-appeal management.
31. The procedure rules provide for notice of appeal to be given where an appellant makes an appeal within the UK no later than 10 days after notice of the decision was received (5 days if the person is in detention). There is no time limit for the respondent to forward the appeal documents to the appellate authority. This induces problems on Home Office pre-appeal management, which contributes to the ineffectiveness of the system, e.g. the decision-making limbo that exists in the long gap between refusal and appeal.

32. Problems arise also from the unwillingness of those presenting the Home Office case to concede unarguable cases or restrict the issues in question. JUSTICE believes that the burden on the Immigration Appellate Authority, and delays in the appeals process, would be reduced if IND officials were to show a greater readiness to concede mistakes and reconsider weak points and errors of fact and interpretation before the case gets on to appeal. It is essential that there should be some scope to correct decision-making errors before the case reaches the appellate jurisdiction by making better use of pre-hearing and encourage the parties to agree matters which should either not be disputed at all or which are raised for the first time at or immediately before appeal
33. JUSTICE shares the government's concerns about delays in the appeals system and believes that it is in the interests of asylum seekers that decisions are made more efficiently. We are, however, convinced that reforms to improve the efficiency of the appellate procedure will not be successful unless they are accompanied by similar improvements to the initial decision-making process. Good, well-reasoned first instance decisions, based on all the relevant issues, would mean that adjudicators could focus on reviewing contentious issues rather than investigating the facts of the case before them. Good quality initial decision-making would also reduce the number of appeals.
34. JUSTICE is concerned that the result of the recent amendments to the immigration and asylum appeals system has been to reduce access to justice and the supervisory jurisdiction of the courts without tackling the inherent deficiencies in the asylum system, which lay essentially in initial-decision making process by the Home Office. The system should be improved through better management and more efficient and effective processing of claims, not by removing procedural rights and safeguards.