

Asylum Appeals Process

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Introduction

Most applicants whose initial asylum claim to the Home Office is refused can appeal to the Asylum and Immigration Tribunal (AIT) for a reconsideration of the decision.¹ The right of appeal is a legal safeguard, providing independent judicial oversight of executive decision-making.² Challenging initial decisions also gives appellants the opportunity to put forward additional evidence in favour of their application. The right of appeal is not stipulated in the UN Refugee Convention and it is the responsibility of individual states to design, legislate for and implement appeals procedures.

In the United Kingdom, prior to 1993, appeals came under the general provisions of the 1971 Immigration Act. The 1993 Asylum and Immigration Appeals Act broadened the rights of appeal to include additional categories of eligible applicants. Five major pieces of legislation have since modified rights of appeal for asylum applicants, with successive governments aiming to filter out what are frequently described as 'weak' applications to reduce the perceived burden on the asylum system. It has been argued that such measures have been introduced as a response to governments' political concerns over the increasing number of applicants³ and claimants looking to prolong their stay in the UK through appeals procedures. The rate of appeal in asylum cases is higher than in any other jurisdiction (70%) leading some to argue that the appeals process could be viewed as an intrinsic part of the decision-making process.⁴ The Home Office has described the asylum appeals system as being subject to a 'pervasive culture of abuse' by asylum seekers⁵ and it has successively sought to reduce the number of applicants and the administrative burden by restricting rights of in-country appeal and through restructuring the process entirely. The key changes can be summarised as follows:

Asylum and Immigration Act 1996

- The fast-track appeals process (discussed in more detail below) was extended to include more groups of people, such as those from designated 'white list' countries whose claims were 'certified' as clearly unfounded.

Immigration and Asylum Act 1999

- A general right of appeal was introduced if it was alleged that a public authority had breached the Human Rights Act when making decisions under Immigration Acts.
- Asylum claims could be certified as 'manifestly unfounded' and the right of appeal consequently restricted.

Nationality, Immigration and Asylum Act 2002

- The Act prohibited the in-country right of appeal for claims certified as clearly unfounded.
- The introduction of a list of 'safe countries' denied applicants from those countries the right of an in-country appeal.

¹ See IAC briefing on 'The Operation of the Asylum Determination Process' for a description of the initial decision-making process.

² Thomas, R. (2005) Evaluating tribunal adjudication: administrative justice and asylum appeals, *Legal Studies* 25 (3)

³ Ibid.

⁴ Thomas, R. (2006) *Assessing asylum and immigration determination processes*, paper presented at the Asylum, Migration and Human Rights Centre

⁵ Ibid.

Asylum and Immigration (Treatment of Claimant, etc) Act 2004

- The Asylum and Immigration Tribunal (AIT), a single-tier body, replaced the two-tier appeals system.

Immigration, Asylum and Nationality Act 2006

- A new right of appeal was introduced for refugees who are no longer considered to qualify as refugees after their five-year review.
- A new right of appeal was introduced against removal directions for refugees whose status is revoked (in addition to the right of appeal at the revocation stage).
- The introduction of Section 55, which enables the AIT or the Special Immigration Appeals Commission to consider an asylum appeal in the context of national security.

Since 2 October 2000, judges in asylum appeals cases have been required to adjudicate upon issues arising under the Human Rights Act as well as the UN Refugee Convention.

Until 2004, the appeals system consisted of two tiers whereby claims were first heard by an adjudicator and subsequently by the Immigration and Asylum Tribunal (IAT). In 2003, the present government decided to abandon the two-tier structure and replace it with a single-tier system, despite two-tier structures being the established model for appellate systems which handle large volumes of appeals.⁶ This was implemented in the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The government's stated rationale for introducing this measure was to decrease the length of the appeals process to a maximum of six weeks⁷ and to reduce exploitation of the system by appellants.⁸ It has been argued that the introduction of the single-tier system is against the government's own notion of 'proportionate dispute resolution', which recommends that mechanisms of redress should be proportionate to the seriousness of the claim, for example decisions affecting the right to life, which arguably includes some asylum cases.⁹

Also proposed in the 2004 Act was an 'ouster clause' to prohibit the right to seek judicial review of decisions made by the newly created AIT. This proposal was met with significant criticism¹⁰ and consequently withdrawn. In its place, a modified statutory review process before the administrative court was established, in which five days is allocated to decide whether a material error of law has been made during the appeal.

It has been argued that legal alterations to the appeals process are motivated by political considerations and may increase the difficulties of operating an effective appeals process.¹¹ There is considerable tension between the need to provide a fair, accurate and independent decision-making process, whilst ensuring its efficiency and cost-effectiveness. The latter, it has been argued, often prevails due to political pressures on the government¹² to take a hard line on asylum.

⁶ Thomas, R. (2005) Evaluating tribunal adjudication: administrative justice and asylum appeals, *Legal Studies* 25 (3)

⁷ Ibid.

⁸ Constitutional Affairs Committee (2004) *Asylum and Immigration Appeal: Second report of session 2003-2004*

⁹ Thomas, R. (2005) Evaluating tribunal adjudication: administrative justice and asylum appeals, *Legal Studies* 25 (3)

¹⁰ See for example the Constitutional Affairs Committee's Asylum and Immigration Appeals, Second Report of Session 2003-4

¹¹ Thomas, R. (2005) Evaluating tribunal adjudication: administrative justice and asylum appeals, *Legal Studies* 25 (3)

¹² Ibid.

Statistics

Statistics on asylum appeals are collated by the Home Office Research, Development and Statistics Department. The following table outlines the number of appeals lodged, adjudicated (this may not occur in the same year, accounting for the discrepancy in figures) and the outcome of appeals. The figures include applicants who are refused refugee status but granted another form of status, but still appeal this decision.

	1997	1998	1999	2000	2001	2002	2003	2004	2005 (R) ¹³	2006 (P) ¹⁴
Appeals received by Home Office	20,950	14,320	6,615	46,190	74,365	51,695	46,130	35,110	4,935	N/A
Appeals received by IAA/AIT	22,385	15,440	7,775	28,935	47,905	64,125	70,575	47,000	24,890	14,865
Number of decisions determined	21,090	25,320	19,460	19,395	43,415	64,405	81,725	55,975	33,940	16,095
Appeals allowed	1,180 (6)	2,355 (9)	5,280 (27)	3,340 (17)	8,155 (19)	13,875 (22)	16,070 (20)	10,845 (19)	5,870 (17)	3,610 (22)
Appeals dismissed	18,145 (86)	21,195 (84)	11,135 (57)	15,580 (80)	34,440 (79)	48,845 (76)	63,810 (78)	43,760 (78)	26,745 (79)	11,705 (73)
Appeals withdrawn	1,720 (8)	1,770 (7)	3,050 (16)	475 (2)	825 (2)	1,685 (3)	1,845 (2)	1,370 (2)	1,330 (4)	780 (5)

All figures in parentheses are percentages of the total number of decisions during a particular year. All figures (other than percentages) are rounded off to the nearest 5.

The number of appeals lodged with the IAA/AIT reached a peak in 2003 at 70, 575 followed by a drop to 14,865 in 2006, reflecting the decrease in numbers of applications. From 2000 to 2006 the proportion of initial decisions appealed ranged from 65% to 77%. This may reflect changing levels of provision of information and advice to applicants and the potential for success at appeal for refused claims as a result of changes in country situations.¹⁵ Between 2002 and 2006, more appeals were determined than were lodged, reducing the backlog of cases and reflecting efforts to increase the capacity of the Tribunal to determine more cases in less time.

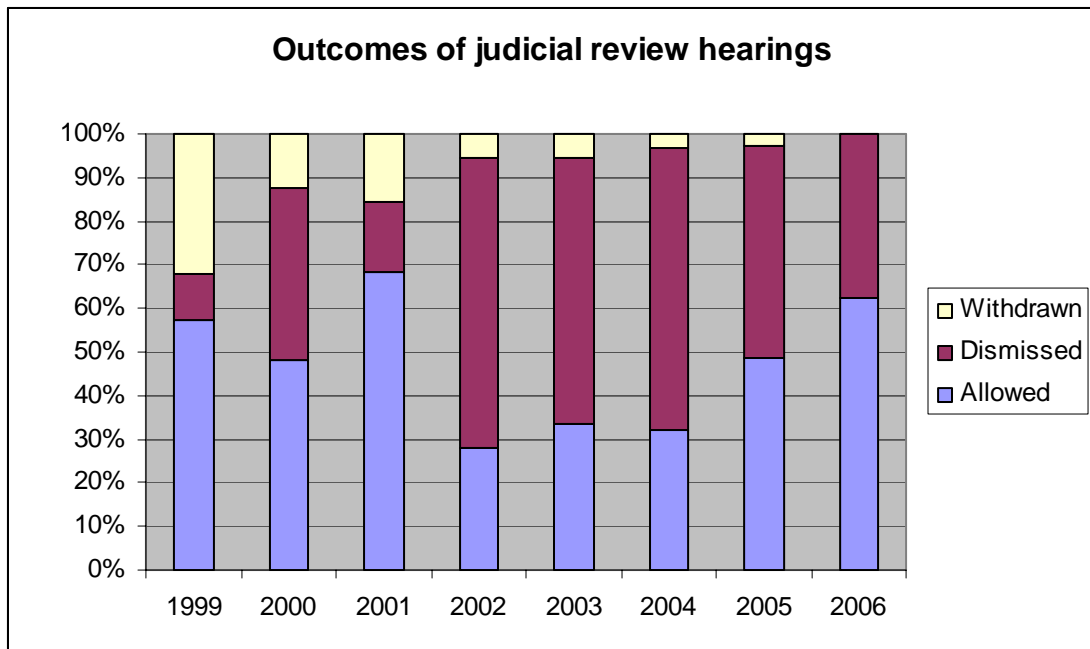
The number of appeals allowed has remained around the 20% mark since 2000. The rate of successful appeals by nationality however varies considerably. In 2006, appellants from three countries had a success rate of over 40%: Somalia (47%), Eritrea (44%) and Zimbabwe (42%). The average success rate of most other nationals hovered around the 20% mark or below. This pattern is repeated in the figures for previous years. The former Immigration and Nationality Directorate (IND) asserted that differences in appeal rates result from an interplay of various factors, including caselaw, country situations, the resourcefulness of applicants and the ability of caseworkers to disprove the key issues of claims.¹⁶

¹³ (R) Revised figures

¹⁴ (P) Provisional figures

¹⁵ ICAR (Sep 2006) *Decision making and the appeals process*

¹⁶ *Ibid.*



The vast majority of applications for judicial review of appeal decisions are dismissed. Since 2001, the figure for those granted permission to apply for judicial review have remained between 9% and 15%. A significant proportion of the applications are allowed however and this suggests that judicial review remains an important function in the asylum determination process.

The appeals process

The right to appeal

In the appeals process, the person making an appeal is known as the 'appellant' and the person challenging the appeal, usually the Secretary of State or an Immigration Officer, is known as the 'respondent'. Both sides are 'parties' to the appeal.

In most asylum cases, a refusal of asylum is accompanied by an immigration decision; this is a decision that the applicant has no legal right to be in the UK and in such cases the applicant is able to lodge an appeal. The right to appeal against a negative decision on an asylum application has been increasingly restricted over the last few years; as a result there are certain categories of asylum applicants that are unable to pursue an appeal within the UK. These include individuals:

- with cases certified as clearly unfounded and detained at Oakington;
- identified as third country cases;
- with an earlier right of appeal;
- granted leave for 12 months or less.

Under Section 96 of the Nationality, Immigration and Asylum Act 2002 (amended by Section 30 of the 2004 Act), the refusal of an asylum or human rights claim cannot be appealed if the Secretary of State certifies the claim by asserting that the matters that have been raised by the applicant should have been raised in an earlier appeal or in response to a one-stop notice. With some exceptions applicants can appeal the decision to refuse them refugee status, even if they are awarded an alternative form of status such as humanitarian protection or discretionary leave.¹⁷

The Asylum and Immigration Tribunal

In April 2005, the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 abolished the Immigration Appellate Authority (IAA) - a two-tier system comprising immigration adjudicators and the Immigration Appeal Tribunal (IAT) - and replaced it with a single-tier body; the Asylum and Immigration Tribunal (AIT). Since May 2007, the newly-formed Ministry of Justice has been responsible for the AIT. Previously, the AIT formed part of the Department of Constitutional Affairs. With the exception of national security-related cases which are heard by the Special Immigration Appeals Commission (SIAC) all appeals against decisions made by the Home Office on asylum, immigration and nationality matters are heard by the tribunal.¹⁸ Appeals are conducted in one of nineteen 'hearing centres' located throughout the UK.¹⁹

AIT appeals are heard by one or more immigration judges and are sometimes accompanied by non-legal members of the tribunal. Immigration judges and non-legal members are appointed by the Lord Chancellor and form an independent judicial body.²⁰ The AIT and its members adhere to a series of procedure rules and practice directions, the latter of which are issued by the President of the AIT.

¹⁷ Joint Council for the Welfare of Immigrants (2006) *Immigration, nationality and refugee law handbook*

¹⁸ Home Office (May 2007) *Asylum appeal hearings overview*

¹⁹ <http://www.ait.gov.uk/venues/venues.htm>

²⁰ Joint Council for the Welfare of Immigrants (2006) *Immigration, nationality and refugee law handbook*

Initial appeals process

A 'notice of decision' is issued to all asylum seekers who make an appeal. The notice explains the right to appeal, the time limit for appealing, whether the appeal is an in-country one and the grounds on which the appeal can be brought.²¹ An individual has ten working days after the notice of decision is served to lodge an appeal and five days if they are being detained. For non-suspensive appeals from abroad, an appellant has twenty eight days to make an appeal.²²

Appellants are required to complete one of three 'notice of appeal' forms, within the timeframes specified above. One form is for appeals lodged in the UK, one is for appeals made overseas and the third is used in cases where the decision is made while the applicant is in the country, but where the appeal can only be lodged when the appellant has left the UK.²³ The notice of appeal form is an opportunity for the applicant to state their reasons for appealing, as well as request an interpreter. The AIT is responsible for booking an independent interpreter for appeals hearings where necessary.²⁴

The notice of appeal form requires the appellant to state their grounds for making an appeal. Grounds for appeal include whether the removal of the appellant would breach obligations under the Refugee Convention and the European Convention on Human Rights (ECHR). Racial discrimination is also grounds for appeal in cases where it is alleged a public authority has unlawfully discriminated against the appellant. An appellant must state all grounds for appeal, as the AIT may not allow them to be mentioned at a later stage. To ensure speedier processing, all notice of appeal forms are now sent directly to the AIT rather than to the Home Office.²⁵

Asylum seekers with an in-country right of appeal against an asylum decision cannot be removed from the UK whilst their appeal is pending and the appeal remains pending while it is waiting to be heard by the AIT. Furthermore, the Home Office cannot remove an asylum seeker who is still within the allocated timeframe to ask permission to appeal. An appeal ceases to be pending if the appellant withdraws the appeal, leaves the UK or if the Home Office certifies the appeal as a national security case, thereby transferring the appeal to SIAC.²⁶

Appeal hearings

There are three types of appeal hearings: case management review (CMR) hearings, substantive appeal hearings and reconsideration hearings. The main purpose of the first hearing in the appeals process - the CMR hearing - is to ensure that the appeal is ready to go ahead. The key issues to be determined by the appeal may also be identified at this stage. Appellants in the fast-track process are not entitled to a CMR hearing.²⁷

The substantive hearing forms the main hearing in the appeals process and the following people normally attend: the appellant, their legal representative and a representative from the Home Office (a Home Office Presenting Officer). The appellant is required to provide evidence at the hearing; this may include specific documents, expert evidence (usually in the form of a written report), country reports and witnesses. The burden of proof (who proves the facts) lies

²¹ Joint Council for the Welfare of Immigrants (2006) *Immigration, nationality and refugee law handbook*

²² Home Office (May 2006) *Operation Enforcement Manual, Section C - Appeals, asylum, human rights and racial discrimination claims, Chapter 20 - appeals*

²³ Home Office (Nov 2006) *Immigration Directorates' Instructions - Chapter 12, section 4 - handling Appeals*

²⁴ Joint Council for the Welfare of Immigrants (2006) *Immigration, nationality and refugee law handbook*

²⁵ Ibid.

²⁶ Ibid.

²⁷ Home Office (May 2007) *Asylum appeal hearings overview*

with the appellant, with the standard of proof (the level of certainty to which the facts must be proved) being relatively low: i.e. a reasonable degree of likelihood of persecution under the Refugee Convention. The immigration judge (or panel) decides whether the appeal against the original decision of the Home Office should be allowed or dismissed. This is provided in writing to both parties within ten working days and is called a determination.²⁸

Challenging AIT decisions

Once the AIT has made its decision and issued a determination, either party can request a reconsideration on the grounds that the AIT made an error of law. This is known as an onward right of appeal. Reconsiderations are first considered by a senior immigration judge at the AIT and if successful, will result in an order for the AIT to reconsider the original determination and hear the case again. If a reconsideration is refused then in limited cases, the AIT's decision can be reviewed by the High Court²⁹ on the grounds that the Tribunal made an error of law. Reconsiderations cannot be sought if the AIT sat as a panel of three or more legally qualified members when it heard the original appeal and any appeal is instead directed to the Court of Appeal on a point of law.³⁰

If there is a negative outcome as a result of a reconsideration hearing at the AIT, then it is possible to apply for permission to appeal to the Court of Appeal. A further appeal against the decision of the Court of Appeal can be brought, with permission, to the House of Lords, the highest court in the UK. Cases that are unsuccessful before the House of Lords may be brought before the European Court of Human Rights (ECtHR) in Strasbourg.³¹

Special Immigration Appeals Commission

Under Section 97 of the Nationality, Immigration and Asylum Act 2002 an appeal to the AIT against a negative asylum/human rights decision will not be allowed if the person's exclusion from the UK is in the interests of national security and if the decision was made on the basis of information that cannot be disclosed for reasons of national security. In this small number of cases, there is instead a right of appeal to the Special Immigration Appeals Commission (SIAC). At SIAC hearings, appellants are entitled to two legal representatives: a special advocate appointed by the government who is allowed to view any sensitive material in closed session and make representations on behalf of the appellant; and another representative that represents the appellant in the open sessions. The SIAC panel consists of a High Court judge, an immigration judge and an expert in security matters and is subject to its own separate procedural rules.³²

The one-stop system

The one-stop procedure was introduced in October 2000 under the 1999 Act and was subsequently amended under the 2002 Act. It is intended to ensure that people applying to enter or remain in the UK are only able to make one application detailing all their reasons for seeking permission to enter or remain in the UK, receive one decision taking into account everything relevant to their case, and lodge only one appeal, if refused.

When an appeal is lodged, the appellant is also required to respond to a 'one-stop notice' and

²⁸ Home Office (Nov 2006) *Immigration Directorates' Instructions - Chapter 12, section 4 - handling appeals*

²⁹ The High Court operates in England and Wales, in Scotland it is known as the Outer House of the Court of Session and in Northern Ireland it is called the High Court in Northern Ireland.

³⁰ Home Office (Nov 2006) *Immigration Directorates' Instructions - Chapter 12, section 4 - handling appeals*

³¹ Joint Council for the Welfare of Immigrants (2006) *Immigration, nationality and refugee law handbook*

³² Ibid.

complete a 'statement of additional grounds' form outlining any additional reasons they have for wishing to stay in the UK, other than those they have already disclosed in their initial application. This includes human rights grounds, namely reasons why refusal to grant them entry to the UK would contravene the UK's obligations under the ECHR and the Human Rights Act 1998, and any other compassionate circumstances. All these issues will then be considered at the appeal hearing.³³

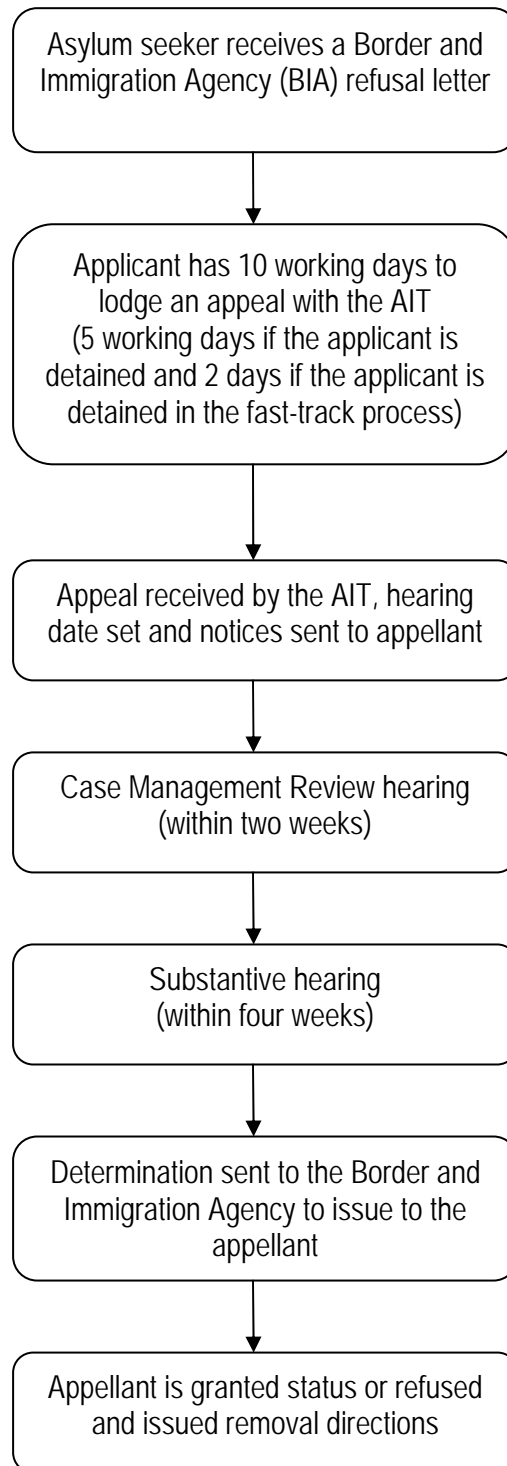
Judicial review

As long as all statutory rights of appeal have been exhausted, an asylum seeker is also entitled to apply to the Administrative Court for permission to move a judicial review of any decision taken during the asylum process. A judicial review looks at whether a decision has been made fairly and properly rather than examining the facts of the claim. The test for a judicial review is whether or not the decision was 'Wednesbury unreasonable'. This means that the decision may be successfully challenged if it is considered so unreasonable that no 'reasonable public body' could have made such a decision. This is a very narrow test and limits the courts' power to supervise the executive. Examples of instances where an applicant may apply for permission to move a judicial review are: cases certified by the Home Office as clearly unfounded so that there is no in-country right of appeal (in this case it is the decision to certify that is being judicially reviewed) and cases that are certified on the grounds that there was an earlier right of appeal (again, it is the certificate that is being judicially reviewed). The Home Office is also entitled to apply for permission to move a judicial review.³⁴

³³ Home Office (July 2006) *Immigration Directorates' Instructions – Chapter 12, section 1 - rights of appeal*

³⁴ ICAR (2006) *Asylum law and process navigation guide*

Diagram of the asylum appeals process³⁵



³⁵ Diagram adapted from the AIT:
http://www.ait.gov.uk/forms_and_guidance/documents/pdf/Asylum%20Appeals.pdf

Key Issues

Decision-making

Prior to 2003, the appellate authority was experiencing a large backlog of cases. Measures introduced to increase the capacity to deal with larger numbers of appeals included recruiting more adjudicators, expanding courtroom space and making better use of court time.³⁶ The Department for Constitutional Affairs (now the Ministry of Justice) and the Home Office jointly agreed targets for processing appeals, meaning that judges hear three cases per day and make determinations on the next day. This led to criticism from some commentators that the appellate authority was 'imbued with a managerial culture' with a target driven mandate that may compromise the quality of the appeals process.³⁷

The unusually high figures for appeals against initial decisions in asylum cases suggests for some commentators that Home Office initial decision-making is of a poor standard. It has been argued that Home Office caseworkers lack training and knowledge of asylum and human rights law, and that interviewing techniques aim to catch out claimants. The National Audit Office has asserted that weaknesses arising at the front end of the process³⁸, pressure to meet targets and the lack of ownership of cases³⁹ leads to unnecessary appeals being made.⁴⁰ Reasons for refusal letters have been criticised for being formulaic, inaccurate and hostile⁴¹, without due consideration to the seriousness of cases. In 2006 however, the president of the AIT said that reason for refusal letters had improved since 2001 possibly due to Home Office initiatives to improve decision-making including: internal quality assurance tests by treasury solicitors; a quality initiative project monitored by UNHCR; and single case ownership introduced in the New Asylum Model (NAM).⁴²

Amnesty International has argued that the number of successful appeals proves that initial decision-making is seriously flawed. AI argues that the appeals stage is necessary for legitimate asylum seekers to present their cases again.⁴³ While this may be true to an extent, others have noted that changes in circumstances over time such as country situations and additional evidence may change the nature of the claim and partly explain the additional successes.⁴⁴ Amnesty share the view of the Home Affairs Committee that resources should be front-loaded to improve initial decision-making and thus reduce the need for appeals and decrease related costs.⁴⁵

The Tribunal employs an adversarial approach in court, which means that judges remain strictly impartial and avoid intervening in the arena other than to seek clarification of points.⁴⁶ Several

³⁶ National Audit Office (June 2004) *Improving the speed and quality of asylum decisions*

³⁷ Thomas, R. (2005) Evaluating tribunal adjudication: administrative justice and asylum appeals, *Legal Studies* 25 (3)

³⁸ National Audit Office (June 2004) *Improving the speed and quality of asylum decisions*

³⁹ In 2006, the president of the AIT asserted that reasons for refusal letters may have improved as a result of the changes under the New Asylum Model (NAM) where asylum applicants are assigned a single caseworker for the duration of their application.

⁴⁰ National Audit Office (June 2004) *Improving the speed and quality of asylum decisions*

⁴¹ Amnesty International (Feb 2004) *Get it right – how Home Office decision making fails refugees*

⁴² Thomas, R. (2006) *Assessing asylum and immigration determination processes*, paper presented at the Asylum, Migration and Human Rights Centre

⁴³ Amnesty International (Feb 2004) *Get it right – how Home Office decision making fails refugees*

⁴⁴ Thomas, R. (2006) *Assessing asylum and immigration determination processes*, paper presented at the Asylum, Migration and Human Rights Centre

⁴⁵ Amnesty International (Feb 2004) *Get it right – how Home Office decision making fails refugees*

⁴⁶ Migration Watch, *House of Commons Select Committee on Constitutional Affairs Briefing paper*

commentators have argued that an inquisitorial approach would be more appropriate for asylum appeals, where judges take a more active role in court.⁴⁷ This would enable judges to examine more closely the credibility of an appellant's account.⁴⁸ It has also been noted that under the Human Rights Act, judges are required to consider the impact of ECHR on individual cases, and this may require a greater involvement on their part.⁴⁹ The Council of Immigration Judges has asserted that the standard of legal representation is 'very variable in quality' which raises the question of whether judges should take a more interventionist approach in court. It has also been argued that standards of representation are likely to fall as a result of legal aid cuts, creating disincentives for good quality caseworkers, thus exacerbating the need for such an approach.⁵⁰

An alternative would be to lower the standard of proof required by appellants, which may compensate for the difficulty of validating facts in court.⁵¹ There is a great deal at stake, at least for some appellants, if decision-making is inaccurate. The following section looks at the use of evidence in appeals, which is often uncertain and contested, making the application of legal rules to 'facts' an imperfect science.

Use of evidence

There is an obligation for collecting evidence for appeals on the state, in the form of country information, and on the applicant, in the form of expert reports. These are considered separately below. Additional sources of information for the Tribunal are the appellant's oral testimony and the AIT's country guidelines determinations. The evidence used to judge appellants is based on the past history of the applicant and the social and political situation in their country of origin, and the appellant's story must be consistent with the country information.

The Tribunal must also assess the credibility of the appellant's account. The AIT have been reluctant to issue guidance on assessing credibility and instead have urged adjudicators to use 'common sense and experience' in judging individual cases.⁵² Adjudicators are required to scrutinise the behaviour of appellants, as stipulated in Section 8 of the 2004 Act, for efforts to conceal information or to mislead, obstruct or delay the claim. This measure has been criticised for linking behaviour with credibility, when in certain circumstances there is no causal link between the two. For example, concealing a passport does not necessarily compromise the credibility of an appellant's story. Further, delays in presenting evidence may arise from appellants' histories of trauma or sexual violence which may cause them shame and difficulties expressing themselves openly.⁵³

Country expert reports

Legal representatives may request expert reports to support an appellant's application. Expert reports are usually written by country experts, such as academics or NGOs, or by medical experts, such as doctors at the Medical Foundation for the Care of Victims of Torture. Details of the case are relayed to the expert who then tailors the report to the individual case. One

⁴⁷ **Thomas, R.** (2006) *Assessing asylum and immigration determination processes*, paper presented at the Asylum, Migration and Human Rights Centre; migration watch; Blake

⁴⁸ **Migration Watch**, *House of Commons Select Committee on Constitutional Affairs Briefing paper*

⁴⁹ **Blake, C.** (2001) *Judging Asylum and Immigration Claims: The Human Rights Act and the Refugee Convention*, *Public Money & Management* 21 (3)

⁵⁰ **Thomas, R.** (2005) *Evaluating tribunal adjudication: administrative justice and asylum appeals*, *Legal Studies* 25 (3)

⁵¹ *Ibid.*

⁵² **Thomas, R.** (2007) *Risk, legitimacy and asylum adjudication*, *Northern Ireland Legal Quarterly* 58 (1)

⁵³ *Ibid.*

country expert has highlighted the importance of stating the impartiality of experts in the report - specifically that they do not know the appellant and that they cannot judge the credibility of their case. The expert must acknowledge points which question an appellant's account as well as those that corroborate it. It is also crucial that the expert does not advocate on behalf of the appellant.⁵⁴ This latter point is included in the AIT's November 2006 practice directions outlining the duties of country experts. Also highlighted in the directions is that the duties of experts to the Tribunal override those to the appellant.

There is evidence of some disagreement between the Tribunal and individual experts on the question of who has greater expertise on the issues relating to appellants' cases. The AIT has claimed on occasion that experts have exceeded their role, whilst experts have criticised the AIT for not paying sufficient attention to their expert opinions. In addition, the Court of Appeal has criticised the Tribunal for insufficiently considering country expert reports, and the latter have been required to explain why they do not accept an expert report.⁵⁵ The Tribunal have voiced concerns about the role of country experts, whom they arguably view as representing the cause of the appellant. John Barnes, Vice President of the former IAT, argued that expert evidence trespasses into the specialist territory of immigration judges. He claims that the Tribunal is in a unique position to claim an overview of asylum and human rights claims because of the vast quantity of adjudications made each year and because judges have frequent discussions in a "collegiate atmosphere...where consistency of approach...is sought".⁵⁶ Such experience therefore, he claims, enables the Tribunal to detect problems with expert reports.⁵⁷

In response to Barnes's article, Anthony Good, an anthropologist and country expert, disagrees that the Tribunal is an expert in country situations, arguing that judges may know certain facts about a case, but that they are unable to culturally interpret these facts, thus providing the necessary contextual understanding to adjudicate a specific claim.⁵⁸ One commentator on the appeals process notes that experts have intuitive fact-finding methods, while the Tribunal has systematised fact-finding procedures. The reluctance of the latter to rely on expert reports is partly because it makes decision-making more subjective and therefore less consistent and predictable.⁵⁹

Medical expert reports

Medical expert reports are sought to support a claim that an appellant has been tortured or ill-treated; this may be of a physical or psychological nature. Guidelines for medical experts documenting torture and reporting findings to judiciaries are set out in the *Istanbul Protocol* of 1999. Medical experts are required to match their clinical findings to the testimony of the appellant.

The Tribunal has been criticised for considering medical evidence after they have made their judgement on an appeal, and subsequently rejecting the evidence presented leading some commentators to argue that the evidence should rather be considered as part of the totality of

⁵⁴ Good, A. (Oct 2003) Anthropologists as experts: asylum appeals in British Courts, *Anthropology Today* 19 (5)

⁵⁵ Thomas, R. (2007) Expert evidence in asylum appeals: an update, *Immigration Law Digest* 2 13(2)

⁵⁶ Barnes, J. (2004) Expert Evidence - The Judicial Perception in Asylum and Human Rights Appeals, *International Journal of Refugee Law* 16 (3) pg 350

⁵⁷ Ibid.

⁵⁸ Good, A. (2004) Expert evidence in asylum and human rights appeals: an expert's view, *International Journal of Refugee Law* 16 (3)

⁵⁹ Thomas, R. (2007) Risk, legitimacy and asylum adjudication, *Northern Ireland Legal Quarterly* 58 (1)

evidence presented during an appeal.⁶⁰ It may however be argued that medical reports do not provide conclusive proof of an appellant's account because doctors are not obliged to scrutinise the credibility of the account.⁶¹ Barnes also claims expertise in considering and evaluating medical reports, though to a lesser extent than for country situations.⁶² Representatives of the Medical Foundation for the Care of Victims of Torture raise caution on this assertion, arguing that clinical judgement should not be replaced by judicial judgement.⁶³ Indeed, they argue that there are clinical areas on which the Tribunal cannot trespass. Another crucial issue they highlight is that some methods of torture aim to avoid scarring and leave no physical markings. Psychological damage also leaves less obvious physical signs but it can be as severe as physical torture. Experienced clinicians will be able to discern the relevant aspect of a patient's history from their demeanour as well as their external injuries.⁶⁴

A practical problem associated with expert reports is that they are often requested only days in advance of the court appearance, which does not provide sufficient time to prepare a high quality report.⁶⁵

Country of origin information

The Country of Origin Information Service (COI Service) in the Research, Development, Statistics (RDS) department of the Home Office produces information on asylum seekers' countries of origin, for use by IND officials involved in the asylum determination process. It is staffed by specialist country officers whose sole function is to research, compile and produce country of origin information (COI). COI products focus on human rights issues and matters frequently raised in asylum and human rights claims. They are compiled from material produced by external information sources such as the US State Department, UNHCR, human rights organisations and news media. All COI products are in the public domain and are based on published or unclassified source material. COI material produced by the Home Office is reviewed by the independent Advisory Panel on Country Information.

COI Service currently publishes four products:

1. COI Reports: These are detailed summaries compiled from material produced by a wide range of external information sources, as noted above. Each report focuses on the main asylum and human rights issues in the country, but also provides background information on geography, economy and history. COI Reports are produced on the 20 countries which generate the most asylum applications in the UK. The reports have been published twice yearly since 1997 but are now updated more frequently.
2. COI Key Documents: For countries which generate fewer asylum applications, which are outside the top 20 asylum intake countries but within the top 50, COI Service provides a product called 'COI Key Documents'. This is an indexed electronic 'bundle' of key source documents, which brings together the same sorts of documents that feature in the source material for COI Reports, but with a brief country profile and index rather than an actual report. COI Key Documents are updated annually. COI Key Documents may be issued

⁶⁰ Thomas, R. (2007) Expert evidence in asylum appeals: an update, *Immigration Law Digest* 2 13(2); Jones, D. and Smith, S. (2004) Medical evidence in asylum and human rights appeals, *International Journal of Refugee Law* 16 (3)

⁶¹ Ibid.

⁶² Barnes, J. (2004) Expert Evidence - The Judicial Perception in Asylum and Human Rights Appeals, *International Journal of Refugee Law* 16 (3)

⁶³ Jones, D. and Smith, S. (2004) Medical evidence in asylum and human rights appeals, *International Journal of Refugee Law* 16 (3)

⁶⁴ Ibid.

⁶⁵ Bail for Immigration Detainees and Asylum Aid (Apr 2005) *Justice Denied – Asylum and Immigration Legal Aid – a system in crisis*

on countries outside the top 50 asylum intake countries where there is a particular operational need.

3. COI Bulletins: Bulletins are issued throughout the year to provide up to date COI as required on countries for which a COI Report is not produced. As with the reports, bulletins are fully sourced to a wide range of externally produced material.
4. COI Fact Finding Missions: These are reports produced following fact finding missions to origin countries.

Country reports are widely used by Home Office Presenting Officers to prepare for hearings at appeal.⁶⁶ The Advisory Panel on Country Information (APCI), an independent body of country experts, was established under the 2002 Act to make recommendations to the Home Office on the content of country information.

The Tribunal has described the reports as providing a “reliable, reasonably impartial and up-to-date assessment” of country situations.⁶⁷ Country of origin information (COI) has however been criticised by refugee advocacy groups and country experts. It has been perceived to lack independence due to the position of the COI service within a government department.⁶⁸ It has been argued that information is repeated year after year, that the reports are not adequately sourced⁶⁹ and that undue weight is given to the reports compared with expert reports.⁷⁰

In addition to COI reports, the Tribunal publish Country Guideline Cases (CGC), which detail situations in asylum seeker-producing countries and aim to make decision-making more consistent. The cases establish ‘factual precedent’ on which similar cases are subsequently adjudicated. The IAS have expressed concern over the use of CGCs, which they see as based on poor, irrelevant, outdated or no country information, and citing no references for material used.⁷¹

Legal aid

In April 2004, new contract specifications for legal aid provision were issued by the former Department of Constitutional Affairs (DCA) and the Legal Services Commission (LSC). The new contract requires legal advisors to seek permission from the LSC to conduct appeals work and withdraws funding for attendance and representation at Home Office interviews (except in limited circumstances). The tape recording of interviews was introduced by the Home Office following a Court of Appeal decision in 2005 after recognising that it was unfair not to have representatives at the interview.⁷²

The Coalition Against the Legal Aid Cuts (CALAC), a pressure group with 120 members including human rights groups, refugee community organisations (RCOs) and law centres, argued that the cuts would deter good quality lawyers and enable poor quality lawyers to

⁶⁶ Morgan, B., Gelsthorpe, V., Crawley, H., and Jones, G. (2003) *Country of origin information: a user and content evaluation* <http://www.homeoffice.gov.uk/rds/pdfs2/hors271.pdf>

⁶⁷ Thomas, R. (2007) Risk, legitimacy and asylum adjudication, *Northern Ireland Legal Quarterly* 58 (1)

⁶⁸ Good, A. (2004) Expert evidence in asylum and human rights appeals: an expert's view, *International Journal of Refugee Law* 16 (3); Thomas, R. (2007) Risk, legitimacy and asylum adjudication, *Northern Ireland Legal Quarterly* 58 (1)

⁶⁹ Good, A. (Oct 2003) Anthropologists as experts: asylum appeals in British Courts, *Anthropology Today* 19 (5)

⁷⁰ Immigration Advisory Service (Feb 2005) *Country Guidelines Cases: benign and practical?* http://www.iasuk.org/module_images/Country%20Guideline%20Cases-Benign%20and%20Practical%20TPPS.pdf

⁷¹ Ibid.

⁷² Thomas, R. (2006) *Assessing asylum and immigration determination processes*, paper presented at the Asylum, Migration and Human Rights Centre

prosper. One organisation highlighted that since the introduction of the new contract, the number of asylum seekers unable to access legal representation has increased, especially at the appeals stage. It has also been argued that the cuts exploit appellants, who may need to fund appeals privately.⁷³ Further, refugee advocacy groups have criticised the LSC for lacking independence from the government, yet they are making decisions relating to legal aid that should be made by independent adjudicators at the appeal hearing.⁷⁴

In April 2005, the government introduced additional legal aid cuts for asylum appeals, whereby retrospective decisions are made regarding the payment of legal fees for appeals work. This measure requires lawyers to make judgements about the potential of a case's success in order to assess the financial implications of representing a client. These amendments do not affect experts or interpreters contracted for the appeal application; it was felt to be unreasonable to expect them to assess the potential of a case in the same way as lawyers. The government recognises that cases may not be clear cut prior to the appeal and therefore provide suppliers a risk premium to offset the risks of taking on clients; this comes to 35% of Controlled Legal Representation rates or 35% uplift of working hours for non-profit organisations.⁷⁵ Cost orders are made by the Tribunal following the appeal or by the High Court at review stage. Legal suppliers can apply for a review of the decision to the AIT, through a paper-based process. The review of a funding decision is made by a different senior immigration judge to the one who made the initial funding decision.

The test to determine whether funding will be granted assesses the prospects of success at the time of the application. The case must demonstrate a 'significant prospect of success' to be awarded funding. This was chosen in place of 'very likely to succeed' which was felt by suppliers to be too risky.⁷⁶ Another concern aired by suppliers was that unsuccessful appeals would result in a default refusal of costs (successful appeals are automatically granted retrospective funding for legal costs).

In making these cuts, the government intended to filter out weak applications by discouraging those without a significant prospect of success from appealing the Home Office's decision and therefore lowering the costs of the appeals process. The former Department for Constitutional Affairs launched a six-week consultation in November 2004 seeking views from a range of organisations on the proposed legal aid cuts. Many of the respondents to the consultation were concerned about the impact of the cuts for their own organisations and for their clients. Some were concerned that immigration and asylum cases had been singled out because retrospective funding was not being applied to other community legal services; others felt that trustees of voluntary organisations could not approve work with such a level of risk attached.⁷⁷ It was also felt that the cuts would lower morale in the sector.⁷⁸ The Committee for Constitutional Affairs in their response to the DCA's consultation noted their concern about the impact the cuts would have on small suppliers such as charities and small firms who may

⁷³ ILPA response to Department for Constitutional Affairs (Nov 2004) *The Asylum and Immigration Tribunal – the legal aid arrangements for onward appeals*

⁷⁴ Bail for Immigration Detainees and Asylum Aid (Apr 2005) *Justice Denied – Asylum and Immigration Legal Aid – a system in crisis*

⁷⁵ Department for Constitutional Affairs (Nov 2004) *The Asylum and Immigration Tribunal – the legal aid arrangements for onward appeals*

⁷⁶ Constitutional Affairs Committee (2004) *Asylum and Immigration Appeal: Second report of session 2003-2004*

⁷⁷ Ibid.

⁷⁸ Department for Constitutional Affairs (Nov 2004) *The Asylum and Immigration Tribunal – the legal aid arrangements for onward appeals*

struggle to cope with the likely drop in income. They recommended that instead of implementing retrospective funding arrangements, the LSC should withhold funds from suppliers who consistently bring forward unmeritorious claims.⁷⁹ Elsewhere, commentators have noted that more appellants are likely to represent themselves in court and this may add to the length of hearings.⁸⁰

As a result of the consultation, the government made some alterations to the proposals. The Tribunal and High Court can: award retrospective funding when the claim is unsuccessful if it can be proved that the case would have been successful if not for changes in circumstance or law; and provide for costs where applications are withdrawn, abandoned or conceded. Additionally, a supplier can appeal the decision of refused funding within ten days of receipt of the Tribunal's decision.

Fast-track appeals

An appeal becomes 'fast-tracked' in cases where an asylum seeker receives a negative initial decision whilst being detained in one of four Immigration Removal Centres (IRCs) (Campsfield, Colnbrook, Harmondsworth or Yarl's Wood). The process operating in Harmondsworth for male asylum seekers and Yarl's Wood for female detainees is often referred to as the 'super fast track' process and is administered so that asylum seekers remain in detention throughout the asylum application process, including for any appeal they may lodge. Asylum seekers in this expedited process are given two working days to lodge an appeal against a negative initial decision, in comparison to five working days for asylum seekers detained in other IRCs and ten working days for non-detained asylum seekers.⁸¹

The fast track process exists in Oakington Reception Centre, however if an asylum seeker's claim is refused but the person has a right of appeal in the UK, they are usually released to pursue appeals from outside detention. The majority of refused cases at Oakington are certified to be 'clearly unfounded' and therefore applicants are not entitled to an in-country right of appeal at all. These cases are also known as 'non-suspensive appeal' or NSA cases and are explained in more detail below.⁸²

The fast track system has been strongly criticised for placing unrealistic time constraints on asylum applicants and legal representatives. The human rights organisation Justice has commented that the accelerated process does not allow an asylum applicant sufficient time to receive proper legal advice or effectively challenge a negative decision on appeal.⁸³ However, the Home Office maintains that there are several safeguards within the fast track process, including the option for legal representatives to make an application to transfer the claim from the fast track system to the mainstream system.⁸⁴

⁷⁹ **Constitutional Affairs Committee** (2004) *Asylum and Immigration Appeal: Second report of session 2003-2004*

⁸⁰ **Migration Watch**, *House of Commons Select Committee on Constitutional Affairs Briefing paper* http://www.migrationwatchuk.org/Briefingpapers/legal/Summary_of_evidence_cac.asp

⁸¹ **Joint Council for the Welfare of Immigrants** (2006) *Immigration, nationality and refugee law handbook*

⁸² *Ibid.*

⁸³ **Justice** (2003) *Inquiry into asylum and immigration appeals: Committee on the Lord Chancellor's Department.*

⁸⁴ For further information on Home Office safeguards regarding the detained fast track process see **Oakley, S.** (April 2007) *Accelerated procedures for asylum in the European Union: fairness versus efficiency*, Sussex Migration Working Paper no. 43

A recent report by Bail for Immigration Detainees (BID) into the detained fast track process at Yarl's Wood found, in one week's observation, that over a quarter (27%) of detained women were unrepresented by lawyers during appeal hearings.⁸⁵ Similarly, statistics released under the Freedom of Information Act showed that in January and February 2006, of 132 appeals, 72 (55%) appellants in the fast track process were not represented in court at the appeal stage.⁸⁶

Cuts in publicly funded legal aid have led to an increase in asylum seekers going through the appeals process without legal representation. Representing a case that does not merit public funds can result in severe penalties for legal firms and under new regulations firms could lose their contract to do asylum work if they do not win at least 40% of the asylum appeals that are granted public funding.⁸⁷

Non-suspensive appeal cases

The Nationality, Immigration and Asylum Act 2002 removed 'suspensive' or in-country rights of appeal from anyone whose asylum or human rights claim is certified to be clearly unfounded. A clearly unfounded claim is one that is so evidently without substance that it is certain to fail, for example if the case does not raise a fear of persecution for one of the reasons stated in the Refugee Convention.⁸⁸ In such cases, known as 'non-suspensive' or NSA, an asylum seeker can only appeal against a negative decision from abroad (in the country of origin) within 28 days.⁸⁹

The Home Office has created a list of 'safe' countries whose nationals are likely to have their cases declared non-suspensive. At present the list consists of all member states of the European Union, as well as nationals from the following countries: Albania, Bolivia, Brazil, Ecuador, India, Jamaica, Macedonia, Moldova, Mongolia, South Africa, Serbia (including Kosovo, but not Montenegro), Ukraine, Ghana (male applicants only) and Nigeria (male applicants only).⁹⁰ A draft order was laid in Parliament on 22 May 2007 proposing designation of NSA for the following additional countries:⁹¹

- Bosnia-Herzegovina
- Gambia (in respect of men)
- Kenya (in respect of men)
- Liberia (in respect of men)
- Malawi (in respect of men)
- Mali (in respect of men)
- Mauritius
- Peru
- Sierra Leone (in respect of men).

In addition to the designated safe country list outlined above, the Home Office also has the authority to certify the case of an asylum seeker from any country as clearly unfounded, if they

⁸⁵ **Bail for Immigration Detainees** (September 2007) *'Refusal Factory' - Women's experiences of the Detained Fast Track process at Yarl's Wood Immigration Removal Centre*

⁸⁶ **Bail for Immigration Detainees** (March 2006) *Working against the clock: inadequacy and injustice in the asylum system*

⁸⁷ **Oakley, S.** (Apr 2007) *Accelerated procedures for asylum in the European Union: fairness versus efficiency*, Sussex Migration Working Paper no. 43

⁸⁸ **Immigration Law Practitioners' Association** (January 2004) *Asylum – a guide to recent legislation*

⁸⁹ **Joint Council for the Welfare of Immigrants** (2006) *Immigration, nationality and refugee law handbook*

⁹⁰ **Home Office** (July 2007) *Non-suspensive appeals (NSA)*

⁹¹ <http://press.homeoffice.gov.uk/press-releases/asylum-apps-continue-to-fall>

believe the claim to be without substance.⁹² The only way to challenge a case that is certified as clearly unfounded is by judicial review. If a judicial review is successful, the Home Office is obliged to withdraw the certificate and allow an in-country appeal against the original decision. If unsuccessful, the certification is upheld and the asylum seeker must leave the UK in order to lodge an appeal.⁹³

It has been observed by various organisations⁹⁴ that NSA cases give rise to several problems. First, as a result of being certified 'clearly unfounded', an asylum seeker could be returned to a country where they fear persecution before being able to appeal. The Asylum Rights Campaign recommends that 'any reasoned dispute over the safety of country of origin should always attract an in-country right of appeal.'⁹⁵ Furthermore, it has been noted that in practice it is extremely difficult for a person to be able to appeal from abroad and it remains unclear what responsibility the Home Office has for helping - financially or otherwise - a successful appellant to return to the UK.⁹⁶

⁹² Immigration Law Practitioners' Association (January 2004) *Asylum – a guide to recent legislation*

⁹³ Joint Council for the Welfare of Immigrants (2006) *Immigration, nationality and refugee law handbook*

⁹⁴ Asylum Rights Campaign (2004) *Providing protection in the 21st century – Refugee rights at the heart of UK asylum policy*

⁹⁵ Ibid.

⁹⁶ Joint Council for the Welfare of Immigrants (2006) *Immigration, nationality and refugee law handbook*

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