ASYLUM LAW REFORM

The "Telegraph's" website recently carried an article about various provisions of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, in particular the changes in the appeals system which are being brought into force as from 4 April 2005. The article quotes at considerable length the criticisms of the Act and of associated proposals regarding legal aid in asylum appeals made by Mr Justice Collins, former President of the Immigration Appeal Tribunal and now lead judge in the Administrative Court. The learned judge is concerned that there are to be severe limitations on legal aid for references of asylum and immigration appeals from the new Asylum and Immigration Tribunal to the High Court - mainly because new regulations will require that legal aid funds will not meet the costs to appellants of applications for review unless the Tribunal itself certifies that the application had a significant chance of success. If there is no such certificate the appellant's legal representative will have to bear the cost himself. The object is to discourage frivolous appeals which waste the time of the court and merely serve the purpose of enabling the appellant to put off the day on which he becomes liable as a failed asylum seeker to be deported. It is not the purpose of this article to answer the judge's comments in detail, but to put the other side of the concerns which he has expressed about protecting individual rights and liberties and in particular the rights of appellants in asylum and immigration appeals to access to justice.

Mr Justice Collins is entitled to respect for having done something to improve the hitherto dismal reputation of the Immigration Appeal Tribunal during his tenure of office as President, but the fact is that the Tribunal has provided for years an additional and unnecessary level of appeal against adverse decisions by the Home Office, asylum decisions in particular. Asylum seekers cannot be deported while they have an appeal pending and the availability of an additional appeal beyond the adjudicator enables them to spin out the process for years, particularly when, as so often happens, the Tribunal cannot be troubled to dispose of a case itself but remits it to be heard again by another adjudicator - this sometimes happens several times. The abolition of the Tribunal is long overdue and it is a great pity that successive governments, although they caused Parliament to pass substantial Acts on immigration and asylum in 1993, 1996, 1997, 1999 and 2002, failed to appreciate the need to reduce the excessive time taken by the availability of multiple appeals until introducing what is now the 2004 Act.

I agree with the criticisms made at the time of passage of the Bill of the ouster clause, which sought to put decisions of the new Asylum and Immigration Tribunal beyond the scope of any form of judicial review by the higher courts. My reason for agreeing is that I would have been appalled at the prospect that former adjudicators and Immigration Appeal Tribunal Chairmen, reincarnated as immigration judges under the 2004 Act, would have had the last word on fact and law and not have been subject to correction. The rise in the volume of asylum appeals in recent years has meant a huge expansion in the numbers of lawyers recruited as adjudicators, many of whom are not of the highest calibre. The following table, taken from official statistics, shows what has been happening to asylum appeals in recent years. The huge

and growing annual influx from 1997 onwards has now begun to diminish, but we are still receiving 40,000 or more fresh applications for asylum each year. There have been corresponding increases in the number of decisions taken by the Home Office on these applications and increases in the numbers of appeals to adjudicators and to the Immigration Appeal Tribunal against adverse decisions. More civil servants have had to be recruited by the Home Office and more adjudicators and Tribunal Chairmen by the Immigration Appellate Authority. The bottom line in the table shows an alarming increase in the percentage of appeals allowed, from 5.7% in 1997 to 19.66% in 2003. In Migration Watch we do not believe that this is attributable to any deterioration in the competence of Home Office staff but rather to a combination of factors affecting the quality of determinations made by adjudicators : (1) pressure put on them to increase productivity without adequate regard to quality and (2) a large and rapid increase in their numbers which has meant a decline in overall professional competence. We have put this problem in detail to the two government departments concerned, the Home Office and the Department of Constitutional Affairs, but have so far met with a refusal to treat it seriously.

	1997	1998	1999	2000	2001	2002	2003	2004 Q1-3	Totals
a. Decisions	36000	31600	21300	97500	119000	82700	64605	37575	490280
b. Granted asylum	4000	5300	7800	10400	11200	8100	3880	1195	51875
c. Granted on appeal	1200	2300	5300	3300	8200	13900	16070	8925	59195
d. Total granted asylum	5200	7600	13100	13700	19400	22000	19950	10120	111070
e. Percentage of applicants	14.4%	24.1%	61.5%	14.1%	16.3%	26.6%	30.9%	26.9%	22.7%
f. Granted ELR	3000	3900	2500	11400	19800	20000	7210	3020	70830
g. Total granted asylum/ELR	8200	11500	15600	25100	39200	42000	27160	13140	181900
h. Percentage asylum/ELR	22.8%	36.4%	73.2%	25.7%	32.9%	50.8%	42.0%	35.0%	37.1%
j. Removals	7160	6910	7605	8980	9285	10410	12490	9535	72375
k. Percentage removals	19.9%	21.9%	35.7%	9.2%	7.8%	12.6%	19.3%	25.4%	14.8%
l. Appeals determined	21090	25320	19460	19395	43415	64405	81725	44375	319185
m. Appeals failed - number	19890	23020	14160	16095	35215	50505	65655	35450	259990
n. Appeals failed - %age	94.3%	90.9%	72.8%	83.0%	81.1%	78.4%	80.3%	79.9%	81.5%
o Appeals allowed - %age	5.7%	9.1%	27.2%	17.0%	18.9%	21.6%	19.7%	20.1%	18.5%

Note: all numbers exclude dependants

These considerations apart, the table also shows the huge volume of cases to be decided at initial and appellate levels and underlines the need to accelerate their final disposal by, *inter alia*, reducing the number of levels of appeal and associated scope for delay. Because of the vociferous opposition to the ouster clause when the Bill was going through Parliament the government relented and introduced provision for statutory review by the High Court of possible errors of law by the new Asylum and Immigration Tribunal, an abbreviated form of judicial review. The draft rules on provision of legal aid for applications for statutory review give retrospective responsibility for deciding on the grant of legal aid to an immigration judge. This means that the lawyer who is conducting the application will not recover his fees unless it can be shown that the application had a significant prospect of success. The purpose of this is to encourage lawyers to assess the merits of a case before deciding to pursue it. The asylum appeals system has always been clogged by large numbers of meritless appeals and applications for judicial review, pursued mainly for the purpose of extending the appellants' stay in the United Kingdom. Any steps which can be taken to reduce their numbers are to be welcomed. We are happy to note that the learned judge is not objecting in principle to retrospective funding but only

to what he regards as the unduly severe test of "a significant prospect of success" and to the assignment of responsibility for decisions on legal aid to the Tribunal rather than the High Court.

It is right and proper that the judges should be zealous in safeguarding our civil liberties. However, where asylum is concerned it has to be borne in mind that for years now the United Kingdom and other countries have faced a growing influx of asylum seekers who for the most part are not escaping persecution in their own countries and do not have genuine claims to the protection of the international community. They are economic migrants. There has been and continues to be much abuse of the asylum system and Mr Justice Collins is much more aware of this than most High Court judges. The huge and growing numbers of asylum seekers have created enormous problems for the government and for the community as a whole. The cost to the taxpayer of processing claims and appeals and of housing or otherwise providing for the maintenance of asylum seekers is now around £2 billion annually. In this situation some curtailment of the liberties normally available to citizens in pursuing their legal rights and remedies is unavoidable. We believe that the steps so far taken by the government are not excessive and are compatible with the rights and remedies of asylum seekers and of the community as a whole.

Harry Mitchell QC
11 January 2005