

*These notes refer to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (c.19) which received Royal Assent on 22 July 2004*

# ASYLUM AND IMMIGRATION (TREATMENT OF CLAIMANTS, ETC.) ACT 2004

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## EXPLANATORY NOTES

### APPEALS

#### *Section 26: Unification of appeal system*

86. [Section 26 \(1\)](#) replaces section 81 of the Nationality, Immigration and Asylum Act 2002, which made provision for the appointment of asylum adjudicators under the two-tier system. Section 26 establishes a single-tier tribunal called the Asylum and Immigration Tribunal, which is referred to in the rest of this part of the Act as “the Tribunal”.
87. [Section 26 \(2\)](#) amends section 82(1) of the 2002 Act. Section 82 lists the immigration decisions that attract a right of appeal to an adjudicator. This amendment is consequential upon the merger of the two-tier system. With the amendment, the appeal is to the new Tribunal.
88. [Section 26 \(3\)](#) makes a similar consequential amendment to section 83(2) of the 2002 Act which states the circumstances in which a person has a right of appeal from rejection of an asylum claim. Appeals will be to the new Tribunal.
89. [Section 26\(4\)](#) substitutes a new Schedule (found at Schedule 1 ) for Schedule 4 of the 2002 Act. The old Schedule 4 made provision for the terms of office, staffing, remuneration and sitting arrangements for adjudicators. It is replaced by a Schedule making similar provision in respect of Tribunal members, and related matters.
90. [Section 26\(5\)](#) repeals sections 100 to 103 and Schedule 5 of the 2002 Act, thereby abolishing the Immigration Appeal Tribunal (IAT), the second tier of the current system. As a consequence of this, this section also removes the right of appeal to the IAT, the right to seek statutory review of a refusal by the IAT to grant permission to appeal to itself, and the right to appeal from the IAT to the higher appellate courts. Schedule 5 made provision as to the membership, staffing and sitting arrangements of the IAT.
91. [Section 26\(6\)](#) inserts new sections 103A to 103E into the 2002 Act.
92. Section 103A enables a party to an appeal to the Tribunal to apply to the appropriate court for an order requiring the Tribunal to reconsider its decision on appeal on the grounds that the Tribunal made an error of law. If the appropriate court thinks the Tribunal may have made an error of law it will order the case to be reconsidered by the Tribunal.
93. The application must be made within 5 working days of receipt of the Tribunal determination but if made from abroad the application must be made within 28 days. An application will be determined by reference to the written submissions of the applicant, and where rules of court permit, other written submissions. The decision of the appropriate court will be final.

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94. In this section the ‘appropriate court’ is: in relation to an appeal decided in England and Wales, the High Court; in relation to an appeal decided in Scotland, the Outer House of the Court of Session; in relation to an appeal decided in Northern Ireland, the High Court in Northern Ireland.
95. This section does not apply to a decision of the Tribunal where its jurisdiction is exercised by three or more legally qualified members. In such cases, higher court oversight would be by way of appeal on a point of law under section 103E.
96. Section 103B provides for a party to an appeal, where an appeal has been reconsidered, to bring a further appeal on a point of law to the appropriate appellate court. An appeal may only be brought with the permission of the Tribunal, or if the Tribunal refuses permission, the appropriate appellate court.
97. The reference to ‘reconsideration’ is to a reconsideration following an order under section 103A(1) or a remittal to the Tribunal under section 103C or 103E.
98. In this section the ‘appropriate appellate court’ is: in relation to an appeal decided in England and Wales, the Court of Appeal; in relation to an appeal decided in Scotland, the Inner House of the Court of Session; in relation to an appeal decided in Northern Ireland, the Court of Appeal in Northern Ireland.
99. Section 103C enables the appropriate court, on consideration of an application under section 103A(1), to refer a case straight to the appropriate appellate court if it thinks the case raises a question of law of such importance that it should be decided by that court.
100. In this section ‘appropriate court’ has the same meaning as in section 103A and ‘appropriate appellate court’ has the same meaning as in section 103B.
101. Section 103D provides for an enabling power to make regulations for an appellant’s costs for review and reconsideration under section 103A to be paid out of the Community Legal Service Fund. This type of legal aid remuneration will apply only where it is the appellant who is the party applying for review and reconsideration.
102. Section 103D(1) enables the appropriate court to order an appellant’s costs to be paid in respect of the review application. Section 103D(3) enables the Tribunal to order an appellant’s costs to be paid in respect of both the review application and the reconsideration
103. The power to make regulations about the exercise of the power in subsections (1) and (3) would be exercised by the Secretary of State for Constitutional Affairs. Regulations made under this section are subject to the affirmative resolution procedure.
104. The regulation-making power enables restrictions to be placed upon the exercise of the power in 103D(1) and (3) by reference to the appellant’s prospects of success at the time the application under section 103A(1) was made. Regulations will also govern detailed matters such as the manner of determining the amount payable. Regulations can also add to the Legal Services Commission’s statutory functions and apply, modify or disapply other enactments relating to the funding (in England, Wales or Northern Ireland) the funding of legal services.
105. In this section ‘appropriate court’ has the same meaning as in section 103A.
106. This Section only has effect in relation to an appeal decided in England, Wales or Northern Ireland.
107. Section 103E provides that a party to an appeal that has been decided by the Tribunal exercising its jurisdiction by three or more legally qualified members may bring an appeal to the appropriate appellate court. An appeal may only be brought with the permission of the Tribunal, or if the Tribunal refuses permission, the appropriate appellate court.

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108. In this section ‘appropriate appellate court’ has the same meaning as in section 103B.
109. [Section 26\(7\)](#) gives effect to Schedule 2, which makes consequential amendments and transitional provisions.
110. [Section 26\(8\)](#) enables the Lord Chancellor to vary time limits specified in section 103A(3)(a), (b) or (c) or paragraph 29(5)(b) of Schedule 2, by order. An order made under this section is subject to the negative resolution procedure and the Lord Chancellor is required to consult the heads of judiciary in the parts of the United Kingdom affected by the order.

#### ***Schedule 1: New Schedule 4 to the Nationality, Immigration and Asylum Act 2002***

111. [Schedule 1](#) replaces Schedule 4 of the 2002 Act, as specified in section 26(4).
112. [Schedule 4](#) made provision for the appointment of asylum adjudicators and related matters. As the two-tier system of adjudicators and the Immigration Appeal Tribunal is replaced by the single tier Asylum and Immigration Tribunal, the new Schedule makes provision for the appointment of members of the new Tribunal and related matters instead.
113. [Paragraph 1](#) imposes on the Lord Chancellor the duty and responsibility for appointing the members of the new Tribunal.
114. [Paragraph 2](#) specifies the qualifications required to become a member of the new Tribunal. There will be legally qualified members and non-legal members.
115. [Paragraph 3](#) specifies when the appointment of a Tribunal member shall end, including specifying a retirement age of 70, and otherwise makes the holding of office subject to the terms of the holder’s appointment. The terms and conditions may make provision for removal from office, and also about the training, appraisal and mentoring of members the Tribunal by other members.
116. [Paragraph 4](#) allows the Lord Chancellor to make provision for the title of members of the Tribunal. Read together with paragraph 23 of Schedule 2, the order is subject to the negative resolution procedure.
117. [Paragraph 5](#) provides for the Lord Chancellor to appoint a President of the Tribunal, and one or more Deputy Presidents, and specifies the qualifications for appointment as President. It also makes provision for the powers and functions of the Deputy Presidents.
118. [Paragraphs 6 to 8](#) are provisions for the sitting arrangements, constitution of the Tribunal composition and allocation of proceedings to members of the Tribunal. In particular, paragraph 7 provides that it is for the President to determine, having regard to various factors, whether cases are heard by a single Tribunal judge or a panel of members, and when non-legal members will sit. The direction making power is subject to rules.
119. [Paragraph 9](#) allows the Lord Chancellor to appoint Tribunal staff. Paragraphs 10 and 11 make provision for the remuneration and allowances to members and staff of the Tribunal.

#### ***Schedule 2: Asylum and Immigration Tribunal: Consequential Amendments and Transitional Provision***

120. [Part 1](#) of this Schedule makes consequential amendments to other legislation. Where legislation refers to an “adjudicator” or the “Immigration Appeal Tribunal”, these are changed to refer to the new Asylum and Immigration Tribunal and Tribunal members.
121. [Paragraph 4](#) (British Nationality Act 1981). This provision has the effect that appeals under this Act are handled in the same way as appeals under Part 5 of the 2002 Act, and

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the same provisions for higher court oversight and legal aid are applied. It also has the effect that a deprivation order can be made before any appeal is heard, thereby allowing deprivation and deportation proceedings to take place concurrently.

122. **Paragraph 20** (Nationality, Immigration and Asylum Act 2002). This paragraph amends the powers of the Lord Chancellor to make rules governing the procedure of the Tribunal. They are enlarged to cover matters contained in section 26, such as the reconsideration of cases reviewed by the High Court under s.103A, and during the transitional period when senior members of the Tribunal consider s.103A applications before they go to the higher court. A purposive provision is added as s.106(1A) that in making rules, the Lord Chancellor should aim to ensure that the rules are designed to ensure that the proceedings are handled as fairly, quickly and efficiently as possible, and that they confer on members of the Tribunal similar responsibility for ensuring that proceedings are dealt with in that way.
123. **Paragraph 23**. This adds to the provision in the 2002 which provides for the parliamentary procedure for subordinate legislation made under the 2002 Act. It provides that any regulations made under s.103D (legal aid for reviews and reconsiderations), attract the affirmative resolution procedure.
124. **Part 2** makes transitional provisions for the office holders and staff currently at the Immigration Appellate Authority. Persons appointed as adjudicators (under s.81 of the Nationality, Immigration and Asylum Act 2002) and members of the Immigration Appeal Tribunal (under Schedule 5 of the 2002 Act) will automatically be considered on commencement to have been appointed as a member of the new Tribunal. Similarly, the staff of the IAT automatically become staff of the AIT at commencement.
125. **Paragraph 29** introduces transitional arrangements for the operation of section 103A. For a period beginning with commencement and ending on a date appointed by order of the Lord Chancellor, an application made under section 103A(1) will be considered by a member of the Asylum and Immigration Tribunal. On consideration of the application the Tribunal member can make an order under section 103A(1). If the Tribunal member does not make an order under section 103A(1) the applicant can elect for his application to be looked at by the appropriate court.
126. An order under paragraph 29 will be subject to the affirmative resolution procedure and the Lord Chancellor has a statutory requirement to consult before making the order. He may make a further order reviving the transitional arrangements by the same procedure.

### ***Section 27: Unfounded human rights or asylum claim***

127. **Section 27** amends section 94 of the Nationality, Immigration and Asylum Act 2002. Section 94 provides that a person may not bring an appeal while in the United Kingdom solely by virtue of having made an asylum or human rights claim where the Secretary of State certifies that claim as clearly unfounded. It also provides that where the Secretary of State is satisfied that an asylum or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim as clearly unfounded unless satisfied that it is not. Subsection (5) provides an affirmative order-making power under which a State or part of a State may be added to the list in subsection (4) where certain conditions are met. Those conditions are that:
  - a) there is in general in that State or part no serious risk of persecution of persons entitled to reside in that State or part, and
  - b) removal to that State or part of persons entitled to reside there will not in general contravene the United Kingdom's obligations under the Human Rights Convention.
128. **Section 27** extends the order-making power in section 94. It provides that where the conditions in section 94(5) are met for a "description of person" within a State or part of a State then that State or part may be added to the list in subsection (4) in respect

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of that description of person only. Examples of what might constitute a “description of person” are given in new subsection (5C) of section 94.

129. The effect of using the power in section 27 to add a State or part to the list in section 94(4) is that where an asylum or human rights claimant is both entitled to reside in the State or part added and falls within the defined “description of person” for that State or part, the Secretary of State shall certify the claim as clearly unfounded unless satisfied that it is not. The purpose of this section is to provide extra flexibility to identify groups of persons within a State or part for whom conditions are generally safe.
130. [Section 27\(4\)](#) deletes from the list in section 94(4) of the 2002 Act the 10 States which joined the European Union on 1 May 2004. From that date, the appeal rights of a national of one of those State who makes an asylum claim have been governed by different legislation (at present, the Immigration (European Economic Area) Regulations 2000 as amended by the Immigration (European Economic Area) (Amendment No.2) Regulations 2003).
131. [Section 27\(7\)](#) disapples the requirement in section 94(3) of the 2002 Act to certify a clearly unfounded asylum claim made by a claimant entitled to reside in a state or part designated under section 94(4) where that claimant is subject to extradition proceedings or has been arrested in anticipation of extradition proceedings pursuant to the Extradition Act 1989 or the Extradition Act 2003. The effect of section 27(7) is that a claimant who is subject to extradition proceedings and would normally have a non-suspensive right of appeal by virtue of section 94 of the 2002 Act will have a suspensive right of appeal against any refusal of his asylum or human rights claim.
132. [Section 27](#) also amends section 94 of the 2002 Act to provide that an asylum or human rights claimant will not benefit from a suspensive right of appeal in reliance on section 92(2) against an immigration decision of a kind in section 82(2)(c), (d) or (e) of the 2002 Act if the Secretary of State certifies the asylum or human rights claim as clearly unfounded.

### ***Section 28: Appeal from within United Kingdom***

133. [Section 28](#) replaces section 92(3) of the Nationality, Immigration and Asylum Act 2002. It sets out the circumstances in which a person who arrives with entry clearance may appeal against a refusal of leave to enter from within the United Kingdom. Refusal of leave to enter will give rise to a right of appeal exercisable from within the United Kingdom where the person is in the United Kingdom at the time of refusal and has entry clearance on arrival, except where his purpose in arriving in the United Kingdom is different from the purpose specified in the entry clearance.
134. [Section 28](#) provides an exception to this provision for a British overseas territories citizen, a British Overseas citizen, a British National (Overseas), a British protected person, or a British subject within the meaning of the British Nationality Act 1981. A person who falls within the listed categories will benefit from an appeal against refusal of leave to enter from within the United Kingdom in the additional circumstance where he is in the United Kingdom and has a work permit at the time of refusal.

### ***Section 29: Entry clearance***

135. [Section 29](#) provides an affirmative order-making power under which the Secretary of State may specify requirements in the immigration rules. Where entry clearance is refused because a specified requirement is not met, there will be no right of appeal against that refusal. However, the section preserves the right to appeal on human rights or race discrimination grounds.

***Section 30: Earlier right of appeal***

136. **Section 30** amends section 96 of the Nationality, Immigration and Asylum Act 2002. Section 96 sets out when a new claim or application may be certified under the "one-stop" system. Certification prevents an appeal being lodged against the decision on the new claim or application. The revision has the effect of removing provisions for certifying appeals after they have been lodged; those provisions are no longer needed. It also clarifies the circumstances in which a certificate may be issued. There are now two options:
- a) where the person was notified of a right of appeal against an earlier immigration decision, the matter being raised in the new claim or application could have been raised at that appeal, and there is no satisfactory reason for not having raised it at that appeal. It does not matter if the person did not exercise the earlier right of appeal or did not pursue it to determination, so long as they had the opportunity to do so.
  - b) where the person has been given a one-stop notice under section 120 of the 2002 Act in relation to a previous immigration decision, the matter being raised in the new claim or application should have been raised in response to that notice, and there is no satisfactory reason for not having raised it in response to that notice.

***Section 31: Seaman and aircrews right of appeal***

137. **Section 31** restores the right of appeal for a small number of people, crew members of ships and aircraft, who are to be removed from the United Kingdom under 1971 Immigration Act powers relating specifically to crew members of ships and aircraft. The right of appeal is subject to section 92 of the Nationality, Immigration and Asylum Act 2002, and in common with other rights of appeal against removal decisions cannot be exercised in the UK unless an asylum or human rights claim has been made here, or the crew member claims that the decision breaches certain Community Treaty Rights.

***Section 32: Suspected international terrorist: bail***

138. **Section 32** creates a right of appeal on a point of law to the Court of Appeal (in Scotland, the Court of Session, or in Northern Ireland, the Court of Appeal in Northern Ireland) where the Special Immigration Appeals Commission has made a determination in respect of an application for bail by someone who has been certified as a suspected international terrorist under Part 4 of the Anti-terrorism, Crime and Security Act 2001.