Guidance Note No. 5
April 2003

ADJUDICATOR GUIDANCE NOTE

UNREPRESENTED APPELLANTS

It is possible that more appellants than in the past will be appearing unrepresented at their appeal hearings. The Legal Services Commission is tightening up the merits test under which franchised firms can grant Controlled Legal Representation ('CLR') in immigration and asylum cases. Some asylum seekers may find ways to pay for representation but many will not. New rules, such as closure Rule 13, Closure Date, in the 2003 Procedure Rules may mean we must hear the case whether the appellant is represented or not. This guidance note, drafted by Richard McKee, to whom, thanks, looks at some of the issues that are likely to arise.

Why is the Appellant Unrepresented?

The appellant's previous representatives may already have asked the IAA to take them off the record. On the other hand, it may not be apparent until the day of the hearing that the appellant will not be represented. You will want to know why the appellant is not represented. He may even hand you a letter from the solicitors telling him that he does not qualify for CLR. This may be a privileged document, which you may feel you should not read. On the other hand, a solicitor's letter may give a more accurate idea of the situation than the appellant can explain in his own words. In any event, the fact that the appellant has not passed the merits test must not colour your assessment of his case. Failure to pass the LSC merits test is not a guarantee that the case has no merit.

Should I Adjourn?

You must always make this decision having regard to the overriding objective in the Procedure Rules. In practice an unrepresented appellant may ask for more time, to instruct another representative. This should generally be resisted. If he has already failed the merits test with one firm, he is unlikely to pass it with another. He may, however, say that he is endeavouring to put up the money, through friends perhaps, to pay for a lawyer privately. Before

agreeing to grant an adjournment in those circumstances, you will need to

consider how realistic such a prospect is, what efforts have already been made and whether the appellant's case has already been set out. There may be a self-completed Statement of Evidence Form ('SEF'), an asylum interview record ('AIR') and a witness statement along with supporting documents, so that a new lawyer would not be able to add very much to the appellant's case. The Procedure Rules may mean you must proceed in any event but if you do adjourn, fix an early date for the next hearing. If you do not adjourn, you should explain briefly in your determination why you did not.

What to Tell the Appellant?

You must reassure the appellant that he will not be prejudiced by your proceeding to hear his case in the absence of a representative. You must give the appellant every assistance in putting his case, and tell him so. In particular, explain at the outset of the hearing what the procedure is, and encourage him to say at any point if there is something that he does not understand, or feels unhappy about. Guidance Note No. 3 sets out a 'pre-hearing introduction' in which you explain the procedure to the appellant and ensure that the appellant and the interpreter understand each other. You can readily adapt this formula to the situation where the appellant is unrepresented.

The Interpreter

The role of the interpreter will be even more important than usual. To make sure that the interpreter and the appellant really understand each other, ask them to have a chat in the manner suggested by Guidance Note No. 3. Tell the appellant to let you know if he is having any interpretation difficulties, and tell the interpreter to let you know if, for his part, he is having difficulty understanding the appellant. Indeed, the court interpreter is duty-bound to bring to your attention any interpretation difficulties of which he becomes aware.

A McKenzie Friend?

The appellant may bring with him an English-speaking relative or friend who wishes to speak on the appellant's behalf. If he has relevant evidence to give, then of course he can give that evidence as a witness. But he cannot act as an advocate for the appellant. That can only be done by a member of a designated professional body (a barrister, solicitor or Legal Executive), or by someone who has been registered by the Immigration Services Commissioner. So explain to the appellant's friend why he cannot make submissions and why he must not prompt the appellant when questions are being put to him.

Witnesses

The appellant may also bring one or more witnesses who wish to give evidence on his behalf. You will need to inquire what the relevance of their evidence is, and ask them to narrate it (after waiting outside in the usual way,

if other testimony is given first). Make sure that they do not stray too far from the events that their evidence is supposed to be relevant to.

The Appellant's Account

The appellant's account should already be set out in the Home Office 'appeal bundle' and any further statement(s) made by the appellant. Representatives will usually ask their client at the beginning of examination-in-chief whether he 'adopts' these versions of his story. You should do something similar, making sure that the appellant understands exactly which document you are referring to. He may otherwise get confused between, for example, the statement he gave at his solicitor's office and the interview he had at the Home Office.

If he confirms that he gave a true and accurate account on these occasions, you can tell him that he does not have to repeat the story before you. It may be helpful at this stage if you give him a potted account of what you understand his story to be, and ask him if that outline is a fair summary of his case. You should also outline the main points in the 'reasons for refusal' letter, and ensure that the appellant understands the case against him at this stage.

Where the appellant does not adopt a version or versions of his story previously given, you must establish what parts of it he does not agree with, and why. He may, for example, resile from parts of the interview record because the Home Office interpreter misunderstood him, or claim that the SEF is not accurate, because his solicitor completed it without asking him to confirm the contents. Or it may simply be that it is so long since the SEF statement or the interview record was read back to him (if it was), that he has forgotten what he said on that occasion.

It may be necessary in those circumstances to ask the court interpreter to translate the relevant extracts from the appellant's previous statements or interview record, which set out his story. If the appellant disputes the accuracy of any of this, you will need to ask him what did happen, and why his present account differs from that given previously.

The appellant having agreed on the version of events which he is now putting forward, you should ask him if there is anything he needs to add to it. When you are satisfied that the appellant's account, with any alterations or additions, is fully before the court, you should explain that the Home Office representative will now have some questions for him. Assure him that the purpose of these questions will be to make sure that we have the whole picture, not to prove that his story is untrue.

Cross-examination

The HOPO will probe the appellant's evidence in the usual way. As the appellant will not have a representative to object to inappropriate questions, you must ensure that the HOPO asks relevant questions, and does not go on a fishing expedition in the hope of catching the appellant out. The manner of

the cross-examination must not be hostile or aggressive, although it may sometimes have to be persistent in order to get an answer.

Your Own Questions

At the end of cross-examination, there may still be matters troubling you about the appellant's credibility. For example, there may be discrepancies in his evidence which the HOPO has not noticed, or you may wish to know more about the provenance of documents, such as an arrest warrant or a court summons, which the appellant has adduced. These doubts need to be put to the appellant, as you cannot make adverse credibility findings on these matters without giving the appellant an opportunity to address them. The *Surendran* Guidelines, endorsed by the President of the Tribunal in *MNM** [2000] INLR 546, give advice to adjudicators on how to ask questions of the appellant when there is no HOPO to cross-examine him. These Guidelines (which are annexed) are equally pertinent when a HOPO is present, but there are still questions that need answering, and there is no appellant's representative to put them. The point emphasized by the *Surendran* Guidelines is that the adjudicator may ask questions, but must not descend into the arena and appear to be assuming the HOPO's mantle.

Submissions

When all the oral evidence has been taken, tell the appellant that you will now hear submissions from the HOPO (explaining what 'submissions' are), and that the appellant will have an opportunity afterwards to rebut any adverse points made by the HOPO. The HOPO will probably refer to passages in the CIPU Assessment and other country background reports, and to case-law. It will not be necessary to give the appellant copies of these documents, as he will probably not be able to read them for himself. It may be necessary for the Presenting Officer to read out those passages which he relies on, they should then be translated by the court interpreter.

The HOPO usually relies upon the 'reasons for refusal' letter. Ask him to make explicit those points in the refusal letter which he is relying on. The pace of the HOPO's submissions will be considerably slower than usual, since the interpreter will need to translate fully to the appellant everything that is said, instead of just giving the gist of the submissions, as happens when the appellant is represented.

When the appellant's turn comes, you may need to prompt him if the HOPO's submissions have made an important point which the appellant has not addressed. Check that the appellant is satisfied he has been able to put his case fully. Some leeway needs to be given to emotive pleas by the appellant which do not deal directly with the evidence. Reassure the appellant again that you are completely independent of the government and will scrutinize his case fairly and sympathetically.

What if there is no HOPO?

When neither side is represented, it may be necessary for you to ask more questions than in the situation envisaged by the *Surendran* Guidelines, where the appellant's representative is likely to have asked questions in-chief which you may now find yourself having to ask instead. Again, the main thing is not to appear to be cross-examining the appellant. It will be more important than ever in this situation that you are completely familiar with the contents of the court file before the commencement of the hearing. If it becomes apparent during the course of the hearing that you need time to peruse documents, you should rise for a while to do so.

Since there will be no submissions from the respondent's side, you will simply ask the appellant – once the evidence is before you – if there is anything he would like to add. This can be shortened if, as above, you assure the appellant that you will give his case the most anxious scrutiny. Some adjudicators feel that, to avoid any future allegation that they have conducted the proceedings unfairly, they should ask their usher to remain in the court-room throughout the hearing (insofar as the usher is not needed for other duties, for instance in another court-room). That is a matter of judicial discretion, but it may be wise to adopt this course.

HHJ Henry Hodge OBE
Chief Adjudicator
March 2003

***ANNEX FROM MNM v SECRETARY OF STATE (IAT (starred appeal) 00TH02423)**

THE SURENDRAN GUIDELINES (IAT Appeal No. 21679 heard 02/06/99)

1. Where the Home Office is not represented, we do not consider that a special adjudicator is entitled to treat a decision appealed against as having been withdrawn. The withdrawal of a decision to refuse leave to enter and asylum requires a positive act on the part of the Home Office in the form of a statement in writing that the decision has been withdrawn. In the instant case, and in similar cases, this is not the position. The Home Office, on the contrary, requests that the special adjudicator deals with the appeal on the basis of the contents of the letter of refusal and any other written submissions which the Home Office makes when indicating that it would not be represented.

2. Nor do we consider that the appeal should be allowed simpliciter. The function of the adjudicator is to review the reasons given by the Home Office for refusing asylum within the context of the evidence before him and the submissions made on behalf of the appellant, and then come to his own conclusions as to whether or not the appeal should be allowed or dismissed.

In doing so he must, of course, observe the correct burden and standard of proof.

3. Where an adjudicator is aware that the Home Office is not to be represented, he should take particular care to read all the papers in the bundle before him prior to the hearing and, if necessary, in those cases where he has only been informed on the morning of the hearing that the Home Office will not appear, he should consider the advisability of adjourning for the purposes of reading the papers and therefore putting the case further back in his list for the same day.

4. Where matters of credibility are raised in the letter of refusal, the special adjudicator should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the special adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him.

5. Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions.

6. It is our view that it is not the function of a special adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversarial system and the special adjudicator is an impartial judge and assessor of the evidence before him. Where the Home Office does not appear the Home Office's argument and basis of refusal, as contained in the letter of refusal, is the Home Office's case purely and simply, subject to any other representations which the Home Office may make to the special adjudicator. It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of papers, in which case these matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto. We would add that this is not necessarily the same function which has to be performed by a special adjudicator where he has refused to adjourn a case in the absence of a representative for the appellant, and the appellant is virtually conducting his own appeal. In such an event, it is the duty of the special adjudicator to give every assistance, which he can give, to the appellant.

7. Where, having received the evidence or submissions in relation to matters which he has drawn to the attention of the representatives, the special adjudicator considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. We would emphasise, however, that it is not his function to raise matters which a Presenting Officer might have raised in cross-examination had he been present.

8. There might well be matters which are not raised in the letter of refusal which the special adjudicator considers to be relevant and of importance. We have in mind, for example, the question of whether or not, in the event that the special adjudicator concludes that a Convention ground exists, internal flight is relevant, or perhaps, where, from the letter of refusal and the other documents in the file, it appears to the special adjudicator that the question of whether or not the appellant is entitled to Convention protection by reason of the existence of civil war (matters raised by the House of Lords in the case of Adan). Where these are matters which clearly the special adjudicator considers he may well wish to deal with in his determination, then he should raise these with the representative and invite submissions to be made in relation thereto.

9. There are documents which are now available on the Internet and which can be considered to be in the public domain, which may not be included in the bundle before the special adjudicator. We have in mind the US State Department Report, Amnesty Reports and Home Office Country Reports. If the special adjudicator considers that he might well wish to refer to these documents in his determination, then he should so indicate to the representative and invite submissions in relation thereto.

10. We do not consider that a special adjudicator should grant an adjournment except in the most exceptional circumstance and where, in the view of the special adjudicator, matters of concern in the evidence before him cannot be properly addressed by examination of the appellant by his representative or submissions made by that representative. If, during the course of a hearing, it becomes apparent to a special adjudicator that such circumstances have arisen, then he should adjourn the case part heard, require the Home Office to make available a Presenting Officer at the adjourned hearing, and prepare a record of proceedings of the case, which should be submitted to both parties up to the point of the adjournment, and such record to be submitted prior to the adjourned hearing.