

LEVEL 3 ASYLUM PAPER

INSTRUCTIONS TO CANDIDATES

Level 3 (75 Marks)

This examination is open book. You may refer to materials such as the OISC exam resource book, published texts and your own notes.

The Paper comprises 11 questions. Each question is numbered and the marks allocated to each are detailed in closed brackets after the relevant question.

You have 3 hours to complete this exam paper. You may begin reading as soon as the invigilators say so. You may begin writing whenever you have read the questions.

You may use bullet points to summarise your answers in non-drafting questions, and you may use reasonable abbreviations so long as their meaning is obvious.

Your Instructions

Your client, Ahmed, is from Mosul in Iraq. He originally claimed asylum in 2009, but his claim was refused. He is a Sunni Muslim.

From memory, Ahmed thinks that the judge agreed that most of his account was true, and accepted that he is an Iraqi from Mosul, but decided that he would not be at risk in Mosul and, in any case, he could live elsewhere in Iraq if he did not want to go back to his home city.

Ahmed comes to see you to ask if there is anything that can be done to revive his asylum claim now that Mosul is in a state of war. He thinks that he will be at risk from the general violence in the area, from ISIS, as he does not support them, and from the government's forces who, he understands, are carrying out indiscriminate attacks on Sunnis.

The Questions (75 marks)

Question 1

What is the procedure and legal test that will be applied if Ahmed wants to revive his asylum claim?

(6 marks)

Question 2

Ahmed says that he has lost all the paperwork relating to his previous claim for asylum, and his previous representatives are no longer in practice.

Why will it be a good idea to get hold of this paperwork, and how will you do this?

(3 marks)

Question 3

Explain, with reference to the appropriate law, the basis upon which protection may be available to Ahmed if it can be shown that everyone is at risk in Mosul from the very high level of violence as the opposing forces attack each other.

(4 marks)

You read, after your initial meeting with Ahmed, the following UNHCR guidance on Iraq (dated 14th November 2016):

Treatment of Civilians in Areas Formerly under Control of ISIS

23. In areas retaken from ISIS, forces affiliated with the Popular Mobilization Units (PMUs), tribal groups and Kurdish security forces have reportedly engaged in widespread reprisal acts against Sunni Arab and Turkmen inhabitants and returnees on account of their real or perceived support for or affiliation with ISIS. Reported abuses include arbitrary arrest and abduction, forced disappearance, extra-judicial killing, forced displacement and the looting and deliberate burning and destruction of homes, shops and mosques, and, in some cases, the deliberate destruction of whole villages. In Sinjar District (Ninewa), Yazidi self-defence groups have reportedly also been implicated in retaliatory attacks against Sunni Arab civilians, including women and children.

24. Areas retaken from ISIS reportedly see instances of inter- and intra-tribal violence as some Sunni Arab tribes, or parts of them, may have sided with ISIS while others stayed on the side-lines or fought against the group. Members of Sunni Arab families or tribes known or perceived to have cooperated with ISIS have reportedly been subjected to extra-judicial forms of justice by tribes or families opposing ISIS

UNHCR Position on Returns to Iraq

47. Under the present circumstances, UNHCR urges States to refrain from forcibly returning any Iraqis who originate from areas of Iraq that are affected by military action, remain fragile and insecure after having been retaken from ISIS, or remain under control of ISIS. Such persons, including persons whose claims for international protection have been rejected, should not be returned either to their home areas, or to other parts of the country. Many Iraqis from these areas are likely to meet the criteria of the 1951 Convention for refugee status. When 1951 Refugee Convention criteria are found not to apply, broader refugee criteria as contained in relevant regional instruments or complementary forms of protection are likely to apply. Depending on the profile of the individual case, exclusion considerations may need to be examined.

48. Where decision-makers consider the availability of an internal flight or relocation alternative, the burden is on the decision-maker to identify a particular area of relocation and to show that in respect of this location the requirements for the relevance and reasonableness of the proposed relocation alternative are met. In the current circumstances, with large-scale internal displacement, a serious humanitarian crisis, mounting intercommunal tensions, access/residency restrictions in virtually all parts of the country and increasing pressure exercised on IDPs to prematurely return to their areas of origin following the retaking of these areas from ISIS, UNHCR does not consider it appropriate for States to deny persons from Iraq international protection on the basis of the applicability of an internal flight or relocation alternative. An internal flight or relocation alternative would only be available in the exceptional circumstances where an individual can legally access and remain in the proposed area of relocation, would not be exposed

to a new risk of serious harm there, and has close family links in the proposed area, with the family willing and able to support the individual. In light of the difficult humanitarian conditions in many parts of the country, especially in areas hosting large numbers of IDPs, family members who are themselves in a situation of internal displacement would generally not be considered as being able to provide such support.

Question 4

Prepare a file note in preparation for drafting Ahmed's protection claim;

- (a) outlining, with specific references to the Refugee Convention and any applicable Rules and/or Regulations, leaving aside the issue of credibility, the extent to which this information supports Ahmed's claim for protection; and

(18 marks)

- (b) identifying, with reasons, any additional information you need from Ahmed or elsewhere in order to establish the merits his protection claim in the light of the country information.

(8 marks)

Question 5

Ahmed's application is refused by the Home Office, with a right of appeal. Draft a letter to Ahmed, explaining how he can challenge that decision? Explain also the procedure, timing and grounds for such a challenge. You do not need to mention your costs.

(11 marks)

Note: two of the 11 marks will be awarded for structure and use of language suitable for the intended recipient.

Question 6

How will you advise Ahmed if he tells you that he cannot afford your legal costs for the appeal?

(2 marks)

Question 7

If the Home Office decided Ahmed's new protection claim had no realistic prospect of success, and made a decision to remove him, how would your answer to Question 5 differ?

(5 marks)

Question 8

The Home Office accept Ahmed has a right of appeal. You receive Ahmed's file of papers.

You note from the appeal determination that his claim to be an Iraqi for Mosul was accepted by the immigration judge. But his claim to have fought with a Sunni militia against the US Army in 2008 was not. Ahmed tells you that this account was the truth, and his current fear relates, in part, to the role he played then.

Note, briefly, the implications of trying to revive this part of Ahmed's case when presenting his appeal?

(3 marks)

Question 9

The Home Office refusal letter disputes Ahmed is from Mosul.

Ahmed informs you that he knows a number of people from his home area who have been granted refugee status in the UK, following their appeal hearings. Some of them know him and his family and can give evidence at his appeal.

However, you are advised by a more experienced colleague that you should not prepare witness statements for the witnesses, as they may be cross-examined at the hearing. She explains that if they provide detailed witness statements, there is more chance of inconsistencies arising during cross-examination at the hearing.

Outline what you think of this advice, with reasons (including reference to any relevant rules of evidence).

(5 marks)

Question 10

You arrange to meet the potential witnesses. List the documents you will ask them to bring to the meeting.

(5 marks)

Question 11

On the morning of the hearing, you receive a faxed copy of a criminal record, in Ahmed's name, appearing to show that he has been convicted for credit card fraud. A copy has been sent to the Tribunal. You note that the Home Office appears to have had this document for some weeks.

Ahmed tells you that this criminal record does not belong to him, but to someone of the same name.

How will you respond to receiving this document?

(5 marks)

LEVEL 3 ASYLUM PAPER

MODEL ANSWER

INSTRUCTIONS TO CANDIDATES

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Your Instructions

Your client, Ahmed, is from Mosul in Iraq. He originally claimed asylum in 2009, but his claim was refused. He is a Sunni Muslim.

From memory, Ahmed thinks that the judge agreed that most of his account was true, and accepted that he is an Iraqi from Mosul, but decided that he would not be at risk in Mosul and, in any case, he could live elsewhere in Iraq if he did not want to go back to his home city.

Ahmed comes to see you to ask if there is anything that can be done to revive his asylum claim now that Mosul is in a state of war. He thinks that he will be at risk from the general violence in the area, from ISIS, as he does not support them, and from the government's forces who, he understands, are carrying out indiscriminate attacks on Sunnis.

The Questions (75 marks)

Question 1

What is the procedure and legal test that will be applied if Ahmed wants to revive his asylum claim?

(6 marks)

Ahmed will need to make further submissions under the Fresh Claim procedure in paragraph 353 of the Immigration Rules. He will need to make representations and provide evidence to show:

- 1) that his fresh claim (by way of the facts or evidence he relies on) is significantly different to his previous claim, and
- 2) that considered together with his earlier claim, the new evidence creates a realistic prospect of success on appeal.

The further representations must be submitted in person to the Home Office Further Submissions Unit in Liverpool.

Question 2

Ahmed says that he has lost all the paperwork relating to his previous claim for asylum, and his previous representatives are no longer in practice.

Why will it be a good idea to get hold of this paperwork, and how will you do this?

(3 marks)

Before assessing the merits of a fresh claim for asylum, we will need to see the evidence considered by the Home Office in respect of the earlier claim, and the decisions made on that evidence, including any appeal decisions. Any further submissions we now make will be assessed by the Home Office in the light of all the previous material. Particularly,

we need to see what was accepted and rejected in respect of that previous claim (including the findings as to Ahmed's credibility).

We should make a Subject Access Request to the Home Office to get a complete copy of his Home Office file (which will have all the previous papers in it).

Question 3

Explain, with reference to the appropriate law, the basis upon which protection may be available to Ahmed if it can be shown that everyone is at risk in Mosul from the very high level of violence as the opposing forces attack each other.

(4 marks)

Ahmed may be entitled to Humanitarian Protection under paragraph 339C of the Immigration Rules (or Article 15C of the Qualification Directive). He will need to show there is a real risk he will suffer serious harm by way of 'a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.

You read, after your initial meeting with Ahmed, the following UNHCR guidance on Iraq (dated 14th November 2016):

Treatment of Civilians in Areas Formerly under Control of ISIS

23. In areas retaken from ISIS, forces affiliated with the Popular Mobilization Units (PMUs), tribal groups and Kurdish security forces have reportedly engaged in widespread reprisal acts against Sunni Arab and Turkmen inhabitants and returnees on account of their real or perceived support for or affiliation with ISIS. Reported abuses include arbitrary arrest and abduction, forced disappearance, extra-judicial killing, forced displacement and the looting and deliberate burning and destruction of homes, shops and mosques, and, in some cases, the deliberate destruction of whole villages. In Sinjar District (Ninewa), Yazidi self-defence groups have reportedly also been implicated in retaliatory attacks against Sunni Arab civilians, including women and children.

24. Areas retaken from ISIS reportedly see instances of inter- and intra-tribal violence as some Sunni Arab tribes, or parts of them, may have sided with ISIS while others stayed on the side-lines or fought against the group. Members of Sunni Arab families or tribes known or perceived to have cooperated with ISIS have reportedly been subjected to extra-judicial forms of justice by tribes or families opposing ISIS

UNHCR Position on Returns to Iraq

47. Under the present circumstances, UNHCR urges States to refrain from forcibly returning any Iraqis who originate from areas of Iraq that are affected by military action, remain fragile and insecure after having been retaken from ISIS, or remain under control of ISIS. Such persons, including persons whose claims for international protection have been rejected, should not be returned either to their

home areas, or to other parts of the country. Many Iraqis from these areas are likely to meet the criteria of the 1951 Convention for refugee status. When 1951 Refugee Convention criteria are found not to apply, broader refugee criteria as contained in relevant regional instruments or complementary forms of protection are likely to apply. Depending on the profile of the individual case, exclusion considerations may need to be examined.

48. Where decision-makers consider the availability of an internal flight or relocation alternative, the burden is on the decision-maker to identify a particular area of relocation and to show that in respect of this location the requirements for the relevance and reasonableness of the proposed relocation alternative are met. In the current circumstances, with large-scale internal displacement, a serious humanitarian crisis, mounting intercommunal tensions, access/residency restrictions in virtually all parts of the country and increasing pressure exercised on IDPs to prematurely return to their areas of origin following the retaking of these areas from ISIS, UNHCR does not consider it appropriate for States to deny persons from Iraq international protection on the basis of the applicability of an internal flight or relocation alternative. An internal flight or relocation alternative would only be available in the exceptional circumstances where an individual can legally access and remain in the proposed area of relocation, would not be exposed to a new risk of serious harm there, and has close family links in the proposed area, with the family willing and able to support the individual. In light of the difficult humanitarian conditions in many parts of the country, especially in areas hosting large numbers of IDPs, family members who are themselves in a situation of internal displacement would generally not be considered as being able to provide such support.

Question 4

Prepare a file note in preparation for drafting Ahmed's protection claim;

- (c) outlining, with specific references to the Refugee Convention and any applicable Rules and/or Regulations, leaving aside the issue of credibility, the extent to which this information supports Ahmed's claim for protection; and

(18 marks)

- (d) identifying, with reasons, any additional information you need from Ahmed or elsewhere in order to establish the merits his protection claim in the light of the country information.

(8 marks)

File note:

Client: Ahmed Date: 24 November 2016

Need to draft further submissions:

Key facts: Iraqi, Sunni, from Mosul

How does he meet the requirements of Article 1A(2) of the RC1951

Well-founded fear:

- Mosul : ongoing war between ISIS and govt forces
- Considering UNHCR guidance on treatment of civilians in areas formerly under control of ISIS (14 November 2016)
- Widespread reprisals against Sunnis from Popular Mobilization Units, tribal groups and Kurdish security forces
- Also inter/intra-tribal conflict
- Reported abuses include arbitrary arrest and abduction, forced disappearance, extra-judicial killing

Persecution:

- arbitrary arrest, killing etc amounts to persecution
- Regulation 5, as this sufficiently serious to amount to breach of Article 2/3 ECHR

Convention reason:

- Religion or (imputed) political opinion
- Regulation 6(2)

Protection:

- Government unable (too weak) and unwilling (because persecutors include government forces)
- Insufficient protection (Regulation 4(2))

Internal relocation:

- Reference UNHCR guidance, only available in exceptional cases
- Neither safe nor reasonable
- Rule 3390, Immigration Rules

Humanitarian Protection:

- Also arguable on basis of internal armed conflict (if Home Office does not accept there's a Convention reason). Reference in UNHCR guidance to 'complementary forms of protection'

Further information required from client

- Proof that Ahmed is from Mosul (so that the we can show his home area is under ISIS control, with fighting against govt forces)
- Need to no more about his home area – exactly where it is and what is going on there now (to identify particular risks he may face from local conflict)
- We need more on his tribe or family to how they are involved, and/or any risks of inter/intra-tribal conflict (to assess any particular risk of reprisals being directed at him)
- We need to know the whereabouts and circumstances of family members to see if internal relocation is available
- Need to see if there are any grounds on which he might be excluded from protection (ie his own activities here and in Iraq)

Question 5

Ahmed's application is refused by the Home Office, with a right of appeal. Draft a letter to Ahmed, explaining how he can challenge that decision? Explain also the procedure, timing and grounds for such a challenge. You do not need to mention your costs.

(11 marks)

24 November 2016

Dear Ahmed

Re: Your asylum claim

I have received a decision on your further submissions the Home Office. Unfortunately, the Home Office has decided again that you are not entitled to protection in the UK. I enclose a copy of their letter giving reasons for their decision.

The Home Office has however decided that your application did amount to a 'fresh claim' for asylum, meaning that you have been granted a further right of appeal. As I explained when we last met, this decision is not surprising and I continue to believe that you have a real chance of succeeding in your appeal.

So, we now need to lodge an appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against the Home Office decision. We need to complete a Notice of Appeal and submit it online to the Tribunal within 14 days of the date the Home Office decision was sent to us.

The fee for an appeal is currently £800.00, but we can apply for the fees to be waived in certain circumstances. We can discuss this further when we meet.

You can challenge the decision of the Home Office on the grounds that it was made in breach of your right to protection under the Refugee Convention 1951, and in breach of your right to Humanitarian Protection.

I need to meet you urgently to confirm that you want me to appeal the decision and to explain the appeals process to you. Presuming you want to go ahead with the appeal, I will then complete and submit the Notice of Appeal. I will then have to refer your case to a more experienced colleague who will prepare the appeal and attend the Tribunal with you to represent you at your hearing.

Please ring me when you get this letter to arrange an urgent appointment.

Yours sincerely

Note: two of the 11 marks will be awarded for structure and use of language suitable for the intended recipient.

Question 6

How will you advise Ahmed if he tells you that he cannot afford your legal costs for the appeal?

(2 marks)

I will refer him to a firm that does legal aid work

Question 7

If the Home Office decided Ahmed's new protection claim had no realistic prospect of success, and made a decision to remove him, how would your answer to Question 5 differ?

(5 marks)

If Ahmed was not granted a right of appeal, because the Home Office decided that the further submissions did not amount to a fresh claim. that decision can only be challenged by applying to the Upper Tribunal (IAC) for a judicial review. To succeed in the JR, we will need to establish that his further submissions do have a real prospect of success on appeal.

We will need to refer him to a solicitor (who does legal aid work) to further advise on bringing a JR. That must be done urgently as a decision has been made to remove him from the UK.

Question 8

The Home Office accept Ahmed has a right of appeal. You receive Ahmed's file of papers.

You note from the appeal determination that his claim to be an Iraqi for Mosul was accepted by the immigration judge. But his claim to have fought with a Sunni militia against the US Army in 2008 was not. Ahmed tells you that this account was the truth, and his current fear relates, in part, to the role he played then.

Note, briefly, the implications of trying to revive this part of Ahmed's case when presenting his appeal?

(3 marks)

It will be difficult to persuade the Tribunal that facts rejected in the earlier appeal should now be accepted as true. The starting point for the judge hearing his new appeal will be that the findings of fact made at the earlier appeal should be maintained (*Devaseelan*). We will therefore need new evidence or good reasons to show the earlier findings were wrong.

Also, if he was fighting in a Sunni militia against the US Army, the Home Office may argue he should be excluded from protection under Article 1F of the Refugee Convention 1951. If the Home Office does argue for exclusion, that will have to be decided as the first issue on appeal.

If he is excluded from protection, we will still be able to argue he cannot be removed due to Article 3, ECHR (but he will get only 'restricted leave' in those circumstances).

Question 9

The Home Office refusal letter disputes Ahmed is from Mosul.

Ahmed informs you that he knows a number of people from his home area who have been granted refugee status in the UK, following their appeal hearings. Some of them know him and his family and can give evidence at his appeal.

However, you are advised by a more experienced colleague that you should not prepare witness statements for the witnesses, as they may be cross-examined at the hearing. She explains that if they provide detailed witness statements, there is more chance of inconsistencies arising during cross-examination at the hearing.

Outline what you think of this advice, with reasons (including reference to any relevant rules of evidence).

(5 marks)

I will completely reject this advice, and definitely prepare detailed witness statements for all the witnesses. There will usually be directions from the Tribunal that witness statements must be provided (under Procedure Rule 14), so that a judge could refuse to hear evidence in chief without a statement having been prepared (or at least be critical of our failure to provide statements). In any case, drafting witness statements is an important process which helps prepare the witnesses for giving their oral evidence.

Question 10

You arrange to meet the potential witnesses. List the documents you will ask them to bring to the meeting.

(5 marks)

I will ask them to bring all the documents relating to their own asylum claims, including their grants of refugee status, their screening and substantive asylum interview records, their statements, and appeal decisions.

Question 11

On the morning of the hearing, you receive a faxed copy of a criminal record, in Ahmed's name, appearing to show that he has been convicted for credit card fraud. A copy has been sent to the Tribunal. You note that the Home Office appears to have had this document for some weeks.

Ahmed tells you that this criminal record does not belong to him, but to someone of the same name.

How will you respond to receiving this document?

(5 marks)

I will attend the hearing (or inform counsel to attend if they are instructed). I will need to consider whether to argue that the evidence should be excluded from the hearing as it has been produced so late in the day and in breach of Directions. The Tribunal are likely to refuse that submission as the evidence is material. If so, we will need to seek an adjournment of the appeal hearing to carry out further enquiries to show the criminal record does not belong to Ahmed.

I may also apply for a wasted costs order for the wasted hearing as the Home Office should have told us well before the hearing they were seeking to rely on this evidence.