Validity of Appeals

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Introduction

This instruction provides guidance for Case Owners on how to identify and deal with invalid appeals, appeals that have been inappropriately lodged or where the appellant has been wrongly advised of a right of appeal.

Further guidance on appeals rights are available in:

Chapter 12, section 1 of the immigration Directorate Instructions (IDIs)

Application of this instruction in respect of children and those with children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the UK Border Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55. The UK Border Agency instruction 'Arrangements to Safeguard and Promote Children's Welfare in the United Kingdom Border Agency' sets out the key principles to take into account in all Agency activities.

Our statutory duty to children includes the need to demonstrate:

- Fair treatment which meets the same standard a British child would receive;
- The child's interests being made a primary, although not the only consideration;
- No discrimination of any kind;
- Asylum applications are dealt with in a timely fashion;
- Identification of those that might be at risk from harm.

AIT Procedure

All notices of appeal are sent direct to the AIT unless the appellant is detained in which he may serve his notice of appeal on the person who has custody of him (under Procedural Rule 6(3) b). The person on which the notice is served would send the notice to the AIT. Therefore the AIT is legally responsible for identifying and (under Procedural Rule 9) rejecting invalid appeals. Unfortunately, it is possible that a number of invalid appeals may be missed and be listed for hearing. The Case Owner will usually discover an invalid case once AIT has listed the case for the CMR hearing.

If this occurs, it will be the responsibility of the Case Owner presenting the appeal to raise this matter before the AIT, preferably at the CMR hearing rather than the substantive hearing.

Where a person does not have a right of appeal

A person will have no right of appeal:

- If no immigration decision, (as defined in s82 of the 2002 act) has been made in their case.
- Under s83, If leave granted for 12 months or less (However, if the any cumulative leave after the initial decision, results in leave exceeding 12 months, the applicant would have a right of appeal under s83).
- Under s83a unless refugee status has been revoked and some other leave has been granted.

  Please note: if an illegal entrant or overstayer has been refused status, the decision would not constitute as an immigration decision. However the removal decision that may accompany the refusal would be the immigration decision.

- If the case has been certified under S96 (one stop certificates) or S97/97A (national security) of the 2002 act.

Dealing with cases with no right of appeal

If the AIT fails to correctly reject an appeal under rule 9 of the 2005 Procedure Rules, the case owner must raise at the CMR hearing that the appellant has no right of appeal. If for some reason it is not raised, then it should be raised at the substantive hearing.

Where the appellant has been advised wrongly of their right of appeal by the Home Office

There may be circumstances where asylum was refused outright but the applicant had extant leave that was not curtailed and no immigration decision (as defined in section 82 of the 2002 Act) was made.

Please see the Asylum Instruction (AI) on Curtailment for further information on cases where leave should not be curtailed. For cases that fall outside of the exceptions, Case Owners should ensure that they endeavour to always curtail leave which would result in an immigration decision which in turn would give a right of appeal.

If a Case Owner comes across an appeal case where:

- a notice of appeal was lodged by the appellant,
- an immigration decision was not served by mistake,
- and their extant leave was not curtailed;

there is still no right of appeal to the AIT. The Case Owner should contact APPU in order to obtain details of how to serve an immigration decision in these cases.

The Case Owner should point out the error to the immigration judge or panel at the CMR or substantive hearing and invite them to find that there is under rule 9 of the 2005 Procedure Rules no appeal ground because no immigration decision has been served on the appellant. The Case Owner can also point out that the asylum decision is being reviewed in order to issue an immigration decision that provides a valid ROA.

Non-Suspensive Appeals (NSA)

The Case Owner may identify a case where the claim has been certified under S94 of the 2002 Act, however an applicant may either return to the UK (either legally or illegally) for their appeal hearing or attempt to bring an appeal before s/he has left or been removed from the UK. This identification can be made from CID records updated by the Immigration Service (IS), direct contact from IS, direct contact from the applicant's representative or by the applicant's appearance at the hearing. If this happens see AI 'NSA Appeals Instructions' for further information to argue that the appellant has no right to pursue the appeal while in the UK.

Out of Country Rights of Appeal

The Case Owner should be aware that, even when a person has been notified of a right of appeal under section 82 this appeal right cannot always be exercised in country. Section 92 provides that there will only be an in country right of appeal under sections 82 (2) (c), (d), (e) (f) and (j), that is,

- Refusal of a certificate of entitlement
- Refusal to vary leave so that there is no leave
- Curtailment
- Revocation under section 76
- Decision to make a deportation order, or where
- there has been an asylum or human rights, claim or where matters relating to claims under European Treaties are involved.

If a claim is certified under section 94 so that there is a non-suspensive right of appeal the Case Owner should argue that appellant has no right to pursue the appeal while in the UK. See NSA Appeals above.

Summary- Q&A

1. Has an immigration decision (as defined in section 82 of the 2002 Act) been made in this case? If no, then **there is no appeal before the Tribunal** (unless it is a S83 appeal and HP or DL has been granted for more than 12 months).

2. Has the case been certified (under S96 (one stop certificates) or S97/97A (national security) of the 2002 act) to remove the right of appeal? If so, again, **there is no appeal before the Tribunal**.

3. If the case is a NSA appeal, is the appellant in the UK? If yes, then **there is no appeal before the Tribunal while they remain** (but seek advice from a SCW before presenting the case).

Document Control

Change Record

Version	Authors	Date	Change Reference
1.0	DH	30/01/07	New web style implemented
2.0	MO	18/04/07	General Update
3.0	RA	29/10/09	Included reference to S55 BCIA 2009 (Children's duty)