

# OPERATIONAL GUIDANCE NOTE

## MALAWI

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#### 1. **Introduction**

- 1.1** This document evaluates the general, political and human rights situation in Malawi and provides guidance on the nature and handling of the most common types of claims received from nationals/residents of that country, including whether claims are or are not likely to justify the granting of asylum, Humanitarian Protection or Discretionary Leave. Case owners must refer to the relevant Asylum Instructions for further details of the policy on these areas.
- 1.2** This guidance must also be read in conjunction with any COI Service Malawi Country of Origin Information at: [http://www.homeoffice.gov.uk/rds/country\\_reports.html](http://www.homeoffice.gov.uk/rds/country_reports.html)
- 1.3** Claims should be considered on an individual basis, but taking full account of the guidance contained in this document. In considering claims where the main applicant has dependent family members who are a part of his/her claim, account must be taken of the situation of all the dependent family members included in the claim in accordance with the Asylum Instruction on Article 8 ECHR. If, following consideration, a claim is to be refused, case owners should consider whether it can be certified as clearly unfounded under the case by case certification power in section 94(2) of the Nationality Immigration and Asylum Act 2002. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail.
- 1.4** With effect from 27 July 2007 Malawi is a country listed in section 94 of the Nationality, Immigration and Asylum Act 2002 in respect of men only. Asylum and human rights claims must be considered on their individual merits. If, following consideration, a claim made on or after 27 July 2007 by a man who is entitled to reside in Malawi is refused, case owners must certify it as clearly unfounded unless satisfied that it is not. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail. Malawi is not listed in section 94 in respect of women. However, if a claim from a woman is refused, case owners may certify it as clearly unfounded on a case-by-case basis if they are satisfied that it is so clearly without substance that it is bound to fail. Guidance on whether certain types of claim are likely to be clearly unfounded is set out below.

## Source documents

1.5 A full list of source documents cited in footnotes is at the end of this note.

## 2. Country assessment

2.1 The former British federated colony of Nyasaland achieved independence as Malawi in 1964 and Hastings Banda became the first prime minister. He quickly adopted an autocratic style, leading to ministerial rebellions in the 1960s, which in turn led to further repression. In the climate of the Cold War donors were prepared to tolerate his domestic idiosyncrasies, especially since, in contrast to his neighbours, he managed an effective economy in one of the poorest countries in the world. But with the collapse of communism, the props, both domestic and international, were kicked away. Under donor and popular pressure, as well as feeling the effects of age (he was at least 90), he conceded multi-party democracy in 1993. Bakili Muluzi and his United Democratic Front (whose popular support was in the densely-populated south of the country) won the ensuing presidential and parliamentary elections in 1994.<sup>1</sup>

2.2 Although the UDF was the largest party in parliament after the 1994 elections, it failed by three seats to win an absolute majority. Banda's Malawi Congress Party (MCP) dominated the central region and the Alliance for Democracy (AFORD) the north. In September 1994, Chakufwa Chihana, president of AFORD, joined the UDF Government as second Vice-President and a coalition government was formed. But Chihana resigned in May 1996, just as the President was about to dismiss him. AFORD decided to withdraw from the coalition, but not all the AFORD ministers resigned: four remained in government, and two AFORD MPs also joined. AFORD and the MCP boycotted the December 1996 parliamentary session in protest at UDF's 'poaching' of MPs. In April 1997, MCP and AFORD decided to end the boycott (after many of their members had ignored it anyway). Dr Banda retired later that year and was replaced as leader of MCP by former vice-president Gwanda Chakuamba. Banda died in November that year and was given a state funeral. The next presidential and parliamentary elections were held in June 1999. Once again Muluzi won the presidency, but his party failed to gain an overall majority.<sup>2</sup>

2.3 In the 2004 presidential and parliamentary elections Bingu wa Mutharika, Muluzi's hand-picked successor as leader of UDF, won the presidency with 36% of the vote. The MCP's John Tembo was the immediate runner-up on 27%, and Chakuamba, now heading a coalition of opposition parties, won 26%. In the parliamentary contest the MCP overtook the UDF, and a large number of independent MPs were also elected. International observers declared the poll generally free and fair. However, they highlighted previous misuse of government resources by the UDF, and the Malawi Electoral Commission's failure to adequately address problems with the voters' roll.<sup>3</sup>

2.4 Mutharika soon indicated he was his own man, in particular launching a determined attack on corruption, alienating many influential figures in the UDF, including his former patron Muluzi. Eventually Mutharika split from the party and founded his own, the Democratic People's Party, which drew support from a number of minor opposition parties and disaffected UDF MPs. Mutharika's uncompromising approach and willingness to upset his former colleagues have won him the support of many international donors.<sup>4</sup> The political climate remained unstable following the April 2006 arrest and charge of Vice-President Cassim Chilumpha for treason,<sup>5</sup> and the attempted

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<sup>1</sup> COIS Malawi Country Report 2006 (Section 4) & Foreign and Commonwealth Office (FCO) Malawi Country Profile

<sup>2</sup> COIS Malawi Country Report 2006 (Section 4) & FCO Malawi Country Profile

<sup>3</sup> COIS Malawi Country Report 2006 (para 5.10 – 5.14) & FCO Malawi Country Profile

<sup>4</sup> COIS Malawi Country Report 2006 (paras 5.15 – 5.16) FCO Malawi Country Profile

<sup>5</sup> British Broadcasting Corporation (BBC) News Timeline: Malawi

arrest of former President Muluzi in July 2006 on corruption charges. In late 2006, President Mutharika sacked the Director of the Anti-Corruption Bureau (ACB), the Director of Public Prosecutions and his Attorney General. It is reported that some 50 senior officials in total have been removed from office since Mutharika came to power.<sup>6</sup>

- 2.5** Under Banda, Malawi's human rights record was one of the worst in the region. Freedom of assembly and expression were banned, arbitrary arrest and detention without trial were frequent, and prison conditions appalling. The failure to address donors' concerns over human rights led to the withholding of aid in 1992. Multi-party democracy brought with it constitutional and other safeguards, including a Malawi Human Rights Commission, but the UDF-led government displayed occasional heavy-handedness, particularly towards the media.<sup>7</sup>
- 2.6** The United Nations Development Assistance Framework (UNDAF) for the period 2002 to 2006 stated that human rights as a framework for development are embodied in a number of international conventions, declarations, plans of action and other agreements of which Malawi is a signatory. Malawi has ratified major international human rights instruments as well as key human rights related International Labour Conventions. As a signatory to these instruments, the country has accepted it will take necessary steps, to the extent that its resources allow, to progressively implement the provisions.<sup>8</sup>
- 2.7** Although observance of human rights has improved over recent years, cases of abuse still exist. Low level of knowledge of rights and responsibilities at civil society and government levels are among the major causes of abuse of human rights. One of the contributing factors to this state of affairs is the prevailing culture that does not promote accountability and transparency of the institutions that have been assigned the responsibility of ensuring that civic education is made available. This is further compromised by the low level of professional skills in human rights institutions.<sup>9</sup>
- 2.8** The Government generally respected the human rights of its citizens in 2006; however, there were problems in some areas. HIV/AIDS and severe food shortages affecting as many as four million persons exacerbated these problems.<sup>10</sup> Individual incidents of the police using excessive force were reported in 2006 and there was occasional mob violence. Arbitrary arrest and detention, including an upsurge in politically motivated arrests, and lengthy pre-trial detention were also problems during the year.<sup>11</sup>
- 2.9** During 2006, the Government took significant steps to punish human rights abusers and investigate corruption; however, these efforts stopped after the President dismissed the country's two top prosecutors, and it had just resumed at the end of the year. Parliament passed domestic violence legislation to address the rising incidence of gender-based violence in the country.<sup>12</sup>
- 2.10** A wide variety of domestic and international human rights groups operated without government restriction in 2006, training civic educators, advocating changes to existing laws and cultural practises, and investigating and publishing their findings on human rights cases. Government officials generally were cooperative and responsive to their views. Ombudsman Enock Chibwana was mandated by the law to investigate and take legal action against government officials responsible for human rights violations and other abuses. The ombudsman's freedom of action was circumscribed by legislation that

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<sup>6</sup> BBC News Timeline: Malawi & FCO Malawi Country Profile

<sup>7</sup> FCO Malawi Country Profile

<sup>8</sup> COIS Malawi Country Report 2006 (para 6.02)

<sup>9</sup> COIS Malawi Country Report 2006 (para 6.03 & 6.04)

<sup>10</sup> U.S. Department of State report on Human Rights Practices (USSD) 2006: Malawi (Introduction)

<sup>11</sup> USSD 2006 (Introduction)

<sup>12</sup> USSD 2006 (Introduction)

requires a warrant and a three-day waiting period to gain access to certain government records. The activities of the ombudsman are subject to judicial review.<sup>13</sup>

- 2.11** The constitutionally-mandated Malawi Human Rights Commission (MHRC) is charged with monitoring, auditing, and promoting human rights and conducting investigations regarding violations of human rights; however, a shortage of resources resulted in a backlog of cases, delayed production of reports, and failure to expand human rights monitoring. While complete statistics had not been published by the end of 2006, the MHRC reported that it had received 867 complaints of human rights violations during the year; most were related to labour issues, inadequate access to the judiciary, violations of children's rights, restrictions on property rights and economic activity, and rights of prisoners. The Government cooperated with international governmental organisations and permitted visits by UN representatives and other organisations.<sup>14</sup>

### **3. Main categories of claims**

- 3.1** This Section sets out the main types of asylum claim, human rights claim and Humanitarian Protection claim (whether explicit or implied) made by those entitled to reside in Malawi. It also contains any common claims that may raise issues covered by the Asylum Instructions on Discretionary Leave. Where appropriate it provides guidance on whether or not an individual making a claim is likely to face a real risk of persecution, unlawful killing or torture or inhuman or degrading treatment/ punishment. It also provides guidance on whether or not sufficiency of protection is available in cases where the threat comes from a non-state actor; and whether or not internal relocation is an option. The law and policies on persecution, Humanitarian Protection, sufficiency of protection and internal relocation are set out in the relevant Asylum Instructions, but how these affect particular categories of claim are set out in the instructions below.
- 3.2** Each claim should be assessed to determine whether there are reasonable grounds for believing that the applicant would, if returned, face persecution for a Convention reason - i.e. due to their race, religion, nationality, membership of a particular social group or political opinion. The approach set out in *Karanakaran* should be followed when deciding how much weight to be given to the material provided in support of the claim (see the Asylum Instructions on Assessing Credibility in Asylum and Human Rights Claims).
- 3.3** If the applicant does not qualify for asylum, consideration should be given as to whether a grant of Humanitarian Protection is appropriate. If the applicant qualifies for neither asylum nor Humanitarian Protection, consideration should be given as to whether he/she qualifies for Discretionary Leave, either on the basis of the particular categories detailed in Section 4 or on their individual circumstances.
- 3.4** This guidance is **not** designed to cover issues of credibility. Case owners will need to consider credibility issues based on all the information available to them. (For guidance on credibility see the Asylum Instructions on Assessing Credibility in Asylum and Human Rights Claims).
- 3.5** All Asylum Instructions can be accessed via the Horizon intranet site. The instructions are also published externally on the Home Office internet site at:
- [http://www.ind.homeoffice.gov.uk/ind/en/home/laws\\_policy/policy\\_instructions/apis.html](http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis.html)
- 3.6 Malawians connected to the MDC in Zimbabwe**
- 3.6.1** Applicants may make asylum or human rights claims based on ill-treatment amounting to persecution at the hands of the state due to political connections to the Movement for

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<sup>13</sup> USSD 2006 (Section 4)

<sup>14</sup> USSD 2006 (Section 4)

Democratic Change (MDC) in Zimbabwe. Many claim to have dual Malawian/Zimbabwean citizenship and claim to be at real risk, if returned to Malawi, of being refouled to Zimbabwe where they fear persecution by the Zimbabwean authorities on account of their political activities in Zimbabwe.

**3.6.2 Treatment.** There is no evidence that individuals who are Malawian citizens or who are entitled to reside in Malawi face a real risk of mistreatment by either state or non-state agents in Malawi on account of their activities in support of the MDC in Zimbabwe. Such applicants would therefore not face persecution or treatment amounting to a breach of the ECHR in Malawi. Nor is there evidence that Malawian citizens or people who are entitled to reside in Malawi would be refouled to Zimbabwe because of alleged involvement in politics in Zimbabwe.

**3.6.3** To establish whether an applicant is a citizen of Malawi or is entitled to reside there, an overview of the nationality and citizenship laws in Malawi is set out in paragraph 5.04 of the COIS Malawi Country Report.

**3.6.4 Sufficiency of protection.** As this category of applicants' fear is of ill-treatment/persecution by the state authorities, they cannot apply to these authorities for protection.

**3.6.5 Internal relocation.** As this category of applicants' fear is of ill-treatment/persecution by the state authorities, relocation to a different area of the country to escape this threat is not feasible.

**3.6.6 Conclusion.** Persons considered as Malawian citizens or those who it is considered are entitled to reside in Malawi would not face a real risk of persecution or treatment in breach of the ECHR in Malawi on account of their affiliation to the MDC in Zimbabwe. The grant of asylum in such cases is not appropriate and claims should be refused and certified as clearly unfounded.

### **3.7 Political opposition**

**3.7.1** Applicants may make asylum or human rights claims based on ill-treatment amounting to persecution at the hands of the state due to their political affiliation.

**3.7.2 Treatment.** The major opposition party in Malawi is now the UDF, which co-operates with the MCP. There are few ideological differences among the major political parties. For the most part, Malawian political divisions are based on ethno-regional loyalties and personality rather than policy, leading to frequently shifting alliances and parliamentary floor-crossings. Opposition parties are allowed to function freely, although political violence has occasionally flared during election periods, mostly in the form of intimidation of party rallies or canvassing.<sup>15</sup>

**3.7.3** There were no reports of politically motivated disappearances in 2006.<sup>16</sup> The constitution and law prohibit arbitrary arrest and detention; however, the Government did not observe these prohibitions in practice, and there was a growing trend toward politically motivated arrests and prosecutions in 2006.<sup>17</sup>

**3.7.4** During 2006, the security forces arrested a number of opposition politicians, primarily from the UDF, on a range of charges. While Government actions generally were legal in the strictest sense, courts dismissed or suspended by injunction the majority of these cases.<sup>18</sup>

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<sup>15</sup> Freedom House Malawi 2007

<sup>16</sup> USSD 2006 (Section 1)

<sup>17</sup> USSD 2006 (Section 1)

<sup>18</sup> USSD 2006 (Section 1)

- 3.7.5** In January 2006, security forces arrested and charged two UDF activists with treason for allegedly plotting to overthrow the Government. The court dismissed the treason charges, but the Government filed sedition charges against one defendant who was later convicted and sentenced to nine months' imprisonment.<sup>19</sup>
- 3.7.6** **Sufficiency of protection.** As this category of applicants' fear is of ill-treatment/persecution by the state authorities, they cannot apply to these authorities for protection.
- 3.7.7** **Internal relocation.** As this category of applicants' fear is of ill-treatment/persecution by the state authorities, relocation to a different area of the country to escape this threat is not feasible.
- 3.7.8** **Conclusion.** It is most unlikely that anyone claiming involvement in low-level political activities would be of interest to the Malawi authorities or be able to demonstrate a well-founded fear of persecution within the terms of the 1951 Convention. The evidence generally suggests there are few differences between political parties and that co-operation exists between the UDF and MCP. A grant of asylum in such cases would not generally be appropriate; however, the nature of the political activity and level of involvement with any political party should be thoroughly investigated.
- 3.8** **Prison conditions**
- 3.8.1** Applicants may claim that they cannot return to Malawi due to the fact that there is a serious risk that they will be imprisoned on return and that prison conditions in the Malawi are so poor as to amount to torture or inhuman treatment or punishment.
- 3.8.2** The guidance in this section is concerned solely with whether prison conditions are such that they breach Article 3 of ECHR and warrant a grant of Humanitarian Protection. If imprisonment would be for a Refugee Convention reason, or in cases where for a Convention reason a prison sentence is extended above the norm, the claim should be considered as a whole but it is not necessary for prison conditions to breach Article 3 in order to justify a grant of asylum.
- 3.8.3** **Consideration.** Prison conditions remained harsh and in some cases life threatening in 2006. Overcrowding, inadequate nutrition, substandard sanitation, and poor health facilities remained serious problems. The prison system, which was meant to accommodate approximately 7,000 inmates, held approximately 11,000 prisoners. Inmates were encouraged to grow vegetables and raise livestock; however, they complained that they did not receive enough food. Construction of a new prison was completed in November 2006; the main Mzuzu Prison was subsequently designated as a remand centre. Community service programmes were available as alternatives to prison terms.<sup>20</sup>
- 3.8.4** During 2006, an average of 20 inmates died in prison each month, mostly due to HIV/AIDS. There were no available statistics on prison deaths at the year's end. In October 2006 the press reported that Justice Mbekeani, a prisoner serving an eight-year sentence for robbery, had sued the attorney general, the minister for home affairs, the minister for internal security, and the commissioner of prisons, claiming that he and fellow prisoners had been subjected to torture and cruel, inhumane, and degrading treatment contrary to the constitution. The case was discontinued during the year.<sup>21</sup>

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<sup>19</sup> USSD 2006 (Section 1)

<sup>20</sup> USSD 2006 (Section 1)

<sup>21</sup> USSD 2006 (Section 1)

- 3.8.5** Although women were not kept in separate facilities, they were segregated within the prison compound and monitored by female guards. In the four maximum security prisons, there were separate facilities for juveniles; however, the separation was inadequate, and there were reports of sexual and physical abuse of juvenile prisoners. In the other prisons, juveniles were routinely incarcerated with adults. The law requires pre-trial detainees to be held separately from convicted prisoners; however, many prisons did not comply with this law due to lack of space and inadequate facilities.<sup>22</sup>
- 3.8.6** The Government permitted the Inspectorate of Prisons, domestic nongovernmental organizations (NGOs), and international NGOs to visit and monitor prison conditions and to donate basic supplies during 2006. The Prison Reform Committee worked in collaboration with the Ministry of Home Affairs and the Inspectorate of Prisons to visit prisons.<sup>23</sup>
- 3.8.7** **Conclusion.** Whilst prison conditions in Malawi are poor with overcrowding inadequate nutrition, substandard sanitation, and poor health facilities being particular problems, these conditions will not normally be sufficiently severe to meet the high Article 3 threshold. In addition to these adverse conditions there are reports that officials act with impunity and regularly mistreat inmates. The information available does not suggest that particular groups of inmates are more at risk of such mistreatment than others. There is no evidence that the mistreatment is of such a systematic nature as to make removal a breach of Article 3 on these grounds.
- 3.8.8** Even where applicants can demonstrate a real risk of imprisonment on return to Malawi a grant of Humanitarian Protection will not generally be appropriate. However, the individual factors of each case should be considered to determine whether detention will cause a particular individual in his particular circumstances to suffer treatment contrary to Article 3, relevant factors being the likely length of detention the likely type of detention facility and the individual's age and state of health. Where in an individual case treatment does reach the Article 3 threshold a grant of Humanitarian Protection will be appropriate.

#### **4. Discretionary Leave**

- 4.1** Where an application for asylum and Humanitarian Protection falls to be refused there may be compelling reasons for granting Discretionary Leave (DL) to the individual concerned. (See AI on Discretionary Leave) Where the claim includes dependent family members consideration must also be given to the particular situation of those dependants in accordance with the Asylum Instructions on Article 8 ECHR.
- 4.2** With particular reference to Malawi the types of claim which may raise the issue of whether or not it will be appropriate to grant DL are likely to fall within the following categories. Each case must be considered on its individual merits and membership of one of these groups should *not* imply an automatic grant of DL. There may be other specific circumstances related to the applicant, or dependent family members who are part of the claim, not covered by the categories below which warrant a grant of DL - see the Asylum Instructions on Discretionary Leave and on Article 8 ECHR.
- 4.3** **Minors claiming in their own right**
- 4.3.1** Minors claiming in their own right who have not been granted asylum or HP can only be returned where they have family to return to or there are adequate reception, care and support arrangements. At the moment we do not have sufficient information to be

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<sup>22</sup> USSD 2006 (Section 1)

<sup>23</sup> USSD 2006 (Section 1)

satisfied that there are adequate reception, care and support arrangements in place for minors with no family in Malawi.

- 4.3.2** Minors claiming in their own right without a family to return to, or where there are no adequate reception, care and support arrangements, should if they do not qualify for leave on any more favourable grounds be granted Discretionary Leave for a period as set out in the relevant Asylum Instructions.

#### **4.4 Medical treatment**

- 4.4.1** Applicants may claim they cannot return to Malawi due to a lack of specific medical treatment. See the IDI on Medical Treatment which sets out in detail the requirements for Article 3 and/or 8 to be engaged.

- 4.4.2** A September 2004 report by the Department for International Development (DFID) noted that since the formulation of the first National Health Plan in 1964, and subsequent plans in 1973 and 1986, Malawi has made some impressive strides in the health sector. The number of health units the Government put in place and the immunisation coverage on communicable diseases evidences this expanded commitment. Despite these improvements to health care delivery, the health status of the population remains relatively poor. This is due to a lack of financial and human resources, reduced donor support, increased demand for health services, the resurgence of diseases such as TB and malaria, and the escalation of the AIDS pandemic.<sup>24</sup>

- 4.4.3** Among the major challenges is the consistent shortage of essential drugs and medical supplies at service delivery points. This is partly because of the chronic under-funding of the health sector. Health expenditure as a percentage of GNP in Malawi is among the lowest in Sub-Saharan Africa. Problems are often compounded by mismanagement, pilferage, and less than efficient drug procurement and distribution procedures. Health indicators are amongst the worst in the world and have shown little improvement in recent years.<sup>25</sup>

- 4.4.4** Where a case owner considers that the circumstances of the individual applicant and the situation in the country reach the threshold detailed in the IDI on Medical Treatment making removal contrary to Article 3 or 8 a grant of discretionary leave to remain will be appropriate. Such cases should always be referred to a Senior Caseworker for consideration prior to a grant of Discretionary Leave. The Article 3 threshold will not be reached in the great majority of medical cases and a grant of Discretionary Leave will usually not be appropriate.

### **5. Returns**

- 5.1** Factors that affect the practicality of return such as the difficulty or otherwise of obtaining a travel document should not be taken into account when considering the merits of an asylum or human rights claim. Where the claim includes dependent family members their situation on return should, however, be considered in line with the Immigration Rules, in particular paragraph 395C requires the consideration of all relevant factors known to the Secretary of State, and with regard to family members refers also to the factors listed in paragraphs 365-368 of the Immigration Rules.

- 5.2** Malawi nationals may return voluntarily to any region of Malawi at any time by way of the Voluntary Assisted Return and Reintegration Programme (VARRP) implemented on behalf of the Border and Immigration Agency by the International Organization for Migration (IOM) and co-funded by the European Refugee Fund. IOM will provide advice and help with obtaining travel documents and booking flights, as well as organising

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<sup>24</sup> COIS Malawi Country Report March 2006 (paras 5.44 & 5.60)

<sup>25</sup> COIS Malawi Country Report March 2006 (para 5.44)



reintegration assistance in Malawi. The programme was established in 1999, and is open to those awaiting an asylum decision or the outcome of an appeal, as well as failed asylum seekers. Malawi nationals wishing to avail themselves of this opportunity for assisted return to Malawi should be put in contact with the IOM offices in London on 0800 783 2332 or [www.iomlondon.org](http://www.iomlondon.org).

**6. List of source documents**

- British Broadcasting Corporation (BBC) News Timeline: Malawi (dated 16 August 2007). [http://news.bbc.co.uk/1/hi/world/africa/country\\_profiles/2982250.stm](http://news.bbc.co.uk/1/hi/world/africa/country_profiles/2982250.stm)
- Foreign and Commonwealth Office Malawi Country Profile (last reviewed on 1 March 2007). <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1019744969259>
- UK Home Office COI Service Malawi Country of Origin Information Report March 2006. [http://www.homeoffice.gov.uk/rds/country\\_reports.html](http://www.homeoffice.gov.uk/rds/country_reports.html)
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