

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
- 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 Instructions 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 male 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 Malawi is a multi-party democracy. Constitutional power is shared between the president and 193 National Assembly members. Bingu wa Mutharika, chosen by former president Bakili Muluzi as the candidate for the ruling United Democratic Front (UDF), won the 2004 presidential election with 36% of the vote. John Tembo of the Malawi Congress Party (MCP) was the immediate runner-up on 27%, and former vice-president Gwanda Chakuamba, representing a coalition of opposition parties, won 26%. In the 2004 parliamentary contest the MCP overtook the UDF as the largest party in parliament, and a large number of independent MPs were also elected. International observers declared the 2004 presidential and parliamentary elections generally free and fair. However, they highlighted serious shortcomings, including misuse of government resources by the UDF, and the Malawi Electoral Commission's failure to adequately address problems with the voters' roll.¹
- 2.2 President 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 Progressive Party, which drew support from a number of minor opposition parties, disaffected UDF MPs, and independents. Mutharika's uncompromising approach and willingness to upset his former colleagues led to an impeachment attempt in October 2006, the arrest of the vice-president, Cassim Chilumpha, and the suspension of parliament.²
- 2.3 President Mutharika won a resounding victory in the May 2009 presidential election, defeating the MCP's John Tembo, who was backed by Mutharika's rival and former president, Bakili Muluzi. Mutharika's Democratic Progressive Party also won a strong majority in the parliamentary elections. Tembo rejected the election results claiming election fraud, but Muluzi has congratulated Mutharika. Both the European Union and the Commonwealth observer groups hailed the elections as a peaceful and well-managed voting process, but noted that some key benchmarks for democratic elections were not met. For example, a lack of balanced coverage from state media during the campaign has been highlighted.³
- 2.4 The Government generally respects the human rights of its citizens. There are, however, problems in some areas, including unlawful killing by members of the security forces, and police use of excessive force including torture, though the Government has reportedly taken steps to prosecute and punish some abusers. Occasional mob violence; arbitrary arrest and detention, including politically motivated arrests; corruption; and government restrictions on freedom of speech, press, and assembly also remain problems.⁴
- 2.5 A variety of domestic and international human rights groups operate without government restriction, training civic educators, advocating changes to existing laws and cultural practices, and investigating and publishing their findings on human rights cases. Government officials are reportedly cooperative and responsive to their views. The Ombudsman is mandated by law to investigate and take legal action against government officials responsible for human rights violations and other abuses. In 2008, the Ombudsman

¹ FCO Country Profile 2009: Malawi & U.S. Department of State report on Human Rights Practices 2008: Malawi (Introduction & Section 3)

² FCO Country Profile 2009: Malawi & British Broadcasting Corporation (BBC) News Timeline: Malawi

³ BBC News Timeline: Malawi, BBC News Country Profile: Malawi, BBC News 'Malawi president is inaugurated' dated 22 May 2009, BBC News 'Malawi president wins re-election' dated 22 May 2009 & BBC News 'Q&A: Elections in Malawi' dated 22 May 2009

⁴ USSD 2008: Malawi (Introduction & Sections 1 & 2)

reportedly enjoyed government cooperation and operated without government or party interference. However, the ombudsman's freedom of action was restricted by legislation that requires a warrant and a three-day waiting period to gain access to certain government records.⁵

2.6 The Malawi Human Rights Commission (MHRC), an independent government agency, is charged with monitoring, auditing, and promoting human rights and conducting investigations regarding violations of human rights; however, a shortage of resources has resulted in a backlog of cases, delayed production of reports, and failure to expand human rights monitoring. The MHRC reported that it received 585 complaints of human rights violations during 2008; 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 cooperates with international governmental organisations and permits visits by United Nations representatives and other organisations.⁶

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 guidance 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 Instruction on Considering the Asylum Claim).

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 the 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 'Considering the Asylum Claim' and '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.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions>

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

⁵ USSD 2008: Malawi (Section 4)

⁶ USSD 2008: Malawi (Section 4)

persecution at the hands of the state due to political connections to the Movement for 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 Country of Origin Information Service Malawi Country Report dated March 2006.
- 3.6.4 Sufficiency of protection.** There is no evidence that this category of applicant has a well founded fear of persecution or treatment likely to engage the UK's obligations under Article 3 of the ECHR and the question of state protection in Malawi is not therefore relevant.
- 3.6.5 Internal relocation.** There is no evidence that this category of applicant has a well founded fear of persecution or treatment likely to engage the UK's obligations under Article 3 of the ECHR in Malawi and the question of internal relocation in Malawi is not therefore relevant.
- 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. Political divisions are generally based on ethno-regional loyalties and personality rather than policy. Political violence by police or party thugs has occasionally flared during election periods. In January 2007, police arrested two UDF officials and charged them with sedition after the airing of a leaked recording in which the president purportedly called for unspecified action against former president Bakili Muluzi. In April 2007, the Government sent military forces to disrupt a UDF rally. A court injunction barring the police from halting the rally was apparently ignored.⁷
- 3.7.3** There were no reports of politically motivated disappearances in 2008. The constitution and law prohibit arbitrary arrest and detention, but the Government does not always observe these prohibitions in practice. In 2008, the security forces arrested a number of opposition politicians, primarily from the UDF, on a range of charges. Arrests of opposition politicians were greater in 2008 than the previous year. While Government actions generally were legal in the strictest sense, courts dismissed or suspended by injunction the majority of these cases.⁸
- 3.7.4 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

⁷ Freedom House – Freedom in the World 2008: Malawi

⁸ USSD 2008: Malawi (Section 1)

protection.

3.7.5 Internal relocation. Where a category of applicants' fear is of ill-treatment/persecution by the state authorities, this does not mean that case owners should automatically presume that internal relocation is not an option. As Lord Bingham observed in *Januzi* ([2006] UKHL 5):

"The more closely the persecution in question is linked to the state, and the greater the control of the state over those acting or purporting to act on its behalf, the more likely (other things being equal) that a victim of persecution in one place will be similarly vulnerable in another place within the state. The converse may also be true. All must depend on a fair assessment of the relevant facts."

3.7.6 Very careful consideration must be given to whether internal relocation would be an effective way to avoid a real risk of ill-treatment/persecution at the hands of, tolerated by, or with the connivance of, state agents. If an applicant who faces a real risk of ill-treatment/persecution in their home area would be able to relocate to a part of Malawi where they would not be at real risk, whether from state or non-state actors, and it would not be unduly harsh to expect them to do so, then asylum or humanitarian protection should be refused.

3.7.7 Conclusion. It is most unlikely that anyone claiming involvement in low-level political activities would be of interest to the 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. 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 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 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 in Malawi are harsh with overcrowding; inadequate nutrition; substandard sanitation; and poor health facilities remaining serious problems in 2008. The prison system, which was meant to accommodate approximately 5,000 inmates, routinely held double that number during 2008. According to the prison commissioner, there were more than 11,000 inmates in the prison system at the end of 2008. Staffing in prisons was reportedly inadequate in 2008 with more than 60% of positions unfilled. Budget allocations for the prison system were less than 20% of the stated need, and the warden to inmate ratio was 1:17 rather than the recommended 1:5.⁹

3.8.4 According to the U.S. Department of State, inmates are encouraged to grow vegetables and raise livestock and often do so; however, they have complained that they do not receive enough food. In an attempt to remedy the food shortage, the prison system has planted vegetables, but still expects to only meet about half the nutritional need of prisoners. Community service programmes are available as alternatives to prison terms for first-time offenders convicted of less serious crimes and who have permanent addresses.

⁹ USSD 2008: Malawi (Section 1) & Amnesty International (AI) Report 2009 : Malawi

Numerous inmates died in prison each month during 2008, largely due to HIV/AIDS, diarrhoea, pneumonia, tuberculosis, and inadequate diet.¹⁰

3.8.5 Although women were not kept in separate facilities in 2008, more than 200 female prisoners were segregated within the prison compound and monitored by female guards. Juveniles are no longer incarcerated with adults and there are three juvenile detention centres (Bvumbwe, Lilongwe, and Byandzi) and two prisons with juvenile wings (Zomba and North Mzimba). The law requires pre-trial detainees to be held separately from convicted prisoners; however, the number of pre-trial detainees swelled to over 2,800 in 2008 and many prisons did not comply due to inadequate facilities. The Government permits domestic and international non-governmental organisations and the media to visit and monitor prison conditions and to donate basic supplies.¹¹

3.8.6 *Conclusion.* Whilst prison conditions in Malawi are poor, conditions are unlikely to reach the Article 3 threshold. Therefore, 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 Asylum Instructions 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 the Asylum Instructions 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 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 favorable 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

¹⁰ USSD 2008: Malawi (Section 1) & AI Report 2009 : Malawi

¹¹ USSD 2008: Malawi (Section 1)

Article 3 and/or 8 to be engaged.

- 4.4.2** Most Malawians do not have access to a high level of healthcare and there is a shortage of health workers. According to Medicins Sans Frontieres, about half of the 165 doctors working in Malawi are in central hospitals in urban areas, leaving shortages in rural areas. To compensate for the shortage of doctors, Malawi relies on clinical officers and medical assistants. However, due to shortages across the spectrum of health staff, the Government has also created health surveillance assistants, who receive ten weeks of training and are responsible for multiple tasks including immunisation and dispensing of essential drugs.¹²
- 4.4.3** There are an estimated 940,000 people living with HIV/AIDS in Malawi and the HIV prevalence rate for adults is 14.1%. The Government has progressively scaled up the health-sector response to the pandemic and along with international donors has poured millions of dollars into the AIDS programme. The number of people on antiretroviral drugs increased from 70,000 in 2006 to 150,000 in 2008.¹³
- 4.4.4** Mental health is part of the primary health care system and treatment of severe mental disorders is available at the primary level. Regular training of primary care professionals is carried out and there are community care facilities for patients with mental disorders. Therapeutic drugs are generally available.¹⁴
- 4.4.5** Where a case owner considers that the circumstances of the individual applicant and the situation in Malawi 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.

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** Malawian nationals may return voluntarily to any region of Malawi at any time by way of the Voluntary Assisted Return and Reintegration Programme implemented on behalf of the UK Border 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 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. Those wishing to avail themselves of this opportunity for assisted return should be put in contact with the IOM offices in London on 0800 783 2332 or www.iomlondon.org.

6. List of source documents

- Home Office Country of Origin Information (COI) Service Country of Origin Information Key Documents: Malawi (dated 10 July 2008).
http://www.homeoffice.gov.uk/rds/country_reports.html

¹² United Nations IRIN Malawi Humanitarian Country Profile dated March 2007 & Medicins Sans Frontieres (MSF) 'Despite new types of health workers, demand still outstrips supply' dated 24 May 2007

¹³ IRIN Malawi Humanitarian Country Profile dated March 2007, IRIN 'Malawi: Success in reducing HIV rate' dated 30 May 2008 & MSF 'Despite new types of health workers, demand still outstrips supply' dated 24 May 2007

¹⁴ World Health Organisation Mental Health Atlas 2005: Malawi

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- IRIN 'Malawi: Success in reducing HIV rate' dated 30 May 2008. <http://www.plusnews.org/Report.aspx?ReportId=78491>
- Medecins Sans Frontieres 'Despite new types of health workers, demand still outstrips supply' dated 24 May 2007. http://www.msf.org/msfinternational/invoke.cfm?objectId=BCF8F4FF-15C5-F00A-2591E98AB6D51845&component=toolkit.article&method=full_html&mode=view
- Freedom House – Freedom in the World 2008: Malawi. <http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7439>

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