



REFORM OF THE IMMIGRATION APPEALS SYSTEM

1 In August 2008 the government published a paper for the purpose of consulting on reforms to the present system for hearing appeals against adverse decisions by the Home Office on asylum and immigration cases. The substance of that paper and Migration Watch comments on it are set out in **Briefing Paper 8.29**, issued in November 2008. An account of the workings of the present appeals system is to be found in **Briefing Paper 8.2**. The government has now published a response to the consultations, setting out its decision. The undated paper “Fair decisions: faster justice” has recently been issued jointly by the UK Border Agency (UKBA) on behalf of the Home Office and by the Tribunals Service on behalf of the Ministry of Justice.

2 The intention is to transfer the present Asylum and Immigration Tribunal into the unified tribunal structure created by the Tribunals, Courts and Enforcement Act 2007, an Act passed in part for the purpose of creating a uniform structure for the many different tribunals exercising jurisdiction in a wide variety of subjects including criminal injuries compensation, social security benefits, sea fish licensing and many others. The new tribunal will be in two tiers. Initial decisions on appeal against UKBA decisions will be made by immigration judges in the first tier. If the party whose appeal has been dismissed believes that the first tier tribunal has made an error of law, he or she may apply for permission to appeal to the Upper Tribunal. In applying for permission the applicant must show that he or she has an arguable case. If permission to appeal is refused by the First-tier Tribunal, renewed application may be made to the Upper Tribunal itself. If permission is granted by either the First-tier or Upper Tribunal, the latter will hear the appeal to determine whether an error of law was made. If it accepts that there was an error of law, it may make a fresh decision or remit the case to the First-tier Tribunal with directions for its reconsideration. If the appeal is dismissed by the Upper Tribunal, that should be the end of the matter, though there will continue to be as at present a further right of appeal on a point of law to the Court of Appeal or corresponding courts in Scotland and Northern Ireland. Under the present system some 400 cases a year end up in the Court of Appeal. As to the possibility of judicial review, a major source of delays under the present system, see paragraph 5 below.

3 My initial reaction to the proposal for a two tier system, as set out in last year's consultation paper, was adverse. I had ten years' experience as an immigration adjudicator working under the previous two tier system, which was replaced by the supposedly* single tier Asylum and Immigration Tribunal in 2005. The senior of the two tiers at the time, the Immigration Appeal Tribunal, had a very pedantic, not to say nit picking approach to dealing with the determinations of adjudicators which were referred to it on appeal. A common course of action by the Immigration Appeal Tribunal when it was disposed to allow an appeal was to remit the case to be heard afresh by a different adjudicator from the one who had first heard it, rather than dispose of the appeal itself. This was done partly because of the pressures of workload but partly also because it involved less work for the Tribunal's members. It was not unusual for cases to be remitted several times, resulting in years of delay to the final disposal of appeals. In the light of this experience I strongly opposed on behalf of Migration Watch the proposals contained in last year's paper.

*I say "supposedly" because under section 103A of the Nationality, Immigration and Asylum Act 2002 provision is made for applications to the High Court requiring the Tribunal to reconsider its decisions. Under transitional legislation that jurisdiction has up to now been exercised by senior immigration judges who *de facto* constitute an upper tier of the present Tribunal.

4 The government's intentions are an improvement on what was previously proposed in two important respects. The possibility of remittal of appeals by the Upper Tribunal back to the First-Tier Tribunal is to be permitted, but according to the paper it "should only take place in exceptional circumstances and no case should be remitted more than once". The intention appears to be that this limitation should not appear expressly in legislation, as the paper accepts that the Senior President of Tribunals (i.e. of *all* Tribunals under the unified structure) should have the primary role in guidance on how cases should be handled. However, there is a precedent for legislation on this as section 103A of the Nationality, Immigration and Asylum Act 2002, referred to in the footnote to paragraph 3 above, expressly provides that the High Court or other body ordering the Tribunal to reconsider its decision on an appeal may make such an order only once in relation to any particular appeal.

5 The other and most significant improvement on what was originally proposed is that the Upper Tribunal should be constituted as a court of record, in which High Court judges as well as Senior Immigration Judges will sit. It is intended that the Upper Tribunal will have the power to dispose of applications for judicial review of the Tribunal's own decisions. One motive behind the reconsideration of the asylum and immigration appeals system has been to reduce the considerable burden of judicial review applications which take up a great deal of judicial time and also add considerably to delay in the final disposal of appeals. Under the new system particular types of cases will be transferred to the Upper Tribunal, to be heard in that Tribunal by High Court or other more senior judges. In making the Upper Tribunal a court of record it is hoped that most judicial review applications will be disposed of there rather than in the Administrative Court or its counterparts in Scotland or Northern Ireland. It would have been possible for the government to include in the relevant legislation a bar on any applications for judicial review of Tribunal decisions. However, the government was apprehensive that any

such proposal would have met with strong Parliamentary opposition and it has therefore been decided not to include it in the legislation but to leave it to the courts to decide, if the matter is raised before them, whether decisions of the Upper Tribunal are judicially reviewable.

6 When I reviewed the original consultation paper on this subject in 2008 I was very critical of the proposal to revert to a two tier system, having regard to the serious shortcomings of the earlier system of which I had had personal experience – see paragraph 3 above. The provision made for creating the Upper Tribunal as a court of record should in theory at least eliminate those shortcomings. In its paper the government claims that of asylum claims in particular, 90% will have either been granted or have had their appeal rights exhausted within 18 weeks, against the 42 weeks frequently taken under the existing system. This would be a major improvement but we await the actual outcome with some scepticism.

7 The government's original intention was to include clauses providing for reform of the appeals system in what appeared in September 2008 as the Draft (Partial) Immigration and Citizenship Bill, an ambitious attempt to rewrite the whole of immigration and asylum statute law from scratch. (See **Briefing Paper 8.28.**) However, the current economic crisis created the need for the government to reduce the number of Bills being considered in the 2008-9 session, so that Bill was one of the casualties. The next session, beginning in November 2009, cannot run beyond the end of April 2010, when a General Election must be held if it has not been held before that date. It is therefore highly unlikely that the draft Immigration and Citizenship Bill will be able to be accommodated in the programme for such a short session and it is not unreasonable to assume that it is dead, at least for the present Parliament. The government has therefore decided to bring in the new appeal arrangements by a different route. The Tribunals, Courts and Enforcement Act 2007, referred to in paragraph 2 above, by sections 30 and 31 empowers the Lord Chancellor to transfer the functions of an existing tribunal to a new tribunal to be established under the unified structure created by that Act. The government's intention is to lay the necessary transfer of functions order before Parliament in October 2009 so that the new arrangements can come into effect early in 2010.

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