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Reform of the Immigration Appeals System

This is a revised version of Legal Briefing Paper MW 159 originally published in May 2009.

Abbreviations used in this paper are as follows:

- FTT Immigration and Asylum Chamber of the First Tier Tribunal
- UTT Immigration and Asylum Chamber of the Upper Tier Tribunal
- TCE Tribunals, Courts and Enforcement Act 2007
- UKBA United Kingdom Border Agency

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 (now deleted). An account of the workings of the present appeals system is to be found in Briefing Paper 8.2 (now deleted). The government has now published a response to the consultations, setting out its decision. The undated paper Fair decisions: faster justice was 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 in May 2009.

2. The Tribunals Service is the agency of the Ministry of Justice which is now responsible for statutory tribunals dealing with a vast range of subjects such as income tax, criminal injuries compensation, social security, sea fish licensing and many others. It is responsible for the administration of Part 1 of the Tribunals, Courts and Enforcement Act 2007 (TCE), the object of which is to create a uniform structure for these many different tribunals. The government's plan is to abolish the present Asylum and Immigration Tribunal, which was created by the Nationality, Immigration and Asylum Act 2002 and to replace it as from February 2010 with what will be known as the Immigration and Asylum Chambers of the First Tier (FTT) and Upper Tier (UTT) Tribunals in the unified tribunal structure. The function of immigration judges sitting in the FTT will be to hear in the first instance appeals against UKBA decisions on asylum and immigration applications. 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 under section 11 of TCE 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 FTT renewed application may be made to the UTT itself. If permission is granted by either tribunal, the UTT 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 UTT 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 paragraphs 9 and 10 below.

3. My initial reaction to the proposal for a two tier system, as set out in last years 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 Tribunals 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 years 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. This transitional arrangement will now disappear with the establishment of the new tribunals.

4. The governments intentions are an improvement on what was previously proposed in two important respects. The possibility of remittal of appeals by the UTT back to the FTT 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. I recently attended a seminar organised by the Tribunals Service which was addressed by Mr Mark Ockleton, Deputy President of the present Asylum and Immigration Tribunal, who assured the gathering that the intention of the immigration judges was that remittal would be used sparingly as a remedy and only once at most in any particular appeal.

5. By the operation of section 9 of TCE the FTT will have a limited power to review its own decisions so as to correct errors, amend reasons given for decisions or to set decisions aside. The UTT has a corresponding power in respect of its own decisions under section 10.

6. Rights of appeal beyond the UTT will be regulated by section 13 of TCE. This section creates a general right of appeal on a point of law with the permission of the UTT itself or of the relevant appellate court i.e. the Court of Appeal for England and Wales, The Court of Session for Scotland or the Court of Appeal in Northern Ireland.. An important restriction on the right is created by subsection (6) of section 13, which authorises the Lord Chancellor to make provision that permission may not be granted unless the Upper Tribunal or the relevant appellate court considers (a) that the proposed appeal would raise some important point of principle or practice or (b) that there is some other compelling reason for the relevant appellate court to hear the appeal. There is as yet no indication as to whether that power is likely to be exercised by the Lord Chancellor and if so to what extent or in relation to what categories of appeals. A further restriction is in subsection (8) of section 13, which excludes certain categories of decisions by the Tribunal from the general right of appeal, including any decision of the first tier tribunal that is of a

description specified in an order made by the Lord Chancellor.

7. The Asylum and Immigration Tribunal will have been functioning for only five years when it is abolished in February 2010. It is reasonable to enquire whether savings in efficiency and particularly in speed in disposing of appeals will justify this fresh upheaval. The governments optimistic assurances on this point appeared in the paper published in May 2009 in the following paragraphs:

In addition to the overall savings in time that will be achieved by replacing the review and reconsideration process where applications may have to be made to the relevant High Court or Court of Session with permission to appeal applications that can be finally decided by the Upper Tribunal, we will also deliver improvements in the speed of the initial decision making process so that we are meeting targets to make decisions within one month of application and, working with the judiciary, will ensure that asylum appeals under the new system are concluded faster than at present, with a reduction of time to initial appeal hearings facilitated by earlier delivery of the respondents bundle of evidence. We will aim to conclude 40% of asylum appeals within six weeks and 80% within twelve weeks.

Taken as a whole, we expect that these measures will ensure that 90% of asylum applications have either been granted or have exhausted their appeal rights within 18 weeks. This is a significant improvement over performance under the current system, where it can take up to 42 weeks for cases to reach this stage. [Emphasis added.]

8. This was a joint commitment on the part of the UKBA and the Tribunals Service and the promised improvements depend on speeding up of initial applications by the caseworkers and other staff of UKBA at least as much as on a corresponding speeding up of the disposal of appeals. At the seminar which I attended the Deputy President on behalf of the AIT and its planned successor was decidedly non-committal on this subject. He emphasised that the commitment in the paper was made by the government, not by the Tribunal, and he took no personal responsibility for it. He said that the speed of disposal of appeals depended on the numbers of appeals outstanding and the numbers of immigration judges available to hear them. It appears also that money is a problem and that the volume of work at the moment is causing the Tribunal to spend significantly above its budget. These observations obviously cast a question mark over the optimistic promise quoted above.

9. A further important matter which arises in connection with the new arrangements for appeals arises under section 53 of the Borders, Citizenship and Immigration Act 2009, the tenth in a series of Acts of Parliament on the subject of asylum and immigration which have been passed since 1971, and which received Royal Assent on 21 July. This section requires the High Court in England and Wales, the High Court in Northern Ireland and the Court of Session in Scotland to transfer to the UTT a limited category of immigration judicial review applications. The category in question is any claim based on material which is not significantly different from material which has previously been considered i.e. any case in which an appellant who has once been unsuccessful tries a second time on more or less the same facts or legal arguments. This section is not yet in force and it can reasonably be expected that it will be brought into force some time after the new

Tribunals come into being.

10. An important motivation behind the governments wish to change the present asylum and immigration appellate system after it has been in operation for only four years is the continuing excessive volume of applications for judicial review of appeal decisions. Such applications are more often than not worthless and are made as a means of delaying final disposal of cases and enabling appellants to avoid deportation. The original intention was to incorporate in the Bill a general power vested in the UTT to undertake judicial review of asylum and immigration appeals; this intention would have been fully backed by the judges and would have greatly reduced their workload. However, it came up against strong opposition in the House of Lords, so the government introduced its own amendment when the Bill received its third reading in the House of Commons on 14 July 2009. In the course of debate the Minister, Phil Woolas, explained that there had been over the previous 12 months period a total of 4600 judicial review applications in asylum and immigration cases, of which 85% had failed. Of these applications 900 had related to cases in which facts and legal arguments were being relied on which were not significantly different from facts and legal arguments which had already been heard and had failed to bring about a successful appeal. On the basis of these figures there is therefore an expectation that the power contained in section 53 of the 2009 Act will reduce the burden of judicial review applications on the courts by about 20%. A modest improvement, but not as drastic as was originally hoped.

11. The governments 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. Part of that intention was to provide that the Asylum and Immigration Tribunal would be designated as a court of record, which would very largely, though not completely, have transferred to it the function of judicial review of asylum and immigration decisions. 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. Reform of the appeals system was considered to be of sufficient importance to warrant dealing with it through TCE in the manner described above, which obviated the need for primary legislation. Sections 30 and 31 of TCE give the Lord Chancellor power to abolish existing tribunals such as AIT and to transfer their functions into the new arrangements. The Lord Chancellors powers are exercisable by statutory instruments, drafts of which, according to section 49(5) of TCE must be laid before and approved by resolutions of each House of Parliament. The governments 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

12. The next session, beginning in November 2009, cannot run beyond May 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 the means described in the previous paragraph. Sections 30 and 31 of TCE empower 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..

Harry Mitchell QC
Honorary Legal Adviser

Migration Watch

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