Tribunal Procedure Committee
Consultation on Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules

Response of the Immigration Law Practitioners' Association

29 August 2023

Introduction

1. The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors, and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations, and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

2. This is a response to the Consultation of the Tribunal Procedure Committee ('TPC')[1] on potential changes to rules on Citizens' Rights Appeals and Rule 22A of the Upper Tribunal Rules.

Citizens' Rights Appeals

Question 1: Do you agree that Rule 19 should be amended? If not, why not?

3. It is our view that Rule 19 need not be amended. However, if clarity is needed, it could be amended, but not in the way the Home Office or TPC proposes. Both proposals are a regressive policy change, rather than mere clarification of ambiguity.

4. At §22 of the Consultation, the TPC suggests that a 'degree of ambiguity has arisen'. We understand there to be two interpretations. The question is whether an applicant to the European Union Settlement Scheme ('EUSS') who has applied for an administrative review of the refusal has:

    i) a right to appeal that is exercisable only for the 14 or 28 day period in Rule 19(3B) following the original decision and then only for the 14 or 28 day period in Rule 19(3D) following the decision on the administrative review, without the ability to appeal between these two periods (i.e. the Home Office's interpretation); or

    ii) a right to appeal that is exercisable in every case for the 14 or 28 day period in Rule 19(3B) following the original decision, and, if a person applies for an administrative review and has not yet appealed (per Rule 19(3C)), the right to appeal is exercisable

[1] Tribunal Procedure Committee, 'Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules' (18 July 2023) <https://www.gov.uk/government/consultations/possible-changes-to-the-first-tier-tribunal-immigration-and-asylum-chamber-rules-and-the-upper-tribunal-rules#:~:text=Consultation%20description,the%20content%20of%20such%20rules> accessed 24 August 2023 (hereinafter 'Consultation').

from the point of application for administrative review[2] of the original decision until the end of the 14 or 28 day period following the decision on the administrative review in accordance with Rule 19(3D).

5. We would suggest that the second interpretation is correct. Rule 19(3D) is presently clear, through the Home Secretary's choice of the words "not later than", that an appeal and an administrative review can run concurrently. We agree with the TPC's interpretation at §28-29 of the Consultation:

> *'28. […] if an administrative review decision has not been sent to a prospective appellant, any notice of appeal submitted before that date will, by definition, be "not later than 14 days after P is sent the notice of the decision." It could be said to be a considerable period* before *the expiration of that 14-day period. The fact that the 14-day period has not yet started does not, on this view, prevent a prior date from being regarded as* before *the expiration of that 14 day period.*
>
> *29. [...] The right of appeal is triggered by, and attaches to, the underlying EUSS decision, not the administrative review. The unsuccessful applicant in such circumstances continues to enjoy a substantive right of appeal against the underlying EUSS decision. Nothing in the current rules expressly states that the time limit for bringing an appeal does not start until a decision on an appellant's administrative review has been taken. Clear wording would be required to deprive a prospective appellant of the substantive rights they otherwise enjoy by virtue of the Withdrawal Agreement or under the 2020 Regulations.'*

6. Therefore, it is our view that although there is, according to §24 of the Consultation, a 'significant cohort of applicants who wish to pursue an appeal, notwithstanding the fact that their administrative review process has not concluded', Rule 19(3D) protects them from needing to appeal out of time. It enables them to appeal in time, and have their appeal run concurrently with their pending administrative review. Such applicants fall squarely within Rule 19(3C). They have applied for an administrative review of a citizens' rights immigration decision under the relevant rules, and "had not" started appellate proceedings in relation to the original decision.

7. If further clarity is needed, Rule 19(3B)-(3E) could be redrafted and replaced with the below Rule 19(3B)-(3D), to indicate the specific requirements that apply depending on whether the individual has or has not applied for an administrative review:

[2] It may be from the point of original decision for a person in the UK who applies for their administrative review within the 14-day period provided for in Rule 19(3B)(a). However, for example, for a person in the UK and not detained who applied for their administrative review, in-time (i.e. within 28 days), but after the expiry of the 14 days provided for by Rule 19(3B), there may be a few days in which their right to appeal is not exercisable. Nevertheless, it is clear Rule 19(3D) is engaged as soon as the administrative review application is made under the relevant rules, per Rule 19(3C).

(3B) Where a person ("P") does not apply for an administrative review of a citizens' rights immigration decision under the relevant rules, the notice of appeal in relation to an appeal against that decision must be received—

(a) if P is in the United Kingdom, not later than 14 days after the appellant is sent the notice of the decision;

(b) if P is outside the United Kingdom, not later than 28 days after the appellant receives the notice of the decision.

(3C) Where a person ("P") applies for an administrative review of a citizens' rights immigration decision ("the original decision") under the relevant rules, the notice of appeal against the original decision must be received—

(a) if P is in the United Kingdom, not later than 14 days after P is sent the notice of the decision on administrative review;

(b) if P is outside the United Kingdom, not later than 28 days after P receives the notice of the decision on administrative review.

(3D) In this rule, "the relevant rules" means—

(a) Appendix AR (EU) and Appendix AR (administrative review) to the immigration rules, or

(b) the Citizens' Rights (Frontier Workers) (EU Exit) Regulations 2020 (see regulations 21 to 23 of those Regulations).

8. This would clarify that there are only two options, when appealing against a citizens' rights immigration decision, and which option applies depends on whether the person has made an application for an administrative review. It would be "both simple and simply expressed", in accordance with section 22(4)(d) of the Tribunals, Courts and Enforcement Act 2007. It would also be fair in maintaining existing rights of appeal, rather than seeking to delimit and restrict them.

9. By contrast, the Home Office's proposal, recorded at §25 of the Consultation, is a regressive policy change in (a) prohibiting a concurrent appeal to be made after the window in Rule 19(3B) has expired, except out-of-time, (b) requiring withdrawal of the pending administrative review, due to the Home Office's own delay and backlog, and (c) making the window for appealing start only once the notice of withdrawal is accepted by the Home Office:

(3D) Where this paragraph applies, the notice of appeal against the original decision must be received—

(a) if P is in the United Kingdom, not later than 14 days after P is sent the notice of the decision on administrative review or the notice accepting withdrawal;

(b) if P is outside the United Kingdom, not later than 28 days after P receives the notice of the decision on administrative review or the notice accepting withdrawal.

10. The TPC's proposal at §35 would rectify regressive policy change (c), but retain regressive policy changes (a) and (b):

> *(3D) Where this paragraph applies, the notice of appeal against the original decision must be received—*
>
> *(a) if P is in the United Kingdom, within 14 days of P sending a notice of withdrawal of administrative review to the Secretary of State or being sent the notice of the decision on administrative review;*
>
> *(b) if P is outside the United Kingdom, within 28 days of P sending a notice of withdrawal of administrative review to the Secretary of State or being sent the notice of the decision on administrative review;*

11. We agree with the TPC that an appellant's right of appeal should not be dependent upon the Home Office's administrative action of issuing a "notice accepting withdrawal" of the administrative review, as the TPC is correct that paragraph 34X(3) makes clear that an application for administrative review 'will be treated as withdrawn on the date on which the request is received'. Such a Home Office notice accepting withdrawal could be issued in an unknown and unstipulated window, following the administrative review being treated as withdrawn, which could result in the applicant and their representative (if they have one) being unprepared and unable to meet the subsequent deadline of 14 or 28 days for appealing.

12. However, it is our view that the TPC's proposed amendment pertaining to withdrawal is unnecessary to allow an applicant who was 'unhappy with the delay in resolving their administrative review' (per §26 of the Consultation) to appeal concurrently on the basis of Rule 19.

13. Furthermore, the TPC's proposal of adding "within" 14 or 28 days is a further regressive policy change as it invalidates a notice of appeal received before the relevant period. The TPC's proposed formulation is more constricted than the Home Office's present working understanding (in §23 of the Consultation) of Rule 19, which permits an appeal made within the 14 or 28 day window in Rule 19(3B) to run concurrently with an administrative review. Read with Rule 19(3C), the TPC's proposed Rule 19(3D) would appear to mean that if a person applied for an administrative review of the original decision within 28 days,[3] paying the relevant fee of £80, and then, within the relevant time limit in Rule 19(3B), sought to appeal against the original decision, the First-tier Tribunal would consider the notice of appeal to be invalid, unless the

[3] Immigration Rules, Part 1, paragraph 34R(1A)(c).

administrative review was withdrawn or the notice of decision of the administrative review was sent.

14. It is evident that these regressive policy changes are unnecessary. The Home Office does not have any principled issue with administrative review applications and appeals running concurrently. There is nothing in Appendix AR (EU) to the Immigration Rules, paragraphs 34M to 34Y of the Immigration Rules, or the Administrative review: EU Settlement Scheme caseworker guidance[4] that makes any reference to an individual being unable to submit an appeal to the First-tier Tribunal (IAC) if a person opts to make an administrative review.

15. In fact, EUSS administrative review applications benefit from more generous provisions than other administrative reviews. For example, an application for administrative review made under Appendix AR (EU) which has not been determined is not treated as 'withdrawn if the applicant makes an application for entry clearance, leave to enter or leave to remain', unless the application is 'a valid application made under Appendix EU, Appendix EU (Family Permit), Appendix S2 Healthcare Visitor or Appendix Service Providers from Switzerland'.[5] This significantly differs from Appendix AR 2.10 for ordinary administrative reviews, which states an administrative review is not pending when the 'administrative review has previously been pending and the individual in respect of whom the eligible decision has been made submits a fresh application for entry clearance, leave to enter or leave to remain. In this case the day prior to the day on which the fresh application is submitted is the last day on which administrative review is pending.' Moreover, paragraphs 4.2 and 4.3 of Appendix AR (EU) state when an administrative review is pending, and when it is not pending, and make no mention of appeals.

16. Similarly, nothing in The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (which amends Rule 19 of the Tribunal Procedure Rules) prevents an appeal against an EUSS refusal, where the person has also applied for an administrative review of the same decision. The only references to administrative reviews are in Part 2 of Schedule 4 to the 2020 Regulations, amending the procedure rules for the Special Immigration Appeals Commission and the First-tier Tribunal (IAC). Similarly, these are the only paragraphs of those Regulations prescribing the time limit for appealing. Paragraph 3 simply refers to a person with a right of appeal against decisions relating to leave to enter or remain in the United Kingdom made by virtue of residence scheme immigration rules, who 'may appeal against a decision made on or after exit day'.

17. The Consultation states, at §18, that '*[i]n practice, applicants were encouraged to seek administrative review before making an appeal.*' This understanding is repeated at §30: *'the Secretary of State's policy intention appears to have been to encourage unsuccessful applicants to pursue administrative review in lieu of appeals'.*

[4] Home Office, 'Administrative review: EU Settlement Scheme' (version 8.0, published 31 May 2023) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1161203/Administrative_review__EU_Settlement_Scheme_.pdf> accessed 24 August 2023.

[5] Immigration Rules, Part 1, paragraph 34X.

18. However, one of our members has provided the following extract, with bold and underlined emphasis added, from an EUSS refusal decision, from July 2023, which supports the above contention that the Home Office accepts that an administrative review and an appeal can run concurrently:

> '*If you do not appeal now and do apply for an administrative review you will be able to appeal later if your administrative review is unsuccessful. You can only appeal once. If you* ***<u>appeal now and apply for administrative review</u>****, you will not be able to appeal later. Your administrative review decision will give you further details on how to appeal.'*

19. While it contains the Home Office's erroneous interpretation in the first sentence, misapplying Rule 19(3C)-(3D), it is clear from such correspondence with applicants that the Home Office has no principled objection to both an administrative review and an appeal running concurrently.

20. As the Home Office has no principled objection to the two challenges running concurrently, it, therefore, appears arbitrary to suggest a person should only be able to exercise an appeal right if they withdraw the administrative review.

Question 2: Do you agree with the TPC's proposed formulation at paragraph 35, above? If not, why not?

21. No, for the reasons we have given above, we do not agree with the TPC's proposed formulation.

Question 3: Do you have any further comments?

22. Yes. We are concerned by this attempt of the Home Office to reduce their EUSS administrative review backlog, in which these reviews 'are taking 12-18 months to complete' (according to §24 of the Consultation), by displacing the burden to the First-tier Tribunal (IAC) and HMCTS.

23. We understand the First-tier Tribunal has already seen a steady increase in the proportion of European Economic Area and EUSS appeals since June 2021: 'The EEA/EUSS receipts now make up 33% of all FTTIAC receipts. In January to March 2023, there were 3,700 EEA/EUSS receipts, an increase of 1% compared to the same period last year. Overall, in the financial year 2022/23, there were a total of 14,000 EEA/EUSS receipts, a 26% decrease from 2021/22, but still the second highest number of receipts since reporting began in 2015/16.'[6] Under the TPC's proposed rule change, applicants who have paid and have been waiting for an administrative review decision, and would have the original decision overturned on review, granting them status under

[6] Ministry of Justice, 'Official Statistics: Tribunal Statistics Quarterly: January to March 2023' (published 8 June 2023) <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2023/tribunal-statistics-quarterly-january-to-march-2023#immigration-and-asylum> accessed 24 August 2023.

the EUSS, may be compelled to withdraw their administrative review and appeal, unnecessarily burdening the Tribunal and justice system.

24. The solution to the Home Office's EUSS administrative review backlog is not to amend Tribunal Procedure Rules, and require withdrawal of administrative reviews and appeals in lieu, but to speed up EUSS administrative review decision-making (ensuring the team is adequately resourced, so that there is no decrease in quality of decision-making) and expedite certain administrative reviews where there are compelling reasons to do so. We remain willing to work with the Home Office to help to achieve this.

25. In any case, we are concerned that such withdrawals would not, in fact, ease the burden or workload of the Home Office. They serve no public interest. In an appeal, the respondent Home Secretary would still need to review the matter before the appeal proceeds. There is nothing put forward by the Home Office in the Consultation to suggest that the respondent's meaningful review following service of the appellant's bundle and skeleton argument[7] could not take place at the same time as the EUSS administrative review, with a response/decision on both reviews made at the same time. Unlike other administrative reviews under the Immigration Rules, in administrative reviews under Appendix AR (EU), new evidence can be introduced, and the person considering the administrative review on behalf of the Secretary of State must still consider whether the decision is incorrect because '*[i]nformation or evidence that was not before the decision maker has been provided to the reviewer which shows that the applicant qualifies for:*

> *(i) a grant, or a different grant, of leave under Appendix EU; or*
>
> *(ii) permission to enter or stay in the UK under Appendix S2 Healthcare Visitor; or*
>
> *(iii) entry clearance or permission to enter under Appendix Service Providers from Switzerland.*'[8]

26. Therefore, delaying consideration of the matter until an appeal would not even save the Home Secretary, or her officials, from having to review new information or evidence. Per paragraphs AR(EU)2.3 and 2.4 of the Rules, '[t]he reviewer will consider any information and evidence submitted with the application for administrative review, including information and evidence that was not before the original decision-maker' and may even 'contact the applicant or their representative to request further information or evidence'.

27. As for fairness, it is not the case that, by being pushed to withdraw their administrative review in order to exercise their right to appeal, individuals would be placed in the position they would

[7] Tribunals Judiciary, 'First-tier Tribunal (Immigration and Asylum Chamber) User and Visitor Guide' (January 2023) Part 6, Annex A, A.8 <https://www.judiciary.uk/wp-content/uploads/2022/06/IAC-User-Guide-January-23.pdf> accessed 24 August 2023.
[8] Immigration Rules, Appendix AR (EU), AR(EU)2.1(c).

have been after refusal of the original decision. They will have lost time waiting for a decision on their administrative review, in addition to any fees paid for legal assistance and the fee paid to the Home Office of £80 to apply for that administrative review.

28. For these practical reasons, there is no reason to prohibit an appeal running concurrently with an administrative review.

29. Notwithstanding our primary position in response to Question 1, should the TPC decide to amend Rule 19 to give effect to the Home Office's desire that a person *must* withdraw their administrative review in order to trigger a right of appeal, it is essential that appropriate safeguards are put in place to ensure a person does not lose their ability to challenge an EUSS refusal if they decide to move from challenging the refusal in an administrative review to challenging the refusal in an appeal.

30. Arguably, both the Home Office and the Tribunal Procedure Committee's drafting of the amended rule create a situation where there is a real risk that individuals, who withdraw administrative reviews out of frustration with Home Office processing times, run the risk of missing the deadline to submit a notice of appeal to the First-tier Tribunal. This is because the administrative review has to be withdrawn in order to trigger the right of appeal, leaving a person, at a minimum, temporarily stranded without any pending challenge against the EUSS refusal. This is equally the case if the triggering moment is the Home Office issuing the notice accepting withdrawal of the administrative review (in the Home Office's proposed formulation) or if it is the applicant requesting withdrawal of their administrative review (in the TPC's proposed formulation).

31. If, contrary to our submissions, the TPC decides that applicants must withdraw their pending administrative review for an appeal against a citizens' rights immigration decision to be heard, the Tribunal Procedure Rules should still permit a person to send a valid notice of appeal whilst the administrative review remains pending. However, it would be for the Home Office to ensure in practice and within the Immigration Rules that, once this appeal notice has been validated (i.e. payment processed and any other procedural steps taken), this event automatically triggers the administrative review being treated as withdrawn. Carrying out the steps in this order alleviates the risk that a person may not adhere to the time limits for appealing once the administrative review has been withdrawn. The withdrawal should not be considered to have taken place before the appeal is made, as this may cause a gap in any leave extended by section 3C of the Immigration Act 1971. The Immigration Rules should secure that the administrative review remains 'pending', within the meaning of section 3C(2)(d)(ii) of the Immigration Act 1971, until it is withdrawn, and that there is a seamless transition to leave extended by virtue of section 3C(2) of the Immigration Act 1971 whilst an appeal is pending.

32. Furthermore, as a person in this situation will have paid £80 for an administrative review that the Home Office has invested no resources to resolve, the fee should be refunded. Alternatively,

the person should be able to have a fee exempt paper appeal (which is also £80), or pay the £60 difference to have an oral hearing; it would then be up to the Ministry of Justice to claim back the administrative review fee of £80 from the Home Office.

33. We would strongly warn against requiring applicants to take positive steps to withdraw their pending EUSS administrative review. If, contrary to our recommendations, such a process were to be introduced, the Home Office would need a new online form for withdrawal of EUSS administrative reviews, and this would need to have clear information about the right to appeal, and the additional costs and time limits involved. Applicants would need to be able to print and be posted/emailed a receipt with this information, containing proof of the date of the submission of the withdrawal request. Without such evidence and knowing the date of the withdrawal request, representatives will be unable to advise potential appellants of the deadline for appealing and whether good reasons for appealing out of time must be made to request an extension of time, and the First-tier Tribunal will struggle to ascertain whether notices of appeal have been received in-time, without subject access requests or disclosure containing this information from the respondent Home Secretary.

Rule 22A Upper Tribunal Rules

Question 4: Do you agree with the deletion of Rule 22A from the Upper Tribunal Rules? If not, why not?

34. Yes, ILPA agrees with the deletion of Rule 22A from the Upper Tribunal Rules (inserted by the Tribunal Procedure (Amendment No. 3) Rules 2014).

Question 5: Do you have any other comments?

35. It has long been ILPA's position that decisions should be served on both parties simultaneously. ILPA responded as such in the 2013 consultation of the TPC, and described such provisions as *'extraordinary and inherently unfair: the Tribunal should not be providing a determination to one party without also providing it to the other. One party should not be in receipt of the determination before the other is, let alone able to control the time at which the other party receives the determination. The perception of unfairness is striking. There has also been substantive unfairness, with the respondent failing to serve the decision for long periods and even lodging an appeal against a positive decision before serving the decision on the appellant (see for instance the decisions and observations of the Asylum and Immigration Tribunal in EY (Asylum determinations - date of service) Democratic Republic of Congo [2006] UKAIT 00032, RN (rule 23(5): respondent's duty) Zimbabwe [2008] UKAIT 00001 and HH (Rule 23: meaning and extent) Iraq [2007] UKAIT 00036, and the Court of Appeal in NB (Guinea) [2008] EWCA Civ 1229). In NB Guinea, while rejecting the argument that rules 23(4) and (5) were ultra vires, Jackson LJ observed that they were "unpalatable". He continued:*

> *"It is undesirable that a litigant should receive or appear to receive preferential treatment from a court or tribunal even in relation to administrative matters such as the promulgation of judicial decisions. It is also undesirable that one party should habitually act as agent for the court or tribunal in relation to matters of service. However, in relation to asylum claims there are powerful pragmatic and policy reasons why appeal decisions should be delivered to the Home Office and served by the Home Office upon appellants. First, the Home office has the resources to perform this task. Secondly, the risk of absconsion by unsuccessful appellants is such that the Home Office must be in a position to take a prompt and appropriate action after appellants have received AIT decisions."*[9]

36. We maintain the above position, that all decisions should be served on parties simultaneously, including decisions of the Upper Tribunal refusing permission to appeal in asylum cases.

37. Therefore, we welcome the Upper Tribunal's request, and the Home Office's full support, for the removal of Rule 22A.

29 August 2023

Zoe Bantleman
Legal Director
Immigration Law Practitioners' Association

[9] ILPA, 'ILPA Response to Tribunal Procedure Committee Consultation on the proposed Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2013 and amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008' (29 June 2013) <https://ilpa.org.uk/wp-content/uploads/resources/18287/13.07.03-ILPA-response-to-Tribunal-Procedure-consultation-re-proposed-Tribunal-Procedure-First-tier-Tribunal-IAC-Rules.pdf> accessed 24 August 2023.