

Response of the Immigration Law Practitioners' Association (ILPA) to the consultation on the Tribunal Procedure (First Tier Tribunal) General Regulatory Chamber Rules 2009

Introduction

ILPA is a professional association with around 1000 members who are barristers, solicitors and advisors regulated by the Office of the Immigration Services Commissioner, practising in all areas of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum through training, disseminating information, research and influencing work. ILPA is represented on many Government, Tribunal and court 'stakeholder' and similar groups.

ILPA has responded to previous consultations by the Tribunals Service. This response is concerned solely with the proposed rules for the General Regulatory Chamber as they will affect cases currently heard by the Immigration Services Tribunal.

Question 1: Do the rules, as drafted, meet the needs of the jurisdiction(s) you are concerned with? If not, what additional provisions to you require and why?

ILPA has compared the proposed new rules with The Immigration Services Tribunal Rules (SI 2000/2739) as amended. A number of omissions are worthy of further consideration.

There does not appear to be any provision in the proposed rules equivalent to Rule 4 of SI 2000/2739, which made provision for a register of proceedings before the Tribunal that was to be accessible to the public. The rules should provide for a register to be maintained.

While proposed Rule 5(3)(m) deals with the *varying* or *cancelling* of directions made under paragraph 9(3) of Schedule 5 or paragraph 8 of Schedule 7 to the Immigration and Asylum Act 1999, it does not deal with the making of such directions. It may have been felt that sufficient provision is made for this within the general case management powers, or that these read with the statutory provisions are sufficient. If one examines rules 10 and 15 of SI 2000/2739, Rule 15 of SI 2000/2739 makes provision for the form that an application made by the Commissioner under paragraph 9(3) of Schedule 5 should take. It provides that the Tribunal should invite representations or hold a hearing before deciding an application under the rule. This is in contrast to the power, rather than an obligation, to invite representations or to hold such a hearing contained in Rule 16 of SI 2000/2739. This is an area where separate rules specific to the Immigration Services Tribunal are required and, to make the rules clear and accessible to those subject to them, the question of the making of directions under the relevant paragraphs should be dealt with on the face of the rules and the express procedural protections be preserved on the face of the rules.

Proposed Rule 10(5)(b) makes provision for the Tribunal to consider a person's financial means when imposing costs 'if the paying person is an individual'. ILPA suggests that it would be appropriate to have regard to the financial situation of a company, and in particular questions of cash-flow and the option of paying by instalments. A precedent would be the way that civil penalties for breaches of the laws on employing persons without permission to work in the UK are dealt with under the *Employment* provisions of the Immigration, Asylum and Nationality Act 2006.

Rule 3 of SI 2000/2739 made provision as to the composition of the Tribunal. The question of composition now appears to be governed by The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 (SI 2008/2835) which indicates that the composition of the Tribunal is to be determined by the Senior President. It would have been helpful had the consultation paper set out what the composition of the Tribunal is intended to be, as it is a little difficult to evaluate the procedure rules without this information.

SI 2000/2739 allows a representative of the Council of Tribunals to be present at the hearing, including any part of the hearing from which the public is excluded (Rule 20(5)). Rule 20(5) was amended in 2002 by The Immigration Services Tribunal (Amendment) Rules 2002 (SI2002/1716) to make it express that the representative of the Council on Tribunals could be present, but could not participate in the Tribunal's deliberations. If it is intended that members of the Administrative Justice and Tribunals Council be given the same access then ILPA can envisage that the lack of any express provision may cause practical difficulties in the future and suggests that this be examined.

Rule 22(3) of SI 2000/2739 makes express provision for the burden and standard of proof where it was alleged that any person has been guilty of criminal or fraudulent conduct. This does not appear to have been repeated in the new rules; ILPA considers that it should be. This point may be of relevance more broadly than just to the Immigration Services Tribunal.

Question 2: Are there any rules, which as drafted, will not work in the jurisdiction(s) you are concerned with? If so, please explain why?

Please see the comments above, in particular those relating to paragraph 9(3) of Schedule 5 and paragraph 8 of Schedule 7 to the Immigration and Asylum Act 1999.

Question 3:

(a) Should National Security cases, and matters falling within s.2A(4)(b) and Schedule 1D to the Charities Act 2003, always be dealt with by the Upper Tribunal?

(b) Are there other categories of case that would be suitable for the Upper Tribunal in all instances?

(c) Should parties be able to apply for directions under Rule 21(1) for a case to be transferred to Upper Tribunal?

(d) Should the consent of all parties always be required before a case is transferred?

ILPA directs its comments at question 3(b). The consultation paper states:

'8.1 Rule 21: The Transforming Tribunals Consultation paper explained that in limited circumstances the Upper Tribunal would deal with first instance appeals. The intention is that it will do this where it is considered that: the appeal raises complex or unusual issues and the importance of the case would merit it being dealt with in the higher Tribunal. The consultation

paper set out tribunal jurisdictions where the Government considered it may be appropriate for first instance appeals to be dealt with by the Upper Tribunal, and explained that this may be provided for either by way of amendments to primary legislation, or by Procedure Rules or Practice Directions issued by specified persons.

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10.3 Respondents are also asked to note that as outlined in “Transforming Tribunals: Implementing Part 1 of the Tribunals Courts and Enforcement Act 2007” there will not be an appeal right from decisions of Immigration Services Tribunal, and such decisions may only be challenged by way of Judicial Review to the High Court.’

The *Transforming Tribunals* consultation makes clear an intention not to give an appeal right from decisions of the Immigration Services Tribunal, so that judicial review would be the only recourse but ILPA does not agree with this decision. Judicial review is a costly remedy and will not be accessible to all those who have grounds for challenging a decision. The reasons given in the *Transforming Tribunals* consultation are laconic and fail to convince:

‘202 The government favour continued exclusion of an appeal right because of the need for a rapid resolution of these cases and the risk of tactical appeals.’

It is unclear that the need for speed in cases heard by the Immigration Services Tribunal is any greater than some other cases that might fall to be dealt with by the Regulatory Chamber. Nor is any evidence or reasoning supplied as to why there might be a particular fear of ‘tactical appeals’ in this area. Given the powers to suspend (or not) a person’s practicing while the Tribunal is deliberating, the risk of ‘tactical appeals’ does not appear to ILPA to have been made out.

If it is the case that a right of appeal is to be denied, all the more reason to allow particularly complex cases to be heard in the Upper Tribunal and to make provision for this.

Question 5: Views are sought on the process for applying for permission to appeal to the Upper Tribunal and the powers of the Tribunal in relation to applications made under the provisions of Part 4 of the rules? Are further rules or guidance required in relation to the process?

See comments above.

Please do not hesitate to get in touch with ILPA with any further questions or any matters raised by this response.

Sophie Barrett-Brown
Chair, ILPA
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