Tribunal Procedure Committee

Judicial Review of "Fresh Claim" decisions in immigration and asylum cases. Consultation on possible amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008.

Questionnaire

We would welcome responses to the following questions set out in the consultation paper. Please return the completed form by email to IPTInbox@tribunals.gsi.gov.uk Thank you.

Respondent name	**Immigration Law Practitioners Association**
Organisation	**Immigration Law Practitioners Association**

Q1. Do you have any comment on the definition of FCJRs in rule 1? Note that the proposed definition reflects the language of the BCI Act and that if the direction issued by the Lord Chief Justice of England and Wales does not extend to all cases falling within the BCI Act the proposed definition may need to be revised.

Comments:

ILPA agrees that the proposed definition should mirror the terms of the Borders Citizenship and Immigration Act 2009, section 53, subject to any limitation in the direction issued by the Lord Chief Justice. This will provide the greatest clarity and consistency in the law.

Q2. Do you have any comments on the proposed provision for fees in rules 8 and 28A(1)?

Comments:

ILPA is opposed to the provision for fees for fresh claim judicial reviews in the Upper Tribunal. The majority of applicants are detained and/or destitute and in many cases will be facing imminent removal. Finding the funds to pay court fees or completing complicated applications for remission of the fees is likely to represent a significant additional hurdle to access to justice for such people, which can be quite literally a matter of life or death. ILPA considers that, given that the majority of applicants are likely to be eligible for fee remission, it would be simpler and more cost effective (since it would save time in the administration of applications for fee remission) simply to exclude applicants in fresh claim judicial reviews from having to pay fees. The Ministry of Justice has recently agreed following its consultation on the introduction of fees for immigration appeals that fees should not be charged in Upper Tribunal Immigration and Asylum Chamber; given that fresh claim judicial review will be heard in this chamber rather than in the Administrative Appeals

Chamber, this would promote consistency.

If fees are introduced, ILPA opposes the automatic strike out provision in proposed rule 8(1)(b). Non-payment of fees should not result in automatic strike out of fresh claim judicial reviews. ILPA considers that it is wrong for fresh claim judicial reviews to be treated more severely than other judicial review claims in the Upper Tribunal. These claims raise extremely important issues. As noted above, applicants will often be detained or destitute, and applications for remission of fees can be complicated. Rule 8(1)(a) already allows the Upper Tribunal to strike out a claim for failure to comply with an 'unless order'. ILPA believes that this provision is sufficient to deal with cases of failure to pay by those who are in a position to do so and provides an essential procedural safeguard that an applicant will be given a 'final warning' that if he does not comply with a direction to pay the court fee, his claim will be struck out.

Q3(a) Should representation for FCJRs be restricted as it presently is in the Administrative Court?

Comments:

Yes.

ILPA has consistently, for example in its response to the Office of the Immigration Services Commissioner (OISC) consultation on competence in January 2010 (available on www.ilpa.org.uk), made clear its position as regards the need for continued representation of the Secretary of State by Treasury Solicitor and counsel, which in part derives from the particular professional ethical obligations of solicitors and barristers and our experience of the practical importance of these in the conduct of litigation against the Secretary of State before the Administrative Court as contrasted with litigation of appeals in the Immigration and Asylum Chambers of First-tier and Upper Tribunals and their predecessors.

Representation before the Administrative Court is restricted to those who have higher court rights of audience, ordinarily barristers or solicitors with higher court rights. That reflects the fact that judicial review proceedings involve on the one hand specialised law and on the other involve general legal concepts and principles. They therefore require the knowledge and skill of a lawyer. ILPA understands that the intention when transferring fresh claim judicial reviews is in no way to dilute the quality of the proceedings. To permit non-lawyers to provide representation is liable to reduce those standards because non-lawyers have neither the generalised skills in legal proceedings (as opposed to knowledge of a particular specialism) nor the same duty to the Court (and appreciation thereof). That is especially significant in light of the importance of the duty of candour in judicial review. Representatives conducting fresh claim judicial reviews regularly have to make urgent out of hours applications for interim injunctions to prevent removal. It would be absurd to permit representation by persons not in a position to do so. Yet

judges considering such ex parte applications place great reliance on the lawyer's duty to the court.

Given that the law and the application of judicial review principles will remain the same and given that the same life and death issues will arise with the same lack of margin for error, and given that removal may be imminent, ILPA can see no basis to permit non-lawyers to provide representation. If the Lord Chief Justice's direction is not limited to judicial reviews which solely challenge refusals to recognise a fresh claim, then ILPA's concern will increase accordingly.

ILPA's objection is not simply one of principle. It is based on evidence and practical experience. OISC representatives are not required to show any expertise in administrative law. Neither do Home Office Presenting Officers. It is quite wrong that representatives in such important judicial reviews should not have to have appropriate legal qualifications and training.

Further, in ILPA members' experience, fresh claim judicial reviews frequently settle through early and realistic negotiation between the parties, thus saving court time and public funds by avoiding the need for a court hearing. It is generally very difficult to speak to a Presenting Officer prior to an appeal hearing, not least because they are often not allocated cases until the day before the hearing, and they often do not attend the court room until 10.00 on the day of the hearing itself. Moreover, even when it is possible to communicate, very often, whether the problem is their instructions or training, constructive negotiations to dispose of matters do not prove possible.

This concern about the need for the Treasury Solicitor to remain involved in fresh claim judicial reviews was raised by ILPA in its response to the UK Border Agency consultation on Immigration Appeals: Fair Decisions; Faster Justice in October 2008. We said:

42. [...] The interim report shows that the option of statutory appeal to the AIT in fresh claim cases was rejected. Theses cases will therefore involve equally complex legal principles as does judicial review in the Administrative Court.

43. [...] The reality is that the numbers of judicial reviews of fresh claims reflect woeful decision making by the Home Office and the inability or unwillingness to engage in any reasonable communication until a judicial review is lodged and the Treasury Solicitor is instructed. Legal aid cuts in the AIT and, in particular, the severe effects on the fixed fee regime which are now emerging, also increasingly contribute to the failure to present all relevant evidence first time round.

44. Members also repeatedly find that only at the judicial review stage where the Treasury Solicitor is routinely instructed is there a reasonable chance of being able to engage in any form of constructive discussion with the Home Office to resolve issues.

ILPA remains extremely concerned that unless the Treasury Solicitor and counsel continue to be instructed in fresh claim judicial reviews, the opportunities to settle those claims in advance of the hearing will be

significantly reduced, thus increasing costs and placing additional burdens on the Tribunal's time. This is an additional reason why representation before the Tribunal in fresh claim judicial reviews should remain restricted to those who would have rights of audience before the Administrative Court. ILPA's previous consultation responses are available on its website at www.ilpa.org.uk
Q3(b) If so, do the proposed amendments to rule 11 achieve that aim?
Comments: Yes.
Q4(a) In relation to service of the claim form, should the claim form be sent to the Treasury Solicitor by the applicant or by the Tribunal?
Comments: ILPA considers that it is appropriate for the Tribunal to administer service of the claim form. ILPA agrees that if the Tribunal is responsible for service there will be greater confidence that notice has been served. It considers that the benefits of relying on court staff and reduction of error and delay further into the process, would outweigh any increased cost to the Ministry of Justice. Furthermore, given that all claim forms will need to be served on the Treasury Solicitor and the respondent in all cases will be the Secretary of State, the administration involved will be relatively straightforward.
Q4(b) If by the applicant, is that aim achieved by the amendments to rules 28 and 29 and the addition of rule 28A(2)?
Comments: Yes.
Q5(a) Should the current time given for oral renewal of a refused FCJR in the Administrative Court (7 days plus 2 days for postal service of the refusal of permission) be replicated for FCJRs in the UT, or should the current UT Rules provision of 14 days be retained?

Comments:

ILPA considers that the current Upper Tribunal Rules provision of 14 days should be retained. As stated above, ILPA considers that as a matter of principle fresh claim judicial reviews should not be treated more severely in the Upper Tribunal than other types of judicial review claim which can be heard in the Upper Tribunal. The same time limit applies to fresh claim judicial reviews as applies to other judicial reviews in the Administrative Court and no basis is offered for singling them out for a different time limit in the Upper Tribunal.

The additional time (as compared to the Civil Procedure Rules) would allow more time for applicants to seek and obtain advice on the merits of renewing their application for permission to an oral hearing, and to apply for public funding. Given the current lack of any formal provision for applicants to respond to the Secretary of State's acknowledgement of service which, in ILPA's experience, frequently contains new or additional reasons (and often is accompanied by a new decision letter) in fresh claim judicial reviews, and the fact the decisions on permission on the papers may be made very quickly after the acknowledgement of service is filed, this is likely to be an applicant's first opportunity to fully review the merits of their claim in the light of the respondent's defence to the claim. In many cases, the initial claim will have been lodged on an urgent basis to prevent removal with little time for preparation of the claim. If the applicant is detained, a longer period would make it easier for instructions to be given to legal representatives.

While it could be argued that a shorter period should be allowed where the applicant is detained, since it is the applicant who is detained and s/he who needs to make the application for renewal, s/he may do so in less than the 14 day time period if appropriate.

Q5(b) Should the current time given for lodging an acknowledgement of service (21 days plus 2 days for postal service of the application) be replicated for FCJRs in the UT, should the current UT Rules provision of 21 days be retained, or should some shorter period be prescribed?

Comments:

ILPA considers that the current time given in the administrative court, (21 days plus two days for postal service) should be retained. However, ILPA believes that where the applicant is detained, time for lodging of the acknowledgment of service should be abridged. Detention is normally on the basis that the UK Border Agency considers that removal is imminent. The UK Border Agency has the power to release the applicant from detention but if it chooses to maintain detention while an application for judicial review is considered, it should be required to serve its acknowledgement of service promptly, no more than 14 days.

Q6. Do you have any comments on the interrelationship with other proposed changes to the UT rules?

Comments:

ILPA intends to respond separately to the consultation on proposed changes to part 4 of the Upper Tribunal Rules and will address any specific issues arising in relation to fresh claim judicial reviews in its response. As stated above, ILPA is opposed as a matter of principle to fresh claim judicial reviews being subject to more severe provisions than other judicial review claims in the Upper Tribunal and so does consider believe that any amendments should be different for fresh claim judicial reviews.

The question of how likely it is that amendments to a judicial review will require it to be transferred (back) to the Administrative Court in fresh claim judicial reviews will depend on the terms of the Lord Chief Justice's direction and whether this limits the kinds of fresh claim judicial review which may be transferred to/heard in the Upper Tribunal.

As set out below, ILPA believes that the UT Rules should be amended to allow for replies to be filed by applicants/amendment of grounds after the filing of the Acknowledgement of Service in all judicial review claims.

Q7. Are there any other changes which should be made to the UT Rules in the light of the commencement of section 53 of the BCI Act? Please be specific about what addition is required and why it is needed.

Comments:

ILPA considers that the Rules should make provision for an applicant to file a reply to the respondent's acknowledgement of service or amend his/her grounds, as appropriate, before the question of permission is considered, at least where a new decision is made. Fresh claim judicial reviews are very often brought by applicants facing imminent removal. The cases can develop very quickly and very often the Acknowledgement of Service is accompanied by further or new reasons for refusing to treat the claim as an asylum claim and often by a new decision letter. This will often lead to permission being refused because the grounds for the original claim have fallen away as a result of the new decision. It would be fairer and more efficient to allow the applicant an opportunity to raise any new grounds or matters in light of the respondent's summary grounds before permission is considered on the papers, rather than leaving these matters to be raised on a renewed application for permission. While this is a particular problem in fresh claim judicial reviews, due to the Secretary of State for the Home Department's more common practice of issuing a new decision with the acknowledgement of service, ILPA considers that a general provision in all judicial reviews would be appropriate.

Q8 Do you have any comments on the draft Practice Directions?

Comments:

These comments are made by reference to the paragraphs of the draft Practice Directions:

1.1: The definition of 'the Tribunal' should be the "Immigration and Asylum Chamber of the Upper Tribunal', not the First-tier Tribunal. The First-tier tribunal does not have jurisdiction to consider fresh claim judicial reviews.

2.2 ILPA welcomes the placing of the definition of cases to which Part 4 applies at the start of the Practice Directions as this draws attention at an early point to the special procedure in part 4. However, ILPA considers it would be helpful for this definition, or a summary of it, to be replicated at the start of part 4.

3.1: ILPA notes that the recent absorption of the Upper Tribunal Immigration and Asylum Chamber website into the unified courts and tribunals service has caused considerable confusion and has made locating key documents harder. It is imperative that any mandatory form is easily accessible not only to representatives but also to litigants in person.

ILPA would welcome the opportunity to be consulted on the design of the form and considers that the transfer of fresh claim judicial reviews into the Upper Tribunal offers an ideal opportunity to design a form which is more user-friendly, accessible, and specific to the issues raised in such claims than the general judicial review claim form (N461). This is likely to be particularly important for litigants in person. For example, the question of whether Part 4 of the proposed practice direction applies could be raised on the first page of the form for ease of reference, and the question could be phrased in simple language by reference to the definition of claims to which Part 4 applies. The form could include a specific box for indicating that the applicant is detained and where, without the need to put the full address of the detention centre. The identity of the Secretary of State as respondent could be pre-completed and there could be no requirement to include her solicitor's contact details as these will always be the Treasury Solicitor.

4.1: ILPA considers that 4.1 is an unnecessary and onerous addition to Rule 28 (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008. In particular, ILPA questions whether it is necessary for applicants to include copies of relevant statutory material with their claims. This will act as a barrier to litigants in person, particularly those who are detained and may not have access to the relevant statutory material, and given that all such judicial reviews will be fresh claim cases, in the vast majority of such cases the only statutory material relied on will be paragraph 353 of the Immigration Rules.

6.1: It is assumed that the reference in this paragraph to rule 33 is intended to be a reference to rule 32. The practice direction in its terms makes no provision for exceptions to this direction, which requires seven working days notice of any application to amend the grounds of claim: there ought to be

some provision for (a) urgent cases where there are less than seven days notice of the hearing; (b) exceptional cases where there is a need to apply to amend the grounds on less than seven days notice such as, for example, the not uncommon occurrence that the Secretary of State for the Home Department issues a new decision letter giving new reasons for not treating the representations as a fresh claim, in the days immediately preceding the hearing. Please see also our proposal set out above for express provision to be made in the Upper Tribunal Rules for a reply to be filed or grounds amended after the respondent has filed its acknowledgement of service where a new decision has been made.

11.3 Practice Direction 54 Part 18 currently requires the judicial review claim form in removal cases to be immediately sent to the UK Border Agency office whose contact details are given on the Immigration Factual Summary. This makes sense because it is the office of the UK Border Agency which is actually dealing with the applicant's case. The Immigration Factual Summary also gives contact details for the Command and Control Unit who deal with all cases out of normal office hours and specifies that that is where the claim should be sent in those purposes. Without explanation, the new Practice Direction requires the claim form instead to be sent to the Treasury Solicitor's office. ILPA is concerned that this proposed change may give rise to additional delay in communicating the fact that a claim has been issued to the UK Border Agency case owner, thus increasing the risk of an applicant being removed from the jurisdiction despite having issued a claim for judicial review, contrary to UK Border Agency's normal policy. It is also likely to create confusion for litigants in person if the claim form is not required to be served on the office dealing with his case whose contact details are provided in the Immigration Factual Summary which is served with removal directions.

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Chair
ILPA
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