Home Office
UK Border Agency

CONSULTATION: IMMIGRATION APPEALS

FAIR DECISIONS; FASTER JUSTICE

21 August 2008

Contents

FOREWORD

i. The biggest shake-up to our border protection and immigration system for over 45 years is well underway. We have published a draft Immigration and Citizenship Bill which fundamentally overhauls the law. The Bill is central to delivering on our objective to make the legal framework clearer, more streamlined and easier for the public and migrants to understand. The new law will say what it means and means what it says, and will be easier for UKBA to enforce.

ii. This reform will help drive the UK Border Agency to implement fast and fair decisions that are right first time. Sometimes these are difficult decisions with serious consequences for those concerned. In these cases it is right that there should be the opportunity to test decisions through an appeal. Of course, if certainty is to be achieved quickly, in addition to the decision, the appeal must also be dealt with speedily.

iii. A swift appeals system helps wherever the work of the UK Border Agency touches people's lives:

- Earlier confirmation of asylum decisions resulting in swifter integration of refugees and faster removal of unsuccessful claimants allowing them to better plan their future;
- People who wish to visit or settle with family members in the United Kingdom will have their applications concluded faster;
- Students will be able to plan the continuation of their studies with more certainty;
- Businesses will know if they can keep their foreign employees;
- Those who harm our society will be removed more quickly.

iv. The draft Bill we have published will be added to before the full Bill is introduced in the next Parliamentary session. The draft Bill already makes it clear when someone has a right of appeal but it does not yet fit the immigration appeal system within the wider court and tribunal structure. We believe this needs further and careful thought. In our Green Paper, "The Path to Citizenship", we stated that the current appeals system did not require a radical overhaul. However, we said that we were concerned about the heavy burden being placed upon the higher courts by the immigration system. Having now examined the system in some detail we have established what we believe is the best way forward to address this problem.

v. The proposals detailed in this paper stem from the recommendations of a small working group. The group was jointly chaired by Lord Justice Richards, a Court of Appeal judge, and Lin Homer, Chief Executive of the UK Border Agency. The Government welcomes the working group's recommendations and believes that these proposals will deliver:

- An appeals system which is **faster** – bringing appeals to a conclusion sooner;
- An appeals system which is **final** – where good decisions are made which are not litigated over in the higher courts;
- An appeals system which is **respected** – a Tribunal structure that is recognised as fair, expert and efficient.

vi. These proposals are the result of recognition that further reform is required to achieve the efficient and effective administration of justice. The Government also believes that the proposals will result in a more efficient immigration system. We now want to inform others more widely and collect together views and suggestions before we proceed with any necessary legislation and implementation. We will continue to work with all our partners and stakeholders including the judiciary to ensure that we do the right thing and make change stick.

Liam Byrne MP

Minister of State for Borders and Immigration

PAST REFORMS

1. There have of course been previous reforms to speed up the immigration appeals process and to limit the burden on the higher courts. In April 2000 Sir Jeffery Bowman's review of the Crown Office List identified immigration cases as the single greatest source of applications for judicial review. In addition to procedural changes in the Civil Procedure Rules in England and Wales, the Nationality, Immigration and Asylum Act 2002 limited the scope to judicially review decisions of the Immigration Appeal Tribunal. Instead of judicial review, the Administrative Court, or its equivalent in Scotland or Northern Ireland, would consider statutory review applications on the papers.

2. The most radical recent change was in April 2005 with the creation of the Asylum and Immigration Tribunal with the aim of speeding up appeals and tackling asylum applicants who lodge groundless appeals to frustrate the process and delay removal. The new Tribunal has been a success. In 2004 the Immigration Appellate Authority was not hearing asylum appeals until seven weeks after they received the appeal notice, which itself was two to four weeks after the appellant submitted the appeal notice to the Home Office. From lodging an appeal notice to promulgation of the determination typically took twelve weeks. Today the Asylum and Immigration Tribunal decides approximately 60% of asylum cases within six weeks of submission of the appeal notice. A further six weeks later and the proportion of decided cases rise to approximately 90%.

3. The success of the new Tribunal does not end there. The old Immigration Appeal Tribunal used to take up to a year to hear appeals and consequently developed a considerable backlog. That backlog has been cleared. In addition the Asylum and Immigration Tribunal decides whether to grant applications for reconsideration in just two weeks.

4. We want to build on these successes and now need to focus on the tail end of the appeal process, which despite past efforts remains slow. Once any appeal to the Asylum and Immigration Tribunal has been decided, an application can be made first to the Asylum and Immigration Tribunal and then to a higher court asking for an order requiring the Tribunal to reconsider their decision. An application to the Tribunal typically takes two weeks to decide, but any subsequent application to the higher court typically takes eight weeks. We need to find a way of eliminating delay at this stage in the appeals process, while striking the right balance between speed and anxious scrutiny.

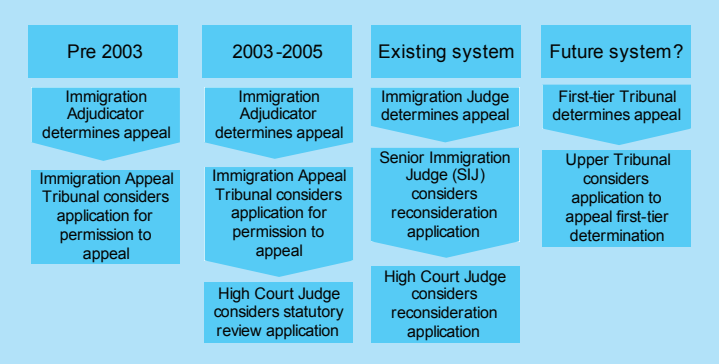

figure 1: History of past reform to immigration appeals system

5. We do not undertake further reform lightly and we are determined to get it right. That is why we have supported the appeals working group chaired by Lord Justice Richards and Lin Homer which included senior judiciary with considerable experience of immigration matters before the higher courts and the administrative justice system. We value this contribution because we recognise success can only be achieved by a mutual understanding of our priorities: firm and fair immigration control and effective administrative justice.

THE BURDEN ON THE HIGHER COURTS

6. Immigration work comprises a significant proportion of the workload of the higher courts. This is partly because of the volume of immigration decisions made each year by the UK Border Agency. In 2006 we removed 16,330 failed asylum seekers, excluding dependants. Last year we deported over 4,000 foreign national prisoners. These are record numbers and we intend to remove even more this year. The inevitable consequence of this activity is that more people will try and resist removal through the courts.

7. The higher courts obviously have a much wider jurisdiction than just immigration. The difficulties posed by the volume of the immigration workload have a consequential effect for a much wider group. Relieving the burden on the courts is not just something we must worry about in the context of effective immigration control. It is in the interests of the justice system, government and society as a whole.

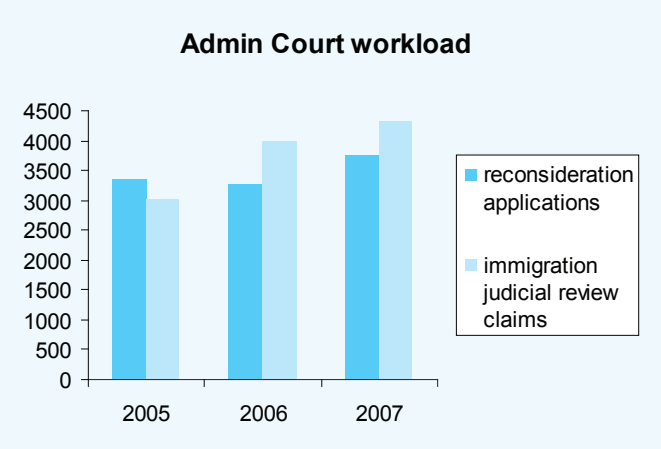

figure 2: Immigration cases in the Administrative Court of England and Wales

8. The volume of immigration cases is a reflection of the fact that people do not accept the decision of the Asylum and Immigration Tribunal as the final resolution of their case. Consequently, they seek to prolong their appeal by applying for reconsideration in a number of cases where there is no arguable error of law and may later seek to judicially review a decision relating to their removal, often raising issues which have already been dealt with on appeal. The limited resources of the higher courts are stretched and we believe that much of the work of the higher courts could be done more effectively by a tribunal. This would aid the proper administration of justice by freeing up higher court time for more complex cases and allowing a quicker conclusion of unmeritorious cases.

9. Under the current immigration appeals system, once the Asylum and Immigration Tribunal has determined an appeal it is possible to make two applications to have that decision reconsidered. These are:

   a. An application to the Tribunal seeking reconsideration, and if that is refused

   b. An application to the appropriate higher court seeking an order for reconsideration.

10. The first of these two routes was intended as a transitional measure to limit the burden on higher courts during the introduction of the new Asylum and Immigration Tribunal in 2005. Not only has it been necessary to maintain this measure but even with this procedure the reconsideration work for the higher courts has not diminished.

11. Even so, of all asylum applicants less than 2% will benefit by being granted a reconsideration order by a higher court – and of those only a fraction will go on to have their appeal allowed.

THE CHALLENGE FOR THE UK BORDER AGENCY

12. The Government has set targets to ensure that we remain focussed on delivering controlled, fair migration that protects the public and contributes economic growth. Our performance will be measured externally through a Public Service Agreement (PSA3 – October 2007). The agreement sets out a number of performance indicators including:

    i. Reducing the time to conclusion of asylum applications, and

    ii. (Increasing the number of removals year on year.

13. An effective asylum system must deliver fast case conclusion, swiftly removing those with no right to be in the UK and integrating those who need protection. Within 6 months of an asylum application we aim either to return the applicant to their country of origin or to grant them protection in the UK. To achieve this, all parts of the asylum process must be dealt with swiftly including any appeal.

14. Enforcement of our immigration laws is essential to reduce illegal immigration and illegal working in the UK. Firm and fair enforcement of the law requires us to remove those with no legal basis to be in the country. If appeals and legal challenges are not concluded in a reasonable time we cannot achieve the required volume of removals.

15. At present, if an asylum appellant has their appeal dismissed and they choose to fully exercise their appeal rights, the appeal cannot be concluded in less than 140 days – about four and a half months. Less than half of that time is actually spent determining the appeal while the rest of the time is spent considering whether or not the appeal should be reconsidered. While we recognise that a fair and just system must not be compromised for speed, this imbalance must be addressed.

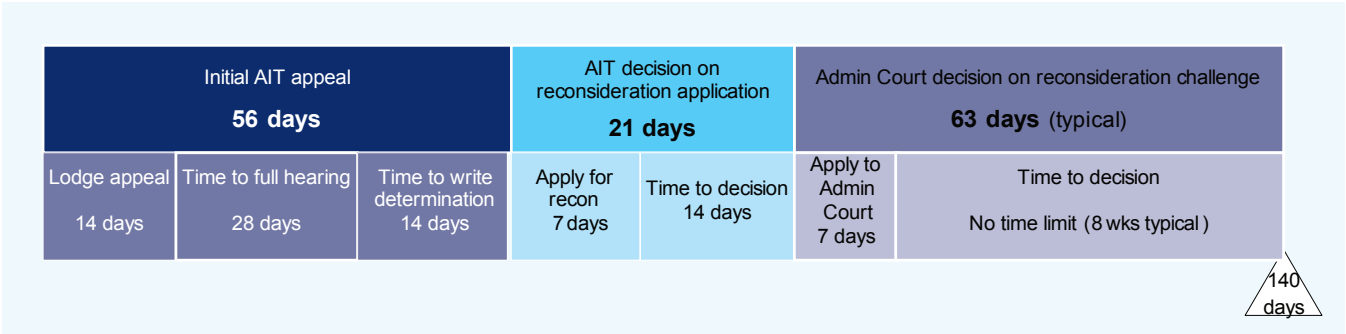

figure 3: Fastest possible timeline to exhaust appeal rights assuming (i) applications to challenge initial appeal decision are refused, (ii) no adjournments, and (iii) excluding time to serve determinations

A NEW TRIBUNAL

16. The limited resources of the higher courts are stretched, impacting on our ability to enforce our immigration laws. We believe that much of the immigration work of the higher courts could be done more effectively by a specialist tribunal. This would aid the proper administration of justice by freeing up higher court time for more complex cases and bringing unmeritorious cases to a speedier conclusion.

17. The Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") creates a new common framework for tribunals in England and Wales and tribunals with cross-UK jurisdiction. The immigration appeal system could fit within this new tribunal structure. This new structure presents an opportunity for ensuring that immigration litigation is dealt with at an appropriate judicial level, by a body with the necessary level of expertise and within a system with resources capable of delivering quicker decisions while maintaining a fair and efficient procedure.

18. The 2007 Act creates two new Tribunals: the First-tier Tribunal and the Upper Tribunal. The Upper Tribunal will be a strong and dedicated appellate body at the head of the new system. Its authority will derive from its status as a superior court of record, presided over by a Senior President (Lord Justice Carnwath). The Upper Tribunal will enjoy a high-ranking position in the judicial hierarchy. It will benefit from the participation of High Court judges, senior immigration judges and other senior judges from the courts and tribunals in all parts of the United Kingdom. The Senior President of Tribunals has seen these proposals, and supports them in principle, subject to consultation.

19. The two new Tribunals have been carefully designed and extensive consideration has been given to ensure that their form and structure are right. The need to reform the Tribunals system was first set out in Sir Andrew Leggatt's review Tribunals for Users – One System, One Service. The Government's subsequent White Paper Transforming Public Services: Complaints, Redress and Tribunals made clear the government's commitment to transforming tribunals – the most radical change to this part of the justice system for 50 years. The establishment of the Tribunals Service in 2006, the 2007 Act and the ongoing implementation work complete the picture. A picture shaped by extensive consultation, thought and commitment from Government, Judiciary and practitioners.

20. Work on creating these two new Tribunals is at an advanced stage. The new Tribunals will come into being later this year with the first wave of transfers into the new structure. It would be consistent with the wider implementation of the 2007 Act for an asylum and immigration First-tier chamber to be constituted under section 7 of the Act. The specialist nature of these appeals and the special procedure rules they have makes it desirable that these appeals are processed at this level within their own chamber, rather than as part of another first-tier chamber.

21. The Upper Tribunal would potentially have to deal with a similar volume of appeals to the present number of reconsiderations heard by the Asylum and Immigration Tribunal. It would be important to ensure that this volume of cases did not present an unmanageable burden. A broad pool of judiciary would be able to sit in the Upper Tribunal to hear the appeals including High Court Judges, Senior Immigration Judges, and their equivalents in Scotland and Northern Ireland. An appeal could be heard by the appropriate judge or combination of judges.

22. Immigration appeals could be dealt with in the Upper Tribunal either by a separately constituted asylum and immigration appeals chamber or within the proposed administrative appeals chamber. We think there is a case for a specialist chamber of the Upper Tribunal, which would be able to develop a high level of expertise in dealing with immigration cases.

A NEW TRIBUNAL (continued)

23. The new tribunal system should provide an immigration appeals system which delivers significant improvements in both terms of speed and finality. In relation to speed, the elimination of delays in the higher courts and the high quality decisions we expect, will help us to deliver more effective immigration control and administrative justice. In relation to finality, because the Upper Tribunal will be a superior court of record and its judges will include High Court judges, the Government has been advised that except in the most exceptional circumstances, decisions of the Upper Tribunal will not be subject to judicial review.

24. The Senior President of Tribunals has indicated that he would, in principle, support the bringing forward of legislation to confirm that decisions of the Upper Tribunal should have equivalent status to those of the High Court. The Government is considering this proposal and may bring forward legislation in consultation with the devolved authorities where appropriate, to make the status of the Upper Tribunal absolutely clear and seek to ensure that decisions of the Upper Tribunal are not routinely challenged by judicial review.

STATUTORY APPEALS

25. Under our proposals, The Asylum and Immigration Tribunal would transfer into the new framework provided by the 2007 Act. Appeals would proceed through the new system as shown in figure 3 below:

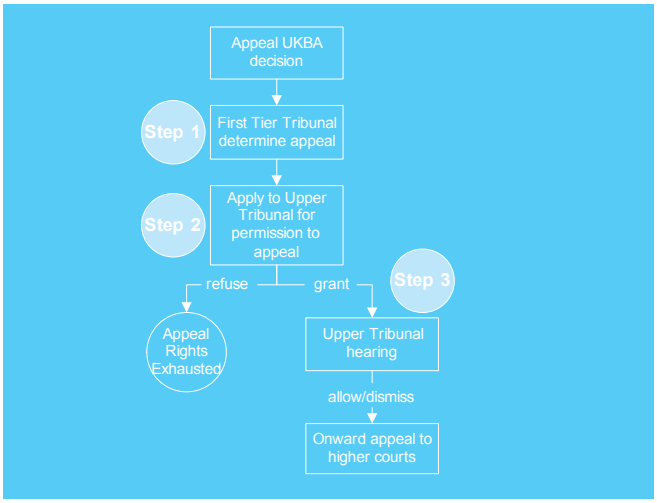

figure 4: The immigration route through the new tribunal structure

26. As the new system comes into operation, it will be extremely important especially during the transitional phase to ensure it comes into operation smoothly without creating new backlogs or delays. The judiciary and the UK Border Agency will continue to work closely together to ensure that this is the case.

Step 1

27. The structure of any appeals system must be robust to prevent unmeritorious applications. Once the First-Tier have made their decision, the only route to challenge this decision must be by an appeal to the Upper Tribunal. The First-tier Tribunal would not be able to review its decision once the decision had been made. The power of the First-tier Tribunal to review its decisions, as provided in section 9 of the 2007 Act, would be excluded in respect of immigration cases by procedure rules. However, the First-tier would continue to be able amend its decisions to correct a clerical error or other accidental slip or omission.

Step 2

28. An appeal to the Upper Tribunal will be the only way to challenge a First-tier Tribunal decision. Section 11 of the 2007 Act allows an appeal to be taken to the Upper Tribunal in two ways:

    i. By making an application for permission from the First-tier; if refused

    ii. By making an application for permission from the Upper Tribunal.

29. Applicants who are seeking to delay their removal from the United Kingdom will inevitably take advantage of this procedure by applying for permission wherever possible. We believe there should only be one route to apply for permission to the Upper Tribunal. However, to exclude the possibility of seeking permission from the First-tier will require primary legislation. To avoid delaying implementation of these appeal reforms we may, as an interim measure, allow appellants to apply first to the First tier and then to the Upper Tribunal for permission to appeal to the Upper Tier.

30. Permission will only be granted where the Upper Tribunal believe that the First-tier Tribunal has made an error of law and there is a real possibility that the Upper Tribunal would decide the appeal differently. It is for consideration whether permission applications should always be dealt with on paper, whether there should be a right to a permission hearing, or whether an intermediate position should be adopted whereby a hearing may take place if directed by a judge (but not at the request of either of the parties). If the Upper Tribunal find no merit in a permission application, that will bring the statutory appeals process to a close.

STATUTORY APPEALS (continued)

31. An appeal to the Upper Tribunal would be a significant departure from the current model. Currently, once an appeal has been determined by the Asylum and Immigration Tribunal, the mechanism to challenge that determination is by seeking reconsideration rather than appealing. As with reconsideration, an appeal would only be available where there was an error of law in the original determination. It is thought that, whereas reconsideration is appropriate to the existing one-tier Asylum and Immigration Tribunal, an appeal would fit better within the proposed two-tier structure. It is intended that the outcome of most appeals would be a substantive decision by the Upper Tribunal, without remittal to the First-tier. This should lead to a reduction in the workload of the Court of Appeal and Court of Session (to which an appeal on a point of law would lie, with permission, from the Upper Tribunal).

32. There is a concern that if the Upper Tribunal re-heard every appeal in full where permission to appeal was granted, it could have an excessive workload. It might be helpful to identify categories of appeals which were suitable to remit back to the First-tier Tribunal without substantive consideration by the Upper Tribunal. This possible hybrid between the appeal and reconsideration model might require primary legislation.

Step 3

33. Once the Upper Tribunal had granted permission to appeal, it would usually go on to determine the appeal, as explained above. Where appropriate, there would be the opportunity for the appeal to be dealt with on the papers, or possibly remitted back to the First Tier for a rehearing.

PROCEDURE RULES

34. The Asylum and Immigration Tribunal Procedure Rules are currently made by the Lord Chancellor. Their objective is to ensure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible. The Procedure Rules reflect the Government objectives to conclude asylum claims quickly and fairly and are regularly amended to ensure that those objectives are pursued. The Government believes this model works.

35. The 2007 Act provides a different model whereby procedure rules will be made and amended by the Tribunal Procedure Rules Committee. While this model is appropriate for most administrative jurisdictions, the Government remains to be convinced that the Committee is the appropriate body to set procedure rules for immigration matters.

36. If the current system for making procedure rules were to be maintained, primary legislation would be required.

JUDICIAL REVIEW

37. The 2007 Act also gives the Upper Tribunal the power to exercise a judicial review jurisdiction if certain conditions are met. One of those conditions is that the application falls within a class specified in a direction given, in the case of England and Wales, by the Lord Chief Justice with the agreement of the Lord Chancellor ("class transfer"). There is also a power in the High Court to transfer individual judicial review cases to the Upper Tribunal if certain conditions are met ("individual transfer"). There is currently a statutory bar, in section 19 of the 2007 Act, on the transfer of immigration cases to the Upper Tribunal.

38. It is proposed that section 19 be amended so as to remove the existing bar to transfers. This would leave it open to the judiciary to decide what types of immigration judicial review case should be transferred to the Upper Tribunal, whether as a class or on an individual basis. It is thought that some, but not all, immigration judicial review cases would be suitable for transfer. A transferred case could still be heard, if appropriate, by a High Court Judge, either sitting alone or with a specialist immigration judge.

39. Section 20 of the 2007 Act concerns the transfer of judicial review applications from the Court of Session. It is proposed that section 20 is also amended so as to remove the similar statutory bar on the transfer of immigration cases to the Upper Tribunal. Although we propose to amend section 20, we remain open minded as to exactly how immigration judicial reviews will be handled in Scotland. The process for judicial review in Scotland is currently subject to any changes that may or may not be introduced following the review of the civil courts in Scotland currently being undertaken under the chairmanship of Lord Gill, the Lord Justice Clerk. Immigration is not a devolved matter but we will of course consult with the devolved authority in Scotland on any measure which impacts on Scottish courts.

40. The Upper Tribunal would need to be well-established before any such a provision on transferring judicial review applications would be commenced and any transfers could be made. First it would be important to ensure the Upper Tier had the capacity to deal with the additional workload quickly and efficiently. It would also be necessary to consider the best use of judicial time, the desirability of allocating cases to the appropriate level of judiciary, and the impact on judicial resources within the higher courts and the Upper Tribunal.

IMPLEMENTATION TIMESCALES

41. It is in the interests of everyone involved in the administrative justice system that measures to relieve the burden on the higher courts are implemented as soon as possible. In the above proposals we have identified the possible need for primary legislation in the following areas:

    i. Streamlining the route for appealing to the Upper Tribunal from the First-tier Tribunal (paragraph 29);

    ii. (A mechanism for the Upper Tribunal to remit appeals to the First-tier Tribunal without substantive consideration by the Upper Tribunal (paragraph 32);

    iii. Maintaining the system of procedure rules made by the Lord Chancellor (paragraph 36);

    iv. Removing the statutory bar to transferring immigration judicial review cases from the Administrative Court, the High Court of Northern Ireland and the Court of Session in Scotland, to the Upper Tribunal (paragraph 38).

42. It would be possible to transfer the Asylum and Immigration Tribunal into the new tribunal structure and to implement the bulk of our proposals without primary legislation. This could be done as early as June 2009. The changes to primary legislation would be brought forward in the 2008-09 Parliamentary session with the final proposals being implemented soon after such legislation receives royal assent.

RESPONDING TO THE CONSULTATION

43. The Government welcomes comments on the proposals in this paper. Responses should be sent no later than 16 October 2008 to the following address:

    Andrew Elliot
    Immigration appeals consultation
    UK Border Agency
    1st Floor Seacole
    2 Marsham Street
    London SW1P 4DF

    Please ensure that your response is marked clearly if you wish your name to be kept confidential.

    Comments may also be sent by e-mail to: appeals@homeoffice.gsi.gov.uk. If commenting by e-mail please include the words "consultation response" in the subject title.

ISBN: 978-1-84726-702-3

HO_01145_UKBA