Tribunal Procedure Committee

Consultation on amendments to Tribunal Procedure (Upper Tribunal) Rules 2008 arising from statutory changes to judicial review

Questionnaire

We would welcome responses to the following questions set out in the consultation paper. Please return the completed questionnaire by **Thursday 20 June 2013** to:

The Secretary, Tribunal Procedure Committee, Post point 4.38, 102 Petty France London SW1H 9AJ

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Respondent name	Immigration Law Practitioners' Association
Organisation	Immigration Law Practitioners' Association

(1) Should the special rules which currently apply to immigration fresh claim judicial review proceedings be applied to all judicial review proceedings in the Immigration and Asylum Chamber of the Upper Tribunal? If not, why not and what provision should the rules make in this regard? Is the new definition of 'immigration judicial review proceedings' appropriate?
Comments: ILPA is conscious that the direction of the Lord Chief Justice as to which cases should be transferred has yet to be made. It is not possible to give a definitive answer to this question until that direction is made as ILPA considers that for the greatest clarity and consistency the rules should mirror as closely as possible section 31A of the Senior Courts Act 1981 as it will be amended by s 22 of the Crime and Courts Act 2013, and the Lord Chief Justice's direction. The consultation paper makes reference to "a wide class" of applications being transferred and the drafting appears based on section 31A(7) of the Senior Courts Act. The transfer of a wide class of applications is something to which ILPA is opposed and we continue to advocate against transfer. It is unclear whether immigration is used as a term of art in paragraph six of the consultation paper or as a

shorthand for immigration and nationality We set out in our briefings to the Crime and Courts Bill our reasons for opposing transfer in general and specific transfers, such as that of decisions made under the British Nationality Act 1981[1]. Those briefings are available at http://www.ilpa.org.uk/pages/briefings-on-the-crime-and-courts-bill-2012.html . There have been only two reported fresh claim judicial review decisions of the Upper Tribunal as of 11 June 2013 and only 14 Age Assessment Judicial Review decisions, the latter being very different from immigration and from nationality judicial reviews. We do not consider that the Upper Tribunal (Immigration and Asylum Chamber) has built up such expertise in this matter as would justify the transfer of a wide class of applications.

As to the reference in draft paragraph (a)(iii) to 'any instrument having effect under an enactment within para. (i) or (ii)', we read that to mean any secondary legislation made under the Immigration Acts or the British Nationality Act 1981, and the immigration rules themselves, which are made under the Immigration Act 1971 section 3(2). If that reading is correct, then we are surprised at, and opposed to, the breath of the provision. Examples of such legislation include:

- The Asylum Support Regulations 2000[2] (made under the Immigration and Asylum Act 1999, sections 94, 95, 97, 114, 166, 167);
- The Immigration (Designation of Travel Bans) Order 2000[3] (made under the Immigration Act 1971, section 8B;
- The Reporting of Suspicious Marriages and Registration of Marriages (Miscellaneous Amendments) Regulations 2000[4] (made under Immigration and Asylum Act 1999 section 24(3) (*inter alia*);
- The Detention Centre Rules 2001[5] (made under various provisions of the Immigration and Asylum Act 1999); and
- The Asylum (Designated States) Order 2003[6] (made under s. 94(5) of the Nationality, Immigration and Asylum Act 2002)

This list includes matters that we should have anticipated remaining in the High Court. The High Court deals with habeas corpus and unlawful detention more broadly. Very many such claims may involve damages etc. and remain in the High Court. The tribunal has experience in matters of bail only and a transfer of cases with no damages element may increase the number of cases in which damages are claimed, in an effort to remain in the High Court.

We consider that it would be anomalous were asylum support claims transferred, given that there is already a dedicated Asylum Support Tribunal in the First-tier, but no equivalent in the Upper Tier. It is far from obvious that the Immigration and Asylum Chamber, as opposed to other chambers of the Upper Tier, would be the right home for such claims.

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[1] Those briefings are available at http://www.ilpa.org.uk/pages/briefings-on-the-crime-and-courts-bill-2012.html.
[2] SI 2000/704, as amended.
[3] SI 2000/2724.
[4] SI 2000/3164.
[5] SI 2001/238.
[6] SI 2003/561.

Similarly with matters such as travel bans or the registration of marriages. These instruments move us far from the Immigration and Asylum Chamber's specialist areas.

All that said, if a "wide class" is transferred, we do object to the proposed definition being of "immigration judicial reviews." We consider that it is necessary first to define immigration judicial reviews and then, separately, to define nationality judicial reviews.

Unlike immigration claims, some nationality law claims may be brought in private law proceedings as well as by public law claims for judicial review. Nationality law claims concerning challenges to the refusal to register or naturalise a person as a British national of a particular description are public law claims brought by a claim for judicial review. But in addition, nationality law claims may be issued for declarations as to whether a person has automatically acquired a form of British nationality, for example at birth. These may be brought in private law claims or as public law claims for judicial review.

Where a person seeks a declaration, s/he is not seeking to challenge a decision of the Secretary of State but rather to obtain recognition from the Court about a status s/he holds by operation of law. Where a person seeks a declaration that she holds a form of British nationality, the view of the Secretary of State is no more than advisory in nature. It is the High Court in a disputed case that decides whether s/he holds British nationality by operation of law. Such applications are usually dealt with by the Chancery Division.

Even if judicial review claims concerning nationality were transferred to the Upper Tribunal, a person would still be able to apply for a declaration in the High Court by way of private law proceedings. Thus some form of nationality law claim could remain in the High Court. In addition, it is not unknown for a person to claim both an automatic right to nationality (by way of a declaration) and then to challenge a further refused application to register or naturalise (by way of judicial review) in the alternative. Special provision may need to be made if the judicial review were be transferred to the Upper Tribunal but parallel proceedings remained in the High Court in respect of a declaration. Without judicial review, the question of automatic acquisition of British nationality has never been within the jurisdiction of the Upper Tribunal. There is only one circumstance in which a statutory right of appeal is provided in relation to a nationality decision. A decision to deprive a person of citizenship may be appealed to the First-tier[7]. There is no statutory right of appeal against any decision to refuse to register, naturalise or recognise a person as a British national (whether as a British citizen, British overseas territories citizen, British Overseas citizen, British National (Overseas), British protected person or a British subject). These decisions can only be challenged by way of judicial review. Nor has there ever been a right of appeal to either Tribunal against the decision to refuse to register or naturalise a person as a citizen.

[7] Section 40(A)(1), British Nationality Act 1981 provides for an appeal to the First-tier Tribunal.

(2) Do you agree with the draft rule 34? Do you have any improvements to suggest?

Comments:

We agree that the Upper Tribunal should be required to hold a hearing before making a decision which disposes of an application (paragraph 34(3)). The right to argue one's case before a judge at an oral hearing is a fundamental principle of our justice system and is an important part of ensuring access to justice.

As to draft rule 34(4)(a), the power to strike out a case pursuant to rule 8(1)(b) or 8(2) without a hearing, ILPA continues to oppose the provision for fees for judicial reviews in the Upper Tribunal. Many 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. The Ministry of Justice agreed following its consultation on the introduction of fees for immigration appeals that fees should not be charged for appeals in Upper Tribunal Immigration and Asylum Chamber. ILPA considers it anomalous that fees are charged for fresh claim judicial reviews in that Chamber. It would be helpful if the Ministry of Justice looked at how many unrepresented appellants have managed to apply for fee remission and, if they have applied, whether they have been successful.

ILPA continues to oppose the automatic strike out provision in rule 8(1)(b) and that non-payment of fees can result in automatic strike out of judicial reviews. ILPA considers that it is wrong for judicial reviews in this chamber to be treated more severely than other judicial review claims in the Upper Tribunal. These claims raise matters of grave importance. As observed above, applicants will often be detained or destitute, and applications for remission of fees can be complicated. The powers of the Upper Tribunal to strike out a claim for failure to comply with an 'unless order' are sufficient to deal with cases of failure to pay by those who are in a position to do so. This approach provides an essential procedural safeguard that an applicant will be given a 'final warning' that if s/he does not comply with a direction to pay the court fee, his/her claim will be struck out.

ILPA objects to draft rule 34(4)(b) allowing the tribunal to consent to withdrawal, pursuant to rule 17, without a hearing. We suggest that the other party should be given the opportunity to make representations and only if the other party does not object, should there be consent to withdrawal without a hearing. The draft Rule already makes provision, at 34(4)(d) for a consent order agreed between the parties to be approved by the Upper Tribunal without a hearing, so draft rule 34(4)(b) would only apply where one party wishes to withdraw its case and the other party opposes that withdrawal. ILPA is concerned that in such circumstances there is a risk of injustice if the Upper Tribunal does not hold a hearing to resolve the dispute between the parties.

Rule 17, on withdrawal, refers to withdrawal of a party's 'case' rather than to an underlying decision. Thus rule 17 does not appear to prevent the Secretary of State from withdrawing a decision made in the exercise of her statutory powers. In the circumstances it would be helpful to have a definition of 'case'. A possible definition

is that by a party's 'case' is meant the legal and factual contentions advanced by that party for the purpose of securing a particular outcome to the proceedings.

ILPA does not object to draft rule 34(4)(c) which would allow the Tribunal to determine an application for permission pursuant to rule 30 without a hearing (i.e. a party could then apply under rule 30(4) for the decision to be reconsidered at a hearing). ILPA agrees with draft rule 34(4)(d) which would allow the Tribunal to make a consent order disposing of proceedings without a hearing.

(3) Do you consider that the Upper Tribunal should be required to determine permission to appeal at an oral hearing in immigration judicial review cases? Do you consider that this should apply to all such cases or only certain kinds of case? Do you agree with the draft rule relating to appeals from the Upper Tribunal (Rules 44)? Do you have any improvements to suggest?

Comments:

The Committee has set out its reasons for proposing this change which are to ensure that the Upper Tribunal is put in a position to grant interim relief. But we do not understand why this should be a reason to deny the claimant the opportunity to apply for permission to appeal in writing for one month following the hearing. Rule 44(4)(a) in its current form is unobjectionable: a party can apply for permission to appeal at a hearing, but if the party is not in a position to formulate their grounds of appeal or wishes to consider their position before deciding whether to apply for permission to appeal, they have the option of making the application in writing. But we are not in favour of the Tribunal's always deciding the question of permission orally at a hearing whether or not the claimant has asked it to do so. Many claimants may be unrepresented and some may be able to marshal the funds to take advice on a further appeal but not to be represented at the hearing. They need the time to seek advice and consider their position and it is no answer to say that they can still make a written application, but to the Court of Appeal, as they could have done that in any event. Allowing the Upper Tribunal to decide the question of permission to appeal orally at a hearing in the absence of an application effectively deprives a party not in a position to make arguments in support of their application for permission to appeal at the hearing of the opportunity of doing so. This has not been justified. If a party needs interim relief, it will be in the interests of that party to make the application for permission to appeal at the hearing so that the question of interim relief can be dealt with at the same time. Allowing (but not requiring) a party to make the application orally at the hearing meets the mischief which the consultation paper says this rule is designed to meet. Rule 44(4B) goes further and with undesirable effects.

(4) Do you have any comment on rules changes arising from the government's consultation on judicial review reform?

Comments:

The position as set out in the Consultation paper is that:

9. Once the position in the Civil Procedure Rules is clear, the TPC will consider whether equivalent rules should be made in the Upper Tribunal in relation to immigration judicial reviews, so that there is no change of approach as a result of the transfer.

10. In making that decision the TPC will consider the responses that have been made as part of the previous consultation. The TPC will not, at this time, consider extending such rules to other judicial review work within the Upper Tribunal, although it may do so in the future.

It is difficult to respond to the consultation on this point without knowing what rule changes the Civil Procedure Rules committee will make to the Civil Procedure Rules in light of the Government's response to the consultation, or what rules the Committee proposes to make in light of those changes. ILPA considers that it is premature to consult on this issue at this stage and would encourage the Committee to consult on draft rules once it is in a position to set out the rules which it proposes.

The Committee states that it expects to consider the responses that have been made as part of the previous consultation. It is unclear whether the Committee will have access to the full responses submitted by all those who responded to the judicial review consultation or only to the Government's summary of those responses. ILPA urges the Committee to consider the full responses. This will be particularly important if there is not to be a separate consultation.

Appended to ILPA's response to the consultation on judicial review[8] at Annex A is a list of case examples where permission was been refused on the papers, including cases where the case was certified as being 'totally without merit', but permission was subsequently granted at an oral hearing and the claim was either conceded by (then) UK Border Agency or allowed by the Court. We commend these examples to the Committee in thinking through any rule changes. We also invite the Committee to consider the two fresh claim judicial reviews so far decided by the Upper Tribunal at a substantive hearing. In, *R (on the application of Mamour) v Secretary of State for the Home Department* (FCJR) [2013] UKUT 00086(IAC), the High Court had certified the claim as totally without merit. Following renewal, the Upper Tribunal had twice refused a stay on removal. The applicant was removed before the oral hearing of his permission application, at which permission was granted, and his claim was ultimately allowed by the Upper Tribunal, the respondent having conceded that her decision had been unlawful.

We highlight the following points made in our submission, which are relevant:

The starting point must be that the right to an oral hearing is a basic principle of the system of justice *MD (Afghanistan) v SSHD* [2012] EWCA Civ 194.

[8] ILPA's response to the consultation on judicial review can be read at http://www.ilpa.org.uk/data/resources/17007/13.01.24-ILPA-response-to-Ministry-of-Justice-consultation-on-Judicial-Review-proposals-for-reform.pdf

Restrictions on the right to an oral hearing are in particular likely to disadvantage litigants in person (the numbers of whom are increasing as a result of the restrictions in the availability of legal aid from April 2013 and may increase still further, see below). Litigants in person may find it particularly difficult to present their arguments cogently on paper. The loss of the opportunity to present their case orally, and for the tribunal judge to seek clarification of points which are unclear from the written argument, risks injustice in some cases and, as in other cases, in an increase in the number of appeals to the Court of Appeal. Consideration needs to be given to rules that would support litigants in person in these circumstances. Extra time may assist those able to use to secure assistance or to do drafting that they could not have done more quickly, but it will not assist every litigant in person.

The Home Office frequently serves fresh decision letters with its Acknowledgement of Service to which the claimant has no meaningful opportunity to respond before permission is determined on the papers. The tribunal judge may refuse permission and certify it as totally without merit in light of the new decision letter (which may have addressed some or all of the original grounds of claim) but the claimant may have good grounds for challenging the further decision letter or further reasons of which the tribunal judge will be unaware. Consideration should be given as to whether rules can help the Upper Tribunal to do justice and to manage time effectively where in such circumstances fresh applications for judicial review of the new decision are made and/or there is an increase in appeals to the Court of Appeal.

Procedural protection is needed as ILPA considers that the concept of 'totally without merit' is insufficiently precise particularly in immigration and asylum cases given the gravity of the matters at stake. 54APD 18.4 empowers a High Court judge to certify an application in immigration as clearly without merit. This does not bar an oral renewal but in such cases it is the Secretary of State's policy not to stay removal. ILPA set out in its response to the consultation that this prioritises administrative convenience over the protection of the law, including for persons who may face torture or death on return and argued that it was not a model to emulate. The Government has decided that it is to be emulated, but consideration must be given to the extent to which procedure rules can provide protection for claimants.

We highlighted in our response to the consultation our concern about cases where an application is dismissed as "totally without merit" but without adequate reasons being given.

We consider that the rules need to make provision for cases where the decision that the claim is totally without merit is clearly erroneous, such as where it has been based on a clear misunderstanding of the facts, or where it has been reached in a procedurally unfair manner such as where the defendant has introduced new matters in the Acknowledgement of Service to which the claimant has had no opportunity to respond.

ILPA expressed concerns in its response to the consultation that the overall effect of the fee changes would be to restrict access to justice. ILPA's concerns have also been detailed in our response to the consultation on "Fees in the High Court and Court of Appeal" of February 2012.

We should also like to highlight the current Ministry of Justice consultation *Transforming Legal Aid.* This proposes to remove eligibility for all legal aid from those who fail a "residence test" and to change the funding arrangements for judicial review so that lawyers will do work on the permission stage will be "at risk." If these proposals are accepted then we anticipate, for the reasons set out in our response to the consultation[9] , that there will be very many more litigants in person at the permission stage. There will also (we trust) be persons who, having obtained permission without representation, then seek representation for the full hearing.

We have set out in our response to the consultation the other ways in which we anticipate that changes to the funding arrangements will influence the behaviour of the parties to a judicial review and other respondents to the consultation have commented in similar vein. This is a further reason why ILPA considers that it is premature for the Committee to be consulting on any changes to be made in light of the consultation on judicial review. The proposed changes to legal aid for judicial review will affect access to justice in judicial review cases. Any changes to the Upper Tribunal Rules as a result of the consultation on judicial review should be informed by the availability of legal aid, particularly pre-permission. The procedure rules must promote accessibility as part of promoting justice in the Tribunals.

(5) Do you have any other comments on the draft rules?

Comments:

We agree with the proposed changes to rules 11(5A) and 11(5B) so that a party may only appoint a representative who is entitled to conduct litigation in the high court for the reasons given in our June 2011 response to the consultation on fresh claim judicial reviews.

ILPA considers that it is appropriate for the Tribunal to administer service of the claim form for the reasons given in our June 2011 response to the consultation on fresh claim judicial reviews. Thus ILPA opposes rules 28(8) and 28A(2)(a) in both their current and their amended form.

In June 2011, ILPA set out that it agreed that if the Tribunal is responsible for service there will be greater confidence that notice has been served and that it considered 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. It pointed out that 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 would be relatively straightforward. This continues to be ILPA's view.

It continues to be ILPA's view that the Upper Tribunal provision of 14 days for oral renewal should apply in all immigration and nationality judicial reviews. The

[9] Available at http://www.ilpa.org.uk/resources.php/18039/transforming-legal-aid-ilpas-response-as-submitted-to-the-ministry-of-justice-on-3-june-2013

additional time (as compared to the Civil Procedure Rules) would allow more time for claimants 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 claimants to respond to the Secretary of State's acknowledgement of service which, in ILPA's experience, frequently contains new or additional reasons, and that decisions on permission on the papers may be made very quickly after the acknowledgement of service is filed, this is likely to be a claimant'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. If the applicant is detained, a longer period would make it easier for instructions to be given to legal representatives. Rule 30(5) should be amended.

It continues to be ILPA's view that where the applicant is detained, time for lodging of the acknowledgment of service should be abridged. If the Secretary of State maintains detention while an application for judicial review is considered, she should be required to serve the acknowledgement of service promptly, in no more than 14 days. Rule 29 should be amended.

It continues to be ILPA's view that the rules should make provision for a claimant 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. 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 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 claimant 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.

When the Upper Tribunal is under an obligation to order transfer to the High Court, ILPA has no objection to a rule to require the parties to state whether they wish the High Court to transfer the application back to the Upper Tribunal, and why, if the Hig Court's discretionary powers under section 31A(3) of the Senior Courts Act 1981 permit it to do so. This continues to appear to us to be an efficient way of dealing wit such issues without the need for separate applications to be made to the Administrati Court.

Where a transfer is a matter of discretion, ILPA considers it appropriate that the Upp Tribunal should have a power to transfer the application to the High Court where the significance of an amendment, or additional ground of challenge, makes it just and convenient that the High Court rather than the Upper Tribunal should deal with the proceedings, as provided for by rule 33A(3)(b). However, ILPA considers that the rule should make provision for the parties to be afforded the opportunity to make

representations as to whether it is just and convenient that the High Court rather than the Upper Tribunal deal with the proceedings.

The consultation paper anticipates that no direction equivalent to the expected direction of the Lord Chief Justice to be made for England and Wales, will be made for Scotland and Northern Ireland. It is thus necessary to consider the situation of persons who move between England and Wales and Scotland or Northern Ireland in the course of proceedings and to make provision for what will happen to their cases. We suggest that any case started in the High Court should remain in the High Court. We do not have a view as whether any case started in the tribunal should be transferred to the Outer Court of Session or the High Court in Northern Ireland or whether instead the claimant should be able to elect for a transfer, but we do think that the option should be there for the claimant.