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

Questionnaire

We would welcome responses to the following questions set out in the consultation paper. Please return the completed questionnaire by **Tuesday 2 July 2013** to:

The Secretary, Tribunal Procedure Committee, Post point 4.38, 102 Petty France
London SW1H 9AJ
Email: tpcsecretariat@justice.gsi.gov.uk
Fax: 020 3334 2233

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

Structure

(1) Do you have any comment on the proposed structure of the Rules?

Comments:

ILPA welcomes the proposal to bring the Immigration and Asylum Chamber Rules into line with the other Chambers of the First-tier Tribunal and considers that the proposed structure of the Rules is accessible and clear.

Time-Limits

(2) Do you consider it appropriate to calculate time-limits on the basis of when documents are sent, rather than received? If not, why not?

(3) Do you consider the current time-limits in Immigration cases (i.e. those set out in the Draft Rules) appropriate? If not, why not? If you would prefer different time-limits what would these be? Why would these be better than the current time-limits?

(4) In relation to appeals where the applicant is outside the UK, should the Home Office have the same time-limit to appeal as the applicant?

Comments:

(2) Calculation of time by reference to date of sending documents

Calculation of time by reference to the date of sending rather than the date of receipt may give rise to confusion and create particular problems for litigants in person, of which there are likely to be many more following the removal of legal aid from most immigration cases from 1 April 2013 and if the Government implements the proposals in the June 2013 Ministry of Justice *Transforming Legal Aid* consultation.

It is easier for an individual to work out how much time they have for lodging an appeal from the date on which they received a decision, rather than working out when that decision was sent to them, particularly when there may be a difference between the date on any covering letter, the date of the actual decision, and the date of posting as indicated by a post mark on the envelope. Litigants in person in particular, as well as those who only obtain legal advice after receiving the decision, are unlikely to realise the importance of keeping envelopes.

The consultation paper refers to documents sent by 'any official body' and not only the Tribunal. ILPA has grave concerns about time being calculated by reference to the date on which the Home Office sent or received documents; this would be particularly important if the proposal to provide for all determinations to be sent to both parties by the Tribunal (i.e. abolition of rule 23 of the Asylum and Immigration Tribunal Rules), which ILPA supports, were not implemented.

Experience shows that the Home Office has in practice been unable to ensure accurate recording of the date of receipt or sending of documents. Its inability to accurately record the date on which determinations are sent to appellants in asylum cases under rule 23 of the Asylum and Immigration Tribunal Rules has caused a great deal of confusion (and litigation), and potential injustice. In *NB and ZD (para. 59 discretion) Guinea* [2010] UKUT 302 (IAC), for example, the Upper Tribunal observed that:

> *"63. It is not disputed that since 2005 the respondent has been unable to provide either a satisfactory explanation or a system which enables her to comply with paragraph 23, which we note was inserted into the Rules at her request, in the teeth of objections from consultees about precisely the type of problems which subsequently occurred. We consider that the repugnance factor of bringing within the paragraph 23(5)(a)(ii) service procedure determinations relating to claimants with no reason to abscond (because their First-tier Tribunal appeal was successful), coupled with the respondent's failure to notify the correct dates or control his internal postal system so as to comply, must be given significant weight.*
>
> *64. We also note that the respondent did not apologise until the hearing of this second reconsideration, three and a half years later, and then by Counsel, and can provide no explanation of the error on in relation to the claimant's appeal. The respondent's non-compliance was systemic and her attempts to deal with it were designed to obfuscate rather than to solve the problem."*

ILPA agrees that the same approach should follow whether the decision in question is sent by the Tribunal or the respondent and given these problems in particular would urge the Committee to re-consider its proposal to calculate time from the date of sending rather than receipt.

Terminology and times used in the draft Rules

A number of the draft Rules calculate time from the date on which a decision is 'provided' to the appellant, the respondent or the Tribunal (rr. 19, 31(3), 32). It is unclear whether 'provided' is intended to have the same meaning as 'sent' or as 'served' i.e. received. Rule 28(5) refers to a document being 'sent or otherwise provided', suggesting that 'provided' has the same meaning as sent. If that is the case then the time limits in the Rules do not meet the Tribunal Procedure Committee's stated intention of not shortening existing time limits. ILPA supports that intention and asks the Committee to look again at whether the draft Rules achieve it.

Rule 19(1)(a) provides for notice of appeal to be lodged within 14 days of the date on which notice of the decision is 'provided' to the appellant if the appellant is in the United Kingdom. Under the current Rules, notice of appeal must be lodged within 10 working days of receiving the notice of decision (rule7(1)(b)), which is deemed received two working days after it is sent if sent by post or DX (post being the most usual method of service of notice of an immigration decision). The new Rule thus shortens the time limit for appealing in two respects:

- In the ordinary course of events, under the old rules, a person would have 16 days to lodge a notice of appeal from the date of sending (two working days for delivery + 10 working days to lodge) – so if 'providing' is the same as 'sending' then this Rule shortens the existing time limit.
- In addition, the use of working days under the Asylum and Immigration Tribunal Rules took account of
  (a) bank holidays and
  (b) the Christmas break.

The effect of requiring the notice of appeal to be served within 14 days of sending is to require, for example, an appellant to whom the Home Office post a notice of decision on 23rd December, to file their appeal by 6th January, that is a maximum of four working days (24th December to 1st January inclusive not being working days under the Rules, and there being a maximum possible four working days between 1st and 6th January) after posting by the Home Office.

Rule 19(1)(b)(ii) requires a notice of appeal in a case in which the appellant is outside the UK to be received by the Tribunal within 28 days of the appellant being 'provided' with the notice of decision. Under the current Rules, notice of appeal must be lodged within 28 days of receipt, and deemed receipt is 28 days after the decision was sent if it is sent by post or DX (r. 7(2)(b) read with rule 55(5)(b) of the Asylum and Immigration Tribunal Rules). If 'provided' has the same meaning as 'sent', appellants who are outside the United Kingdom and to whom notice of decision is sent by post have their time for lodging an appeal halved.

The same issues arise in respect of the equivalent provisions for applications for permission to appeal to the Upper Tribunal under rule 32.

Rule 16 – abandonment

Should the period in rule 16(3) for serving notice of an intention to continue with an appeal on asylum grounds where leave is granted, be 30 days from the date the decision was sent rather than 28 days to be consistent with the Upper Tribunal Rules (17A(3))? If the rule is 28 days from the date the decision is sent, that would represent a shortening from the current time limit of 28 days from receipt, contrary to the stated intention of the Committee not to reduce any time limits. ILPA's concerns about calculating time based on the date a document is sent by the Home Office set out above apply equally to this Rule.

(3) Proposed new time limits

ILPA welcomes the proposal for the same time limit for lodging an appeal whether or not the appellant is in detention. There is no justification for a more stringent time limit where the appellant is in detention. In our experience, this does not serve to shorten the time a person spends in detention.

In our experience, persons are detained for far longer than the time it takes them to lodge an appeal and for that appeal to be heard, and a longer timescale here is unlikely to make a difference to the time a person spends in detention. In any event, if a longer time limit is provided, it is open to an appellant to speed up consideration of their own case and thus shorten the time they may spend in detention by lodging the appeal more quickly.

Appeals to the First-tier Tribunal are always appeals by the person detained, rather than by the Secretary of State. Given the difficulties experienced by a person in detention in accessing legal advice, receiving correspondence and communicating with witnesses and others there is no logical reason for requiring such appeals to be lodged in half the time available to appellants who are not detained. There are particular difficulties for the not insignificant number of immigration detainees who are detained in Prison Service establishments (rather than immigration removal centres)[1], whose access to immigration officers and proficient legal advice may be further curtailed.

See above re the use of the word 'provided' in the draft rule (rule 19(1)(a)) and whether it achieves the desired effect.

The Social Entitlement Chamber Rules which apply to asylum support appeals provide for notice of appeal to be sent "so that it is received ...within 3 days after the date on which the appellant received written notice of the decision being challenged" (rule 22(2)(a)). The use of 'received' seems clearer. This would be consistent with continuing to calculate time from the date of receipt.

ILPA agrees with the proposal to extend the time limit for an application for permission to appeal to the Upper Tribunal to 14 days from the existing five days from receipt. Five working days is extremely tight. It gives very little time for securing funding, consideration of the merits and the taking of instructions as to whether to appeal, particularly where it is necessary to use an interpreter. It gives very little time for proper consideration of the issues raised by the case and for drafting grounds of appeal. The shortest period provided for in any other Chamber of the First-tier Tribunal is 28 days (in the Health, Education and Social Care Chamber and the General Regulatory Chamber). ILPA suggests the same time limit should apply in the Immigration and Asylum Chamber. This would be consistent with the approach of bringing this Chamber's Rules into line with those of other Chambers.

Applications for permission to appeal from the Upper Tribunal in immigration and asylum cases must be lodged within the equivalent of 10 working days of receipt (rule 44(3B) and (3C) of the Upper Tribunal Rules). Under the 2003 Rules (SI 2003/652), the period was 10 working days where the person was not in detention. Amending the time limit to 14 days would align the procedure with that used in the Upper Tribunal and in the Immigration Appeal Tribunal, (N.B. the predecessor to the Upper Tribunal (Immigration and Asylum Chamber), the Asylum and Immigration Tribunal, was a single tier Tribunal).

Rule 21(3)(aa)(i) of the Upper Tribunal Rules should also be amended so as to provide that a

[1] A snapshot prepared for the Home Office National Asylum Stakeholder Forum in May 2013, at which ILPA was represented, showed 830 persons detained in prison service establishments under Immigration Act powers.

renewed application for permission to appeal to the Upper Tribunal must be lodged within 12 working days from the date on which the decision of the First-tier Tribunal refusing permission to appeal is sent to the appellant.

As set out above, we see no justification for shorter timescales for detainees and the Upper Tribunal Rules should also be amended so as to apply the same timescales for those in detention applying for permission to appeal from the Upper Tribunal to the Court of Appeal.

We note the concerns of the Home Office about extending the length of time taken for an appeal to be resolved, thus increasing the costs of detention and of asylum support but consider that any such increase is justified because of the risk of unfairness created by the very short timescales. The timescales remain considerably shorter than in most other Chambers. The following points are relevant:

- The proposed extensions to the time limits are modest: increasing the time for appealing for those in detention by five working days, and for appeal to the Upper Tribunal by five working days;
- Where an appellant is in detention, as indicated above, it is usually in his/her interests to lodge the appeal as quickly as s/he can;
- The potential increase in asylum support and detention costs in relation to the extended time for appealing to the Upper Tribunal would be modest, and is outweighed by the benefits of access to justice of affording appellants a more realistic timescale for appealing. According to figures provided to ILPA's meeting with Her Majesty's Courts and Tribunals Service on 13 January 2013 in connection with the "Fundamental Review" of the First-tier Tribunal, 18,000 of the 108,000 appeals heard each year are asylum appeals. Not all of those people will be in receipt of asylum support, and not all of those who are in receipt of such support will appeal. A significant proportion of asylum appeals are allowed so that any appeal to the Upper Tier Tribunal will be a Home Office appeal; it is within the control of the Home Office how quickly it lodges an appeal.
- This small increase will be mitigated by the reduction in time and costs which will follow from the Tribunal serving all determinations directly on the appellants if that proposal is introduced.
- The Home Office is itself responsible for very significant delays in the consideration of asylum applications: As of February 2013, according to published statistics, 4719 main applicants had been waiting more than six months for a decision on their asylum claim (out of 9739 applications awaiting an initial decision).[2] Very many detained asylum applicants spend weeks, months or even years in detention after their appeal rights are exhausted so a small extension during the appeals stage is unlikely materially to add to the overall time spent in detention.

(4) Time for Home Office lodging appeals out of country

We do not agree that the Home Office should have 28 days to lodge an appeal to the Upper Tribunal where the appellant is outside the UK. The Home Office is always able to be represented in the appeal before the First-tier Tribunal by a UK-based representative (normally a Presenting Officer, but otherwise the Treasury Solicitor). Grounds of appeal are drafted by Senior Presenting Officers based in London. The time limit at issue here is for lodging an appeal on the grounds of error of law: it should be very rare that it will be necessary to obtain any additional documents or evidence from abroad in order to lodge the appeal. Entry Clearance posts are able to communicate electronically with the Presenting Officers Units, which is often not the case for individual appellants abroad, many of whom are unrepresented.

[2] Monthly Asylum Application Tables published by the Home Office at https://www.gov.uk/government/statistical-data-sets/monthly-asylum-application-tables

Case management powers -- Rule 4

(5) Do you consider it appropriate that case management powers be provided for in a single Rule? If not, why not?

(6) Do you consider that Rule 4 is appropriately drafted? Please suggest any drafting changes.

Comments:

(5) ILPA has no objection to the consolidation of all case management powers into a single rule.

(6) The Rules as a whole do not make clear that the Tribunal has the power to extend time for appealing to the Upper Tribunal. This concern is further addressed below, but it may be that it is most appropriately dealt with by an amendment to Rule 4.

Strike out -- Rule 7

(7) Do you think the Tribunal should have a power to strike out a party if their case has no reasonable prospect of success? If so, why?

(8) Do you think the Tribunal should have a power to strike out a party if their conduct of the case is frivolous, vexatious, abusive or otherwise unreasonable? If so, why?

(9) Do you think the Tribunal should have a power to make an 'unless order' i.e. an order which, if not complied with, will automatically lead to a strike out?

Comments:

ILPA agrees with the Committee's view as set out at paragraphs 40-44 of the consultation paper that on balance, and particularly given the importance of the issues at stake in many of the appeals dealt with by this Chamber, it would not be appropriate to introduce wider strike out Rules.

Costs & Expenses -- Rule 9

(10) Do you think that the tribunal should have the power to award costs or expenses against a party who has acted unreasonably?

(11) Do you agree with the current draft of Rule 9?

(12) Should the draft rule be extended to give the tribunal jurisdiction to award costs or expenses in response to any non-compliance with a rule or order?

(13) If there was not to be jurisdiction to award costs or expenses in the

First-tier Tribunal on the basis of unreasonable conduct etc, should the Upper Tribunal nevertheless have such a power?

Comments:

(10) Power to award costs for unreasonable conduct

One of the features of the Tribunals system has always been its low-cost nature including the lack of penalties.

We consider that the power to award costs for unreasonable conduct could be a useful sanction against the UK Border Agency. We consider that it would rarely be possible to determine that an unrepresented appellant had acted unreasonably, given the complexity of immigration law, and the position of many appellants, who are likely to be unfamiliar with the rules or the workings of the Home Office, who may not speak good English and who may have no one who can advise them on how to proceed. We understand the intention to be that the tribunal's wasted costs and the other party's wasted costs could be awarded.

Concerns have been expressed that a regime that awards costs against appellant's representatives can result in unscrupulous representatives assisting a person to prepare an appeal (and charging for this) but not signing their name to anything and hiding behind the unrepresented appellant. It is necessary to discuss with the regulators what can be done to mitigate such risks in practice.

While in principle ILPA would be in favour of a power to award wasted costs against bad representatives and the Home Office, unless the rule can be drafted in such a way as protects the appellant then it should not be drafted at all. We have seen instances where complaints against representatives have been made not just against bad representatives but good representatives who are properly representing the interests of their clients.

We recommend that wasted costs orders should not be considered in isolation but alongside other sanctions, such as limiting cross-examination.

(11) Current draft Rule 9

In the event that the Committee decides to introduce costs sanctions for unreasonable conduct, ILPA asks for transitional provisions so that such sanctions applies only to appeals commenced after the new Rules come into force, or only to conduct which occurred after the new Rules come into force. It would be unfair for parties to be penalised for conduct which could not be made subject to such a penalty prior to the amendment of the Tribunal Rules.

ILPA also recommends that the Rule be amended to require the Tribunal to consider the means of the parties as part of its decision on costs. There is likely to be an increase in the number of unrepresented litigants given the cuts to legal aid introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and proposed as part of the Government's recent consultation on 'Transforming Legal Aid'. It would be particularly draconian to penalise an unrepresented appellant in costs where the opposing party is a Government department.

(12) Costs for non-compliance with an order or direction

No. ILPA opposes this proposal. It is a feature of the Tribunals system that it should be accessible and inexpensive. Increasing numbers of appellants are likely to be unrepresented.

They should not be penalised in costs for failure to comply with orders or directions. Even if the Committee decides to introduce costs sanctions for unreasonable conduct, ILPA considers that costs sanctions for non-compliance with orders or directions would discourage unrepresented persons from exercising their rights of appeal.

(13) Power to award costs for unreasonable conduct in the Upper Tribunal

No. ILPA favours maintaining the status quo whereby the chamber of the Upper Tribunal has the same power to award costs as the chamber of the First-tier Tribunal from which it is hearing an appeal.

Withdrawal -- Rule 17

(14) Should the Tribunal have the discretion to continue with an appeal, rather than treating it as withdrawn, when the decision to which it refers has been withdrawn?

Comments:

Yes. ILPA supports the amendment of the withdrawal provisions so as to give the Tribunal discretion to continue to hear the appeal where the respondent withdraws her case. Rule 17(2) of the Asylum and Immigration Tribunal Rules which automatically withdraws the appeal in such circumstances is an unfair provision which gives the respondent control over the appeal. She can at any time prevent an appeal proceeding simply by withdrawing the decision under consideration. It is questionable whether this rule is *intra vires*, although the Court of Appeal in *Chichvarkin* [2011] EWCA Civ 91 dismissed, *obiter* and without detailed argument, the argument that it is *ultra vires*.

For example, the respondent can withdraw the decision if she wants to gather more evidence in support of her decision. This is a matter that would otherwise fall to be dealt with by an application for an adjournment. In *R (Nikolay Glushkov) v (1) SSHD, (2) Asylum and Immigration Tribunal* [2008] EWHC 2290 (Admin), Collins J made clear (in a passage later approved in *Chichvarkin*) that:

> "*It is clear beyond doubt, in my view, that the Secretary of State must not use the withdrawal power as a tactical exercise to avoid having to apply for an adjournment. She must only use it if she is genuinely of the view that she might change her mind on reconsidering the material that is put before her. It would be a wrongful exercise, and unfair to an appellant, if she were simply to use this power because she wanted more time to deal with the material that was put forward but had no intention of changing her mind as a result of it. I do not understand that the contrary would have been argued on behalf of the Secretary of State…"* (paragraph 18)

The Tribunal's rules should enable it to take appropriate measures to avoid the abuse of its own processes. Rule 17(2) of the Asylum and Immigration Tribunal Rules made it possible for the respondent to withdraw a decision for the illegitimate purpose of avoiding the need to apply for an adjournment. While she would be amenable to judicial review if she did so (if the appellant could secure funding to bring a judicial review, something that is likely to become more difficult if the Government implements the proposals in the *Transforming Legal Aid* consultation paper), the Tribunal's rules should enable it to prevent the respondent unilaterally terminating an appeal in such circumstances.

The respondent can withdraw the decision if she wants to put forward different reasons for

her decision rather than seeking the leave of the Tribunal to argue these. She will often withdraw a decision stating that she wishes to 'reconsider' the case only to return, usually several months later, with the same decision, either for the same or broadly similar reasons, or with additional reasons. This wastes the time and money of the appellant and the Tribunal and gives the respondent unilateral control over the timing of the appeal. In one recent case, she withdrew the decision to amend the removal directions in a disputed nationality case only to issue a new decision several months later without having amended the removal directions and having added one or two paragraphs to the decision letter.

Rule 17(2) of the Asylum and Immigration Tribunal Rules also means that the respondent is the only party who is not subject to the obligation to decide appeals "as quickly as possible" Rules and the presumption against adjourning: if refused an adjournment, she can simply withdraw the decision. In all other Chambers of the First-tier Tribunal, a party may withdraw its case on appeal, but there is no provision for the appeal to be treated as thereby withdrawn.

Response -- Rule 23

(15) Should the Respondent be required to set out whether it opposes the appellant's case and the grounds for doing so?

(16) Is there any other material which the respondent should be required to provide?

Comments:

ILPA considers that the Respondent should be required to state with particularity whether it opposes the Appellant's case for any additional reasons, other than those set out in any statement of reasons accompanying the notice of decision, and whether it is willing to concede any points previously taken, and that it should be required to do so sufficiently far in advance of any hearing for the Appellant to be able to prepare his/her case on the basis of a proper understanding of the Respondent's position.

Please see ILPA's 23 November 2009 response to the consultation on Draft Practice Statements and Practice Directions of the Asylum and Immigration Chambers of the First-tier Tribunal and the Upper Tribunal[3] of 23 November 2009 where we said:

> *Many Appellants are publicly funded. All Appellants deserve to know the case against them. It is frequently the case that at Case Management Review Hearings and other preliminary hearings, Presenting Officers representing the original decision maker will state that they cannot give any indication of the approach to be taken by the Presenting Officer who will appear at the full hearing. An Appellant faced with a change of approach by the Presenting Officer at the hearing may be seriously disadvantaged if an adjournment is not granted in the face of a change of approach: publicly funded Appellants cannot justify to the Legal Services Commission the preparation of points other than those in the decision appealed against.*
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> *In the circumstances, ILPA has submitted to the Procedure Rules Committee that the imposition of a Rule requiring variation of the reasons in relation to the decision against which the appeal is brought would provide discipline upon the Respondent to appeals, and save judicial time. This would add force to the provision at part 7 of the Practice Directions in relation to the case management review whereby both*

[3] Available at http://www.ilpa.org.uk/data/resources/13044/09.11.537.pdf

appellant and decision maker are required to provide details of the case they intend to present at hearing and the decision maker must provide details of any amendment to his refusal letter. At present, the decision maker may fail to do so yet seek to amend his case at the hearing… While Case Management Review Hearings could operate better than they currently do, ILPA considers that they provide a valuable, indeed often the only opportunity to define and confine the issues prior to the full hearing of the appeal.

23. The current Practice Directions state that at the Case Management Review Hearings, the Home Office must produce 'any amendment that has been made or that is proposed to be made to the notice of decision to which the appeal relates or to any other document served on the appellant giving reasons for that decision' (emphasis added). That indicates that an appellant is entitled to notice of any reasons for refusal not contained in the refusal letter upon which the Home Office will rely at the hearing. The Tribunal Guidance Note on Case Management Review Hearings states that:

> *"…For the respondent, the presenting officer should have the power to concede particular points where appropriate, such as age, nationality, or ethnicity. The presenting officer ought to be able to indicate that particular paragraphs in the reasons or are no longer material. The presenting officer ought to indicate any material issues arising in relation to section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in respect of behaviour by the appellant to be taken into account as damaging to credibility."*

24. Appellants (and the AIT) have long faced endemic and systemic obstacles in persuading the Home Office to disclose its case on the relevant issues with sufficient clarity sufficiently in advance. Fairness entitles the appellant in cases of such gravity to know the case against him. ILPA hopes that the procedures in the new tribunals will enhance fairness in this respect and is therefore concerned that the draft practice directions do not currently include even the provisions in the Asylum and Immigration Tribunals' practice directions.

25. ILPA's concern is increased by recent exchanges with the Home Office as to the role of Presenting Officers. ILPA was provided in with a copy of training materials for Presenting Officers which said, in terms, that the Reasons for Refusal Letter acts as the Presenting Officers skeleton argument and instructions. When ILPA pointed that this was evidently honoured in the breach and not the observance, the Home Office changed the training materials so that they no longer say this. It appears from the training materials provided to ILPA in October 2008 that Presenting Officers are now told that they may change the basis of the Secretary of State for the Home Department's decision, including raising new matters, without reference to the original decision-maker, as long as notice is given. References in previous materials to 'instructions' have been removed.

26. The period of notice proposed by the Home Office is that the Presenting Officer will alert the appellant and Tribunal 48 hours before a hearing, of any proposed amendments to the reasons for refusal letter and that, 'for operational reasons' even this may not be possible in many cases. That is an entirely inadequate timescale.

27. The Home Office has thus confirmed that, as a matter of policy, the reasons for refusal letter will not necessarily identify all matters that the Secretary of State for the Home Department proposes to raise at the hearing, and that new issues may well be raised much less than 48 hours before the hearing ,including at the hearing itself.

Issuing of decisions -- Rule 28

(17) Should decisions in asylum appeals continue to be served by the First-tier Tribunal only on the respondent, on the basis that the latter will then serve the decision on the claimant, or should the First-tier Tribunal serve such decisions on both parties simultaneously?

Written reasons -- Rule 28

(18) Do you think that the Tribunal, outside asylum and humanitarian protection cases, should provide written reasons only on request?

(19) Are there any other categories of case in which written reasons should be produced only on request?

(20) If the rules do take this approach, is Draft Rule 28 satisfactory?

Comments:

(17) Service of decisions in asylum cases by respondent

No – the First-tier Tribunal should serve all decisions on both parties simultaneously. The provisions in the Asylum and Immigration Tribunal Rules which provide for service of decisions in asylum seekers to be effected via the respondent (rules 10(8), 23(4) and 27) are 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*."

He also described as "repugnant" the "…proposition that the Secretary of State can pursue for any prolonged period his challenge to an AIT decision without the victorious party being aware of that decision".

The Upper Tribunal's consideration of the two appeals in *NB Guinea* on remittal is reported

as *NB and ZD (para. 59 discretion) Guinea* [2010] UKUT 302 (IAC). The Upper Tribunal observed that:

> *"63. It is not disputed that since 2005 the respondent has been unable to provide either a satisfactory explanation or a system which enables her to comply with paragraph 23, which we note was inserted into the Rules at her request, in the teeth of objections from consultees about precisely the type of problems which subsequently occurred. We consider that the repugnance factor of bringing within the paragraph 23(5)(a)(ii) service procedure determinations relating to claimants with no reason to abscond (because their First-tier Tribunal appeal was successful), coupled with the respondent's failure to notify the correct dates or control his internal postal system so as to comply, must be given significant weight.*
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> *64. We also note that the respondent did not apologise until the hearing of this second reconsideration, three and a half years later, and then by Counsel, and can provide no explanation of the error on in relation to the claimant's appeal. The respondent's non-compliance was systemic and her attempts to deal with it were designed to obfuscate rather than to solve the problem. There is no obligation on the respondent to serve her notice of appeal on the very last day for service nor any suggestion that it was not reasonably possible for her to have done so one day earlier, to enable proper compliance: removing the date stamp to make it impossible to tell whether there had been compliance is an unattractive 'solution' to this problem.*
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> *...*
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> *67. We bear in mind that paragraph 3.5 of the 2003 Rules, the last IAT Procedure Rules, was sensibly restricted to service by the respondent on the losing asylum claimant in the United Kingdom only, with the objective of preventing absconding. That was changed in the AIT Rules at paragraph 23(5)(a)(i) to allow service by the respondent on successful asylum claimants, at the respondent's request. It was incumbent on the respondent to come up with a method of service which was effective to meet the requirement of paragraph 23 and she has had five years to do so. The original understanding was that such service would normally be in person, in which case it would have been straightforward to give the determination and the grounds of appeal to the claimant at the same time.*
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> *68. However, the respondent has not found that necessary. The reason is clear: there is no real risk of absconding until the claimant knows the outcome of her appeal, and even less risk when a claimant knows that her appeal has been successful: the respondent has therefore not needed to devote resources to individual meetings and simply posts the grounds of appeal and determination to the claimant's address for service. The respondent is in control of that process, both as to service of the determination and of her grounds of appeal. It is not good enough for her to say that business needs mean that she cannot get her grounds of appeal ready in time for both to be served together before the grounds reach the Tribunal.*
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> *69. The repugnance factor is a weighty one. In this claimant's appeal, we remind ourselves that she received the respondent's challenge to her appeal some three weeks before the respondent served the determination in her favour. In the second claimant's appeal, of which we are not now seised, the delay was one or two days. "*

These rules are likely to give rise to a perception that the Tribunal is not independent of the respondent. There is no justification for these provisions: they were originally introduced in the Asylum and Immigration Tribunal Rules when that tribunal's decisions were intended not

to be the subject of any appeal, to reduce the risk of the appellant absconding on receiving an unfavourable decision. Leaving aside the question of whether that was a legitimate reason for this procedure, there is now a right of appeal against any decision of the Tribunal which is not an excluded decision.

As to the Home Office's views about the desirability of its being able to serve decisions personally in cases where the appellant has lost, ILPA does not consider that the tiny minority of cases in which the respondent currently serves decisions personally justifies maintaining this Rule, which creates a perception that the parties are not equal before the Tribunal. ILPA considers that the interests of justice far outweigh the administrative convenience for the Home Office of being able to serve asylum decisions personally.

Moreover, this practice was introduced at a time when it was envisaged that the Asylum and Immigration Tribunal would be a single tier Tribunal with no onward right of appeal so that where an appeal was dismissed, the appellant would be immediately removable. In fact, due to the ability to apply for reconsideration of Asylum and Immigration Tribunal decisions that was never the case but under the current system, an appellant will always have further recourse against an adverse decision of the First-tier Tribunal: either an application for permission to appeal to the First-tier Tribunal, or renewal of that application to the Upper Tribunal.

This has two consequences: first, the likelihood of appellants absconding is lower because they have not reached 'the end of the road'; second, service of decisions by the Respondent in person followed by immediate detention has the effect of making it much harder for appellants to obtain legal advice as to the prospects of appealing and to lodge any appeal. The respondent's practice of no notice detention, particularly in asylum cases, before an individual is even aware that their appeal has been rejected, is a practice ILPA opposes. It is contrary to the Home Office's stated policy of allowing asylum seekers the opportunity to return voluntarily before seeking to enforce removal.

<u>Written Reasons</u>

ILPA answered as follows in its response to the consultation on the Fundamental Review of the First-tier Tribunal:

First, as to the proposal for shorter written judgments where determinations contain the decision and cross-refer to papers provided in the bundles.

> *See discussion in the meeting of 28 January 2013. We do not think these would be shorter in length; they might take a shorter time to prepare. Anything that forms part of a determination must be included in or annexed to that determination (see Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC). for a recent example). Provided all documents are present then whether they are copied out in the text of the determination or appended thereto does not mater provided that the person writing the determination is able to organise the material clearly and ensure that there is no confusion. The written determination has to be freestanding or incorporate bail summary/skeletons in a substantive case. We need to see how the tribunal judge arrived at the decision. We need a written determination and to receive all material that comprises that determination. The sad story of the demise of Refugee and Migrant Justice and the Immigration Advisory Service provide examples of files being lost. Even with the UK Border Agency helping it was difficult to reconstruct the files. Detainees are often moved around without paperwork. To give a new legal representative a chance of their representing their client properly and to give an immigration judge a chance of determining an appeal fairly it is extremely important to have all relevant information incorporated into the determination.*

If a subsequent representative cannot see all the material that comprises the determination then it is extremely likely that protective appeals will be put in and/or adjournments be required.

Unrepresented appellants do not keep all documents. They may turn up to see a representative close to an appeal deadline, with nothing but the determination. In any event, information that is part of the determination should be there. Otherwise the determination is incomplete and cannot be read.

There is a need to see how the immigration judge has weighed the evidence. Some determinations are too long and unfocused but this should sound an alarm. It is very difficult to give an extempore judgment well. The variable quality of written determinations in the First-tier Tribunal at the moment illustrates the problem. Some are good but some are evidence that there would be difficulties in their authors giving extempore judgments: there are examples of inability to organise evidence, inability to set out legal arguments clearly and get to the nub of the legal issue, non-sequiturs and findings that do not flow from the presentation of the material. It seems unlikely that provision for training would solve the problem; no doubt those responsible for training have made many efforts over the years to ensure that written determinations are clear and not longer than they need to be. Problems remain.

It is vital to have a determination as a record of the case that has been put at the hearing. See Kalidas (agreed facts - best practice) v. Secretary of State for the Home Department, [2012] UKUT 00327(IAC). This is an example of the UK Border Agency trying to reopen issues they had previously agreed. The importance of good notes is highlighted.

As to the proposal to dispense with written judgments at all:

We consider that this would result in many determinations of very poor quality with resultant injustice and would cause difficulty and confusion in onward appeals. We were asked in the meeting of 28 January 2013 what would happen if an immigration judge took 30-45 minutes after an appeal to go through the evidence then returned with a decision? This would result in wasted resources for representatives given legal aid fixed fees and for paying clients. There is a limited amount of time in which a centre is open and hearing cases; it should be used for hearings. It is not sensible to pay immigration judges travel, etc. for work they could do at home. We have seen cases on the rolling list at Hatton Cross where a satisfactory dictated decision has been given after a pause, but this may be because of the type of case selected for the list. We have also seen very poor extempore judgments. Immigration cases are among the most complex with which any tribunal judge will have to deal. We recall the recent comments of the Minister, Lord Taylor of Holbeach, in the debates on the Crime and Courts Bill on 14 December 2012:

> *"I agree with my noble friend that no area is more complex than the whole business of the Immigration Rules and the procedures surrounding them.*[4]

This was not a comment about Article 8 or the exercise of discretion, but simply about the rules. See ILPA's March 2012 Short briefing note for the House of Lords on complexity in immigration cases, prepared during the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and available at http://www.ilpa.org.uk/data/resources/14300/12.03.05-ILPA-complexity-briefing-note.pdf

[4] Lord Taylor of Holbeach in response to Lord Lester of Herne Hill, Hansard, HL Report, 12 December 2012: Column 1087.

This cites comments that the senior judiciary and tribunals judiciary have made about complexity. Frequent changes to the rules, often at short notice, and transitional provisions, add to the complexity. It is necessary to go through some determinations with a fine toothcomb to see what evidence was being considered. See the case of *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, which resulted in Cm 8423, some 288 pages of immigration rules published late in the evening of 19 July 2012 and into force on 20 July 2012. These rules transposed guidance, errors and all. ILPA and the UK Border Agency and Home Office have been in voluminous correspondence about these and other recent statements of changes. Since 9 July 2012, when HC 194 came into force, ILPA has identified some 29 errors that it has pointed out to the Home Office in the course of this correspondence (which, of course, the Home Office may also have spotted) being acknowledged. At least as many again in ILPA's view remain to be addressed.

The process of going through the evidence helps one to reach the decision. Decisions without reasons would be unlikely to be sustainable decisions. Often appellants do not understand what the determination means and it could be months later that full reasons are requested.

It would be necessary to create audio recordings of appeals for purpose of transcribing the tapes at a later date when reasons were requested. This is opposed. Costs and time associated with transcription would be very high. Members who sit in the Social Security Chamber record how difficult it is to write a reasoned statement from listening alone. A pilot in the social security tribunal, found that doing full reasons from audio recordings was very hard.

Bail cases do not currently have reasoned decisions. Reasoned decisions have been requested but the request has been rejected. Bail for Immigration Detainees has been told that not all notes need to be disclosed; this depends on the manner in which the tribunal judge's reasons were recorded. If reasons are recorded in judicial notebook then they are not disclosed.

The current system in bail cases contributes to a cycle of inaction. One cannot apply the principles set out in *R v Governor of Durham Prison, ex p Hardial Singh* [1984] 1 WLR 704 without details of the decision.

With just a summary from which to work from one loses sight of the issues as a whole chunk of the evidence for potential future cases is being removed. No one can say what has happened. The recent succession of judicial reviews in which it has been held that the UK Border Agency has breached article 3 ECHR in immigration detention cases of the mentally ill illustrates just what can go wrong. Scottish tribunals produce written decisions for bail hearings decisions which include a summary of both argument and reasons. They explain how a decision has been arrived at.

Given the complexity of immigration and asylum cases, ILPA considers that the duty to provide written reasons is an important discipline which should continue to be an obligation in all such appeals. A procedure by which the parties have to request written reasons if they require them will simply introduce further delay, uncertainty and complexity into the procedure.

Even where neither party intends to appeal, it may be necessary for the parties to know the reasons for the Tribunal's decision to understand the consequences that follow from it: for example, whether an appeal has been allowed under Article 8, of the European Convention on Human Rights or the Immigration Rules may affect the kind of leave that should be granted.

Given the *Devaseelan*[5] guidelines, which require the Tribunal to treat a previous decision of the Tribunal as its starting point in considering a subsequent appeal by the same appellant or in a case in which there is a material overlap of facts, and given the possibility for repeat appeals in all kinds of case, it may also be in the interests of justice for the reasons for the Tribunal's decision to be available to the parties many months or even years later. That need may very well not be appreciated at the time of the Tribunal's decision or within 28 days thereafter.

Draft rule 28

If the Committee decides to introduce this proposal despite the objections set out above, ILPA has the following comments on the draft Rule (as well as asking the Committee to consider its concerns about draft rule 13, to which draft rule 28 refers):

- It may be clearer and simpler to refer to appeals brought on the grounds that removal of the appellant in consequence of the decision would breach the United Kingdom's obligations under the 1951 UN Convention Relating to the Status of Refugees or be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights than to an appeal involving an 'asylum or humanitarian protection claim' (i.e. to use the wording in s. 84(1)(g) of the Nationality, Immigration and Asylum Act 2002);
- ILPA considers that the duty to provide reasons should not be restricted to asylum and humanitarian protection claims but should apply to any appeal in which human rights grounds are relied on by the appellant. Given the complexity of Article 8 appeals and the importance in the assessment of proportionality of the Tribunal's taking account of all relevant factors, ILPA considers that it is particularly important that reasons are given in such cases.

Repeat applications for bail -- Rule 38

(21) Do you think that there should be restrictions on the ability of an applicant to make repeated applications for bail?

(22) If there are to be such restrictions, do you agree with the approach taken in Draft Rule 38?

(23) Do you agree that an applicant should be required to set out any change of circumstances that has occurred since any previous application for bail?

Comments:

(21) Restrictions on the ability to make repeated applications for bail

No. The right to liberty is a fundamental right and the right of a person detained by executive order, with no automatic oversight by a court, to apply for bail is a very important protection of that right. The right to an oral hearing of bail is important in particular because it requires the bail applicant actually to be produced before the Tribunal, either in person or by video link. This is itself an important protection against abuse and arbitrary, prolonged detention.

[5] *Justin Surendran Devaseelan v. Secretary of State for the Home Department*, [2002] UKIAT 000702, , 13 March 2002.

Given the shortage of legal representation for detainees, and the complexity of applying to the High Court for release, it is particularly important that immigration detainees should be able to apply to the Tribunal for bail. ILPA does not consider that the proposed restriction on the right to appear in person before the Tribunal is justified.

The justification offered is that it is not 'a good use of judicial time or other resources' for the Tribunal to be asked to consider repeated applications for bail. However, the proposed restriction would still require Tribunal judges to consider whether any subsequent application for bail made within 28 days of a previous refusal reveals any change of circumstances. ILPA wishes to emphasise that this is necessarily a judicial decision which will require consideration of the documents and grounds lodged in support of the current bail application, as well as the previous bail application, in order to ascertain whether there has been any change of circumstances. It would be wrong to rely on detainees, particularly those who are unrepresented, being aware of any need to identify a change of circumstances on the face of the application form. ILPA therefore considers that the proposed restriction would in fact not achieve its aim of saving judicial time: as well as being fairer, and acting as a safeguard for detainees, an oral hearing may also allow a Judge to determine more quickly whether there has been any change of circumstances.

In addition, both under the common law and under Article 5 of the European Convention on Human Rights it is for the Home Office to justify the need for continued detention and show why a person should be refused bail. The Home Office would need to be required to respond to any application for bail by producing its 'bail summary' setting out its reasons for opposing bail; it should also be required to indicate whether or not it agrees that there has been a change of circumstances. If the Committee decides to proceed with this proposal, draft Rules 38 and 39 should be amended to make clear that the Home Office is required to respond to a bail application whether or not the Tribunal holds a hearing.

Moreover, as the Court of Appeal has emphasised in *MD Afghanistan* [2012] EWCA Civ 194, it is a cardinal principle of the justice system that a person should have a right to renew an application which has been refused without oral argument before a judge of co-ordinate jurisdiction. This principle should not be abrogated and that accordingly, even if an application for bail is refused initially without a hearing, applicants should have the right to renew their application at an oral hearing. Given that this would result in an increased use of judicial and other resources, ILPA's view is that it would be preferable to retain the right to an oral hearing in all cases.

(22) Draft rule 38

If despite the objections noted above, the Committee decides to proceed with this Rule, ILPA does not have many particular comments on the approach taken in draft Rule 38. In particular, ILPA supports the approach that a hearing should be required if there has been a material lapse of time since the last hearing. The Tribunal has traditionally regarded 28 days as a material lapse of time constituting in itself a change of circumstances (see para 3.3 of the 2003 Bail Guidance Notes for Adjudicators and para 67 of the 2011 Bail Guidance); this is also the frequency with which the Home Office's policy in Chapter 55 of the Enforcement Instructions and Guidance requires detention to be reviewed after the first month of detention.

ILPA considers that there will be cases in which the passage of a shorter period of time will in and of itself constitute a change of circumstances, for example in the case of a person suffering from mental or physical illness or a survivor of torture (such persons should only be detained in very exceptional circumstances under the Home Office's published policy), or where a parent is separated from his/her children. It is likely to be unworkable to have a Rule which allows for appropriate exceptions in such cases, and ILPA therefore proposes that in all cases, a shorter time period should be regarded as entitling an individual to a further oral hearing of a bail application. ILPA proposes that this period be no more than 10 days.

Applications in relation to bail in Scotland -- Rule 44

(24) Does this Rule adequately provide for bail applications in Scotland? If not, what changes should be made?

Comments:

The draft Rule appears to provide adequately for the differences in procedure in Scotland but it is confusing and reduces accessibility for the rule to take the form it does. It would be preferable to include provision for Scottish cases within the main Rules, or to have separate Rules dealing with bail in Scotland, rather than a rule that simply modifies the main Rules by cross-reference as this one does.

Fast Track

(25) Should there be a separate set of rules for Detained Fast Track cases? Why?

(26) If there is to be a separate set of rules, should there be any change to the existing Fast Track Rules?

Comments:

No. ILPA agrees with the Tribunal Procedure Committee that there should not be a separate set of rules for persons detained at specific detention centres.

Instead, as proposed by the Committee, the Tribunal should be empowered to exercise its discretion in the handling of appeals resulting from Detained Fast-track asylum cases in accordance with the standard Procedure Rules. The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005[6] should be abolished.

ILPA is concerned that it may not be lawful for the Committee to make separate rules for the Fast Track as any such rules would not be consistent with the Committee's statutory purpose. Individuals placed in the Detained Fast-track should normally expect a decision on their asylum claim within 10-14 days (although in practice the timescales are often much longer). The stated purpose of the fast track as stated in the Home Office Detained Fast-Track Processes document[7] is to allow speedy and efficient processing of asylum claims and cases are selected on the basis of specific criteria set out in the process document which is separate from the Home Office's general policy on detention[8]. These can lead to detention of persons for processing in the fast track who would not be detained under the general detention policy.

However, once a decision is made by the Home Office on the asylum claim, a decision about continued detention is supposed to be made in accordance with the general policy on detention, rather than on the specific fast track criteria. According to statements made when

[6] SI 2005/560.

[7] Version 5, 11 June 2012, paragraph 2.1. Formerly entitled *DFT & DNSA – Intake Selection (AIU Instruction.* Available at http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/guidance/detained_fast_processes?view=Binary

[8] Enforcement Guidance and Instructions, Chapter 55.

the Detained Fast-track process was first established in 2003:

> "*If the claim is refused or for any reason cannot be dealt with in accordance with the pilot timescales, a decision about further detention will be made in accordance with existing detention criteria. Detention in this category of cases will therefore normally be where it has become apparent that the person would be likely to fail to keep in contact with the Immigration service or to effect removal*." (HC Deb 18 March 2003 vol 401 c42WS per Beverley Hughes MP for the Government)
>
> "*We may also detain claimants after we have made and served a decision in accordance with our general detention criteria*". HL Report 16 September 2004 WS130 per Baroness Scotland for the Government.

Thus:

Initial detention, which is for administrative convenience, flows from an initial decision that a case is suitable for the fast track process.

Once an initial decision on the asylum claim is made by the Home Office, the individual is no longer detained as a matter of administrative convenience, but the general detention criteria apply. A specific decision ought to be made as to whether the person's continued detention pending their appeal and subsequently removal from the UK is justified under the general detention criteria.

If persons are detained under general criteria post the initial decision, then who or what determines who has a fast-track appeal? In practice those who have such an appeal are those who went through the initial pre-decision fast track in named detention centres and have not left, but that describes practice not the decision.

Thus the description of the group whose appeal will be subject to the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005[9] (see current Rule 5) is simply that they are detained in a particular detention centre when they receive notice of their decision, and one looks in vain for any decision that a particular individual should get a fast-track appeal, still less for any criteria for the selection of those individual appeals as suitable.

The Committee's purpose, as set out at section 22 of the Tribunals Courts and Enforcement Act 2007, is difficult to match with making separate Fast-track Procedure Rules on this basis. What would be the purpose of separate rules? The Committee must only make those rules which are compatible with and rationally designed to achieve the purposes at section 22.

The Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 promote speed of decision-making at the expense of procedural fairness. The Secretary of State says at paragraph 109 of the consultation paper that they offer 'clear' and 'consistent' procedural parameters. ILPA does not agree. In practice, the result is a rigid and inflexible set of criteria that do not properly allow for the preparation and consideration of often complex cases.

In practice, the rigid application of the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 regularly leads to procedural unfairness in appeal hearings. Unfairness, in turn, increases the likelihood of onward appeals, fresh claims, and urgent applications to the High Court seeking judicial review and/or injunctions at the time of proposed removal. Thus any savings gained by rushing through proceedings in the First-tier Tribunal are often lost down the line.

[9] SI 2005/560.

Asylum applicants in the detention system face difficulties in obtaining corroborative evidence, for example from sources in their country of origin, expert witnesses, or medical practitioners. There are further difficulties in accessing legal representation promptly ahead of Detained Fast Track asylum interviews. Cases are often referred to duty solicitors with no more than 24 hours notice (and frequently less than this). This means that no effective preparatory work can be done. The net effect is that applicants are interviewed before they have been advised about what evidence they might try to obtain.

Refusal decisions by the Home Office are generally made within 36 hours of interview, with an appeal case coming before the Tribunal within five to six days of the decision. This is an extremely short timescale in which to obtain any type of supporting evidence. The applicant is then in the position of having to request an adjournment, which is where the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 become crucially important.

First-tier Tribunal judges considering the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005[10] have an unnecessary incentive to refuse adjournments based on those separate rules. This incentive is not present in the non-detained appeals system, and is not necessary for the efficient administration of justice.

It has been recognised by the Court of Appeal that First-tier Tribunal judges' concern to follow the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005[11] has, in some cases, led to unfair decision making. In the case of SH (Afghanistan) [2011] EWCA Civ 1284[12], an adjournment application, made to obtain crucial evidence, had been refused in the First Tier Tribunal because the tribunal judge saw it would necessitate removing the case from the detained fast-track altogether, which he did not want to do. As Lord Justice Moses held in the Court of Appeal:

> *The mere fact that under the Rules an adjournment can only be given where there is an identifiable future date not more than ten days later provides no justification for refusing an adjournment where there are good grounds for doing so. After all, Rule 28(d) itself contemplates taking a case out of the Fast-Track procedure in circumstances where it cannot otherwise be justly determined.*(para 8).

Lord Justice Moses then went on to state the proper legal test for considering an adjournment:

> *Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand?* (para 14).

That the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 allow for a case to be taken out of the Fast-track where 'it cannot otherwise be justly determined' does not adequately reflect this test, and creates an unfair and unnecessary incentive to keep unsuitable appeals within the Detained Fast-track system.

The effect of the existing rules is that the burden for securing a fair hearing is in effect placed upon the Appellant and/or their representatives. There is no reason why the Tribunal should not have the freedom to deal with the particular and unique evidential factors presented in each case, and to address each case by reference to what fairness demands.

[10] SI 2005/560.
[11] SI 2005/560.
[12] http://www.bailii.org/ew/cases/EWCA/Civ/2011/1284.html

Were the Tribunal to develop its use of discretion in the way it conducts the determination of appeals stemming from the Detained Fast-track process, it would have the added advantage of making clear the independence of the Tribunal from the Secretary of State, thereby increasing the trust placed in the Tribunal by appellants, who would be more likely to perceive that their case has had a fair hearing[13].

The Secretary of State would, in turn, be required to consider more carefully the suitability of complex cases for inclusion in the Detained Fast-track process in the first instance. At present, decision-making on which cases go into the Detained Fast-track does not appear to be informed by the facts of the individual case. This was a key issue in the recent Court of Appeal case *JB (Jamaica), R (on the application of) v Secretary of State for the Home Department* [2013] EWCA Civ 666[14]. As Lord Justice Pill stated:

> *The principal ground on which the respondent sought to justify the decision to treat the appellant's claim as one that could be decided quickly so that his detention would comply with the DFT/DNSA policy was that, having been in this country since May 2010, the appellant had already had enough time to obtain any evidence in support of his case that might be available to him. On that view of the matter allowing him further time was unlikely to result in his obtaining additional evidence of any value and therefore unlikely to assist her in making a fair and sustainable decision. In some cases there might be force in an argument of that kind, but in this case it fails to take proper account of the particular circumstances of the appellant's case…[I]t should have been obvious to anyone who considered the claim with care that the decision was not a simple one because of the difficulty of ascertaining where the truth lay. In my opinion no reasonable person in possession of all the information about the appellant that could and should have been available if his case had been assessed in the manner required by the DFT/DNSA policy could have been satisfied at the time of his detention that a fair and sustainable determination of his claim could be made within a period of about two weeks.* (para 30).

The increased case management powers set out in draft Rule 4 would still permit the Tribunal to list appeals for hearings quickly, where it is fair and justified to do so.

We do not agree with the Secretary of State's concerns (as set out in paragraph 109 of the Consultation document) that a consequence of removing the separate Fast-track procedure rules would be to increase the length of detention for those within the Detained Fast-track, with corresponding increases in detention costs, and more legal challenges to the legality of detention. We consider that the opposite is true for the reasons set out below.

More appeals would be decided fairly in the first instance before the First-tier Tribunal following the abolition of the separate fast-track procedure rules. Consequently the number of fresh claims, judicial review applications, and urgent injunctions sought in the High Court would be likely to fall. Such claims and applications demand the time of judges, lawyers, and civil servants alike. They furthermore extend periods of detention, increasing the associated costs.

Were there no separate fast-track procedure rules then the Detained Fast-Track process would effectively end once an asylum decision has been made. Presently, the fair consideration of

[13] See *inter alia* 'Fast Track to Despair', Detention Action; http://detentionaction.org.uk/fast-track-to-despair-report-published

[14] http://www.bailii.org/ew/cases/EWCA/Civ/2013/666.html

bail is obscured by the concern for keeping a case within the Detained Fast-track system.

The Secretary of State's concerns (as set out in paragraph 109 of the Consultation document) would only be borne out if she maintained detention following a decision to refuse asylum in circumstances where it was unlawful and/or unreasonable to do so.

The draft Rules propose more extensive case management powers (draft Rule 4), and do not provide any fixed time frame for listing asylum appeals, unlike the current Rule 23A. Allowing a longer and flexible time frame for listing appeals following the refusal of asylum would allow for bail applications to be made and heard prior to the main hearing, such that

- detention would not necessarily be prolonged, and
- appeals could proceed in the same way whether or not the appellant remained in detention.

At present, when bail applications are heard prior to the Detained Fast-Track appeal hearing, the experience of practitioners is that many tribunal judges are reluctant to grant bail as they are aware that the effect of doing so would be also to remove the applicant from the Detained Fast-track process and they consider this a matter to be more properly considered by the tribunal judge hearing the substantive appeal. However, if there were no separate procedure rules, then release on bail should not affect the progress of the appeal. The separation of bail and the appeal should result in detention only being prolonged when it can be justified for reasons other than inclusion within the Detained Fast-track. This should also mean that there would not be prolonged detention with the resulting increased costs and reduced capacity which concern the Home Office.

As detention post-decision would no longer be authorised under the Detained Fast-track process, there would be no danger of Detained Fast-track procedures being held incompatible with Article 5 should the Tribunal rules be removed.

If the Fast-track procedure rules are not abolished, ILPA would ask the Committee to consult separately on draft new Rules. It is very difficult to comment in the abstract and decisions that are made in response to the Committee's consultation on the main Rules may well affect decisions which are made about any Fast-track Rules.

We highlight the following matters on which we should wish to expand in any such response (what follows below merely foreshadows the full response we would make):

Extension of the time limit for giving notice to appeal; (Rule 8 (1)): This would enable a greater opportunity for unrepresented (and detained) applicants to be able to seek legal advice and representation; and it would increase fairness insofar as appellants will have greater preparation time before a hearing.

Extension of the period of time for the listing of appeals by the Tribunal; (Rule 11 (1)): This would increase the available preparation time. It would also allow bail matters to be separately considered by the Tribunal and allow a more realistic time frame for a prior bail hearing. This may well reduce periods of detention and increase efficiency early on.

Bail summaries to be served earlier: To allow bail applicants sufficient time to answer the points raised by the Secretary of State to justify their ongoing detention.

An expanded and comprehensive duty of disclosure under Rule 10: This would give effect to the duty under the Data Protection Act 1998 so that complete records are made available to appellants within the diminished Detained Fast-track timescale.

There should be additional time for applications to the Upper Tier Tribunal; (Rule 17):
This would afford unrepresented Appellants additional time to obtain legal representation. For detained appellants who cannot read or write any English, a mere two working days is an entirely unrealistic period of time.

Adjournments (Rule 28): This provision does not sufficiently interact with Rule 30 to make plain that where an adjournment (or crucially *successive adjournments* when taken together) exceed 10 days, the presumption should then be that cases would be removed from the Detained fast-track procedures. As a consequence of this the Tribunal's practice has often granted successive back-to-back adjournments of 10 days; and thereby failed to engage with whether continuing detention and inclusion within Detained fast-track remain appropriate.

Removal of onerous "exceptional circumstances" - Rule 30, (1) (b): This onerous requirement is odds with ensuring fair proceedings and it should be removed and reconsidered as according to the clear guidance as within SH *(Afghanistan)* [2011] EWCA Civ 1284 (para 14)[15].

Upper Tribunal

(27) Do the draft Rules require any changes to the Upper Tribunal Rules?

Comments:

Yes:

Consequential amendments will be required to the following Upper Tribunal Rules in light of the proposed changes to the First-tier Tribunal Rules:

(1) Abolition of the separate fast-track Rules:
   a. Delete definition of 'fast-track case' in rule 1
   b. Delete rule 12(3A)(b)
   c. Delete rule 5(4)
   d. Delete rule. 21(3)(aa)(ii)
   e. Delete rule 24(2)(aa)
   f. Delete rule 25(2A)(b)
   g. Delete rule 36(2)(aa) and amend r. 36(2)(b)
   h. Delete rule. 36A
(2) Abolition of the requirement for the decision to be served on the respondent only in asylum cases and for the respondent to serve on the appellant:
   a. Delete rule 40A
   b. Delete 'or, as the case may be in an asylum case, the Secretary of State for the Home Department,' in rule 44(3A)
(3) Removal of separate time limit for appealing for those who are in detention under the Immigration Acts:
   a. Amend rule 44(3B) and (3C)
(4) Extension of time limit for appealing to the Upper Tribunal to 14 days:
   a. Amend rule 21(3)(aa)(i)

General views

(28) Do you think that the draft Rules work satisfactorily? Do you foresee any particular problems? Or have any improvements to suggest?

[15] http://www.bailii.org/ew/cases/EWCA/Civ/2011/1284.html

(29) Do you have any other comments?

Comments:

Children and adults lacking capacity

There is a need for express provision to be made in the Procedure Rules for the appointment of litigation friends for child appellants and those adults who lack capacity. In our response to the consultation on the draft Practice Directions and Practice Statements for the Immigration and Asylum Chamber of the First-tier and Upper Tribunals (23 November 2009), we made extensive reference to the rights of children and the need for clear guidance on conduct of appeals involving child appellants and child and vulnerable witnesses. The Joint Presidential Guidance Note No. 2 of 2010 on Child, Vulnerable Adult and Sensitive Witnesses addresses a number of our concerns. However, we also said that:

> *ILPA considers that provision should be made in the rules or practice directions for the appointment of a litigation friend in cases of appellants who lack capacity (in particular children and mentally ill adults). We are aware of cases where a litigation friend was appointed by the then Immigration Appellate Authority (predecessor to the Asylum and Immigration Tribunal) or the Court of Protection but at the moment there appears to be no express power to make such an appointment. ILPA is concerned that this is a significant lacuna, because there are inevitably many cases in this jurisdiction involving people with mental health problems, as well as a significant number of cases of children.*

We still consider this to be a significant lacuna in the Rules. We are aware that in *R(AM) v Solihull Metropolitan Borough Council* CO/2467/2011, the Upper Tribunal decided that as a senior court of record it had inherent jurisdiction in judicial review proceedings to allow an adult without capacity to conduct proceedings by a litigation friend. However, that cannot apply to the First-tier Tribunal and we consider that this important gap in the existing rules should be filled both for children and for adults lacking litigation capacity.

We note with concern that unlike the existing rules on bail, draft rule 37 does not make provision for a bail application to be signed by a representative where the bail applicant is a child or person lacking capacity. ILPA would urge the Committee to reinstate this provision.

Rule 1: Interpretation

The draft Rule lacks definitions contained in rule 2 of the Asylum and Immigration Tribunal Rules for:

- 'appeal to the Upper Tribunal'
- 'determination'
- 'Immigration Rules'

ILPA appreciates this may be deliberate in that these definitions may no longer be considered necessary but would welcome clarification of this.

There appears to be a mistake in the final sentence of Rule 1 relating to the definition of 'working days' in the draft Rules, which refers to paragraphs '(b) and (c)', but the draft Rule only contains paragraphs (a) and (b).

Rule 2: Overriding objective

ILPA welcomes the alignment of the overriding objective of the Immigration and Asylum

Chamber with other Chambers of the First-tier Tribunal. The emphasis in the overriding objective of the Asylum and Immigration Tribunal Procedure Rules on handling appeals "as quickly as possible" infected the Tribunal's approach to case management which in our experience at times emphasises speed at the expense of justice – see, for example, the strong presumption against adjourning where further evidence is required.

There is an important difference between 'avoiding delay' and acting "as quickly as possible". Avoiding delay to the extent compatible with the proper consideration of the issues is in the interests of justice; acting "as quickly as possible" may well not be. The rules of every other chamber of the First-tier Tribunal have the same overriding objective. We can see no justification for treating immigration and asylum cases differently and accordingly welcome the proposal that the rules for the Immigration and Asylum Chamber should be brought in line with those for the other chambers. In particular, the Social Entitlement Chamber deals with matters such as asylum support appeals, and the Health, Education and Social Care Chamber deals with Mental Health Act matters, both of which on their face require greater urgency than immigration and asylum appeals.

Rule 3: Delegation to staff

ILPA is opposed to the delegation of judicial decisions, particularly the exercise of discretion, to non-judicial staff. For example, ILPA would be opposed to Tribunal staff making decisions on whether to extend time for appealing, which involves an exercise of judgment. It may however be an efficient use of resources for Tribunal staff to be able to approve decisions to which both parties have consented, for example where both parties support an application for adjournment. But where there is a dispute, the matter should be referred to a tribunal judge.

During meetings as part of the Fundamental Review of the First-tier Tribunal, it was suggested that decisions on validity of an appeal could be made by legal advisors; ILPA would have less objection to this if the Tribunal employed lawyers, such as are employed by the Administrative Court, but we should be concerned about non-lawyer Tribunal staff making decisions about what can be complex questions of law as to the validity of an appeal.

Rule. 11: Calculation of time

How does rule 11(2) (which provides for an act directed to be done on a day which is not a working day to be done in time where it is done on the next working day) sit with the proviso to the definition of business day in rule 1?

Rules 12 and 19: lodging notice of appeal

The Rules do not appear to make provision, comparable to rules 6(3) and (5) of the Asylum and Immigration Tribunal Rules, allowing detainees to lodge a notice of appeal by serving it on the person having custody of him. This is an important protection, particularly for detainees held in prisons, and the draft Rules should be amended to allow notice of appeal to be lodged in this way.

There are a number of differences between rule 8 of the Asylum and Immigration Tribunal Rules (form and content of notice of appeal) and rule 19(3) and (4) which appear intended to replicate it, which presumably result from the Committee's approach of seeking to amalgamate the approach in the Asylum and Immigration Tribunal Rules and that used in other Chambers of the First-tier Tribunal. In particular, draft rule 19(4) requires appellants to provide 'any documents in support of the appellant's case which have not been supplied to the respondent' rather than to 'list any documents which the appellant intends to rely upon as evidence in support of the appeal'. It is more convenient at the stage of lodging the notice of appeal to list documents on which the appellant intends to rely rather than including copies of

them, which will create unnecessary additional paperwork, bearing in mind that appellants will be required by directions to file and serve paginated bundles of documents on which they rely in advance of the hearing.

Draft rule 19(4)(b) requires appellants to provide, as well as the notice of decision, a copy of 'any written record of the decision being challenged' – it is not clear what this is referring to. If it is intended to be a reference to the 'reasons for refusal letter' or other statement of the reasons for the decision, the Rule should be clarified. In asylum support cases, the Social Entitlement Chamber Rules require a copy of the 'reasons for the decision' where these have been provided (r. 22(4)(b)); the General Regulatory Chamber Rules require 'a copy of any written record of that decision, and any statement of reasons for that decision that the appellant has or can reasonably obtain' (rule 22(3)). ILPA would suggest that one of these solutions be adopted in preference to the current wording.

ILPA agrees with the addition of a requirement to state whether an interpreter is required in the notice of appeal (although in practice this is already required by the form, it is useful that this is made explicit in the Rules).

Rule 13 – use of documents and information

ILPA opposes to the introduction of this Rule and considers that it may be *ultra vires.* It appears at odds with the overriding objective. It is wrong for the Tribunal Procedure Committee to introduce new Rules into the First-tier Tribunal's rules which appear to allow for some sort of closed material procedure but without the appeal's being transferred to the Special Immigration Appeals Commission.

The only justification given in the consultation document for the rule in this form is that is 'This Rule follows the form used in other Chambers'. This ignores that in asylum and immigration cases there is already a procedure for material to be withheld from a party, the gravity of the consequences of so doing in these cases being recognised thereby. The statutory scheme for immigration appeals divides them between appeals in which some evidence is withheld from appellants on national security grounds which are heard before the Special Immigration Appeals Commission and appeals where the evidence is made available to both parties, subject to the specific exception where the section 108 procedure is used to put evidence of fraud detection methods before the Tribunal – see rule 51(7) of the Asylum and Immigration Tribunal (Procedure) Rules.

In the Special Immigration Appeals Commission an elaborate, albeit unsatisfactory, system of the use of special advocates and procedures such as gisting and exculpatory review has grown up. But in these rules a combination of 13(7), 13(8) and 13(9) would appear to permit the Secretary of State to disclose material only to the Tribunal in national security cases, without the appellant or anyone acting for them being able to see it or, given the terms of 13(10), in some circumstances even being aware that an application under 13(8) has been made. This could be used to divert cases from the Special Immigration Appeals Commission to remove such procedural protections as exist therein. It is arguably *ultra vires* section 108 of the Nationality, Immigration and Asylum Act 2002 and the whole of the Special Immigration Appeals Act 1997.

Our concerns as to the way in which the procedure could be used can be illustrated by reference to our experience of charter flight cases.

On 23 October 2012, a charter flight left the UK carrying persons back to Sri Lanka. As usual, ILPA was copied in to a letter to the Administrative Court a few days before the flight, alerting the court that it would take place. Then, just after 11am on the day of the flight, we received another letter from Treasury Solicitors. This drew attention to errors in the country

bulletin on Sri Lanka which had been relied upon in the previous letter. These errors suggest recklessness as to the accuracy of the facts that mislead the court. A number of injunctions were granted and thus some people were taken off the flight. ILPA wrote to Mr Justice Ouseley to ask that the court look into the unreliability of the information submitted to it. The Committee for the Prevention of Torture subsequently confirmed that representatives of the Committee, who were visiting the UK at the time, were on the flight.

A further charter flight to Sri Lanka was set to have taken place on 28 February 2013. The flight was scheduled during a period when a country guidance case was pending before the Upper Tribunal. The case is still pending. The Administrative Court of its own motion scheduled a hearing to deal with the question of whether it was appropriate to remove persons to Sri Lanka when a country guidance case was pending that would determine whether returnees were at risk of torture in Sri Lanka. The information that the UK Border Agency put into its letter to the Court advising the Court of the flight so that the court would be on notice should it receive applications for emergency injunctions (which was, as is standard practice, copied to ILPA), was at odds with the Home Office pleadings in the country guidance case. This, having been alerted by ILPA, the lawyers for the applicant pointed out in a letter to the Court. The court granted a stay in all the cases before it, on the basis of which others were able to achieve a stay.

The UK Border Agency subsequently issued a new version of the country policy bulletin responding to some, but not all, of the concerns expressed by Freedom From Torture about the misrepresentation of its evidence. This was posted on the UK Border Agency website in March 2013, described as a reissue of version 2 of the bulletin, rather than as a third bulletin. It cannot be reached through the Agency's *Sri Lanka: Country of Origin information* homepage. Instead it appears on a page headed *Country Specific Asylum Bulletins.* On that page it continues to be described as the October 2012 bulletin. It will only be found on a determined search for evidence by those prepared to check information that appears no longer to be relevant.

Rule 13(7) would be subject to the "overriding" objective and any promise by the Tribunal as to what it would do with a document could only be conditional upon being consistent with that objective. The results of such tension could bring the Tribunal into disrepute. The Tribunal might well obtain documents on the basis that it will not disclose them only to find that there is no good reason why they should not be disclosed.

Rule 13(9) fails to state clearly that a transfer to the Special Immigration Appeals Commission is appropriate in such cases.

As to 13(1), we do not consider it appropriate that such an order should be made unless both parties have consented. Parties must always have the opportunity to be heard. It is a fundamental part of the rule of law that hearings be open, and public. Departure from this may be necessary to protect a party or his/her interests, but a rule should not encourage secrecy as the preferred means of dealing with matters where reporting presents complexity.

As to 13(2), we struggle to think of circumstances where it would be used by the appellant, rather than by the Secretary of State. We are unclear as to how 13(2)(b) is to be read given that it is subject to the overriding objective. As to 13(2)(a), no definition of serious harm is given, despite this being a phrase used to mean different things in different contexts, not the least of which is the asylum context. We question the circumstances in which a representative would not satisfy rule 13(5)(b) but nonetheless the Tribunal would consider it appropriate that the representative appear before it.

Rule 13(10) appears to us otiose.

Rule 22 – when the Tribunal may not accept a notice of appeal

This replicates rule 9 of the Asylum and Immigration Tribunal Rules. It requires amendment in light of the removal of the family visitor appeal rights by the Crime and Courts Act 2012 on 25 June 2013[16].

Rule 26 – public and private hearings

This contains a much broader discretion than the current rule to allow hearings to be held in private and to exclude certain individuals from hearings – c.f. Asylum and Immigration Tribunal rule 54 We re-iterate that hearings must be open and in public in order to comply with fundamental principles of justice. The Tribunal would have sufficient power to control who is admitted to its hearings and to exclude where necessary without this much broader discretion being introduced.

Rule 31 – setting aside a decision

Rule 31(1) risks offending against the principle of legal certainty. The parties need to know that decision is a final. The way to deal with problems that arise is on appeal and we consider that all the matters in rule 31(a) to (d) could be dealt with in this manner, with a remittal, including on limited grounds, if required .

Rule 32 – applications for permission to appeal to the Upper Tribunal

There is no express provision for an extension of time for appealing. We assume that the Tribunal will be able to exercise its general power to extend time in rule 4(2) in appropriate cases, in accordance with the overriding objective. However, we consider that it would add greater clarity and assist litigants in person and those assisting them if there were express provision in this Rule for an extension of time for appealing. There is reference in rule 32(5)(c) to including any application for an extension of time in the application for permission to appeal.

Rules 32-34: Decisions on applications for permission to appeal to the Upper Tribunal and reviews

Rule 34(2), which replicates rule 26(3) of the Asylum and Immigration Tribunal Rules, contains an erroneous reference to 'notices under paragraph (2)' which must be a reference to notices under rule 28(2) (which makes general provision for written notice of decisions).

The Asylum and Immigration Tribunal Rules make express provision for permission to be given on limited grounds and for written notice and reasons for the decision to be given in relation to the grounds on which permission is refused, which is not replicated in the draft Rules. This provision is an important safeguard to ensure that appellants know the scope of the grant of permission to appeal so that they can decide whether to renew the application on those grounds on which permission has been refused.

We advocate for an automatic right to an oral hearing for permission hearings. This is available in other chambers, but not in the Immigration and Asylum chamber.

[16] The Crime and Courts Act 2013 (Commencement No. 1 and Transitional and Saving Provision) Order 2013 (SI 2013/1042 (C.44).

Rule 37 – applications in relation to bail

It is a little confusing to include applications for forfeiture in the same rule as bail applications, especially as the title of the rule is 'bail applications' rather than 'applications in relation to bail.' Also, the rule appears to require provision of information which is not obviously relevant where the applicant is the Secretary of State in a variation application.

ILPA agrees with the omission of the requirement to state the address where the applicant will reside if released on bail in the bail application because it is frequently the case that the applicant will not know the address when the bail application is made, but will be able to provide it for the bail hearing: for example, where the person is subject to probation supervision and is awaiting a place in a probation hostel, or has applied to the Home Office for section 4 bail accommodation and is awaiting confirmation of an address.

Rule 39 The Rules do not appear to provide for the notice of the bail application to be served on the Secretary of State (c.f. rule 39(1)(a) of the Asylum and Immigration Tribunal Rules), or for any other application, for example for variation of conditions or forfeiture, to be served on any other party. These appear to ILPA to be important provisions which should be included in the new Rules.

Other provisions contained in the Asylum and Immigration Tribunal Rules which appear to have been omitted from the draft Rules

Entitlement to an interpreter

The draft rules contain no specific provision on entitlement to an interpreter (Asylum and Immigration Tribunal rule 49A). Specific provision should be made for the entitlement to an interpreter as per the current rule 49A. We suggest that the current rule 49A be reworded to indicate that a person should be entitled to the services of an interpreter when s/he is present in the hearing room during the hearing of his/her own case to translate the proceedings.

Notification of address for service

The draft rules contain no provision on notification of address for service which entails the loss of the important requirement in rule 56(3) of the Asylum and Immigration Tribunal Rules for the respondent to notify the Tribunal of a change of address of which she is aware. This should be reinstated. Asylum seekers in receipt of asylum support are frequently moved from one place of accommodation to another. They often understandably assume that as it is the Home Office which is providing their accommodation and has moved them, the Home Office, and by extension the Tribunal, will be aware of their new address. It is unconscionable for the Home Office to be allowed to defend an appeal in which the appellant may not appear because they are not aware of the hearing date in circumstances where the reason for the appellant's non-appearance is that the Home Office has moved them to a different address and has not informed the Tribunal of that new address. Even in cases where appellants are not in receipt of asylum support, they will often be subject to conditions of temporary admission or release or bail which require them to notify the Home Office of any change of address; again, it would be unfair for the Home Office not to share that information with the Tribunal.