

IMMIGRATION APPEALS

RESPONSE TO CONSULTATION

Fair decisions; faster justice



Tribunals Service

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FOREWORD



In August last year we published the consultation document “Immigration Appeals, Fair decisions; faster justice” which set out our proposals to transfer the Asylum and Immigration Tribunal into the new framework provided by the Tribunals, Courts and Enforcement Act 2007, and to remove the statutory bar preventing the transfer of Judicial Reviews from the higher courts to the Upper Tribunal. The proposals set out reform of the appeals system to ensure that it is fairer and faster, giving decisions that are respected and final.

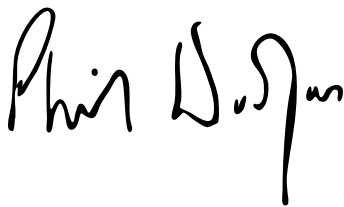
On behalf of the Government, we would like to thank all those who took the time to contribute to this important debate and give us their views on our proposals. The proposals stemmed from a small working group chaired by Lord Justice Richards, a Court of Appeal Judge, and Lin Homer, Chief Executive of the UK Border agency. The group recognised both the need to have an effective appeals system with appropriate levels of judicial scrutiny throughout, and also the need to ensure that the immigration system did not place an excessive and unjustified demand on the higher courts.

We have listened to the views of those who responded to the consultation. There was broad support for the headline measures, but concerns were expressed on some of the supporting proposals. We have taken these comments on board, and they are reflected in this response.

We will transfer the functions of the Asylum and Immigration Tribunal into the First-tier and Upper Tribunals established by the TCE Act. However, we have recognised the concern many respondents had with our proposal for the Lord Chancellor to continue to make immigration and asylum procedure rules, and have decided that it is appropriate that this power should pass to the Tribunal Procedure Committee who make rules for chambers in the new tribunal structure, with the agreement of the Lord Chancellor.

It is delay in the asylum system which causes hardship, frustration, expense, and injustice. These proposals are an essential building block in a better system. We have also confirmed that we will legislate to remove the statutory bar preventing the transfer of Immigration and Asylum Judicial Reviews to the Upper Tribunal. Measures to take this forward have been included in the Borders, Citizenship and Immigration Bill currently before Parliament.

The measures set out in this response will ease the burden of immigration work in the higher courts, and the benefits of an improved appeals system will be felt much more widely. We must not be complacent however. We want to make sure that the immigration system as a whole makes fast and fair decisions, and we intend to keep the system under review. We will continue to address unnecessary delays and we will look at ways to refine the process further. Those who use the immigration appeals system would expect nothing less.



Phil Woolas
Minister of State for borders and immigration,
Home Office



Bridget Prentice MP
Parliamentary under Secretary of State,
Ministry of Justice

INTRODUCTION

On August 21st 2008, the UK Border Agency published a consultation 'Immigration Appeals, Fair decisions; faster justice' which set out a number of proposals to deliver an immigration appeals system that is faster, final and respected. This joint response document sets out how, in the light of the consultation responses we received, we intend to take the proposals forward.

The consultation period ran until October 31st and 47 responses were received. The responses have already been published and can be viewed at

www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/

The proposals in the consultation paper were grouped in to the following key areas, which are each covered separately in this document:

- A new tribunal
- Statutory appeals
- Procedure rules
- Judicial review

The remaining sections provide further detail about how the new system will work in practice, including the implementation timescales for each stage and a section on the end to end asylum system.

A NEW TRIBUNAL

The consultation document proposed that the Asylum and Immigration Tribunal (AIT) should be brought within the common framework for tribunals created by the Tribunals, Courts and Enforcement Act 2007 (TCE Act).

In general, consultation respondents were supportive of this proposal, in particular welcoming the fact that the unified tribunal structure is a two-tier system. The Government has decided to transfer the AIT into the unified tribunal system, in line with the provisions outlined in this document.

The consultation paper raised the issue of whether a separate chamber for asylum and immigration cases should be created in the Upper Tribunal. Responses were mixed, but the majority were in favour of a separate chamber. The Government intends therefore to create a separate chamber in the Upper Tribunal to handle asylum and immigration cases. The concurrence of the Senior President of Tribunals will be sought for this in accordance with s7 of the TCE Act.

The consultation paper also explained that decisions by the Upper Tribunal should not routinely be subject to judicial review. The paper suggested the possibility of legislating to clarify this. There was a mixed reaction to this suggestion and the Government has decided not to legislate for this at present, leaving it to the Courts to determine whether Upper Tribunal decisions are judicially reviewable and, if so, in what circumstances. We will however keep the matter under review.

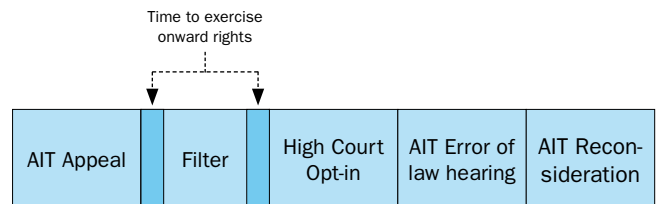
HOW THE NEW TRIBUNAL WILL WORK IN PRACTICE

It is important that the new immigration appeals system is faster, final and respected. We believe that bringing immigration appeals into the unified tribunal structure will ensure that the system is respected, and that its decisions are final. The unified system is overseen by the Senior President of Tribunals, who is a Lord Justice of Appeal, who may request the assistance of judges of the higher courts to hear cases in the Tribunal. As the Upper Tribunal is a superior court of record, the higher courts will no longer need to be an integral part of the immigration appeals system, and the burden on the courts will be reduced substantially.

The tribunal will be part of the unified tribunal system, with a First-tier Tribunal Chamber replacing the existing Asylum and Immigration Tribunal. The Upper Tribunal Chamber will take the place of the existing High Court opt-in stage and will also hear onward appeals, which will replace the substantive reconsideration cases currently heard by the AIT. The processes are shown in the following diagrams. In both the old and new system, there is an onward right of appeal to the Court of Appeal, which is currently exercised in around 400 cases each year.

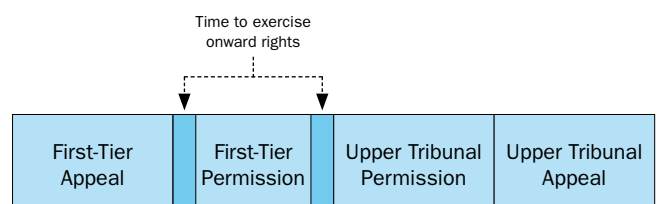
THE EXISTING SYSTEM

Following a decision by the AIT, if applicants believe that the AIT made an error in law, they can apply to the AIT for a reconsideration order, at what is known as the filter stage. If the filter does not grant a reconsideration order, a second application can be made to the High Court, using the opt-in procedure. If a reconsideration order is made at either the filter or opt-in stages, the case is returned to the AIT for a hearing to decide whether there was a substantive error of law, which may then be followed by a reconsideration of the case.



THE NEW SYSTEM

Following a decision by the First-tier Tribunal, if applicants believe that the tribunal made an error of law, they can apply for permission to appeal to the Upper Tribunal. If the First-tier Tribunal does not grant permission, a second application can then be made to the Upper Tribunal. If permission to appeal is granted by either the First-tier Tribunal or the Upper Tribunal, the Upper Tribunal will then hold a substantive hearing to determine whether an error of law was made and may set aside the decision of the First-tier Tribunal, and either re-make the decision, or remit the case to the First-tier Tribunal with directions for its reconsideration.



STATUTORY APPEALS

The section on statutory appeals in the consultation paper covered a number of proposals, which are each covered separately here.

PERMISSION TO APPEAL

The consultation paper proposed that the only way to obtain permission to appeal a First-tier Tribunal decision should be by way of an application to the Upper Tribunal. Responses on this issue were mixed, while a majority of those that expressed a view supported the proposal, some responses linked this to the option of providing for oral permission hearings in the Upper Tribunal, and others opposed the proposal. The Government believes that while removing the First-tier Tribunal permission stage may be beneficial in removing delay in the appeal system, there are a number of practical considerations which would need to be taken into account in order to ensure that the proposal could be implemented effectively. We do not believe that this should prevent the transfer of the AIT into the unified tribunal system but will keep this issue under consideration as part of an overarching review of the end to end application and appeals process. For the present, therefore, appellants unhappy with the decision of the First-tier Tribunal will be able to apply for permission to both the First-tier Tribunal and Upper Tribunal, to appeal the decision of the First-tier Tribunal.

ORAL PERMISSION HEARINGS

A number of consultation respondents expressed support for oral permission hearings, arguing that they would add weight to the finality of Upper Tribunal decisions. The Government believes that the quality of decision making in the Upper Tribunal will be sufficiently high to ensure that a right to an oral permission hearing is not necessary.

REMITTALS

In the main, those respondents that expressed a view on the issue of the Upper Tribunal remitting cases to the First-tier Tribunal were supportive of the practice, recognising the potential burden on the Upper Tribunal. The Government believes that remittal may be necessary in some cases, but it should only take place in exceptional circumstances and no case should be remitted more than once. However, we recognise that the Senior President of Tribunals has the primary role in guidance on how cases should be handled in the unified system.

PROCEDURE RULES

The consultation paper set out the Government's belief that the existing system, whereby procedure rules are made by the Lord Chancellor, is one that works.

The majority of respondents opposed the proposal to maintain the existing system, generally citing grounds that the Tribunal Procedure Committee should make the procedure rules for all tribunals.

Noting the views of respondents, the Government agrees that it is right that the Tribunal Procedure Committee should make procedure rules for the asylum and immigration jurisdiction, and has faith this will be done with full regard to the Government's targets and policy. It is also noted that the Lord Chancellor has the power, where expedient to do so, to direct the committee to make rules necessary to achieve a certain purpose, and may disallow procedure rules made by the committee with written reasons.

JUDICIAL REVIEW

The power to allow the appropriate court to transfer judicial review cases in to the Upper Tribunal on a case by case basis, or for the Lord Chief Justice, Lord President and Lord Chief Justice of Northern Ireland, with the agreement of the Lord Chancellor, to specify a class of case which must be transferred from their respective courts into the Upper Tribunal, exists for other tribunal jurisdictions. The consultation paper proposed that this power should be extended to cover asylum and immigration cases.

Respondents were evenly split over this issue. The Government has decided to legislate to extend this power to asylum and immigration cases, recognising that it will be for the judiciary to decide which types of case are transferred and that the potential impact on Upper Tribunal resources will need to be considered to ensure that transferred applications are dealt with at least as effectively as they are in the High Court and Court of Session. Where cases are transferred to the Upper Tribunal they will be heard by judges of the High Court, Court of Appeal or Court of Session, or other specified judges, where the Lord Chief Justice of England and Wales or Northern Ireland, or Lord President has agreed this with the Senior President of Tribunals. This measure has been included in the Borders, Citizenship and Immigration Bill, which is currently before Parliament.

ASYLUM CASES

Whilst this response paper is mainly concerned with the transfer of the Asylum and Immigration Tribunal into the unified structure, the Government acknowledges that the appeals system is only a part of the overall process for dealing with applications from commencement to completion. In addition to benefiting appellants, a swift and fair end-to-end system is also important for maintaining public confidence. This is particularly important in asylum cases which, despite their relatively low numbers, attract a considerable amount of public attention.

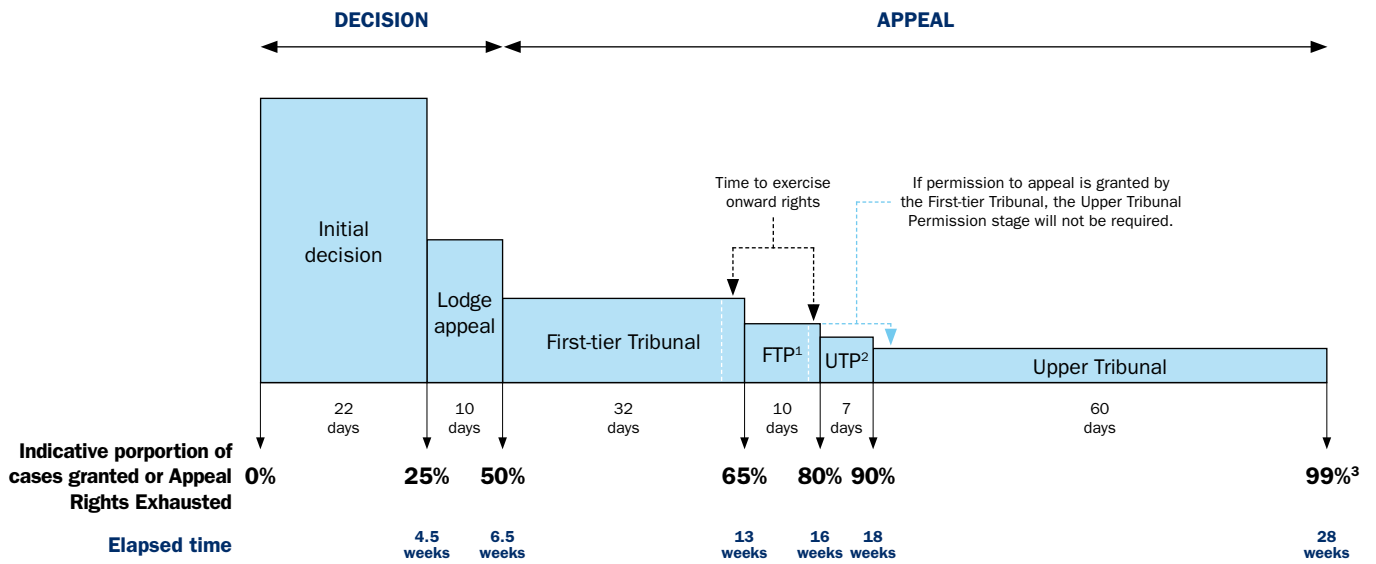
In addition to the overall savings in time that will be achieved by replacing the review and reconsideration process - where applications may have to be made to the relevant High Court or Court of Session - with permission to appeal applications that can be finally decided by the Upper Tribunal, we will also deliver improvements in the speed of the initial decision making process so that we are meeting targets to make decisions within one month of application and, working with the judiciary, will ensure that asylum appeals under the new system are concluded faster than at present, with a reduction in time to initial appeal hearings facilitated by earlier delivery of the respondent's bundle of evidence. We will aim to conclude 40% of asylum appeals within six weeks and 80% within twelve weeks.

Taken as a whole, we expect that these measures will ensure that 90% of asylum applications have either been granted or have exhausted their appeal rights within 18 weeks. This is a significant improvement over performance under the current system, where it can take up to 42 weeks for cases to reach this stage.

Alongside this, the UK Border Agency and the Tribunals Service will keep the end-to-end process under review and will take action to address any unnecessary delays, including looking at the practice of the UK Border Agency serving asylum decisions on appellants, as well as the time required to promulgate decisions. As part of this process, we will also consider whether any changes to legislation or procedure rules are required.

The diagram overleaf shows the role of the new appeals system in the context of the end-to-end asylum process.

The diagram sets out our intended performance targets, rather than statutory time limits, for each part of the process. The numbers of days are expressed in working days. The elapsed time is based on the number of working days required at each stage, plus an additional period of time for the UK Border Agency to serve decisions in person. As we are reviewing the practice of serving decisions in person, this has not been included in the number of working days required at each stage. The percentage of applicants who have either been granted asylum or exhausted their appeal rights is based on the percentage of applicants who exercise onward appeal rights under the present system.



Those granted asylum are integrated into the UK
Failed asylum seekers are removed from the UK.

- 1 First-tier Tribunal Permission
- 2 Upper Tribunal Permission
- 3 The number of cases reaching the Court of Appeal should reduce, as the unified tribunal system has a more restrictive test for permission to appeal.

IMPLEMENTATION TIMESCALE

The new tribunal will begin hearing cases early in 2010. In order to achieve this, a number of changes to the existing rules will need to be made and an order will need to be laid before Parliament to transfer the functions of the AIT into the First-tier and Upper Tribunals. This order will make consequential amendments to the existing AIT procedure rules so that they become rules for the First-tier Tribunal chamber. Responsibility for the First-tier Tribunal chamber rules will then pass to the Tribunal Procedure Committee. Rules for the Upper Tribunal Chamber will be made by the Tribunal Procedure Committee, who will consult on changes required to existing Upper Tribunal rules to ensure they reflect the requirements of immigration and asylum appeals processes. In addition, changes to legal aid processes in England and Wales, Scotland, and Northern Ireland will be made to reflect the establishment of the two-tier appeal structure, and the removal of opt-in applications from the High Court and Court of Session. The expected timetable for consultation and making the necessary changes is outlined opposite.

- Consultation on the Upper Tribunal Rules and legal aid regulations will take place during summer 2009.
- Responses to the consultation will be published in October 2009.
- The transfer of functions order will be laid before Parliament in October 2009. Legal aid regulations will also be laid before Parliament, where and as required, at this time.
- Responses to the consultation on changes to the Upper Tribunal procedure rules will be published in November 2009, and the rules will be laid before Parliament after they are submitted to the Lord Chancellor by the Tribunal Procedure Committee. We expect that this will also be in November 2009.
- All necessary orders will be commenced early in 2010.

