



IMMIGRATION APPEALS: Fair Decisions, Faster Justice

Joint Response of the Refugee Legal Centre and the Refugee Council

31st October 2008

EXECUTIVE SUMMARY

1. We welcome the opportunity to comment on the proposals for reform of the AIT.
2. If implemented, these proposals would undermine access to justice and the rule of law generally. They would place the UK at serious risk of breaching its international obligations on a number of fronts. We believe it is wrong to seek to oust the High Court's jurisdiction. In any event we do not believe it will be successful and may in fact result in an increase in the number of applications made to the Court. By failing to deal with the root causes of poor decision-making and lack of access to quality representation, the proposals will not succeed in bringing greater speed and finality to the asylum appeals process.
3. On a more general note, we believe it is inappropriate for the Home Office, a party to asylum and immigration appeals, to be consulting on the structure, speed and safeguards involved in the appeals process. This should also be considered in the context of the Draft (Partial) Immigration and Citizenship Bill which proposes to give the Secretary of State power to interfere with and even veto certain decisions of the, at present independent, Asylum and Immigration Tribunal. We believe that it is more appropriate for the Ministry of Justice to undertake this review.

ABOUT US

4. The Refugee Legal Centre (RLC) is an independent, not-for-profit organisation and a registered charity. We provide a free legal service to asylum seekers and refugees in the United Kingdom. The RLC has ten regional offices in addition to its head office in London. Our 180 caseworkers and legal officers across the country represent thousands of asylum seekers in initial asylum applications and appeals every year, making us the largest specialist provider of legal advice and representation to asylum seekers in the UK.
5. In addition, the RLC has been responsible for dozens of major precedent-setting cases over the last several years, including the series of Zimbabwean cases challenging the legality of removing anyone to Zimbabwe by force. We are recognised leaders in our field, which is also reflected in our unusually high success rate in appeals before the Asylum and Immigration Tribunal (AIT).
6. The Refugee Council (RC) is a human rights charity, independent of government, which works to ensure that refugees are given the protection they need, that they are treated with respect and understanding, and that they have the same rights, opportunities and responsibilities as other members of our society. We achieve this mission by:
 - supporting refugees and working with them as they build a new life
 - speaking up for refugees and ensuring that refugees themselves have a strong voice in all areas of UK life
 - building links with people from across our society to increase mutual understanding of refugees
 - making the case for a fair and just asylum system
 - taking a leading role in helping to build up a vibrant, sustainable and successful refugee sector in the UK and internationally

GENERAL OBSERVATIONS

7. As described in the consultation paper, the immigration appeals system has been repeatedly revised over the past several years. At each stage the government has sought to speed-up the process of decision-making, in order to reach finality more quickly and reduce the demands on the higher courts. Since 2002, the government has limited onward appeals to points of law only, replaced traditional Judicial Review with the more limited Statutory Review, and replaced a two-tier Tribunal with a single-tier Tribunal.
8. To some extent these new proposals represent a genuine attempt to rationalise the appeals system by dealing with simple matters at the Tribunal level, rather than in the higher courts. In our view, the merging of the old Immigration Appellate Authority (IAA) and Immigration Appeal

Tribunal (IAT) was a retrograde step, and the proposal to re-create a genuine two-tier appellate structure is to be welcomed. It is likely to bring greater objectivity and accountability to the reviewing function of the Tribunal in relation to initial appeals, to increase the quality of decisions generally, and (provided it has suitable powers of remittal) it is likely to significantly reduce the burden on the higher courts.

9. However, we are concerned that the attempt to rationalise the appeals system will be undermined by measures proposed to insulate decisions of the Tribunal from the scrutiny of the higher courts. We believe this aspect of the proposals to be flawed such that the overall package of measures will fail to deliver fair decisions or faster justice. We are particularly concerned at the lack of any detail about how some of the proposals, which raise significant human rights issues, will work in practice.
10. During every previous reform a range of stakeholders have advised the government that the key to reaching quicker decisions and reducing the demands on the higher courts is to make better decisions, and to ensure everyone who needs it receives adequate publicly funded legal representation. However at each stage the government has preferred instead to circumscribe essential procedural safeguards and limit access to legal aid, rather than deal with the causes of the poor decision-making. Regrettably that trend looks set to continue, with the bulk of the current proposals representing an attempt to reintroduce the harshest and most regressive aspects of previous proposals.
11. We are particularly concerned about the lack of analysis in the proposals regarding why so many cases are reaching the higher courts. It appears to be assumed that this is purely the result of opportunistic claimants seeking to prolong their stay in the country. Clearly not all claimants have meritorious cases, but the consultation paper's failure to consider the quality of UKBA asylum decision-making, the Secretary of State's behaviour as a litigant, or the consequences of the single-tier appellate system, is a serious omission.
12. An additional serious omission from the consultation document is the failure to consider the impact of unrepresented appellants. Not only might this result in an increased number of applications to the High Court as they may challenge decisions they believe to be wrong but contain no error of law, but there is a related question of the impact this has generally on the time it takes to determine applications within the process. It is the RLC's experience that applicants who feel competently and honestly advised, having reached a stage at which their representatives advise them there is little merit in any further appeal, are much more likely to accept that advice than applicants who feel they have not had a fair opportunity to put their case. Quality representation does not just mean a greater chance of getting the right decision first time; it also acts as a filter against unmeritorious applications proceeding. Despite this, there is no discussion at all in the consultation document of the role of quality representation in realising the joint objectives of speed and finality. Part of this discussion would have to involve revisiting the public funding regime, which as it

stands acts as a serious obstacle to obtaining representation for some of the poorest and most vulnerable individuals in society.

13. We note with interest that the Tribunal Procedure (Upper Tribunal) Rules 2008 give the Upper Tribunal power to appoint a legal representative to an unrepresented patient in a mental health case. A similar power for asylum and immigration cases will help speed up processes.
14. There is also no discussion of what impact these reforms would have on actions taken against the UK government in the European courts. We believe the High Court will be far more likely to assert its judicial review jurisdiction if the reforms are implemented. For this reason, we believe the proposals simply won't work. But even in the less likely scenario that the High Court does not assert its jurisdiction, or where judicial review is not the appropriate remedy, applications will be made to the European courts. Legal advisors such as the RLC are likely to be forced to take more and more cases to the European courts in order to correct poor decisions. Given that the government is concerned about speed and finality, we urge that it seriously reconsider the proposal to oust the High Court's oversight of decision-making.
15. We are also concerned that the consultation paper draws no distinction between asylum and human rights appeals, and appeals in what may be called "pure" immigration matters. The distinction is an important one, because in asylum and human rights appeals the very life and freedom of the applicant is at stake. The courts have long recognised that where fundamental human rights are at stake, the rule of law demands that a case receive particularly anxious scrutiny from the decision-maker and from the courts, before being rejected.¹ We are concerned that a consultation paper on the future of immigration and asylum appeals fails to recognise the distinction between the two. To assume that procedural safeguards that may be adequate and proportionate in a case involving a student visa for example, can be equally applied to a case involving the threat of torture or death, is to misunderstand the requirements of the rule of law.
16. Furthermore, we view the 'speed agenda' as a false one in the asylum context. The most significant delays in removing refused asylum seekers are caused not at the 'front-end' of decisions and appeals, but at the 'back-end' of re-documentation and removal. However quick the decision and appeal processes become, it will have a minimal effect on the government's objective of removing more refused asylum seekers. What little effect it will have is, in our view, entirely disproportionate to the damage it will do to procedural fairness. While there are no published statistics on the length of time it typically takes the UK Border Agency to remove a failed asylum seeker once they reach the end of the line, it is our experience that this period often far exceeds the time an individual spends within the appeals system. It also appears that the length of time an

¹ Bugdaycay v SSHD [1986] UKHL 3. See also Sivasubramaniam v Wandsworth County Court & Ors [2002] EWCA Civ 1738 (para 52)

individual spends waiting for removal depends a great deal on what country they are from, with some countries appearing almost impossible to remove to.

17. By way of example, the most recent statistics available show that in Quarter 2 of 2008:²
- 17.1. **Eritrea**- 160 asylum seekers had their appeals dismissed. Only 95 were removed³ in the same time period;
 - 17.2. **Somalia**- 110 asylum seekers had their appeals dismissed only 20 were removed in the same time period;
 - 17.3. **Iranian**- 285 asylum seekers had their appeals dismissed. Only 135 were removed in the same time period.
18. The nationals of those 3 countries alone represent 23% of new asylum applicants registered in Quarter 2 of 2008, and yet it appears the Home Office continues to experience very severe difficulties in removing people to those countries. We recognise that removal is a complicated and difficult procedure, particularly where the cooperation of the receiving state is required. However it is wrong to portray delays in the asylum process as being largely the fault of asylum seekers or of the appeals system, and profoundly unjust to try to resolve the problems in removing refused asylum seekers by limiting or truncating their appeal rights.

OUSTING HIGH COURT OVERSIGHT

19. Perhaps the most worrying aspect of the consultation document is the proposal to further limit access to the High Court in asylum and human rights cases. By proposing a system whereby a senior judge of the AIT has the final say on an asylum or human rights claim, this consultation paper effectively returns to the proposed inclusion of a general ouster of Judicial Review in the Nationality, Immigration and Asylum Bill 2002. That proposal was met with considerable opposition and the Government responded by introducing the safeguard of Statutory Review. That safeguard has proven key to protecting decisions of the Tribunal from routine challenge by way of Judicial Review.
20. The consultation paper justifies the abolition of Statutory Review by proposing to give the Upper Tribunal the status of a “superior court of record”. What exactly this means is not explained. While we would welcome any move to involve more High Court judges, from the consultation paper the new Upper Tribunal looks strikingly like the bench

² These figures have been drawn from Control of Immigration Supplementary excel tables, available at: <http://www.homeoffice.gov.uk/rds/pdfs08/coiq208-suptabs.xls> As a result of the independent rounding system used within the statistical tables, the calculated figures may be subject to a small margin of error.

³ Removal in this context includes voluntary departure

of Senior Immigration Judges at the current AIT. While one should not underestimate the status and specialist expertise of Senior Immigration Judges, they do not and cannot play the same role as a High Court judge. Judges of the High Court are first and foremost guardians of the rule of law.

21. The constitution and procedure of other superior courts of record contrasts materially with the proposals for the Upper Tribunal:

21.1. The Special Immigration Appeals Commission (SIAC) is a superior court of record by virtue of section 1(3) of the Special Immigration Appeals Commission Act 1997. However by virtue of paragraph 5(a) of schedule 1 to that Act, each hearing before the Commission must involve "... at least one [member who] holds or has held high judicial office."

21.2. The Court of Protection is a superior court of record by virtue of section 45(1) of the Mental Capacity Act 2005. However by virtue of section 46(2) of that Act a judge of the Court of Protection must be a High Court judge, circuit judge or district judge.

21.3. The Employment Appeal Tribunal is a superior court of record by virtue of section 20(3) of the Industrial Tribunals Act 1996. However by virtue of sections 22(1) and 28 of that Act, a High Court judge or a judge of equivalent status must chair each hearing before the Tribunal.

22. In short it is clear that where parliament has in the past created a new superior court of record, it has required that the key functions of that court be exercised by a judge of the High Court or of equivalent status⁴. The only exception to that appears to be the Upper Tribunal created by the 2007 Act. Without seeking to comment on that development in general terms, we are deeply concerned about its application to asylum and human rights cases as proposed in the consultation paper.

23. Commenting on the creation of SIAC as a superior court of record, the then Lord Chancellor Lord Falconer stated:

"... the membership of SIAC includes a High Court judge to give it the appropriate judicial standing ... Having that status means that the decisions of such a body are a matter of public record and they are binding on any inferior courts. In those respects it puts them on a par with the Administrative Court."⁵

⁴ Even then, we do not think it is clear cut that all decisions of these tribunals are immune from judicial review- see paragraph 24

⁵ Hansard, 13 Dec 2001: Column 1436

24. In relation to the claim that Judicial Review against the Upper Tribunal will only be available in "exceptional circumstances" (see consultation document, para 23), we consider it far from clear that the courts will decline to hear Judicial Review claims against the Upper Tribunal merely because it is designated as a superior court of record. The Court of Appeal considered this point in the context of SIAC in the case of G v SSHD [2004] EWCA Civ 265, and although the point did not ultimately need to be resolved because the Secretary of State chose not to contest that part of the case, the court did indicate a preliminary view. At paragraph 20 the majority of the court considered the significance of SIAC's designation as a superior court of record and observed: "**We are not persuaded that these words are necessarily fatal to judicial review** of the jurisdiction of SIAC to order the release of a detainee who is not pursuing an appeal to SIAC, by purporting to grant bail. SIAC is a court of very limited jurisdiction. It is not easy to accept that, if SIAC purports to exercise a jurisdiction that does not exist, Parliament has excluded all possibility of putting the matter right. What if section 24 had provided that 'a suspected international terrorist who is detained may not be released on bail'? Would there be no remedy if SIAC purported to grant bail?" (Emphasis added). In our view similar issues are likely to arise in the context of the Upper Tribunal, and there is no reason to suppose the courts will take a different approach.
25. The consultation paper suggests that as a superior court of record, the Upper Tribunal will only be subject to Judicial Review in the most exceptional circumstances. However, without the safeguard of Statutory Review, or a significantly more material change in the constitution of the Upper Tribunal we believe the High Court will be far more ready to assert its jurisdiction, particularly in cases involving fundamental human rights.
26. While no process is infallible, we consider that the current availability of a limited High Court review on the papers is the absolute minimum level of oversight that should be contemplated. The RLC strongly argued at the time of the 2002 and 2004 Acts that it was unlawful to replace Judicial Review with the more restrictive Statutory Review, including representing the claimant M in the case of R (M and G) v IAT and SSHD [2004] EWCA Civ 1731 in which the Court of Appeal held that Statutory Review on the papers represented "adequate and proportionate protection of the asylum seeker's rights."⁶ The court made it clear however, that the position may have been different had the scheme not included the right to seek Statutory Review in the High Court.⁷
27. This is not merely a point of principle. The RLC has made scores of High Court review applications since the commencement of the 2004 Act scheme, many of which have resulted in individuals not being sent back to

⁶ Paragraph 26

⁷ See in particular paragraph 3 of the court's decision refusing permission to petition the House of Lords, where the Master of the Rolls observed: "We recognise that the case does involve an important point of general importance and, but for the changes made by the 2004 Act [the introduction of Statutory Review], we might well have been minded to give permission to appeal."

torture and death who otherwise would have been. To these individuals, access to the High Court really was a matter of life or death.

28. In one typical RLC case⁸, our client claimed that if she were returned to Algeria she would be killed by her powerful family who believed she had dishonoured them by escaping from an arranged marriage. A report by a country expert confirmed that her family would feel bound to kill her, that the authorities in Algeria would not protect her, and that even if her family did not kill her she would face intense discrimination as a single woman, and would be at risk of sexual exploitation. At her initial appeal her account was believed, but her claim was refused because the Immigration Judge considered that the authorities would protect her from any abuses. She sought reconsideration from the AIT, but was refused. She lodged a Statutory Review, and this was granted by a High Court judge who criticised the Immigration Judge's decision for failing to look into the case in enough detail, and making assumptions about the situation in Algeria without reference to evidence. Her case was eventually re-heard by the AIT who, after carefully reviewing all of the evidence, found that she was at a very serious risk of being pursued and killed by her own family, and that the authorities would not be willing to protect her. The judges found that she was a refugee, and that removal would violate her human rights; the Home Office has not appealed the decision.

29. In another illustrative case, a client of the Refugee Legal Centre claimed to have uncovered certain corrupt practices involving a senior businessman in China. When he sought to expose the corrupt practices he unleashed a string of reprisal attacks against himself and his family, causing him to relocate within the country. When he was tracked down in the new area and attacked again, he decided to flee the country and come to the UK. At his initial appeal hearing, the judge accepted that he had told the truth about his experiences, and that there were powerful factions associated with the corrupt businessman who would seek to silence him. His claim was refused however because the judge felt that if he relocated within China, and stopped his attempts to publicise the corruption, he would be safe. Our client sought reconsideration from the AIT, but this was refused. He made an application for statutory review, and the High Court judge ordered reconsideration on the basis that the immigration judge had not considered key pieces of evidence about his ability to safely relocate. At the reconsideration hearing our client's case was thought to be so strong that the Home Office representative did not even seek to argue that the appeal should be dismissed. His appeal was allowed, and the Home Office subsequently granted him refugee status.

⁸ These examples are based on real historic cases in which the RLC was involved, but certain facts have been altered to afford anonymity to the clients and witnesses involved, and to ensure that the safety of relatives in their home countries is not jeopardised. Although certain facts have been changed, the cases have not been embellished or exaggerated in any way.

30. In relation to the claim that 2% of applicants benefit by being granted a reconsideration order, the Home Office has since confirmed that that figure relates to the proportion of **asylum applicants** who go on apply for and obtain a reconsideration order from the High Court. In our view, the only statistic that is relevant in assessing the utility of the Statutory Review is a comparison of the number of applicants for such a review, with the number of orders granted. The RLC has recently obtained these statistics under the Freedom of Information Act. They show that from the creation of the current system on 4 April 2005 until 31 March 2008, 11,493 applications were made, and 1053 resulted in the making of an order for reconsideration. That is a success rate of over 10%, or almost one per day since the system began.
31. In relation to the claim that only a fraction of the 2% go on to have their appeals allowed, we note that the Freedom of Information Act disclosure received by the RLC confirms that:
- 1) the AIT do not in fact keep records of how many recipients of High Court orders go on to have their appeals allowed; but
 - 2) of the total number of reconsideration hearings (generated by orders from both the AIT and the High Court), some 31% were allowed over the same time period (4 April 2005 - 31 March 2008)
32. While it is not possible to disaggregate these figures according to the basis on which the appeal was allowed (asylum, human rights or other) it is clear that many hundreds of people have benefited in a very real sense from the Statutory Review process. For those whose lives have been saved by the Statutory Review, and those who may need to rely on this essential safeguard in future, these statistics are a matter of great importance.
33. However national statistics tell only half the story. It has not been possible to determine how many of the 11,493 applications were made without the benefit of legal representation. In order to demonstrate what significance this may have had, the RLC analysed a sample of the caseload of seven RLC Legal Officers who regularly make applications to the High Court. This showed that since October last year, of the 48 applications for review that were made by the RLC and decided by the High Court, an order was made in 23 cases. That represents a success rate of almost 48%. Not only does that figure reinforce our views about the importance and utility of maintaining High Court oversight, it also strongly supports the points made above about the availability and quality of representation. If the RLC is able to achieve a success rate of 48%, it begs the question of why the national average is only 10%, and in our view it strongly suggests that a very great number of applicants for Statutory Review are unrepresented or poorly represented.
34. We appreciate that the involvement of a High Court judge in every case before the Upper Tribunal would not be feasible, given the likely number of such appeals. However in those circumstances we consider that the right of access to the High Court against the decisions of that Tribunal must be

preserved. Taking into account the desire of the government (and no doubt the judiciary itself) to reduce the burden of immigration and asylum cases on the Administrative Court, we suggest the following:

- 34.1. Distinguishing between cases involving asylum or human rights issues, and those involving pure immigration issues only⁹. In this way the highest procedural safeguards could be limited to those with the most fundamental interests at stake.
- 34.2. Enactment of the proposal in paragraph 30 of the consultation paper that there be an oral renewal hearing before the Upper Tribunal where a judge of that Tribunal has refused permission to appeal on the papers. For the reasons given above we envisage this not as an alternative to High Court oversight, but as a means of preventing the more meritorious cases from burdening the higher courts.
- 34.3. Maintaining High Court oversight in asylum and human rights cases, as a necessary and proportionate safeguard against unlawful decisions that may put an individual's life or freedom at risk. This may be through an application to the Administrative Court as now, or to a High Court judge acting as a judge of the Upper Tribunal.

RESTRICTING ACCESS TO THE COURT OF APPEAL

35. We also note with concern the provisions of section 13(6) of the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) which provides that the Lord Chancellor may by order require that permission to appeal to the Court of Appeal, following a hearing in the Upper Tribunal, only be allowed where there is an error of law and:

“(a) ... the proposed appeal would raise some important point of principle or practice, or

(b) ... there is some other compelling reason for the relevant appellate court to hear the appeal.”

36. While we acknowledge that this is a standard requirement in many appeals from Tribunals to the Court of Appeal, it is simply not appropriate in cases involving fundamental human rights. It is recognised in another part of the Act, that such cases require exceptional treatment¹⁰. Where the Upper Tribunal makes an error of law that could have affected the decision on the appeal, it is essential that the appellant have a remedy in every

⁹ We believe such a distinction could be readily made and we would be happy to participate in further discussion on this.

¹⁰ See section 19, although the consultation paper suggests that even this exceptional treatment might be abolished.

case. In our view, anything less places the UK in breach of its international obligations. Should the AIT be incorporated into the new Tribunals scheme, it must be on the basis that access to the Court of Appeal in asylum and human rights cases remains unrestricted by 'public importance' criteria.

37. Instead we would suggest the following ways of addressing the burden on that court:

37.1. Distinguishing between cases involving asylum or human rights issues, and those involving pure immigration issues only. In this way the highest procedural safeguards could be limited to those with the most fundamental interests at stake;

37.2. Enabling the Upper Tribunal to remit appropriate cases to the Lower Tribunal for rehearing as many times as is necessary to reach a lawful decision, as already provided for in the 2007 Act in respect of other chambers. Clearly there may be exceptions, such as for what are now reported or Country Guidance decisions, but the majority of cases should not be forced into the Court of Appeal after only one remittal (as is the effect of the current scheme.¹¹)

THE TRIBUNAL'S JUDICIAL REVIEW JURISDICTION

38. The consultation document proposes transferring certain Judicial Reviews to the Upper Tribunal to determine. We note that there is very little information in the consultation document on how this is envisaged working, despite the real possibility that changes being contemplated would undermine the role of the High Court and have significant constitutional implications. In this respect, the consultation is inadequate, as we are only able to offer some preliminary thoughts on the issues raised.

39. We reiterate what is said above about the High Court having an inherent jurisdiction to oversee the legality of executive action. We also recognise that there are potential benefits to be gained by dealing with less complex Judicial Reviews within the Upper Tribunal. These benefits may be particularly significant for unrepresented claimants, especially if it is accompanied by a de-formalisation of procedure and terminology.

40. However, we believe any change will be highly problematic. While we recognise the advantage of having specialist judges helping to determine Judicial Reviews in their specialist area, we consider that a High Court judge must preside over such hearings in the Tribunal and yet there would seem little point in transferring a case to the Tribunal if it were to be heard by a High Court judge. Alternatively, if the matter were heard by a senior

¹¹ See section 103A(2)(b) of the Nationality, Immigration and Asylum Act 2002

immigration judge, there must be an unfettered right to renew the application to the Administrative Court, otherwise the constitutional role of the High Court would be completely undermined. Clearly, there is also a strong argument not to countenance the transfer of proceedings to the Tribunal in cases involving significant human rights. This was why, following concerns expressed during its passage through the House of Lords, a statutory bar was inserted into Section 19 of the 2007 Act on the transfer of immigration cases.

41. We therefore believe that particular care should be taken in formulating and considering any concrete proposals. There is little evidence that such care has been taken and, as stated above, we consider this part of the consultation to be inadequate. We welcome the acknowledgement in the consultation paper that the Upper Tribunal would need to be well established before any changes were implemented (Paragraph 40). There is therefore time to develop and consult on fully reasoned proposals.
42. We suggest that all stakeholders, and legal representatives in particular, be involved at the earliest opportunity in the development of these proposals. The convening of a seminar involving all interested parties would be a good way of initiating this process. The ambit of this initial meeting need not be confined to the issue of the transfer of proceedings but could also consider the ouster of judicial review. Another matter, worthy of more detailed consideration would be the question of whether there should be a separate upper chamber for asylum and immigration cases.
43. We would be grateful if in its response to this consultation, and certainly prior to any seminar, the government would provide further information on:
 - 43.1. The proposed constitution and procedure of the Tribunal when hearing judicial review cases, including matters relating to rights of audience;
 - 43.2. How these proposals will affect the public funding regime; and
 - 43.3. What remedy will be available to a litigant who wishes to challenge a decision of the Tribunal on their claim.

PROCEDURES AND LOGISTICS

44. The discussion paper proposes merging the AIT into the new Tribunals scheme implemented by the 2007 Act. We could support this in principle as a sensible measure to bring greater coherence to the system of immigration appeals. However we are concerned that the focus of the consultation paper at paragraphs 25 to 36 appears to be ensuring that immigrants and asylum seekers receive less procedural protection than appellants before other Tribunals within the new scheme. By way of example:

- 44.1. Paragraph 27 suggests that the power of most first-tier Tribunals in the new scheme to review their own decisions will be removed in immigration and asylum cases. There is no analysis or reasoning of why this is required, or how it will ultimately lead to faster, fairer or more final decision-making. Surely if a first-tier Tribunal recognises that it has erred, it is faster and easier for all concerned to permit them to correct the error themselves;
- 44.2. Paragraph 29 suggests that the power of most first-tier Tribunals to grant permission to appeal to the Upper Tribunal would be removed, by legislation, in respect of asylum and immigration appeals. The only reasoning offered is that: "Applicants who are seeking to delay their removal from the United Kingdom will inevitably take advantage of this procedure..." There is no evidence that we are aware of that immigrants and asylum seekers without meritorious claims are more likely to "take advantage" of the appeals system than are unmeritorious claimants in other proceedings.
45. More generally, in so far as these and other provisions involve treating asylum seekers and immigrants less favourably, issues of fairness and discrimination arise which do not appear to have been considered.
46. Of particular concern in this regard is the proposal to legislate to ensure that the Procedure Rules applicable in immigration and asylum cases stay outside the remit of the independent Tribunal Procedure Rules Committee. The discussion paper states that the government remains to be convinced that the Committee is the appropriate body to set procedure rules in immigration and asylum cases, and raises the possibility of new legislation to preserve the current system once the new Tribunal is created.
47. The rationale for maintaining the current system is that the Procedure Rules reflect the government's objective of concluding immigration and asylum matters "fairly, quickly and efficiently."¹² Indeed rule 4 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 provides:
- "The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible; and, where appropriate, that members of the Tribunal have responsibility for ensuring this, in the interests of the parties to the proceedings and in the wider public interest."
48. However there appears to us to be no good reason why these objectives could not equally be met through rules drafted by the independent Committee. Indeed section 22(4) of the 2007 Act provides that:

¹² Consultation document, paragraph 34

“Power to make Tribunal Procedure Rules is to be exercised with a view to securing—

(a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,

(b) that the tribunal system is accessible and **fair**,

(c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled **quickly and efficiently**,

(d) that the rules are both simple and simply expressed, and

(e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.”

(Emphasis added)

49. It appears to us that an independent rule making body is just as capable of drafting rules that reflect these objectives, and that there is no good reason to retain the current system. In fact there is a very good reason to abandon it as in immigration and asylum appeals, the government is one of the parties to the appeal. It is the government’s decision that is said to be wrong or unlawful. To allow the government to enact the rules by which the independent judicial Tribunal is bound to conduct itself is to taint the independence of the judicial process, and to undermine the fundamental principle of equality of arms. It gives the respondent in these appeals an unfair and unjust advantage. We see no distinction between asylum and immigration appeals and other appeals in this area; and no reason for the government to maintain control of the Tribunal’s procedure in these cases but not in others.

50. In relation to the jurisdiction of the Upper Tribunal to remit cases to the First-Tier Tribunal, the consultation document observes that re-making substantive decisions at the Upper Tribunal should lead to a reduction in the Court of Appeal’s workload, but notes a concern that preventing remittals altogether might create an unmanageable burden for the Upper Tribunal.¹³ We agree that preventing remittals is likely to create an unmanageable burden. It is likely to lead to unnecessary delay in having cases listed, and would serve to dilute the real function of the Upper Tribunal which is to review and oversee the decisions of the First-Tier Tribunal. We would suggest that there be a presumption in favour of remittal unless:

¹³ Consultation document, paras 31 - 32

- 50.1. All parties agree that the Upper Tribunal should determine the case substantively;
 - 50.2. The matter has already been remitted once;
 - 50.3. A decision can be substituted without the need to make further factual findings; or
 - 50.4. The case is thought suitable for reporting, in order to provide guidance to the First-Tier Tribunal on important matters of law or practice.
51. While it may be argued that repeated remittal would prolong the appeal process within the Tribunal, there are a number of reasons why this should be preferred to the current approach. Allowing the remittal of appeals back to the First-Tier Tribunal, as many times as is necessary to reach a lawful decision, is the best way of reducing the Court of Appeal's workload. At present there is no remedy against an unlawful decision on a reconsideration hearing, aside from appealing to the Court of Appeal.¹⁴ The process is time-consuming, expensive, and unnecessary. Allowing remittal would, at a stroke, prevent the more clearly meritorious cases from burdening the Court of Appeal, allowing it to focus on those in which there is a real controversy over the applicable law.
52. It should also be noted that in most cases there must be a delay of some kind between the identification of the error of law by the Upper Tribunal, and the substitution of a new decision on the appeal. This is because appellants cannot be expected to prepare a case substantively, arrange for witnesses to attend court and experts to prepare reports etc, only for all that work and expense to be wasted if the Tribunal does not identify an error of law. A system of remittals could accommodate these practicalities easily, whereas to keep the appeal within the Upper Tribunal may routinely lead to long adjournments following identification of an error of law.

CONCLUSION AND RECOMENDATIONS

53. We do not think it is appropriate for the Home Office, a party to asylum and immigration appeals, to be consulting on the structure, speed and safeguards in the appeals process. The consultation should be transferred to the Ministry of Justice.
54. We welcome the proposal to re-create a two-tier Tribunal. However, the attempt to rationalise the appeals system will be undermined by measures proposed to insulate decisions of the Tribunal from the scrutiny of the

¹⁴ See section 103A(2)(b) of the Nationality, Immigration and Asylum Act 2002

higher courts. These measures are flawed, will not work and will fail to deliver fair decisions or faster justice.

55. As in mental health cases, the Upper Tribunal should be given power to appoint a representative and this will help speed up processes.
56. Statutory Review is a vital remedy for cases where fundamental human rights are stake. It should be preserved as a minimum safeguard. To reduce the burden on the High Court, there should first be access to an oral renewal hearing before the Upper Tribunal where permission has been refused on the papers.
57. There should be no restriction on access to the Court of Appeal in cases involving fundamental human rights. The burden on the Court of Appeal could be reduced by enabling the Upper Tribunal to remit cases to the Lower Tribunal for rehearing as many times as necessary to reach a lawful decision.
58. The Procedure Rules applicable to immigration and asylum appeals should be within the remit of the independent Tribunal Procedure Rules Committee, not the Home Office which is a party to these appeals.
59. Cases involving fundamental human rights should enjoy as a minimum the same safeguards applicable to less serious cases.
60. In certain material respects, we believe the consultation to be inadequate. We are particularly concerned with the proposals in relation to the possible transfer of JR proceedings. While they are vague and lacking in detail, they also raise profound constitutional issues about the role of the High Court. More generally, we believe the proposals are ill thought through and simply won't work. We therefore suggest that all stakeholders be involved at the earliest opportunity in the review and development of proposals contained in the consultation paper. The convening of a seminar involving all interested parties would be a good way of initiating this process.

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