

Immigration appeals consultation
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Immigration Appeals: Fair Decisions; Faster Justice

This is the response of the Administrative Justice and Tribunals Council (“the Council”) to the consultation on “Immigration Appeals, Fair Decisions; Faster Justice” dated 21 August 2008 and issued by the Home Office UK Border Agency.

The Council’s interest arises not only from its oversight of the tribunal system but also from its oversight of the administrative justice system as a whole. That function of oversight involves considering how the system might be made more accessible, fair and efficient, having particular regard to the needs of users. In cases of asylum and immigration appeals, these users constitute a large, heterogeneous group with some highly vulnerable members.

The consultation takes place in the context of what the Foreword describes as “the biggest shake-up to our border protection and immigration system for over 45 years”. The Council has noted that a number of organisations, in commenting on the draft (partial) Immigration and Citizenship Bill, have expressed serious concern about the extent to which the structure of permissions and appeals under the Bill would erode avenues of redress and possibly lead to increased recourse to judicial review. The Council will study the Government’s response to these concerns with great care.

In principle the Council welcomes the proposal to incorporate asylum and immigration appeals into the two-tier structure provided by the Tribunals, Courts and Enforcement Act, 2007. The Council on Tribunals (the predecessor body of the present Council) expressed misgivings about the establishment of the single tier Asylum and Immigration Tribunal under the Asylum and Immigration (Treatment of Claimants, etc) Act, 2004 on several occasions.

The Council also supports the proposal for specialist asylum and immigration Chambers of the First-tier and Upper Tribunal.

The new proposal should serve to reduce the current pressures on the Administrative Court. The Council is content with the proposal to remove the statutory bar to the exercise of a judicial review jurisdiction by the Upper Tribunal in asylum and immigration cases.

The Council recognises that in the asylum field in particular, speed and finality is of value to appellants, and also has beneficial incentive effects in relation to economic migrants seeking admission to the UK as asylum seekers. However, the Council is concerned about the degree of stress the Consultation Paper places on speed and finality, as against the marked lack of emphasis it gives to the principles of fairness, impartiality and human rights. The new appeals system will only operate fairly and efficiently if initial decision making is as fair and thorough as possible. It seems somewhat incongruous that a UKBA consultation paper about appeals to which UKBA is a party should have so little to say about how initial decision making could be improved. Without such improvement any attempt to speed up and abridge the appeal process is misconceived and could lead to serious injustice. It goes without saying that improved decision making is even more important where there is no right of appeal.

Turning to some more detailed aspects of the Consultation Paper, the Council has concerns about treating asylum and immigration appeals differently from appeals in other jurisdictions of the First-tier and Upper Tribunal. In the paragraphs that follow, these particular proposals are dealt with in the order in which they appear in the Consultation Paper.

a) No power for First-tier Tribunal to review its own decisions (para.27)

In other jurisdictions the power of a lower tribunal to review its own decisions has proved to be an efficient and economical way of correcting mistaken decisions without the need for an appeal to an appellate tribunal. The Council is not convinced of the justification for depriving the First-tier Tribunal of the power to review its own decisions in asylum cases. Nor can the Council see any justification for removing the power of review in ordinary immigration cases.

b) Permission to appeal to Upper Tribunal obtainable only from that Tribunal (para.29)

The Council understands that there may be an argument in asylum cases that a refusal of permission by the First-tier Tribunal will almost certainly be followed by an application for permission to the Upper Tribunal. If that is indeed the case, it may make sense to restrict the making of such applications to the senior level. However, the argument would not seem to apply in ordinary immigration cases.

Having regard to the finality of the Upper Tribunal's refusal of permission, the Council considers that the Upper Tribunal should have the discretion to hold an oral hearing of a permission application.

c) Possible provision for remittal of appeals to First-tier Tribunal without substantive consideration by Upper Tribunal (para.32)

The Council notes that thought is being given to providing for certain categories of case to be remitted to the First-tier Tribunal without substantive consideration by the Upper Tribunal, in order to ensure that the workload of the Upper Tribunal is not excessive. It is difficult to comment on this suggestion without more detail of what is envisaged. The Council would be glad to be consulted as and when the concept is worked out more fully. A proposal along these lines might indeed be appropriate for other jurisdictions in the Upper Tribunal.

d) Procedural rules to be made by Lord Chancellor instead of Tribunal Procedure Committee (para.36)

It is the Council's view that the Tribunal Procedure Committee is the appropriate body to make rules for this jurisdiction as it is for other tribunal jurisdictions. The Consultation Paper gives no reasons for taking a different approach. In the Council's view, the appearance of independence would be enhanced by conferring the rule making power on an independent body, rather than on a Minister of the Crown (albeit subject to consultation with the Council).

In summary, while the Council favours the incorporation of asylum and immigration appeals into the new two-tier structure, it has concerns about the detailed implementation. In addition, the Council needs to be satisfied that the wider proposals in the draft Bill do not erode existing appeal rights to an unacceptable degree.