Consultation on proposed amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008

1. The Tribunal Procedure Committee is established by section 22 of the Tribunals, Courts and Enforcement Act 2007 ("the TCE Act"). Its function is to make Tribunal Procedure Rules governing the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal, which are established by section 3 of that Act. Before making Rules, the Committee must consult such persons as it considers appropriate.

2. The purpose of this consultation is to seek views on possible new rules to be added to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("UT Rules") in England and Wales. These new rules would affect Part 4 of the UT Rules, the Part which concerns judicial review ("JR") claims in the Upper Tribunal. The consultation does not seek to review the rules for JR generally. A more general consultation will be a matter for consideration in the future. The present consultation arises because developments in England and Wales may make it desirable for rules to be made in that jurisdiction to cater for amended or additional grounds of challenge.

3. The new rules under discussion in this consultation would be additional to possible changes applicable to a “fresh claim judicial review” ("FCJR") – i.e. a JR claim relating to a refusal of the Home Secretary to treat submissions as a fresh asylum or human rights claim. The Committee is conducting a separate consultation on possible changes in England and Wales for FCJRs. The FCJR consultation paper can be found at http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm. As explained in the FCJR consultation paper, the Upper Tribunal’s jurisdiction to deal with FCJRs will arise only once section 53 of the Borders, Citizenship and Immigration Act 2009 ("the BCI Act") is brought into force, and under current proposals would have practical effect only in cases arising under the law of England and Wales.

4. Below you will find further information on the following:
5. The UT Rules incorporating the changes proposed in this consultation paper, along with proposed or possible changes identified in the FCJR consultation paper, are set out in Annex 1. The existing rules currently applicable in the Upper Tribunal can be found using links available at:


The consultation questions are at Annex 2 in a separate Word document, which can be used for submitting your response.

6. Relevant legislation and allied material is set out in Annex 3. Further information on HM Courts & Tribunals Service, the Tribunal Procedure Committee, and the First-tier Tribunal and Upper Tribunal can be found using links available at:

http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/index.htm and
http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm

**The First-tier Tribunal and the Upper Tribunal**

7. The Tribunals, Courts and Enforcement Act 2007 ("TCE Act") provides for the First-tier Tribunal ("FTT") and Upper Tribunal ("UT"). The tribunals are judicial bodies independent of Government. The FTT is the first instance tribunal for most jurisdictions. The UT mainly, but not exclusively, decides appeals from the FTT. It also has power to deal with some JR work as explained below.

8. Each of the two tribunals is divided into separate chambers which group together jurisdictions dealing with like subjects.
9. The FTT Chambers are:

- General Regulatory Chamber;
- Health, Education and Social Care Chamber;
- Immigration and Asylum Chamber;
- Social Entitlement Chamber;
- Tax Chamber; and
- War Pensions and Armed Forces Compensation Chamber.

10. The UT Chambers are:

- Administrative Appeals Chamber;
- Immigration and Asylum Chamber;
- Lands Chamber; and
- Tax and Chancery Chamber.

**Judicial Review jurisdiction of the Upper Tribunal**

11. In cases arising under the law of England and Wales the UT has power under section 15 of the TCE Act to grant relief which has the same effect as relief granted by the High Court on an application for JR. It will be seen from Annex 3 that by section 15(1) the power is limited to granting a mandatory order, a prohibiting order, a quashing order, a declaration or an injunction. In circumstances described in section 16(6) the UT may award to an applicant damages, restitution or the recovery of a sum due. Significantly, the remedies available in the UT do not include a declaration of incompatibility under the Human Rights Act 1998.

12. When can the UT’s JR powers be exercised? Section 15(2) identifies two categories. The first arises when conditions in section 18 (dealing with applications made to the UT) are met. The second arises where there has been a transfer from the High Court to the UT: in that event section 19(3) and (4) may authorise the UT to proceed even though not all of those conditions are met.
13. Detailed provision is made in section 15 (3), (4) and (5), and in section 16, to equate the UT’s role in JR claims to that of the High Court, among other things by making it necessary for an applicant to seek permission to make the application.

14. The UT’s JR jurisdiction may arise in relation to applications initially made to the tribunal, applications made to the High Court which must be transferred to the tribunal, and applications made to the High Court which may be transferred to the tribunal. In each of these types of case certain conditions must be met, as explained below.

JR claims that may be made to the Upper Tribunal

15. Section 18 of the TCE Act makes additional provision about JR claims made to the UT. An important feature of section 18 is that it lists four conditions. It is convenient to refer to each of the conditions listed in section 18 as a “Section 18 Condition.” Only if all four Section 18 Conditions are met will the UT have the function of deciding the application. If the UT does not have the function of deciding the application (i.e. if any of the Section 18 Conditions are not met) then the UT must transfer the application to the High Court: see section 18(3).

16. Section 18 Condition 1 is found in section 18(4). It is concerned to limit applications in the UT for JR, or for permission to apply for JR, to those seeking the types of relief identified in sections 15 and 16, along with interest and costs.

17. Section 18 Condition 2 is found in section 18(5). It requires that the application must not call into question anything done by the Crown Court.

18. Section 18 Condition 3 is found in section 18(6). Subsection (6) is concerned to limit the classes of case which may be begun in the UT. It limits them to those within a class specified for the purposes of the subsection. The specification must be set out in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005. For cases arising under the law of England and Wales, this will be a direction by the Lord Chief Justice made with the consent of the Lord Chancellor. In this regard:

(1) To date only one direction has been given in England and Wales. It was made by the Lord Chief Justice on 29 October 2008 (see Practice Direction (Upper Tribunal: Judicial review jurisdiction) [2008] WLR (D) 336) and it specifies two classes of case.
(2) The first of the two classes currently specified is at paragraph (a) of the direction: “any decision of the [FTT] on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with section 5(1) of the Criminal Injuries Compensation Act 1995 (appeals against decisions on review).”

(3) What paragraph (a) does is to focus on JR claims seeking to challenge the main type of decisions dealt with in the Criminal Injuries Compensation jurisdiction of the Social Entitlement Chamber of the FTT. They are excluded decisions under section 11(5)(a) of the TCE Act, so they cannot be appealed from the FTT to the UT – hence the route of JR as the means of challenge. In England and Wales around 60 to 70 such JR claims are received each year. They are dealt with by the Administrative Appeals Chamber of the UT.

(4) The second of the two classes currently specified is at paragraph (b) of the direction. It specifies “any decision of the [FTT] made under the Tribunal Procedure Rules or section 9 of [the TCE Act] where there is no right of appeal to the [UT] and that decision is not an excluded decision within paragraph (b), (c), or (f) of section 11(5) of [the TCE Act].”

(5) What led to the specification at paragraph (b) was that under social security legislation prior to the TCE Act it had been held that interlocutory and certain other ancillary decisions at the equivalent of first-tier level could only be challenged by JR, and not by appeal. The UT has now held that under the TCE Act a right of appeal arises from all decisions of the FTT other than those specifically defined as “excluded decisions” : see LS v London Borough of Lambeth (HB) [2010] UKUT 461 (AAC) at paras 79 to 97, pages 17 to 22. Prior to the decision in LS there had been about a dozen JR claims falling within paragraph (b). The effect of the LS decision is that this class will now be confined to JR claims seeking to challenge excluded decisions within paragraph (a), (d), or (e) of section 11(5) of the TCE Act. In broad terms, the excluded decisions set out in section 11(5)(a) are criminal injuries compensation decisions; those set out in section 11(5) (d) are decisions about setting aside, or review, of an earlier decision of the FTT or about referring a matter to the UT; and those set out in section 11(5)(e) are decisions that have been set aside.

(6) As explained in the FCJR consultation paper a further direction is to be made for cases arising under the law of England and Wales once section 53 of the BCI Act is brought into force – this will specify a third class comprising some or all FCJRs.
19. Section 18 Condition 4 is found in section 18(8). It applies at the hearing of the application, and requires that the presiding judge must be either (a) a judge of the High Court or the Court of Appeal in England and Wales or Northern Ireland, or a judge of the Court of Session, or (b) a person who has been agreed from time to time between the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, as the case may be, and the Senior President of Tribunals.

20. Subsection (11) of section 18 is a rule-making power. It states that Tribunal Procedure Rules may make provision about amendments that would cause the application to become transferrable under subsection (3) – see paragraph 15 above.

JR claims which must or may be transferred by the High Court

21. The TCE Act amended what is now the Senior Courts Act 1981 (formerly the Supreme Court Act 1981) by introducing a new section 31A. In annex 3 it is set out as prospectively amended by the BCI Act - the prospective amendments are shown in square brackets with an asterisk [*].

22. Under section 31A(2) of the Senior Courts Act 1981 the High Court is required to transfer an application if specified conditions are met. It is convenient to call each such condition a “Transfer Condition.” At present four such conditions must be met in order for there to be a requirement to transfer. The criteria identified in Transfer Condition 1 in section 31A(4), Transfer Condition 2 in section 31A(5), and Transfer Condition 3 in section 31A(6) reflect corresponding provisions found in Section 18 Conditions 1, 2 and 3. They thus have the effect that in cases where all three of these conditions are met, subject to satisfaction of Transfer Condition 4 in section 31A(7) (which broadly excludes immigration, nationality, and citizenship claims from transfer), the UT has an exclusive JR jurisdiction in England and Wales.

23. This position will change when section 53 of the BCI Act is brought into force. From that time, if Transfer Conditions 1, 2 and 3 are met, transfer will continue to be mandatory if Transfer Condition 4 is not met (section 31A(2) and (7): no nationality, immigration or asylum question arises). However also from that time section 31A(2A) and (8) will make transfer mandatory if Transfer Conditions 1, 2, 3 and a new Transfer Condition 5 are met, although Transfer Condition 4 is not. Transfer Condition 5 is “that the application calls into question
a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision)”. The new direction (see paragraph 18(6) above) is expected to cover at least some of these cases. These cases will be FCJRs – as to which, see the FCJR consultation paper – and those FCJRs within the scope of the direction should be started and decided in the UT.

24. In addition to compulsory transfer under section 31A(2) and (2A), a discretionary power of transfer is conferred by section 31A(3). Provided that Transfer Conditions 1, 2 and 4 are met, the High Court may transfer an application even if it does not fall within a specified class. This power has been exercised on occasion over the period since November 2008. It is likely to be exercised more frequently in future in England and Wales.

25. In particular, the Court of Appeal in R (FZ) v Croydon LBC [2011] EWCA Civ 59 has drawn attention to the power to transfer “age assessment” JRIs to the UT. These are cases where a person claims to be a minor from outside the United Kingdom, but this is disputed by a local authority in England or Wales which would be under statutory duties if the applicant were of the age claimed. The applicant may seek to challenge the local authority’s stance by mean of a JR in the High Court. This can be transferred to the UT if it does not include any issue as to immigration, nationality or citizenship. If it includes any issue of that kind then the claim cannot be the subject of discretionary transfer as this would fail to satisfy Transfer Condition 4. Once transferred to the UT the claim will be dealt with by the Immigration and Asylum Chamber of the UT, subject to any direction to the contrary: see articles 11 and 15 of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 SI, SI 2010 No. 2655 (“the Chambers Order”).

26. As regards transferred JR claims in England and Wales, the TCE Act makes additional provision in section 19 (3), (4) and (5). By section 19(3) there is a seamless transition of a transferred application for JR. The application is treated for all purposes as if it had been made to the UT. Things done by the High Court prior to transfer are to be treated as if they were done by the UT. It is made clear that it does not matter whether the application falls within a class specified under section 18(6). Similarly by section 19(4) there is a seamless transition of a transferred application for permission to apply for JR. Subsection (5) of section 19 is a rule-making power: tribunal procedure rules may supplement subsections (3) and (4).
New rules: JR claims made to the Upper Tribunal

27. Section 18(11) of the TCE Act provides that the “provision that may be made by Tribunal Procedure Rules about amendment of an application for relief under section 15(1) includes, in particular, provision about amendments that would cause the application to become transferrable under subsection (3)”. The implication appears to be that amendments may be made to JR proceedings in the UT even though the effect is that they must then be transferred to the High Court. There is a good reason why this should be so. It would be open to the UT to refuse to allow such an amendment on the ground that it would be preferable for the applicant to bring separate proceedings in the High Court, leaving the existing proceedings in the UT. But there will be cases where it would be more appropriate for the existing proceedings to be amended and transferred to the High Court, rather than for separate proceedings to be commenced, e.g. where an arguable claim for a declaration of incompatibility is added.

28. No rules under section 18(11) have thus far been made. There is reason to think, however, that such rules should be made so as to cater for developments in JR cases in the UT. This is because parties may wish to amend proceedings, or rely on additional grounds, in a way which would bring section 18(3) into play because an amendment or additional ground would mean that the UT did not have the function of deciding the application. In FCJRs there are often occasions when, e.g. because a fresh decision is taken, it is appropriate to add or substitute a challenge which no longer involves a “fresh claim” dispute. Similarly an age assessment JR may have been transferred by the High Court to the UT at a time when no immigration, nationality or citizenship issue arose, but subsequent developments may give rise to such an issue.

29. The Committee invites comment on proposed new rules which would provide -

“33A. Rules 33B and 33C apply only to judicial review claims arising under the law of England and Wales.

33B. In relation to an application for judicial review or for permission to apply for judicial review the Upper Tribunal may permit or require amendments under rule 5(3)(c), or permit the applicant or another party to rely on additional grounds of
challenge, which will result in transfer of the application to the High Court under section 18(3) of the 2007 Act or under rule 33C.”

30. This would not merely make clear what is implicit in section 18(11). It refers also to “additional grounds” and to transfer under the proposed new rule 33C (see below) and therefore makes clear what otherwise might be in doubt. Reliance upon additional grounds does not necessarily imply an amendment. The current Rules use the term “additional grounds” where a party other than the applicant wishes to support an application on grounds additional to those on which the applicant relies (rule 31(2)) or where an applicant seeks to rely on grounds in a substantive application which were not grounds upon which permission was granted (rule 32).

31. The proposed new rules would apply to JR claims that were originally begun in the UT. They would, pursuant to section 19(3) of the TCE Act, also apply to applications for JR transferred from the High Court to the UT. Moreover they would apply in cases where an application for permission made to the High Court is transferred to the UT, and the UT grants permission – for in that event the permitted application for JR is made to the UT and for that reason falls within section 18(1) of the TCE Act.

32. The proposed new rules would confirm as regards section 18(11) (and establish as regards “additional grounds”) the availability to the UT of a flexible means of determining whether new issues should become part of the application in the light of the statutory consequences which would follow. Comments on this and alternative or additional proposals are invited. Alternative provision that could be made would, for instance, include a rule that would prohibit an amendment that required section 18(3) to be acted upon, thus requiring an applicant to make a separate application to the High Court. Additional provision might take the form of a rule that would require the parties to state whether they would like the case transferred back to the UT, and why, so that that information may be passed to the High Court when the case is transferred.

New rules: amendments and additional grounds after transfer
33. Section 19(5) of the TCEA permits the making of rules to supplement section 19(3) and (4), dealing with the consequences of a case being transferred to the UT from the High Court. No such rules have hitherto been made.

34. The relationship between section 19(3) and (4) and section 18 needs consideration. Section 18(3), read with section 18(2), requires a case to be transferred to the High Court if the four conditions in that section are not all satisfied. Section 19(3) and (4) ensure that an application for JR that is transferred to the UT, and an application for JR made in the UT following transfer of an application for permission, are subject to the requirements in section 18. When doing so, however, those subsections identify one exception: the UT has the function of deciding the case notwithstanding that Condition 3 in section 18 (that the case falls within the scope of a direction made by the Lord Chief Justice) is not met. The exception ensures that discretionary transfers are not stifled once the transfer is made, for they will have been transferred expressly on the basis that Condition 3 is not met (see section 31A(3) of the Senior Courts Act), and without the exception would have to be transferred back as soon as they reached the UT. However, it appears to the Committee that there are potential difficulties where an application is amended, or additional grounds are relied on, after transfer.

35. First, where there has been a mandatory transfer, without the High Court having considered the merits of transfer, it would arguably be contrary to principle for the application to continue in the UT without the High Court so ordering if an amendment or additional ground has the effect that Condition 3 ceases to be satisfied. On the other hand, allowing such an amendment or additional ground would be sensible if good case management required it to be decided together with existing issues. This may well happen in FCJRs. The Committee therefore proposes that Rule 33C(a) should require such a case to be transferred back to the High Court. One factor in this regard is that to treat mandatorily transferred cases more advantageously than cases that have been properly commenced in the UT might act as an encouragement to applicants to start proceedings in the High Court, causing an unnecessary waste of resources in transferring them.

36. Proposed rule 33C(a) would also extend to a case that had been transferred on a discretionary basis under section 31A(3) of the Senior Courts Act if a subsequent amendment or additional ground has the effect that Condition 4 of section 31A would no longer be met. There is no equivalent to Condition 4 of section 31A in section 18 and so such a case would not fall to be transferred to the High Court under section 18(3). Again,
37. Secondly, where a case has been transferred on a discretionary basis, the Committee considers that the UT should have the power to transfer the case back to the High Court if an amendment or additional ground would be of such significance that the UT considered that the High Court would not have transferred it if the amendment or additional ground had been relied on at the time of transfer, even though section 31A(3) would have permitted transfer. Proposed rule 33C(b) would provide such a power. The criterion for transfer back would be in identical terms to section 31A(3) of the Senior Courts Act – “if it appears to be just and convenient to do so”.

38. The proposed rule is –

“33C. Where the High Court has transferred judicial review proceedings to the Upper Tribunal under any power or duty and subsequently the proceedings are amended or any party relies on additional grounds of challenge –

   (a) if the proceedings could not have been transferred to the Upper Tribunal by the High Court had they been so amended or with such additional grounds relied on at the time of transfer, the Upper Tribunal must transfer the proceedings back to the High Court;

   (b) subject to subparagraph (a), where the proceedings were transferred to the Upper Tribunal under section 31A(3) of the Senior Courts Act 1981 (power to transfer judicial review proceedings to the Upper Tribunal), the Upper Tribunal may transfer the case back to the High Court if it appears to be just and convenient to do so.”

39. The Committee invites comment on this proposal, or any alternative or additional proposals.

**Proposed drafts of new rules**
40. Proposed changes to the UT rules are set out in Annex 1 to the present consultation paper. Some changes have already been identified as proposed or possible rule changes for FCJRs, as set out in Annex 1 to the FCJR consultation paper (which can be found at [http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm](http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm)). These are included in Annex 1 to the present consultation paper in italics. Any comments on them should please be sent in a response made specifically to the FCJR consultation paper. Proposed or possible changes arising from the present consultation paper are underlined in Annex 1 to the present consultation paper.

**Consultation Questions**

41. The Committee would be interested in receiving your views on the following questions (these questions are also set out in the separate document for you to respond on at Annex 2):

(1) As regards amendments which would bring section 18(3) of the TCE Act into play, or would give rise to an obligation to transfer the application to the High Court under the proposed new rule 33C:

(a) is it appropriate that the UT’s general powers to permit or require amendments under rule 5(3)(c), or to permit the applicant or another party to rely upon additional grounds of challenge, should extend to amendments and additional grounds which would, once made or relied upon, require the application to be transferred to the High Court?

(b) If so, is the proposed new rule 33B a satisfactory way of ensuring that this will be the case?

(c) if not, ought there to be a rule that would prohibit the UT from permitting or requiring an amendment, or permitting reliance upon an additional ground, which would, once made or relied upon, give rise to an obligation to transfer the application to the High Court?

(d) when the UT is under an obligation to order transfer to the High Court, would it be appropriate for a rule to require the parties to state whether they wish the High Court to
transfer the application back to the UT, and why, if the High Court’s discretionary powers under section 31A(3) of the Senior Courts Act 1981 permitted it to do so?

(2) As regards an application for JR or an application for permission to apply for JR, which the High Court has transferred as a matter of discretion, or as regards an application for JR following grant of permission by the UT in a case where the application for permission was transferred by the High Court as a matter of discretion:

(a) is it appropriate that the UT should have a power to transfer the application to the High Court where the significance of an amendment, or additional ground of challenge, makes it just and convenient that the High Court rather than the UT should deal with the proceedings?

(b) If so, is the proposed new rule 33C a satisfactory way of ensuring that this will be the case?

(c) ought the UT to be required to transfer the application to the High Court where an amendment, or additional ground of challenge, is such that if the amendment or additional ground had been relied on at the time of transfer the conditions which must be met for discretionary transfer would not have been satisfied?

(d) If so, is the proposed new rule 33C a satisfactory way of ensuring that this will be the case?

(3) As regards an application for JR or an application for permission to apply for JR, which the High Court has transferred because it was required to do so, or as regards an application for JR following grant of permission by the UT in a case where the application for permission was transferred by the High Court because it was required to do so:

(a) ought the UT to be required to transfer the application to the High Court where an amendment, or additional ground of challenge, is such that if the amendment or additional ground had been relied on at the time of transfer the conditions which must be met for compulsory transfer would not have been satisfied?

(b) If so, is the proposed new rule 33C a satisfactory way of ensuring that this will be the case?

(4) Are there any other rule changes that would be appropriate for JR claims in the UT?

42. When answering the consultation questions, please do keep in mind that the rules should be simple and easy to follow. They should not include provisions that contain unnecessary
How to Respond

43. Please send your response by Thursday 30 June 2011 to:

Tribunal Procedure Committee Secretariat,
Ministry of Justice
Area 4.19
102 Petty France
London SW1H 9AJ
Email: tpcsecretariat@justice.gsi.gov.uk
Tel: 020 3334 6562/6556
Fax: 020 3334 3147

44. Extra copies of this consultation can be obtained from
   http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm or
   by using the above contact details.