



Tribunals Service

Transferring asylum and immigration appeals into the unified tribunal structure

Q&A

(Valid as at 19 August 2009)

General information about the Asylum and Immigration Tribunal

Q. What is the Asylum and Immigration Tribunal?

A. Established in 2005, the Asylum and Immigration Tribunal (AIT) deals with appeals against decisions made by the Home Office relating to asylum, immigration and nationality issues.

Q. Who are the senior judiciary responsible for the tribunal?

A. At present the AIT is managed by two Deputy Presidents; Mr Ockelton and Miss Arfon-Jones.

Q. How many cases does the AIT deal with per year?

A. Between April 2005 and March 2009 the AIT received on average approximately 167,500 per annum. In 2008/2009, the AIT received over 188,000 appeals.

Forthcoming changes to the tribunal and appeals process

Q. Is there a brief overview of the changes?

A. The work of the current Asylum and Immigration Tribunal will transfer into the two-tier tribunal structure that was created under the Tribunals, Courts and Enforcement Act 2007. Appeals will be sent to a dedicated chamber in the First-tier Tribunal, with onward appeal rights to the Upper Tribunal instead of the High Court.

Q. Why is the AIT moving?

A. The tribunal system is undergoing a major programme of reform to simplify, streamline and improve the appeals process across jurisdictions. Part of this reformation was the creation of a two-tier tribunal system which has already seen several jurisdictions transferred into it. Moving the AIT into the common framework created by the Tribunals, Courts and Enforcement Act 2007 (TCE Act) is in keeping with these reforms and will also ease the immigration workload in the higher courts.

Q. Are you able to provide more detail on the new system?

A. The AIT is currently a one-tier appeal system. If a party wishes to challenge a decision made by the AIT, they must apply to the tribunal for it to reconsider its decision. If the tribunal decides not to reconsider its decision, the party may then go to the High Court (or Court of Session in Scotland or High Court in Northern Ireland) to ask that the court orders the tribunal to carry out a reconsideration.

Where reconsideration is ordered, the tribunal may re-hear the appeal, and any onward appeal from the reconsidered decision is to the Court of Appeal, or Court of Session in Scotland, with permission.

This will change when the AIT moves into the new unified (two-tier appeal) system. Initial appeals will be dealt with in the First-tier Tribunal and the reconsideration process will be replaced by onward appeals to the Upper Tribunal. Those wishing to appeal to the Upper Tribunal will need to seek permission to appeal from the First-tier Tribunal.

Where the First-tier Tribunal refuses to grant permission, the party may then apply for permission directly to the Upper Tribunal. This is a key change to the current arrangements and will ease the immigration workload of the higher courts.

Onward appeals from the Upper Tribunal will be to the Court of Appeal, or Court of Session in Scotland, with permission.

More details on the changes are included in the "Immigration Appeals, Fair decisions; faster justice" consultation paper published by UKBA in 2008, and the Government's response paper, available at:
<http://www.tribunals.gov.uk/Tribunals/Documents/Releases/Immigrationappealsconsultationresponsev11.pdf>.

The tribunal will remain independent.

Q. Who will be responsible for asylum and immigration work in the new tribunal?

A. The new tribunal will be part of the unified tribunals system, with a First-tier Tribunal replacing the existing AIT. The Upper Tribunal will hear onward appeals, replacing the review and reconsideration work done by the AIT and the higher courts

There will be Immigration and Asylum Chambers in both tribunals and there will be a Chamber President in charge of each of these. The unified system is overseen by Lord Justice Carnwath, the Senior President of Tribunals, who is a Lord Justice of Appeal.

Q. How will the changes affect those making appeals?

A. For appellants there will be no change to their initial appeal rights, except that these will now be to the Immigration and Asylum chamber of the First-tier Tribunal, rather than to the AIT.

Where there will be a change is with the new onward appeals process which will replace the current system for challenging decisions of the AIT. Appellants will no longer have to apply to the High Court or Court of Session to request the tribunal to reconsider its decision. They will instead be able to apply to the Upper Tribunal if the First-tier Tribunal has not granted permission for an onward appeal.

Q. Are there any statutory changes which will need to take place?

A. 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 Tribunal and Upper Tribunal.

This order will make the necessary consequential amendments to all primary and secondary legislation. Consequential amendments will also be made to the existing AIT Procedure Rules that will apply to the Immigration and Asylum Chamber of the First-tier Tribunal only. Responsibility for the AIT Procedure Rules will then pass to the Tribunal Procedure Committee.

Procedure Rules for the Upper Tribunal Chamber will be made by the Tribunal Procedure Committee, who will consult on changes required to existing Upper Tribunal Procedure Rules to ensure they reflect the requirements of immigration and asylum appeals processes.

In addition, changes to the 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 below.

- Consultation on the Upper Tribunal Procedure Rules is underway and the closing date is 25th September 2009. See the Tribunals Service website for these papers (<http://www.tribunals.gov.uk/tribunals/rules/tribunalprocedurecommittee.htm>)
- Consultation on Legal Aid arrangements opened 16th July 2009 and the closing date is 8th October 2009.

- The Transfer Order and Legal Aid Regulations for England and Wales are planned to be laid before Parliament in late 2009. Legal Aid regulations for Scotland and Northern Ireland will be taken forward to similar timetables, and laid before appropriate Parliaments.
- Responses to both consultations are expected to be published in late 2009. 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 late 2009.

All necessary orders are scheduled to commence in early 2010.

Q. When will the new appeals system come into effect?

A. Transfer is planned to take place in early 2010 and detailed planning is currently underway to support this.

Detailed/Technical Q&A

Q. Why will appeals be sent to a dedicated chamber in the Upper Tribunal instead of the general administrative appeals chamber?

A. The “Immigration Appeals, Fair Decisions; Faster Justice” consultation paper set out a number of proposals to deliver a more streamlined immigration appeals system. The paper raised the issue of whether a separate chamber for immigration and asylum appeals should be created in the Upper Tribunal. Responses were mixed, but the majority were in favour of a separate chamber. The creation of an immigration and asylum-specific Upper Tribunal chamber will ensure that specialist immigration judges continue to provide jurisdictional expertise.

Other jurisdictions, namely the Finance and Tax and Lands jurisdictions also have their own dedicated chambers in the Upper Tribunal, independent of the Administrative Appeals Chamber.

Q. Will the appeals still be considered by specialist judiciary?

A. Existing tribunal judges and non-legal members will transfer into the new system, continuing their vital work in the same way as at present and preserving jurisdictional expertise.

Q. Will this mean changes for administrative staff in the AIT?

A. Much of the new structure parallels the old, the main change is the replacement of reconsideration applications in the Higher Courts with permission for onward appeal applications in the Upper Tribunal. For this reason, we do not expect that the transfer will bring significant changes to the way AIT staff work. We will ensure that staff are fully briefed and supported through any changes that the transfer will bring.

Q. What will the transfer of AIT mean for availability of Legal Aid in immigration and asylum proceedings?

A. Legal Aid will continue to be available for immigration and asylum appeals. The Ministry of Justice and Legal Services Commission are consulting on proposals for the funding of Legal Aid work in the new two-tier structure. The consultation has begun and will run until 8th October 2009.

Scottish Legal Aid Board and Northern Ireland Legal Services Commission will take forward proposals for legal aid in those jurisdictions.

Q. Why is UKBA issuing decisions rather than the tribunal?

A. UKBA serves asylum appellants decisions relating to their appeal as a result of Rule 23 of the Asylum and Immigration Tribunal (Procedure) Rules 2005. Upon transfer, those rules will become rules for the Immigration and Asylum Chamber of the First-tier Tribunal. Section 31 of the TCE Act specifies that any changes to procedure rules made by the Lord Chancellor in the transfer of functions order must

be consequential, incidental, transitional or supplemental. Therefore the only changes that have been made to the rules are changes that are strictly necessary for transfer.

In respect of the Upper Tribunal, the Tribunals Procedure Committee has noted that the response to the consultation "Immigration Appeals, Fair decisions: Faster justice" states that UKBA and the Tribunals Service 'will take action to address any unnecessary delays, including looking at the practice of UKBA serving asylum decisions on appellants' (consultation response: page 12), and have made the decision to retain respondent service pending this. This is reflected in the Procedure Rules they have issued for consultation.

Q. Which judiciary will be involved in decision making for First-Tier and Upper Tribunal permission applications?

A. In accordance with Section 31 of the Tribunals Courts and Enforcement (TCE) Act, the allocation of judiciary to either the First-Tier Tribunal or Upper Tribunal is a matter for the Lord Chancellor and included in a transfer of Tribunal functions order, which requires affirmative resolution by Parliament.

Allocation of judiciary within the Tribunal is then a matter for the Senior President of Tribunals.

Q. Who will issue Country Guidance in future?

A. The draft Practice Statements and Practice Directions (annexed to the Upper Tribunal Procedure Rules consultation) enable country guidance to be given in a reported determination of the First-tier Tribunal or the Upper Tribunal, as appropriate.

Q. What will happen to those cases that are in the system at the time of transfer?

A. Cases in the system at the time of transfer will move to an equivalent stage of the new system.

Any first instance appeal before the AIT becomes a First-tier Tribunal appeal. Applications for review (i.e. requests for the AIT to reconsider the appeal decision) that remain to be determined by the AIT, or have been determined but not promulgated, at the time of transfer will become First-tier Tribunal permission applications.

Where an application for reconsideration is with the High Court, or Court of Session in Scotland or High Court in Northern Ireland, any for reconsideration will be treated as an order for permission to appeal to the Upper Tribunal. Where reconsideration has been ordered and the AIT is yet to start the reconsideration, it will be treated as an onward appeal and dealt with by the Upper Tribunal. Where reconsideration has commenced, but it is not completed by the transfer date, it will continue to be considered under the old provisions.

Q. Is this not a return to the old system?

A. These proposals differ from previous and current immigration appeal systems. Unlike the pre-2005 two-tier system, the new Upper Tribunal is a superior court of record. Unlike the 2005 single tier AIT, under which the higher courts comprised an integral part of the statutory appeals process through the review and reconsideration system, there will be an appeal to the Upper Tribunal on a point of law from the First-tier Tribunal.

Q. By adding another layer between the AIT and the higher courts, will it not slow down the processes?

A: This system does not add another layer but instead simplifies the system.

The current system is:

- Appeal to AIT
- Apply to the AIT for an order for reconsideration
- *If refused*, apply to the Administrative Court for an order for reconsideration
- *If granted*: reconsideration hearing before the AIT.

Under the new system:

- Appeal to the First-tier Tribunal
- Apply to the First-tier Tribunal for permission to appeal to the Upper Tribunal
- *If refused*, apply to the Upper Tribunal for permission to appeal to the Upper Tribunal.
- *If granted*, substantive one-stage appeal before the Upper Tribunal

This replaces the stage of applying to the Administrative Court for an order with a stage seeking permission to appeal to the Upper Tribunal.

Q. What will be the test for First-Tier / Upper Tribunal permission applications?

A. 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.

Q. What is the test for appeal beyond Upper Tribunal?

A. Onward rights of appeal from the Upper Tribunal can be sought from the Court of Appeal in England and Wales, the Court of Appeal in Northern Ireland or the Court of Session.

The Lord Chancellor has made an Order (pursuant to Section 13 (6) of the TCE Act) that applies to onward appeals from the Upper Tribunal, where the original appeal was dealt with by the First-tier Tribunal.

The effect of that Order is that permission to appeal to the relevant appellate court can only be granted where:

- the proposed appeal raises an important point of principle or practice, or
- there is some other compelling reason for the relevant appellate court to hear the appeal.

Q. Will the Office for the Immigration Service Commissioner's (OISC) members have rights of audience at Upper Tribunal hearings?

A. Yes. Immigration practitioners/representatives will have rights of audience in relation to appeals before the Upper Tribunal.

Q. Is it true that permission to appeal against decisions of the First-tier Tribunal can only be granted by the Upper Tribunal?

A. No. One of the proposals in the consultation paper was that the route of appeal from the First-tier Tribunal would be by permission to appeal from the Upper Tribunal only - which would simplify and speed-up the process. However, there was a mixed response to this proposal from stakeholders and concerns were raised about leaving only one permission stage open to would-be applicants. Further, maintaining a consistent, robust and uniform appeal process with the other tribunals within the unified structure is key to the successful integration of the AIT. It has therefore been decided not to take this proposal forward.

Q. If a further hearing is required for fact-finding purposes, where would that hearing take place?

A. If fresh findings of fact are needed to determine whether the appeal to the Upper Tribunal should be allowed or dismissed, and the Upper Tribunal is not in a position to make those findings at that hearing, the Tribunal will (as now) consider the venue of any further hearing by reference to all the circumstances. This includes the location of parties and their representatives.

Q. Will hearings still be held by video link to prevent the need for travel to London?

A. The Immigration and Asylum Chamber of the Upper Tribunal will have video link facilities and these will be available as per the current arrangements.

Q. Is it true that the Lord Chancellor has retained the power to make and amend the procedure rules - but only relating to this tribunal?

A. No. Although this was proposed in the consultation document, this generated great debate amongst stakeholders. 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 it is appropriate that this power should pass to the Tribunal Procedure Committee who makes rules for chambers in the two-tier tribunal structure. As with all First-tier Tribunal and Upper Tribunal rules, the Lord Chancellor does retain the right to, where necessary, instruct the Tribunals Procedure Committee to make rules for a certain purpose as well as veto any prospective procedure rules with written reasons.

Q. Is there a clear limit on number of remittals that can take place, or when cases can be remitted?

A. When the Asylum and Immigration Tribunal transfers into the unified structure, the Senior President of Tribunals will issue Practice Statements and Directions, which will give guidance on the policy of remittals from the Upper Tribunal to the First-tier Tribunal. Drafts of these are annexed to the Upper Tribunal Procedure Rules consultation.

The Practice Statements prescribe that the Upper Tribunal, upon identification of an error of law, should re-make the decision by the First-tier Tribunal rather than remit it.

The only exceptions to this are where:

- the effect of the identified error was to deprive a party before the First-Tier Tribunal of a fair hearing, or other opportunity for that party's case to be put to and considered by that Tribunal; or
- if there are highly compelling reasons why the decision should not be remade by the Upper Tribunal. Circumstances such as these are expected to occur rarely and can therefore be viewed as exceptional.

Judicial Reviews

Q. Is it possible to have a judicial review of the Upper Tribunal?

A. The Upper Tribunal is a superior court of record. The amenability of the Upper Tribunal to judicial review is subject to a test case before the Administrative Court and is due to be considered in the autumn.

Q. Why has it been decided not to legislate to prevent judicial review of the Upper Tribunal?

A. In the consultation, the Government raised the possibility of legislating to clarify that decisions of the Upper Tribunal should not be routinely subject to judicial review. There was a mixed reaction to this and the Government has decided not to legislate at present. It will be left for the courts to determine whether Upper Tribunal decisions

are judicially reviewable and, if so, in what circumstances. This process is an example of where the Government has responded to the responses received on the consultation paper and adjusted its proposals accordingly.

Q. Why is the barrier to transferring judicial review cases being lifted so soon after introducing it?

A. The Tribunals, Courts and Enforcement Act 2007 allows most judicial review cases to be transferred into the Upper Tribunal, but excludes immigration cases. At the time that Act was passed, there were no plans to transfer the AIT into the unified system. The view of Parliament during the passage of the Act was that immigration judicial review cases should not be heard in the Upper Tribunal upon commencement.

Now that we are transferring the AIT, and the Upper Tribunal has been established, the time is right to legislate to remove the barrier. However, it remains the case that we will not commence any legislation on this until the AIT's functions are transferred into the unified tribunal system, and there are specialist immigration judges in the Upper Tribunal.

Q. As well as reconsideration work, we were told the higher courts deal with large amounts of Judicial Reviews from decisions of UKBA. What is being done to remove this work from the higher courts?

A. The Borders, Citizenship and Immigration Act 2009 makes provision for immigration and asylum "fresh claim" JRs to be transferred into the UT. A fresh claim is defined in the Act as 'an application that 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 (c. 41) 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).'

It will be for the Lord Chief Justice to provide for the transfer to happen in England and Wales by way of a direction in accordance with section 18(6) of the TCE Act. The direction would need to be approved by the Lord Chancellor. Similar procedures would apply in respect of the High Court in Northern Ireland and Court of Session in Scotland.

Consultation and communication

Q. Has there been consultation on this?

A. Yes. On 21 August 2008, UKBA published the consultation "Immigration Appeals, Fair decisions; faster justice" the consultation period ran until 31 October and 47 responses were received.

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 consultation response has been published and can be viewed at:

<http://www.tribunals.gov.uk/Tribunals/Documents/Releases/Immigrationappealsconsultationresponsev11.pdf>

This outlines the details around the changes.

Q. What was the consultation response?

A. In summary, in the response paper the Government has stated:

- It will transfer the functions of AIT into the First-tier and Upper Tribunal
- It is legislating to allow for judges in the High Court and Court of Session to be able to transfer asylum and immigration judicial reviews to the Upper Tribunal
- It has decided not to legislate at present to clarify that decisions of the Upper Tribunal should not be routinely subject to judicial review.
- It will give the Tribunal Procedure Committee the power to make procedure rules for the immigration and asylum chambers in both tribunals - this process is an example of where the Government has responded positively to the responses received on the consultation paper and adjusted its proposals accordingly.

See the full consultation response document at:

<http://www.tribunals.gov.uk/Tribunals/Documents/Releases/Immigrationappealsconsultationresponsev11.pdf>

Q. Why was the consultation document issued by UK Borders Agency (UKBA) instead of the Tribunals Service?

A. UKBA was conducting a wholesale review of immigration laws as part of their Simplification Project. The need to consider the delays in the Administrative Court was identified by the Home Office in the Green Paper *The Path to Citizenship*, published in February 2008. The proposals in the consultation document were drawn up by UKBA in consultation with the Tribunals Service and the two departments have taken forward the implementation of the proposals together. Both Departments have jointly written and published the consultation response document.

Going forward, the transfer of the AIT is being managed by the Tribunals Service.

Q. Will there be any further consultation on this e.g. on new rules? When?

A. Upper Tribunal Procedure Rules are made by the Tribunal Procedure Committee. The rules are subject to a separate consultation process. The consultation has commenced and the closing date is Friday 25th September 2009. See the tribunals service website for these papers:

<http://www.tribunals.gov.uk/tribunals/rules/tribunalprocedurecommittee.htm>

Q. Are stakeholder groups in agreement with the proposals for change?

A. Stakeholders were generally supportive of the transfer of the AIT in principle.

For example, the Joint Response from the Refugee Legal Centre and the Refugee Council stated that "...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."

The Administrative Justice and Tribunals Council also stated that they welcome "... the proposal to incorporate asylum and immigration appeals into the two-tier structure provided by the Tribunals, Courts and Enforcement Act, 2007."

The Public Law Project stated that it "... welcomes the formal reintroduction of a two-tier system of immigration appeals, within the unified appeal system headed by the Senior President of Tribunals."

However, concerns were voiced about some of the proposals underpinning the transfer of AIT. We have listened to these concerns and have made some changes to our previous proposals as a result. For example, we recognised the concern many respondents had with our proposal for the Lord Chancellor to continue to make asylum and immigration procedure rules and have decided that it is appropriate that this power should pass to the Tribunal Procedure Committee which makes the rules for all chambers in the new tribunal structure.

Q. How are the changes going to be communicated to the people affected?

A. Stakeholders, AIT staff and judiciary will be made aware of the changes and the impact on them. TS will work to communicate the change through channels appropriate to stakeholders, with a focus on direct engagement and consultation wherever possible.

Q. When is the next AIT stakeholder forum?

A. The AIT stakeholder forum is led by the Senior President of Tribunals. Arrangements are underway with the next forum expected to be scheduled later this year.

In May 2009, TS Officials held some meetings with AIT stakeholders to discuss the transfer and seek views. Further events took place in early August in London, Manchester and Scotland to give interested parties the opportunity to discuss and provide feedback on the proposed changes.

Q. Where can I get further information?

A. Questions, comments or requests can be emailed to TCEActimplementation@tribunals.gsi.gov.uk and a response will be provided.