



Tribunals Service

Transferring asylum and immigration appeals into the unified tribunal structure

Q&A

Q. What is the Asylum and Immigration Tribunal?

A. The AIT deals with appeals against decisions made by the Home Office relating to asylum, immigration and nationality issues. Established in 2005, the AIT superseded the former Immigration Appellate Authority (IAA).

Q. Who is the president?

A. The President of the AIT is Mr Justice Hodge.

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

A. In 2008/2009, the AIT received over 188,000 appeals. The average number of appeals received from Apr 2005 – Mar 2009 was approximately 167,500.

Q. What is changing (at the strategic level)?

A. The work of the current Asylum and Immigration Tribunal is transferring into the two-tier tribunal structure created under the Tribunals, Courts and Enforcement Act 2007. The new unified structure is designed to simplify, improve and speed up tribunal appeals across the various jurisdictions

Appeals against decisions made by the Home Office will now be made to a dedicated First-tier Tribunal; onward appeals will be made to the Upper Tribunal instead of the High Court. This will mean that the Administrative Court will no longer receive reconsideration applications where the Tribunal does not order reconsideration itself.

Q. Why is the AIT moving?

A. Bringing the AIT into the unified structure will help speed up appeals and deliver more effective immigration control.

Q. When are the changes taking place?

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

Q. What is the current arrangement and how will it change (in detail)?

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) to ask that the court orders the tribunal to carry out a reconsideration.

Where reconsideration is ordered, the tribunal re-hears 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; the higher courts will no longer consider applications for the tribunal to reconsider its decisions. This will therefore 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 consultation paper and response paper.

The tribunal will remain independent.

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

A. Cases in the system at the time of switchover 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 permission applications.

Where an application for reconsideration is with the High Court, or Court of Session in Scotland, the Court can order permission to appeal to the Upper Tribunal, rather than to order reconsideration by the AIT. Where reconsideration has been ordered and the AIT is yet to start or complete the reconsideration, it will be treated as an onward appeal and dealt with by the Upper Tribunal. Onward appeal rights will remain to the Court of Appeal/Court of Session as they would have been pre-AIT transfer.

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 take the place of the existing High Court opt-in stage and will also hear onward appeals.

There will be Asylum and Immigration Chambers in both tribunal tiers and there will be a Chamber President in charge 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 does this fit in with any other reforms that are taking place?

A. The transfer of the AIT fits with the wider reforms to the tribunals system, which began with the Leggatt Report. These reforms have included the establishment of the Tribunals Service and the commencement of the unified structure (First-tier and Upper Tribunals) in November 2008. The reforms create two new tribunals into which the functions of some existing tribunals have already been transferred. Further tribunals will move into the new structure from now until early 2010 - AIT being one of these.

The reforms are part of an overhaul designed to simplify, improve and speed up the appeals process across the various tribunal jurisdictions. Although all First-tier Tribunal chambers will be governed by the similar procedural rules, to promote consistency, there are some differences between chambers, and practice directions may be altered to suit the specifics of cases in some jurisdictions within each chamber.

Q. Who is this going to affect and how?

A. Appellants

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

Where there will be a change – and a benefit - 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.

A. Judiciary

Existing tribunal judges and non-legal members will transfer into the new system and continue their vital work in the same way as at present, preserving jurisdictional expertise. Senior AIT judiciary will be actively involved in the operational transfer, and they are already considering the judicially-led side of judicial review transfer in the event that this is approved by Parliament.

A. AIT staff

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. With the move into the new structure, will we not lose the expertise of those currently involved in AIT hearings? Will this not have a negative impact on those seeking asylum?

A. No: the existing AIT judges and non-legal members will transfer into the new system and continue their vital work in the same way as at present, preserving jurisdictional expertise.

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 will be consulting on proposals for the funding of Legal Aid work in the new two-tier structure later this year. Scottish Legal Aid Board and Northern Ireland Legal Services Commission will take forward proposals for legal aid in those jurisdictions.

Q. Why is the appeals system changing yet again?

A. The UK Border Agency is enforcing the removal of a record number of foreign nationals who have no legal basis to remain in the UK. To remove more people each year and conclude applications as quickly as possible, we need a faster and more efficient appeals system and transferring the AIT into the unified structure will help to achieve this.

Q. How 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. As a superior court of record, decisions of the Upper Tribunal should not routinely be subject to judicial review. This is demonstrated by the Employment Appeal Tribunal and the Special Immigration Appeals Commission – neither of which have been successfully challenged via judicial review. Unlike the 2005 single tier AIT, under which the Administrative Court 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. The decision on whether permission to appeal is granted will be for the Upper Tribunal, and not the Administrative Court.

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, avoiding potential for delays.

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
- Apply to the First-tier 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. Keeping this stage within the tribunals system will save approximately 6 weeks from the appeals process.

Q. How are these proposals going to speed up the process? / How long on average will the new appeals process take?

A. The new system will be simpler and swifter than the existing system because the stage of applying to the High Court for an order for reconsideration will be removed: this currently takes an average of 8 weeks.

The system for reconsiderations will be replaced by a substantive appeal to the Upper Tribunal: this will as a general rule be dealt with without remittals to the first tier, whereas in reconsiderations where there was a substantive error of law identified at a hearing, there would usually be a full reconsideration of the case at the regional hearing centre that heard the original appeal. By retaining appeals in the Upper Tribunal this could save some weeks.

Q. Is it possible to judicially review the Upper Tribunal?

A. The Upper Tribunal is a superior court of record. Other superior courts of record include the Employment Appeal Tribunal and the Special Immigration Appeals Commission — neither of which have been successfully challenged via judicial review.

Q. Will the right of judicial review still exist under the new system?

A. Yes, the right of judicial review still exist under the new system but some cases may be heard in the Upper Tribunal, rather than the higher courts. The right of judicial review will still exist under the new system, but some cases may be heard in the Upper Tribunal, rather than the higher court. This is largely dependent upon Clause 52 of Borders, Immigration and Citizenship Bill, currently going through Parliament. This Clause contains provisions that provide for judicial review cases to

be transferred into the Upper Tribunal from the High Court or Court of Session. An opposition amendment to the clause was voted on and approved by the House of Lords at Report Stage of the Bill on 1 April. The Government is now considering the effect of this amendment and how to proceed.

The Upper Tribunal has exactly the same jurisdiction in judicial review matters as the higher courts, and may grant the same kinds of relief. The Government has stated that it is not intended that this clause, in its current or amended form, will commence until after the AIT has transferred into the two-tier structure.

Q. Does the transfer of judicial reviews affect human rights and fairness?

A. No – see above – The Upper Tribunal has exactly the same jurisdiction in judicial review matters as the higher courts, and may grant the same kinds of relief.

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.

As a superior court of record, decisions of the Upper Tribunal should not routinely be subject to judicial review. This is demonstrated by the Employment Appeal Tribunal and the Special Immigration Appeals Commission – neither of which have been successfully challenged via judicial review.

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 government has decided to legislate to extend the power of the High Court and Court of Session to transfer Judicial Reviews to the Upper Tribunal, to include asylum and immigration cases. It is recognised that it will be for the judiciary to decide which types of case are transferred. It is also acknowledged that the potential impact on Upper Tribunal resources will need to be considered to ensure that transferred applications are dealt with at least as effectively as they are in the High Court and Court of Session. This measure has been included in the Borders, Citizenship and Immigration Bill, which is currently before Parliament.

An opposition amendment to the clause was voted on and approved by the House of Lords at Report Stage of the Bill on 1 April. The Government is now considering the effect of the amendment and how to proceed. The Government remains of the view that it is appropriate that the High Court and Court of Session should in due course have the ability to transfer immigration and nationality judicial reviews to the Upper Tribunal.

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. Has there been consultation on this?

A. Yes. On 21 August 2008, UKBA published the consultation "Immigration Appeals, Fair decisions; faster justice" which set out a number of proposals to deliver an immigration appeals system that is faster, final and respected. The consultation period ran until 31 October and 47 responses were received. The responses have already been published and can be viewed at:

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/close consultations/immigrationappeals/>

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

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

The consultation response outlines the details around the changes.

Q. What was the consultation response?

The response can be viewed on the TS/UKBA websites). 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.

Q. Are stakeholder groups in agreement with the proposals?

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 and UKBA will work together to communicate the change through channels appropriate to stakeholders, with a focus on direct engagement and consultation wherever possible.

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 and Upper Tribunal.

This order will make the necessary consequential amendments to all primary and secondary legislation as well as to the existing AIT Procedure Rules so that they become rules for the First-tier Tribunal Chamber. Responsibility for the First-tier Tribunal Chamber Rules will then pass to the Tribunal Procedure Committee.

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 and Legal Aid arrangements should take place during summer 2009.
- Responses to the consultation are expected to be published in October 2009.
- The Transfer Order and Legal Aid Regulations for England and Wales are planned to be laid before Parliament in October 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. Will there be any further consultation on this e.g. on new rules? When?

A. Upper Tribunal Procedure Rules to be made by the Tribunal Procedure Committee. The rules, once drafted, will be the subject of a separate consultation process. Timeframes for this are yet to be finalised, but are outlined above (see *last answer*).

Q. Is it true that the Upper Tribunal will not be subject to judicial review? How can this be justified - does this not amount to a narrowing of appeal rights?

A. No. 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

Q. Is it true that permission to appeal against decisions of the First-tier tribunal will be restricted to the Upper Tribunal?

A. No. One of the proposals in the consultation paper was that the route of appeal from the First-tier 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. 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 that it is appropriate that this power should pass to the Tribunal Procedure Committee who make rules for chambers in the new 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 (TPC) to make rules for a certain purpose as well as veto any prospective procedure rules with written reasons.