

The Tribunal Procedure (Upper Tribunal) Rules 2008 – consultation on rule amendments for Asylum and Immigration Upper Tribunal Chamber

Response by Joint Council for the Welfare of Immigrants (JCWI)

Introduction

Joint Council for the Welfare of Immigrants (“JCWI”) is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to eliminate discrimination in this sphere and to promote the welfare of migrants within a human rights framework.

JCWI welcomes recent developments that have led to an independent committee assuming responsibility for the development of the procedural rules for immigration and asylum appeals within the Unified Tribunals system. This is a significant advancement on the original proposal which would have resulted in the assumption of such responsibility by one of the litigation parties in this area.

We have had sight of the consultation response issued by the Immigration Law Practitioners’ Association (“ILPA”) and agree with most of the points made therein. We do not therefore propose in our response to repeat those points. We instead indicate in this paper the areas of agreement, points we seek to emphasize and some supplementary points we wish to make.

Consultation questions

Question 1: Are the general powers and provisions sufficient for immigration and asylum appeals?

Question 2: Are any additional rules required?

The rules which apply to all Upper Tribunal cases should be sufficient to deal with immigration and asylum matters. We do not think there should be additional rules that depart from the standards of fairness and independence that are essential in systems of administrative justice. This is referred to in more detail below regarding the particular problems raised by the proposed rules on service of determinations and the fast track system. We endorse the comments of ILPA on these issues.

Question 3: Is the exclusion of immigration and asylum appeals from rule 7(2) and rule 8, except 8(2), an appropriate one?

Yes.

Question 4: Do respondents agree that a permission application granted by the First-tier Tribunal should be treated as a notice of appeal by the Upper Tribunal?

Yes.

Question 5: Do respondents agree that bail applications should be made to either, but not both, the First-tier Tribunal and Upper Tribunal where permission to appeal can be sought from the Upper Tribunal?

Yes however the rule should be made clear so that a detained appellant (who may be acting in person) who applies to the wrong forum does not suffer unnecessary delay by the Tribunal in listing the matter. Such an application should be treated as an application for bail to the correct forum.

Question 6: Views are sought on the process for applying for permission to appeal to the Court of Appeal/Inner House of the Court of Session and the powers of the Tribunal in relation to applications made under the provisions of Part 7 of the rules?

See comments below.

Question 7: Do respondents consider that the rules for the First-tier, proposed rules for the Upper Tribunal, and the draft Practice Directions/Practice Statements, provide a suitable framework for this jurisdiction?

Service of Decisions by the Secretary of State

JCWI shares ILPA's concern about the proposed continuation of the practice of service by the Secretary of State. The Court of Appeal recently commented that a system whereby one party to litigation received the decision first and was then entrusted to serve it upon the other was 'undesirable' and 'unpalatable'(see *NB (Guinea) and ZD (Turkey) v Secretary of State for the Home Dept* [2008] EWCA Civ 1229 at para.13). The Court was however persuaded that the existing Asylum and Immigration (Procedure) Rules 2005 were not ultra vires. It did however emphasize that the service obligations upon the Secretary of State were not to be disregarded lightly. Thus, where the Secretary of State had failed to comply with the requirement to serve the decision upon the appellant on the same day as filing an application for reconsideration (as required by the rule 23(5)(a) of the current rules) this was a serious error of procedure. It was 'repugnant' that the victorious party should be unaware of their victory whilst the loser pursued an appeal for a period of time (para 19). This repugnance had to be weighed carefully under the rule 59(1) powers of the Tribunal in order to decide whether the Secretary of State should be allowed to proceed with any application for reconsideration. The Court found this was so regardless of whether the appellant had suffered any actual prejudice in not being served with the decision.

There is a differently worded provision in rule 7 of the Tribunal Procedure (Upper Tribunal) Rules 2008 that gives discretion to the Tribunal as to how to deal with breaches of procedure such as failure to serve a decision by the Secretary of State. This permits the breach to be waived or remedied (7(2)(a) and (b)). There is also provision in rule 8 to strike out the appellant's case but only in limited circumstances that do not apply to failures to serve. It is submitted that there is presently no adequate sanction for failure by the Secretary of State to serve the decision in accordance with the proposed rule 40A. If the system is to be maintained, then rule 7 should be amended to require that any application for permission to appeal by the Secretary of State be struck out if there has been a failure to comply with rule 40A (4).

Fast Track Cases

JCWI endorses the views of ILPA on this question because the time limits are set too short to enable a complex asylum case to be prepared. This is particularly the case given that there is no transparent and safe procedure for ensuring that only straightforward cases are put into the fast track system. Furthermore, the shortage of lawyers willing to take on fast track cases means that this system leads to unrepresented asylum applicants presenting their own cases, something which is inherently undesirable. These applicants are detained which further impedes their ability to prepare cases.

Further Evidence

JCWI considers the proposed rule 15(2A) to be unnecessary, wasteful and likely to generate satellite litigation. There must be an error of law in order for the Upper Tribunal to grant permission to appeal. This will rarely turn upon fresh evidence. Thereafter however, if an error of law is established, asylum claims will often (even usually) need up to date evidence. There seems little point in requiring representatives to justify each single piece of new evidence put before the Upper Tribunal. This will simply increase costs to the public purse and lead to ongoing appeals if evidence is

excluded for technical reasons on grounds for example that it could have been served earlier.

Question 8: Do respondents consider that anything currently proposed for inclusion in the practice directions/statements should more appropriately be included in procedure rules?

On this point we endorse the comments of ILPA to the effect that there should be leave required to amend grounds of appeal or reasons for refusal decisions.

Question 9: Are there any other areas of procedure or process that respondents consider should be set out in either a) procedure rules or b) practice directions?

JCWI believes that there should be express adoption of practice statements to deal with the particular needs of asylum and immigration cases. In particular we think that the Bail Guidance Notes for Adjudicators (May 2003) are very important in setting out the correct approach to bail. Furthermore we endorse ILPA's comments about the need for practice statements on child asylum seekers (especially those that are unaccompanied) and gender guidelines to recognise the needs of women asylum seekers.