Submission to Ministry of Justice consultation "Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal"

January 2021

Executive Overview

We disagree with both major options proposed in the consultation. Firstly, we consider changes of this kind to be unnecessary as we do not think that the government has put forward a convincing argument for reform, and that there is no need to legislate in this area at this time. Secondly, we consider the proposals to be unfair, in that they carry a significant risk of leading to justice being denied for many. Thirdly, we consider that, if enacted, the proposals will likely be ineffective in any case. In addition, we have serious concerns about the data relied upon in the consultation document, and consider that the proposed changes may have a detrimental impact upon protected groups and families.

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Introduction

The primary function of the judiciary is to interpret and apply the law. The right to appeal is therefore of paramount importance as it provides a way for incorrect understandings of the law to be identified, challenged and corrected. Whilst tribunal judges are of course highly qualified and extremely capable, mistakes and oversights are sometimes made. All decision-makers are liable to fall into error. As the Supreme Court put it in *Cart*:

> "No system of decision-making is perfect or infallible. There is always the possibility that a judge at any level will get it wrong. Clearly there should always be the possibility that another judge can look at the case and check for error. That second judge should always be someone with more experience or expertise than the judge who first heard the case".[1]

Because appeals help to ensure the proper and just application of the law, it is therefore vital that however our legal system is to be organised, the right to appeal erroneous decisions remains practical and effective. Appeals ensure access to justice, which is an essential component of the rule of law and a core part of our legal system. Reform which risks undermining this fundamental right should not be pursued.

General Points

Our concerns with the proposals fall into three broad categories.

Firstly, we question whether the information provided – including the statistical data – provides reliable evidence of the problems identified by the government, and a sufficient justification for this policy intervention. In addition, we consider that the law, as it stands, contains sufficient flexibility and discretion to be able to deal with the problems which do exist. In short, we consider that reform in this area may be **unnecessary**.

Secondly, given the importance of ensuring access to justice, and the potential negative impact limiting appeal rights may have upon this right, we consider that the proposed reforms may lead to a situation which is **unfair**.

Thirdly, even if reform is considered to be necessary, and it is shown that unfairness in can be mitigated, we consider that, based on the information provided, the proposed reforms may nonetheless be **ineffective**.

[1] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [56].

We expand upon these three concerns in this first section, and our comments here should be understood as applying to the proposals as a whole and the consultation questions taken together. Following these more general points, we set out some additional comments in our answers to the questions posed.

A note on empirical data

Much of the consultation draws on empirical data to help explain the nature of the problem being considered the and to justify the solutions proposed. Figures are provided, for example, for the number of applications for permission to appeal reaching the Court of Appeal from the Upper Tribunal each year, as well as the success rate of cases originally certified by tribunals as being totally without merit (TWM) which reach the appellate courts. Empirical evidence can of course be a very useful tool in policy reform, and evidence-based approaches to reform in the legal context are to be welcomed. However, we have significant concerns about the specific empirical data, and the way in which it is used, in the consultation document.

Firstly, it is unclear exactly where all of the material presented in the consultation is being drawn from. For example, the proposal states that of the 'totally without merit' applications considered by the Court of Appeal in 2019, none were successful on the substantive issues raised.[2] It is unclear whether the source of this information is publicly available. If it is, it should be referenced clearly so that the detail and reliability of the figures can be examined, and so that those interested in the consultation may use it to respond more effectively. If it is not, it should be made available.

A related issue is that the consultation document largely draws on data from a single year: 2019, although for unexplained reasons with respect to the number of second appeals lodged before the Court of Appeal, data from 2018 is used instead. Whilst it is perfectly understandable that proposals should be based on the most recent figures, reliance on just one data point in this way means that it is impossible to tell, from the figures provided, whether the picture presented of the situation in 2019 is applicable only to that year, or whether it is representative of a more consistent and general trend. It also means that it is impossible to determine whether the situation is improving or getting worse over time. Both of these factors may either strengthen or weaken the case for intervention. Without this additional data, the figures from a single year do not form a good basis upon which reliable conclusions about the workings of the legal system can be drawn.

Additionally, whilst the consultation document draws upon certain empirical evidence which supports the case for reform, other data which may evidence a different position,

[2] Consultation document, "Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal" ("Consultation") at para 46.

or which might suggest that the appeals system is currently working well, is not included. For example, official statistics reveal that in 2019, over two-thirds of cases reaching the Court of Appeal from the Asylum & Immigration Chamber were successful on the merits. Indeed, in that year, only 39 out of 270 such cases were dismissed.[3] Putting forward only certain kinds of data is unlikely to provide a full and fair picture of how the appeals system works in practice.

Some of the key data relied upon as evidence for the problems identified relates exclusively to the Immigration and Chamber (IAC).[4] However, as is noted in the Impact Assessment (IA), the tribunal system encompasses a wide range of matters, with cases examined by a number of different specialist chambers.[5] Although the IAC is an important jurisdiction and the proposals put forward in the consultation document may well affect appeals coming from that particular tribunal more severely than those of other chambers, proposals to modify the tribunal appeals system generally should rely on data from across the range of tribunals affected. General conclusions about the workings of such a system which rely on data drawn from only one tribunal are not likely to be reliable.

Finally, we have concerns about the accuracy of some of the data relied upon in the consultation. Certain figures provided are difficult to square with information published elsewhere. For example, the cited 'success rate' of second appeals involving asylum and immigration matters is very difficult to reconcile with the publicly available data on the overall success rate of appeals in this area. Again, without access to the data relied upon, it is difficult to consider it reliable.

We consider the proposed reforms to be **unnecessary.**

The government seeks to reduce the number of clearly unmeritorious appeals reaching the Court of Appeal from tribunal system, in order to effect a more a sensible use of the Court of Appeal's judicial and administrative time/resources. Whilst we do not object to this aim in theory, and agree that it is important for the courts to operate efficiently, we do not agree with the government as to the nature and extent of the problem. In order to evidence the problem, the government relies on a number of statistics, some of which are substantiated in its Impact Assessment. However, for the reasons set out above, we suggest that the data provided does not, on its own, constitute convincing evidence in this respect. In short, we are not convinced that the data presents an accurate and representative picture of how the appeals system

[3] Royal Courts of Justice Annual Tables 2019 (https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2020) at tab 3.9.
[4] Impact Assessment, "Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal" ("Impact Assessment") at paras 13, 15 and 37.
[5] Impact Assessment at para 1.

operates in practice. As a result, we do not think that the government has put forward an evidence-based case for intervention at this time.

In any case, it should be remembered that statistical data, whilst potentially very useful, does not always reveal an accurate picture of how adjudication occurs in practice. Official figures, for example, do not tell us anything about rates of settlement, which are known to be very high in judicial review cases.[6] In addition, there are factors outside the statistical data which may nonetheless be important when considering judicial reform. For example, the consultation relies heavily on the low "win rate" of appeals. However, we suggest that the value of an appeals system should be considered on a wider basis than this. For example, parties may benefit from judicial review proceedings regardless of the formal outcome. Claimants may succeed in drawing attention to certain issues or securing certain commitments even if they ultimately lose on the merits.[7] The government may also benefit from having a policy or a decision considered by judges, and such judicial oversight may lead to better, more effective decision-making in the future (either because a policy passes legal muster, or it becomes clear to officials what needs to be amended in order for it to do so). More fundamentally, judgments of appellate courts can greatly benefit the legal system more generally through the setting of precedents and clarifying the law, a point further developed in our response to Questions 1 & 2, below.

Reliance on Immigration and Asylum Chamber (IAC)

We would note our concern about the repeated reference to the IAC in the consultation document. Although the reforms suggested would apply to tribunals as a whole, there is a disproportionate focus on matters relating to immigration and asylum. The consultation document notes that the government is concerned that the appeals system may be "subject to abuse"[8] and that changes should "prevent the misuse of the system by those who see an advantage in the delay caused by bringing hopeless challenges".[9] This concern is explicitly linked with "the significant growth in the volume of judicial reviews in immigration and asylum matters".[10] The implication here seems to be that appeals from the IAC are particularly likely to be wholly unmeritorious and waste judicial time. Indeed, the consultation states plainly that "there is evidence that a high volume of work affecting the Court of Appeal from the Upper Tribunal is generated from appeals in immigration and asylum cases which lack any sort of merit

[6] Maurice Sunkin and Varda Bondy, "Settlement in Judicial Review Proceedings" [2009] PL 237.
[7] Varda Bondy, Lucinda Platt and Maurice Sunkin, *The Value and Effects of Judicial Review: The Nature of Claims, their Outcomes and Consequences* (Public Law Project 2015).
[8] Consultation at para 1.
[9] Consultation at para 28.
[10] Consultation at para 1.

and which are, therefore, not a good use of the Court of Appeal's judicial and administrative time/resource."[11]

However, given that the proposed reforms would apply to all tribunal chambers in the same manner, it is difficult to see why the IAC is being singled out in this way. The consultation repeatedly states that the proposed reforms seek to make effective use of the Court of Appeal's time and resources, and to ensure greater efficiency overall.[12] If, by contrast, the government is proposing reform in order to curb immigration appeals or make changes to this jurisdiction in particular, it should say so explicitly. The justification required for doing so may well be very different from the present one, and if this is the case, the scope of consultation should be amended accordingly.

In addition, it makes sense that there are more appeals from certain chambers compared to others. Certain tribunals deal with issues which are relatively straightforward, and reviews can be conducted relatively easily. The law applied in the IAC, by contrast, is often complex and difficult; Jackson LJ once described this area as "an impenetrable jungle of intertwined statutory provisions and decisions".[13] It falls to be applied in a myriad of complicated and often sensitive contexts. There are therefore fewer hard and fast rules to be applied, resulting in a wider application of discretion on the part of the tribunal judge.

Put simply, cases decided by the IAC are likely to involve more difficult legal questions compared to other areas of law. The issues at stake in a case before the IAC – for example, whether deportation can go ahead - are likely to be particularly important and urgent for claimants. All of this means that appeals are therefore more likely to be lodged against decisions of the IAC compared to other tribunals. But this is to do with the nature of the issues involved rather than because the claimants involved deliberately act in an obstructive manner or are seeking to abuse the system.

Alternative solutions

Finally, reform may be unnecessary for other reasons. Even if it is accepted that there is good evidence for the problems identified by the government, the solution may not necessarily lie with reform to the appeal system. For example, it appears that the

[11] Consultation at para 5.
[12] impact Assessment at para 18.
[13] *R (Sapkota) v Secretary of State for the Home Department* [2011] EWCA Civ 1320 [127]. See also the recent comments of Underhill LJ in *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357 at [59]: "The court has very frequently in recent years had to deal with appeals arising out of difficulties in understanding the Immigration Rules. … the result of poor drafting is confusion and uncertainty both for those who are subject to the Rules and those who have to apply them, and consequently also a proliferation of appeals… I would hope that thought is also being given to how to improve the general quality of the drafting of the Rules." (emphasis added).

number of cases being decided by tribunals, as well as the time taken to dispose of permission to appeal applications, are both decreasing annually.[14] As such, the problems identified may become less acute with time, without the need for intervention which risks creating unfairness and other problems. Research has shown that many of the cases lodged before tribunals involve challenges to low-quality and haphazard decision-making by government officials.[15] Improving the quality of government decision-making would result in fewer applications (and therefore fewer potential appeals) reaching tribunals in the first place.

Unmeritorious or hopeless appeals could also be discouraged and filtered out in other ways, which do not risk affecting access to justice in the way the current proposals do. For instance, hopeless cases are advanced on the basis of unhelpful advice or low-quality legal representation, or because of lack of access to legal assistance;[16] measures which seek to provide prospective tribunal users with good quality legal advice would inevitably result in fewer fruitless cases clogging up the court system. More fundamentally, backlogs and delays could be improved through appointing additional personnel rather than restricting rights of appeal.

We consider the proposed reforms to be **unfair.**

Although it is legitimate to pursue reform of the appeals system so as to avoid its misuse, limiting access to appeal routes inevitably runs the risk of closing off a route to redress in cases where it would be unfair or unjust to do so.

The primary benefit of the appellate system is that a lower court's failure in understanding and applying the law correctly can be remedied. Whilst the government is of course correct in that tribunal judges hold considerable expertise and experience, the judges of the Court of Appeal possess "even greater experience and seniority" than tribunal judges .[17] Judges of the Court of Appeal may be able to spend more time and resources on an appeal and are more likely to arrive at the right legal answer. Unlike Upper Tribunal judges, the judges of the Court of Appeal can choose to depart from precedent which lower judges must consider themselves bound to apply.

[14] Royal Courts of Justice Annual Tables 2019; Tribunal Statistics Quarterly: July-September 2020 (https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2020).
[15] Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews* (Nuffield Foundation, 2019) at 69-77. Robert Thomas, "Mapping immigration judicial review litigation: an empirical legal analysis" [2015] PL 652 at 659-660 and 668-671.
[16] Thomas and Tomlinson found that the strength of legal advice relied upon by those bringing a case before the immigration tribunal varied significantly: *Immigration Judicial Reviews* (Nuffield Foundation, 2019) at 46-56.
[17] *R (Grace) v Secretary of State for the Home Department* [2014] EWCA 1091 at [15].

Restricting access to the courts, including appellate courts, therefore risks creating a situation which is legally repugnant: "the possibility that serious errors of law affecting large numbers of people will go uncorrected".[18] If this were to be the case not only would this this undermine the integrity of the legal system as a whole but it would be severely unfair for those affected. Access to justice is a fundamental right and any restriction of this right should be undertaken very cautiously indeed.

We are pleased to see that the government emphasises its commitment to securing access to justice throughout the consultation document[19] and acknowledges that the need for efficiency and cost reduction must be properly balanced with the need to ensure this fundamental right remains effective.[20]

However, we are concerned that the government has not given enough weight to the detrimental impact their proposals may have on tribunal users, and the potential injustice which may result. Whilst appellants are noted as an affected party in the IA,[21] the proposal itself features scant reference to the interests of claimants and appellants in the tribunal system. In fact, whilst the proposal insists that "the Government wants a justice system that works for everyone"[22] the rights and interests of the main users of the system are presented largely as a secondary consideration.

Where efficiency and justice clash, justice must come out on top. Lord Dyson said as much in a recent case, emphasising that legal and administrative systems must be set up in "a way which ensures that justice is done in the particular proceedings and that the system is accessible and fair" and that, ultimately, in this context, "speed and efficiency do not trump justice and fairness. Justice and fairness are paramount."[23] In another case, whilst accepting that the promotion of speediness and efficiency can form legitimate considerations in the design of an administrative system, Sedley LJ stressed that the government is "not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency… administrative convenience cannot justify unfairness".[24] The proposed reforms may (or may not – see our section on why we consider the reforms "ineffective") secure efficiency, but we consider that the cost to fairness has not been sufficiently acknowledged and accounted for.

We would highlight that many tribunal appeals will involve issues which significantly affect an individual's life. Many will be lodged by those in a very vulnerable or precarious position and might, for example, be facing imminent deportation or be at

[18] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at (Lady Hale).
[19] Consultation at para 6 and 27; Impact Assessment at para 19.
[20] Consultation at para 24; Impact Assessment at para 19.
[21] Impact Assessment at para 22.
[22] Consultation at para 24.
[23] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 at [22].
[24] *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 at [8].

risk of becoming destitute. The importance of getting such cases "right" is paramount. The courts and tribunals system guarantees that the rights of these people are protected, and in some cases the courts may be an individual's sole source of protection. As such, whilst many claims, and indeed some appeals to the Court of Appeal, will prove to be unsuccessful, this does not justify reducing the scope for such appeals to be made; as Lady Hale put it in one case, "people who perceive their situation to be desperate are scarcely to be blamed for taking full advantage of the legal claims available to them."[25] It is imperative that these claimants are not shut out of the legal system through reforms made in the name of efficiency.

The tribunal system also operates to hold decision-makers and government bodies to account - an essential component of our constitutional system. Indeed, the consultation confirms that judicial review acts as "a critical check on the powers of the State, providing an effective mechanism for challenging the decisions of public bodies to ensure they are lawful".[26] Shutting out potentially meritorious appeals may prevent the judiciary from being unable to fulfil one of its core constitutional duties: holding public authorities to account.

We consider the proposed reforms to be **ineffective.**

Although we consider that the proposed reforms are both unnecessary and pose a real risk of giving rise to unfairness, our third point is that even if this were not the case, the proposals fail to provide a convincing solution to the problems outlined. If implemented, these proposals would not necessarily result in a more effective use of the Court of Appeal's judicial and administrative resources. Given that we have serious apprehensions about the effect the proposals would have for access to justice, the fact the proposals may in any case prove ineffective only compounds our concerns.

The stated primary rationale for reform is to increase the efficiency of our legal system[27] and, in particular, to "reduce pressure on the Court of Appeal so increasing efficiency and reducing the backlog of cases".[28] The government claims that by limiting appeal rights, this would result in fewer applications being made to the Court of Appeal, which would in turn reduce running costs, and 'free up' more judicial time, allowing it to deal with other cases more quickly; some statistical figures are provided in order to evidence this. We have concerns about the reliability of some of these figures and are sceptical that they really substantiate the government's claims. Fundamentally, we are unconvinced that the proposed changes would in fact lead to the Court of Appeal spending less time on tribunal appeals overall, or, if it would, that this reduction would

[25] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [47].
[26] Consultation at para 15.
[27] Impact Assessment at para 18.
[28] Impact Assessment at para 32.

be significant enough to be worth pursuing. Specific objections with regard to each proposal are raised in our response to Questions 1-4, below.

Specific Responses

1. **Do you agree that there should be a stricter and narrower test applied to applications for permission to appeal from the Upper Tribunal to the Court of Appeal?**

2. **Do you agree with the proposal to amend element (b) of the current test so that it requires the application to demonstrate that it raises matters of exceptional public interest? Please give reasons.**

Why we consider this option **unnecessary**

The impetus for reform rests on the central claim that tribunal claims are not being dealt with in that system, and that a high proportion of the Court of Appeal's workload is now being taken up by appeals from tribunals, which is aggravated by the especially low 'win rate' of second appeals. These claims are contestable.

The consultation states that 561 applications for permission to appeal stemming from the IAC were determined by the Court of Appeal in 2019.[29] As was set out above, the lack of authoritative official statistics[30] by which to confirm and contextualise this figure prevents meaningful engagement with it.

However, if it is assumed that this figure is both correct (the consultation document at one point suggests that these numbers represent figures for 2018 rather than 2019)[31] and in line with the figures in previous years, this still means that the vast majority of tribunal work stays within the tribunal system.

Although it is again difficult to comment without official statistics, we know that the UT(IAC) disposed of 4724 appeals in the 2019-20 tax year, and dismissed 2229 of them.[32] It can therefore be estimated that over 75% of appellants who lose their appeal before the IAC and *may appeal to the Court of Appeal* choose not to do so. More

[29] Impact Assessment at para 13.
[30] Official statistics relating to the Royal Courts of Justice provide information relating to the "total appeals filed", but it appears that this data relates to the total number of cases dealt with, having been granted permission. The same statistics provide the figures for the total number of PTA decisions made in relation to the IAC, but it appears that these figures reflect all appeals, not just second appeals, including those relating to judicial review.
[31] Consultation at para 42.
[32] Immigration and Asylum Ad Hoc Statistics (https://www.gov.uk/government/statistics/immigration-and-asylum-ad-hoc-statistics)

generally, tribunals report receiving over 400,000 applications a year.[33] Although the consultation document does not reveal how many applications for permission to appeal the Court of Appeal receives annually, it would seem very unlikely that the relevant figure would approach a number by which it could be said that anything but a tiny minority of cases leave the tribunal system in this way.

The government suggests that reform is particularly necessary because the cases which reach the Court of Appeal often do not succeed at a hearing. As evidence, it relies upon the fact that of the 92 'second appeals' from the IAC heard by the Court of Appeal in 2019, 27 succeeded in overturning the decision of the tribunal below. That is a success rate of 30%. Given that the merits threshold for permission to appeal is that the appeal must have a real prospect of success (in addition to which appeals must meet the 'second appeals' criteria), this success rate does not in PLP's view suggest that there is any problem with the current test for second appeals. The test is clearly effective in filtering out hopeless or abusive appeals and strikes the right balance in ensuring that the Court of Appeal can play its vital role in correcting errors by the Upper Tribunal.

As was set out above, these raw numbers have the potential to be misleading. It is unknown how many of the 92 cases granted permission to appeal were settled in the appellant's favour before a hearing. It is also unknown how important the 'winning cases' were, or whether they may represent a far greater number of applications (so-called "test cases") in practice. The numbers also reference only those appeals from the IAC. There is no indication as to how many second appeals succeed from other jurisdictions.

Further, and again as we set out above, it is unclear whether the perceived problems require intervention at the present time, or whether they will become less acute for other reasons. The consultation document does not reveal whether the figures provided are in line with previous years. However, the Court of Appeal's docket is shrinking over time. It disposed of over 6,000 applications in 2015, but fewer than 4,000 in 2019. In fact, 2019 was the Court of Appeal's least 'busy' year in the last decade. If there is evidence that such a trend may well continue, the case for legislative intervention becomes weaker. It does not seem to be the case that this point has been seriously considered.

Why we consider this option **unfair**

Fundamentally, we consider it dangerous to narrow avenues for appeal, especially in the present context where the impetus for doing so is weak. Appeals allow for mistakes

[33] Tribunal Statistics Quarterly: July-September 2020.

to be corrected and injustices to be ameliorated. Lord Brown has stated that through the 'second appeals' mechanism, "the court has been able to deal with cases where something has gone seriously wrong."[34] Indeed, a "wrong" decision adopted by a tribunal can have particularly adverse consequences for those involved. For example, the Chambers dealing with the most cases in an average year are the Social Entitlement Chamber and the Immigration and Asylum Chamber. As regards to the former, an incorrect decision can have severe consequences. As Dyson LJ put it in one case before the Court of Appeal:

> [i]ssues that arise in social security cases may affect the lives not only of the individual claimant, but of many others who are in the same position, some of whom are among the most vulnerable members of our society … the issues may be of fundamental importance to them, sometimes making the difference between a reasonable life and a life of destitution.[35]

In addition, the adverse consequences which may result from a 'wrong' decision in the asylum and immigration context hardly need to be set out; not only would the result be severe (an individual may face extreme difficulties, including possible persecution, in another country, for example) but it may also be irreversible.

These concerns are not hypothetical or abstract; the following cases provide examples of cases where an appeal court has corrected the approach of the tribunal below in the context of a 'second appeal', resulting in unfairness or injustice being corrected:

- In *Akinyemi*[36] the Court of Appeal overturned the tribunal below it, and in doing so corrected a trend occurring in the tribunal system in relation to deportation of criminals. It endorsed a more expansive approach than that which was taken by the tribunal, emphasising that whilst the rules relating to deportation of criminals were harsh, they should nonetheless be interpreted in a manner which is complaint with the ECHR, taking into account the full requirements of the Strasbourg case law.

- In a number of cases such as *Terzaghi*[37] the Court of Appeal stepped in to prevent the permanent removal of an individual from the UK, where the decision authorising that removal was based on a serious error of law.

[34] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [104].
[35] *Wiles v Social Security Commissioner* [2010] EWCA Civ 258 at [47].
[36] *Akinyemi v Secretary of State for the Home Department (No 2)* [2019] EWCA Civ 2098. See also *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630.
[37] *Terzaghi v Secretary of State for the Home Department* [2019] EWCA Civ 2017

- In the case of *HA*[38] the Court of Appeal allowed a challenge to the determination of a tribunal which had ordered the deportation of the appellant without proper consideration of what effect this would have on their family and children.

- In *Langford*[39] the Court of Appeal overturned a decision of the Upper Tribunal which originated in the War Pensions and Armed Forces Compensation Chamber. The Court of Appeal in this case ruled that the provisions relied upon by the tribunal in this case were incompatible with the European Convention on Human Rights.

In addition, sometimes the Court of Appeal may be required to take a look at a tribunal decision not because there is some egregious error of law involved but because it is the only means by which a decision can be effectively examined.

For example, when deciding cases, tribunals rely on both formal and informal precedent. Although the Upper Tribunal is not strictly bound as a matter of law by its earlier decisions, it usually follows them unless there is a good reason not to. This is especially the case where the Tribunal decides an important "test case" or sets out "country guidance". Because the tribunal will almost always follow these decisions, it cannot be relied upon to determine their correctness.[40] Therefore, any challenge to the approach adopted in such a case must come from a higher court. The Court has, for example, evaluated "country guidance" in important cases such as *RT*[41] and *WA*[42] in relation to appeals from Zimbabwe and Pakistan respectively. Sometimes the Court of Appeal has granted permission to appeal specifically in order to assess these otherwise untouchable precedents.[43]

As such, it is vital that appropriate candidates for a successful appeal are not shut out. There are three main reasons as to why the proposed test, involving the need to demonstrate "exceptional public interest", is likely to operate unfairly in this respect.

Firstly, as we explain below, the existing test already operates to exclude the vast majority of appeals. Those few cases which do pass this threshold do so because they raise an important point of principle or practice, some gross injustice has occurred, there would be some other good reason for considering the appeal in full. The intention behind a new, narrower test is that some proportion of these cases would no longer be considered by an appellate court. This straightforwardly raises the potential for significant injustice to occur. Both the courts and the legislature have described the

[38] *HA (Iraq) v Secretary of State for the Home Department [*2020] EWCA Civ 1176.
[39] *Langford v Secretary of State for Defence* [2019] EWCA Civ 1271.
[40] A point made in *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [43].
[41] *RT (Zimbabwe) v Secretary of State for the Home Department* [2010] EWCA Civ 1285 and [2012] UKSC UKSC 38.
[42] *WA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 302.
[43] *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176 at [3].

current provisions governing second appeals as "acting as a safety valve so as to ensure that no compelling injustice" occurs.[44] Narrowing the already-stringent test further risks tolerating exactly this sort of compelling injustice.

The second problem is that not only do the proposed reforms unjustifiably narrow the existing test, but they do so on the basis of grounds which shut out the scope for injustice to be redressed in certain circumstances. Put simply, by limiting second appeals to those matters which are of "exceptional public interest", all scope for redress of individual injustice, which may nonetheless raise little in the way of general public interest beyond the interest inherent in remedying injustice itself, is removed.

There is, by contrast, at least *some* scope for the Court of Appeal to hear appeals under the current framework when a tribunal decision involves a significant legal error or unfairness, or has particularly deleterious effects for the individual involved, even when the case does not involve matters of a wider public interest. The Court of Appeal has directed that a "compelling reason" be defined as a *legally* compelling reason.[45] This means that it can consider appeals where a decision is perverse or plainly wrong, is significantly procedurally flawed or is palpably unfair or unjust,[46] as well as where "the extremity of the consequences for the individual"[47] are severe or "drastic consequences"[48] would result. This means that the Court of Appeal can currently intervene in those – hopefully rare – cases in which tribunal decisions result in a great injustice being done to the individual, regardless of the wider public interest in the cause. This is essential in order for justice to be secured to each individual. The replacement of this scheme with one which determines jurisdiction exclusively according to whether there is "exceptional public interest" at the very least severely limits this possibility, risking a situation where meritorious applications are denied, and potential injustices are ignored.

The third problem concerns the inherent mismatch between the aims of the proposed reforms and the test put forward in order to put those aims into effect. The point of the changes is to identify and filter out "unmeritorious cases with little prospect of success".[49] It is unclear how the metric of "exceptional public interest" can act as a useful discriminator in this regard. A filtering mechanism which shuts out cases unless they demonstrate some "exceptional public interest" does so for institutional reasons – time, effort and resources should not be spent on a second appeal unless there

[44] Lord Woolf, Hansard HL 28 January 1999 col 1242, cited by Carnwath LJ in *PR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA Civ 988 at [6].
[45] *PR (Sri Lanka) v Secretary of State for the Home Department* [2011] EWCA Civ 988 at [36].
[46] *Uphill v BRB* [2005] EWCA Civ 60 at [18].
[47] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [57]; *JD (Congo) v Secretary of State for the Home Department* [2012] EWCA Civ 327 at [27] and in applied [42]-[44].
[48] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [131]; *JD (Congo) v Secretary of State for the Home Department* [2012] EWCA Civ 327 at [44].
[49] Consultation at para 6.

would be some wider benefit to doing so, or the case has some degree of importance. This justification is, however, distinct from one which is behind a mechanism which shuts out cases because of their lack of merit. The proposed reforms take the form of the former but are characterised as the latter. They claim to filter appeals according to *how likely they are to succeed*, when in practice they would filter appeals according to *how important it is that they are heard*. The latter may be a cogent option for reform, but it is not the one the government purports to be pursuing.

It should be remembered that the proposed changes will also affect the government and other public bodies involved in cases before tribunals (after all, the current 'second appeals' test "applies to all litigants — Government and private litigants alike").[50] Whilst there are some bare references to the interests of claimants in the proposal, there is little if anything mentioned about how the changes would affect the government's own position as a litigant. This may be a serious omission; the government may find themselves unable to overturn decisions decided against them which are wrong in law.

The case law reveals a number of occasions in which the government has launched 'second appeals' in fields such as immigration,[51] social security[52] and tax.[53] In many of these cases, not only was the government party successfully able to pass the existing second appeals threshold but went on to succeed on the merits and overturn the decision of the tribunal below.[54] As such, not only would limiting appeal rights risk preventing mistakes from being corrected, but it may have directly negative consequences for the parties involved – *including the government.*

Why we consider this option **ineffective**

The proposals presume that the new test for second appeals would lead to an increase in the effectiveness of the Court of Appeal. In particular, it is assumed that "the volume of permission to appeal applications made to the Court of Appeal would diminish" were the proposed test to come into force[55] and that "a reduction of between 480 and 506 PTA's per year" would result.[56]

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[50] *BS (Congo) v Secretary of State for the Home Department* [2015] EWCA Civ 639 at [24]. This means that local government is also affected (see e.g. *Nottinghamshire CC v SF* [2020] EWCA Civ 226) as well as private parties involved in disputes which do not involve a public body (see e.g. *Curo Places v Pimlett* [2020] EWCA Civ 1621).
[51] *BS (Congo) v Secretary of State for the Home Department* [2015] EWCA Civ 639.
[52] *Secretary of State for Work and Pensions v Cattrell* [2011] EWCA Civ 572
[53] *Samarkand Film Partnership v HMRC* [2017] EWCA Civ 77.
[54] Successful appeals include immigration and asylum cases (e.g. *Secretary of State for the Home Department v KF (Nigeria)* [2019] EWCA Civ 2051) and tax cases (e.g. *HMRC v Smith & Nephew Overseas Ltd* [2020] EWCA Civ 299).
[55] Impact Assessment at para 28.
[56] Impact Assessment at para 40.

A reduction of some 500 applications per year would indeed be an effective result (even if, as we contend, doing so would lead to an intolerable risk of injustice). However, we are unconvinced that such a result is likely to occur for a number of reasons.

This projected reduction was calculated based on the number of 'flagged cases' – those considered to be very important – which were decided by the Court of Appeal. Crucially, however, the number of applications which will be made in the future under the proposed test will not depend on the number of applications which *are* important (or, alternatively, the number of applications which actually pass the "exceptional public interest" threshold) but the number of applications in which *the applicant considers it worthwhile to try and convince the Court that the threshold is met*. Under the current framework, according to the figures provided in the consultation, six times as many appellants seek permission to appeal as those which actually meet the criteria for making a second appeal. The court's time is taken up by cases which do not meet the required threshold but are lodged anyway. It is of course not inconceivable that narrowing the applicable test would discourage some potential appellants, who may consider it worthwhile to apply for permission to appeal under the current test, from appealing further. But it seems inconceivable that would occur to the extent set out in the Impact Assessment, which predicts that 500 out of 560 potential applicants who *would* apply under the current, already stringent test, would choose not to do so the new proposed test. This is simply not realistic.

Further, any time saved due to the reduction in applications made as a result of the new test coming into force – which is, again, likely to be very modest indeed – would likely be offset by the additional time required to deal with other matters arising as a consequence. It would be likely, for example, that the Court of Appeal would have to spend time considering and clarifying the operation of the new test. The definition of "public interest", and in particular what it means for this to be "exceptional" in nature, would benefit from judicial extrapolation. There is also the possibility that a reduction in appeals might lead to a subsequent increase in or fresh claims being made before the original decision-maker, or judicial review applications made with respect to the tribunal's decision.

The current 'second appeals' test

The legislative intervention along the lines proposed in the consultation seems particularly dubious because there are already robust mechanisms for filtering out weak or unmeritorious cases from the Court of Appeal. Under the existing framework, in order to be considered by the Upper Tribunal, an appellant wishing to appeal a decision of the First-Tier Tribunal must demonstrate that their appeal has "a realistic prospect of success". From there, in order to be considered again by the Court of Appeal, an appellant must show that their case involves an "important point of principle

of practice" alongside a "real prospect of success", or otherwise some other "compelling reason".[57]

This is a high threshold. In order to be considered to raise "an important point of principle of practice", an appeal must invoke a cogent argument relating to the creation or extension of a legal principle, rather than its application.[58] In order for permission to be granted for some "other compelling reason", an appeal must be "truly exceptional" in nature[59] and involve a matter which "cries out for consideration".[60] In order to be granted permission, an appeal based on such a compelling reason would itself normally require "very high" prospects of success.[61]

As such, it can be questioned whether changing the test would really make any difference to how second appeals are approached by the Court of Appeal in practice, which is already very stringent. Indeed, in this light there seems little reason to interfere with the existing practice, which is considered by those applying it to be a "fair but streamlined system".[62]

The Court of Appeal can help make system more efficient

Restricting the number of cases which would make it to the Court of Appeal may reduce the long-term efficiency of the system. Statements of high judicial authority have confirmed that the Court of Appeal is "traditionally and rightly responsible for supervising the administration of civil procedure"[63] and that it holds "responsibility for monitoring and controlling developments in practice".[64] In one sense, the judges of the Court of Appeal hold a different role to the tribunal judges, as appellate judges they are uniquely placed to lay out guidance, develop the law and clarify legal issues, all of which can provide vital assistance to tribunals. In this way, appeal courts can play a part in improving the efficiency by making the law clear and remedying inconsistencies which may otherwise lead to additional problems (including further litigation).

Some recent examples of the Court of Appeal providing such assistance in the context of 'second appeals' include:

[57] CPR 52.7(2)(a) and (b).
[58] *Uphill v BRB* [2005] EWCA Civ 60 at [18]; *BS (Congo) v Secretary of State for the Home Department* [2015] EWCA Civ 639 at [17].
[59] *Uphill v BRB* [2005] EWCA Civ 60 at [19].
[60] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [131].
[61] *Uphill v BRB* [2005] EWCA Civ 60 at [24].
[62] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [132].
[63] *Callery v Gray* [2002] UKHL 28 at [17] (Lord Hoffmann)
[64] *R (Gourlay) v Parole Board* [2020] UKSC 50 at [36] (Lord Reed).

- *Akinyemi*[65] and *Hoque*,[66] where it sought to clarify how the rules relating to those with criminal records facing deportation should be understood.

- *AM*,[67] in which it set out the approach to be taken in asylum cases featuring incapacitated or vulnerable children

- *Djaba*,[68] where it set out how the rules in the Mental Health Act relating to discharge procedures should be understood in light of human rights standards

- *SF*[69] where it ruled on how the obligations which local authorities owe to those with special educational needs should be understood

- *HA*,[70] where it set out how to approach the interests of individuals challenging their removal from the UK

- *Logfret*,[71] where it provided an authoritative ruling on how excise duty liability operates under the ECMS

The Court of Appeal can also help to clarify procedural issues in the context of appeals, too. As such, can efficiency of appeals can be regulated and improved by the Court of Appeal itself. For example:

- In *UT (Sri Lanka)*[72] the court provided guidance as to how the Upper Tribunal should treat factual and legal findings of lower tribunals and when to substitute findings of its own

- In *Terzaghi*[73] the court set out how appeals, including 'second appeals', should operate in situations where the tribunal deals with the same factual situation over multiple separate judgments.

These examples provide just a snapshot of a great number of cases in which the senior courts have provided invaluable assistance as to the application of law by lower courts. This shows that whilst cases which reach the appellate courts might take up time, they

[65] *Akinyemi v Secretary of State for the Home Department (No 2)* [2019] EWCA Civ 2098.
[66] *Hoque v Secretary of State for the Home Department* [2020] EWCA Civ 1357.
[67] *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123.
[68] *Djaba v West London Mental Health Trust* [2017] EWCA Civ 436.
[69] *Nottinghamshire CC v SF* [2020] EWCA Civ 226.
[70] *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176.
[71] *Logfret v HMRC* [2020] EWCA Civ 569.
[72] *UT (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1095.
[73] *Terzaghi v Secretary of State for the Home Department* [2019] EWCA Civ 2017.

often produce rulings and guidance which might lead to greater efficiency in the long-term.

Jurisdiction issues

A final point to flag relates to the potential inconsistency arising from the fact that the proposals would modify the test to be applied by the Court of Appeal in England and Wales, despite no changes being suggested for analogous situations concerning the Court of Appeal in Northern Ireland, nor the Court of Session in Scotland. On the one hand, the government's commitment to modifying s13 of the Tribunals, Courts and Enforcement Act shows that the government is generally seeking a uniform approach to the operation of tribunals across the UK – indeed, "there has been no reason put forward to maintain this inconsistency".[74] At the same time, the proposals will result in an odd – and arbitrary – position whereby second appeals to an appellate court will operate in a different manner depending on the particular legal system in which it arises. No reason to justify this inconsistency has been put forward by the government.

[74] Consultation at para 52.

3. **For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal do you agree that the right to apply to the Court of Appeal for permission to appeal be removed?**

4. **For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal, do you agree that there should be a right of review before a second Upper Tribunal judge?**

Why we consider this option **unnecessary**

The main reasons as to why we consider this option unnecessary – namely that the problems posed to the Court of Appeal by tribunal appeals appears to be low, and that improvements to this would be minor, if effective at all – have been outlined above.

The evidence relied on in the consultation does not convincingly show that "considerable judicial time" is being dedicated to these appeals. The consultation document reports that 67 applications which were deemed to be totally without merit (TWM) were then appealed for further consideration by the Court of Appeal. Considering the volume of cases which are declared TWM by tribunals puts this figure into perspective. In 2019, for example, the IAC alone certified 830 such cases (although in previous years, the number of applications declared was much higher, peaking at over 6,000 in 2015-16)[75] meaning that a tiny fraction of applications declared to be TWM were challenged. When it comes to the Court of Appeal's case load, 67 applications represents a miniscule figure when compared to the thousands of civil and criminal applications the Court deals with, often on a much more substantive level. Furthermore, the number of cases being considered annually by the IAC is going down year on year.[76] As such, we are sceptical that reform in this respect would have any significant impact on the Court's time and resources.

[75] Tribunal Statistics Quarterly: July-September 2020. The 'drop-off' here is, in part, a response to the judgment in *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82.

[76] Tribunal Statistics Quarterly: July-September 2020; Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews* (Nuffield Foundation, 2019) at 26.

Why we consider this option **unfair**

We draw attention to the comments above relating to access to justice, the impact on individual applicants, and the unexamined potential for shutting out meritorious cases from due consideration by an appellate court. Having effective access to judicial review is vital, as expressed by the Supreme Court in *Cart*:

> Judicial review is an artefact of the common law whose object is to maintain the rule of law – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise.[77]

All of the above considerations relating to fairness therefore apply *especially strongly* when it comes to access to judicial review, the primary means by which an individual can hold the state to account.

Totally Without Merit (TWM)

The second proposed option raises additional and particular concerns due to the nature of the TWM mechanism. Cases which are deemed to be TWM are placed in a more severe position than those which are merely dismissed on the merits – the formal avenue for traditional appeal is closed off. The only safeguard in such cases is the option to seek permission appeal this refusal to the Court of Appeal, the remedy which the government seeks to remove in this proposal.

One issue is that the distinction between those cases which are considered to be TWM (and which therefore will not be able to apply for permission to appeal) and those which are refused but not considered to be TWM (and therefore will be able to appeal) is not always obvious. Not only do the 'rates' of TWM certification vary wildly from year to year,[78] suggesting that the judges have not yet reached a consistent position on the matter, but the judges themselves have labelled the term "imprecise",[79] and in attempting to elucidate the distinction between cases which are TWM and those which are simply refused have only managed to get as far as saying that an application should be dismissed where the judge is "confident that… it is wrong",[80] whereas a case should be certified as TWM where it is considered "bound to fail".[81] There is a real risk to treating a category of cases particularly unfavourably on the basis of a

[77] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [37].
[78] Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews* (Nuffield Foundation, 2019) at 58-59.
[79] *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82 at [17].
[80] *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82 at [15].
[81] *R (Grace) v Secretary of State for the Home Department* [2014] EWCA 1091 at [13]

single judge's assessment of its merit, when a case falls in or out of that category on a very fine and sometimes arbitrary basis.

Further, one of the justifications put forward for the TWM procedure was that an appeal to the Court of Appeal could always be pursued, which acted as a fundamental safeguard to being closed off from the right to appeal.[82] The removal of such a safeguard not only raises questions as to the continued fairness of the TWM mechanism but may lead to judges being more likely to certify cases as TWM in the first place, due to the lack from resulting scrutiny. Without the possibility of appeal to the Court of Appeal, TWM certifications may become more sloppy and more likely to give rise to unfairness.

A final reason for caution over putting cases deemed to be TWM in a further disadvantageous position is that there is some evidence that the government is unfairly characterising too many cases as TWM before the court, which "devalues the concept" significantly,[83] and that the Upper Tribunal may be accepting this argument too readily or not providing sufficient reasons for certification.[84] Removing the possibility of intervention by the Court of Appeal would only exacerbate these problems, and increase the likelihood of the TWM mechanism being unfairly applied or abused.

Problems with insular appeals

Q4 asks whether, in this context, there should instead be a right to review by another tribunal judge. Of course, preserving *some* kind of review mechanism, even if it is one in which an appeal is considered by another tribunal judge, is better than removing the possibility entirely. However, there are good reasons as to why an appeal before a Court of Appeal judge is *strongly* preferred to an appeal before another tribunal judge.

An additional appeal of this kind would be an insular procedure. Although the objectivity and impartiality of tribunal judges cannot be seriously doubted, one of the key reasons for allowing an appeal to the Court of Appeal in exceptional circumstances is so that misunderstandings and faulty processes which have taken hold within the tribunal system can be identified from outside and rectified. There is much to be said for an outsider to consider a case "afresh", especially if the PTA concerns an issue which is common in the diet of a tribunal judge but presents something more novel for a judge of the Court of Appeal to consider. As Lady Hale stated in *Cart*, internal review by judges of the same ranking, who may work closely together and adopt similar ways

[82] *R (Grace) v Secretary of State for the Home Department* [2014] EWCA 1091 at [15]
[83] *K (A Child) v The Secretary of State for the Home Department* [2018] EWHC 1834 (Admin) at [104] and [107].
[84] See e.g. *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82 at para [45] and [66].

of thinking, is less likely to result in the detection of errors than a judge in a different court.[85]

Further, as we explained above, tribunal judges are constrained by factors such as precedent, whereas the judges of the Court of Appeal are subject to comparatively fewer restraints.[86] This alone is a good reason to ensure that some possibility of access to the Court of Appeal is retained.

Supreme Court authority warns against treating tribunal judges as the "final arbiters of the law".[87] Cutting off the possibility of oversight and appeal by the Court of Appeal runs the risk of cases becoming "fossilised"[88] within the tribunal system rather than "channelled into the legal system".[89] Diverting appeals from the Court of Appeal to another tribunal judge runs the risk of injustices going uncorrected, because the system lacks an independent means of spotting them in the first place.

Why we consider this option **ineffective**

As expressed above, we consider that the very modest number of renewed PTA applications brought before the Court of Appeal means that reform of this area is unlikely to make much of a difference in practice. Although the scenario modelling set out in the Impact Assessment predicts that 118 cases could be removed from the Court of Appeal's annual docket[90] this seems improbable given that just 67 cases were considered by that Court in 2019 (it is unclear quite how the figure of 118 cases was calculated). Even if 118 cases were removed, this would not make a very considerable dent in the court's workload.

There are, however, further reasons to consider that this option would not be an effective means of bringing about the aims of increasing the Court's efficiency. In the above section we expressed a preference for the retention of *some* kind of review mechanism for assessing the certification of TWM applications, if it was considered that review by the Court of Appeal must be removed in spite of the problems this would cause. The proposal suggests that a route of appeal could be preserved by installing a further appeal option before another tribunal judge.

If this were put into place, this would of course lead to a reduction of cases before the Court of Appeal. But it would, incidentally, lead to more pressure on the tribunal judges. Although the consultation acknowledges that there would be "modest additional work

[85] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [42].
[86] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [43].
[87] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [43].
[88] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [130].
[89] *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859 at [30].
[90] Impact Assessment at para 45.

for the Upper Tribunal"[91] it is not explained why this is considered preferable to a situation resulting in modest additional work for the Court of Appeal. The Court of Appeal is indeed "a precious resource"[92] but so is the Upper Tribunal, which has its own – albeit less acute – problems with delay and case load.[93]

Further, there are some reasons to believe that the transfer of appeal routes from the Court of Appeal to the Upper Tribunal might result in *greater* time and expenses being spent.

Secondly, the very limited obligation to provide reasons for certifying an application as TWM has likewise been justified by the existence of the safeguard provided by the Court of Appeal.[94] In other words, the very possibility of an appeal arising allowed the Upper Tribunal to save time by providing short, summary reasons and thus save time. Were the route to the Court of Appeal to be jettisoned, judges may be required to provide longer, more substantive reasons as a result.

Thirdly, and most straightforwardly, as the consultation notes, "the fees cost to appeal to the Upper Tribunal compared to the Court of Appeal are much lower".[95] Put simply, the lower fees involved with this appeal route may encourage more dissatisfied applicants to pursue a challenge, reducing or nullifying any time saved by removing the jurisdiction of the Court of Appeal.

Inconsistency issues

A final issue relates, again, to inconsistency. As with the first option, the proposal sets out changes to the way PTA applications are considered in England and Wales, without specifying what, if anything, would occur with respect to the position in other jurisdictions, and whether any inconsistencies resulting can be justified. In addition, as far as can be seen, the current proposal to reform TWM appeals would only affect those appeals coming from the tribunal system. However, the TWM mechanism is not exclusive to tribunals; the Civil Procedure Rules also provide for judicial reviews in the Administrative Court to be so certified; presumably, the rules relating to appeals from other courts would continue to apply as normal. If so, this is another inconsistency which has not been acknowledged or engaged with in the consultation document.

[91] Impact Assessment at para 30.
[92] Consultation at para 4.
[93] The UT is hardly speedy itself; it takes, on average, 100 days for paper permission decision to be given (Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews* (Nuffield Foundation, 2019) at 38-39) and around 425 for final determination on average (at 44)
[94] *R (Wasif) v Secretary of State for the Home Department* [2016] EWCA Civ 82, [19]
[95] Impact Assessment at para 38.

5. **Do you agree that the "second appeals" test should be applied by the Upper Tribunal when considering an application for permission to appeal to the Court of Session?**

We would defer to the views of those with greater expertise in the operation of the applicable legal framework in Scotland, but there is seemingly nothing objectionable about this proposal and uniformity, so far as possible, is a desirable goal.

6. Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please provide any empirical evidence relating to the proposals in this paper.

We have referred to many of the assumptions and conclusions featuring in the IA in our answers above. Fundamentally, we have serious concerns about the empirical data relied upon (see "A note on empirical data"). Beyond this, our central concern about the IA is that whilst the scenario projection exercise is welcome, we are, for the reasons we set out earlier, sceptical that the projected outcomes are likely to materialise. As explained above, we are particularly doubtful as to the numbers which the IA claims will be "taken out of the system" in the event of options 1 and 2 being put into place. Based on the (admittedly limited) data which is included in the proposal, we are not satisfied that these scenarios set out accurate estimates of the impact of the policies proposed.

Notwithstanding this issue, a number of other factors likely to affect the time and resources spent by the Court of Appeal and tribunals do not appear to have been factored into the model adopted. These include the additional time which would be required to flesh out and develop the modified tests and the potential for a greater incidence of judicial review might have on the court and tribunal case load.

We are also concerned that the IA, and the consultation more generally, contain certain statements and assumptions which do not seem to be rooted in the evidence provided. For example, statistics demonstrating a low success rate of cases before the Court of Appeal are purported to show that the rules are not strict enough to "prevent the misuse of the system by those who see an advantage in the delay caused by bringing hopeless challenges."[96] The data in fact shows no evidence of this motive. It is also stated that "considerable judicial time being used to consider" renewals of permission to appeal decisions.[97] Whilst this may be the case, no evidence is provided for this.

[96] Impact Assessment at para 13.
[97] Impact Assessment at para 12 and 46.

7. From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?

8. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the Government should consider? Please give data and reasons.

The IA acknowledges that the changes suggested would have a "differential (adverse) impact" on "the characteristic of race and also, perhaps, religion/belief" due to the fact that a number of appeals from tribunals relate to immigration and asylum concerns. A potential adverse impact on people with disabilities is also acknowledged (due to the impact on social security claims).[98] This is welcome, but in our view this matter is not taken seriously enough. The concerns over the impact of reform on these groups is readily dismissed on the basis that there is "a good case for the proposed reforms".[99] Given the importance of ensuring that those with protected characteristics are not discriminated against, directly or indirectly, we are concerned that the adverse impact on such groups is not being taken seriously enough. The particular harm of discrimination only compounds the injustice inherent in these proposals (see, in particular, the "unfairness" sections above).

In addition, particular problems are likely to arise in other areas which are not expressly acknowledged in the proposal. For example, tribunals must sometimes consider applications from those being removed from (or denied entry to) the UK, resisting this on the basis that they would be targeted and persecuted in their home country because of their gender,[100] sexuality,[101] religious belief,[102] or gender identity.[103] Certain welfare claims involve allegations of gender, disability and age discrimination. Claims made in the mental health and social care context may also reasonably invoke claims of mistreatment on grounds of disability. We consider that the proposal has failed to properly account for the impact the proposed reforms may have on such claimants.

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[98] Impact Assessment at para 66
[99] Impact Assessment at para 67.
[100] *K v Secretary of State for the Home Department* [2006] UKHL 46
[101] *YD (Algeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1683; *R (Brown) v Jamaica* [2015] UKSC 8; *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31.
[102] *WA (Pakistan) v Secretary of State for the Home Department* [2019] EWCA Civ 302.
[103] *LSL v Secretary of State for the Home Department,* Appeal Number PA/11792/2016, unreported, 10 August 2017; *EFH v Secretary of State for the Home Department*, Appeal Number AA/08503/2015, unreported, 12 February 2016.

9. What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider? Please give data and reasons.

We would emphasise that many of those who apply to tribunals for redress are facing severe difficulties, which may reasonably impact upon a person's family. The tribunal with the greatest number of annual receipts is the Social Entitlement Chamber; this tribunal will deal with complaints in relation to the provision of certain social benefits which directly affect the family such as childcare benefits and maternity payments. More generally, however, failings in relation to the provision of welfare and social support for those who need it most will very clearly have a significant impact on disadvantaged individuals and their families.

Tribunals are important for families, particularly when difficulties occur. For example, arrangements for schooling for those with disabilities and particular needs can be determined by the Special Educational Needs and Disability Tribunal. The Mental Health Tribunal can ensure that the right support and treatment is given to those with complex or severe mental health problems.

The most acute context in which families are affected by the tribunal system, however, is in the immigration and asylum context. Article 8 ECHR specifically protects the right to family life, and is frequently relied upon by claimants in the FTT and UT IAC.[104] Tribunals have recognised that modern families should be protected, and as such have provided protection for carers[105] and adopted families[106] as well as more traditional family units. It goes without saying that the removal of a member of the family from the country – particularly if it is a parent or carer – is significantly disruptive to the enjoyment of family life. Where such a removal order is unlawfully made, or would have a particularly disproportionate impact on a person's family, tribunals have the power to limit or even prevent this occurring.[107]

These examples show that tribunals provide invaluable protection for families, and that, when tribunal judges err, the judges of the Court of Appeal can ensure that justice is done. We consider that the proposed reforms, being both unnecessary and unfair (and in any case, ineffective), risk reducing this protection in practice.

[104] Robert Thomas and Joe Tomlinson, *Immigration Judicial Reviews* (Nuffield Foundation, 2019).
[105] *MS (Malaysia) v Secretary of State for the Home Department* [2019] EWCA Civ 580; *Omotunde v Secretary of State for the Home Department* [2011] UKUT 247 (IAC).
[106] *Uddin v Secretary of State for the Home Department* [2020] EWCA Civ 338.
[107] See e.g. *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630.