

**JUDICIAL REVIEW IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)**

Recent approaches to age assessments and fresh claims;

Proposals for all immigration judicial reviews to be transferred to the Upper Tribunal

Introduction

1. The *Tribunals, Courts and Enforcement Act 2007* (“the TCEA 2007”) radically transformed the structure of the tribunal system, so as to bring disparate tribunals and appeals against their decisions within a unified structure.
2. The Upper Tribunal has three different roles. It may be a tribunal of first instance.¹ Second and “probably most important”² there is a right of appeal on any point of law arising from a decision of the First-tier Tribunal (other than an excluded decision)³. Third, it may exercise a statutory jurisdiction which is the equivalent of the judicial review jurisdiction of the High Court in England and Wales or Northern Ireland. Lady Hale described this as “a major innovation in the 2007 Act”.⁴
3. In this paper we consider the circumstances in which a judicial review claim may or must be transferred to the Upper Tribunal, current practice (with particular reference to age assessment claims and fresh asylum claims), and possible developments in the future.

The transfer of judicial review cases to the Upper Tribunal

4. Section 31A of the *Senior Courts Act 1981* (“the SCA 1981”), introduced by the TCEA 2007, came into force on 3 November 2008. It provided the following framework for the transfer of judicial review claims and applications for permission to apply for judicial review from the High Court to the Upper Tribunal.

¹ For example, the Lands Chamber has both the first instance and appellate jurisdictions of the former Lands Tribunal, the Administrative Appeals Chamber has the jurisdiction of the former Transport Tribunal and the Tax and Chancery Chamber has the jurisdiction of the former Financial Services and Markets Tribunal

² *R (Cart) v Upper Tribunal* [2012] 1 AC 663, paragraph 26, *per* Lady Hale.

³ Section 11, TCEA 2007.

⁴ *R (Cart) v Upper Tribunal* [2012] 1 AC 663, paragraph 25.

5. It specified a number of conditions:

- (1) The application does not seek relief beyond that ordinarily granted in judicial review.⁵
- (2) The application does not call into question anything done by the Crown Court.
- (3) The application falls within a class specified by the Lord Chief Justice and approved by the Lord Chancellor⁶. There are two classes so far:⁷
 - (i) Challenges to decisions of the First Tier Tribunal (Criminal Injuries Compensation).⁸
 - (ii) Challenges to unappealable decisions of the First Tier Tribunal.⁹

Providing, in both cases, that the application does not seek a declaration of incompatibility under s 4 of the *Human Rights Act 1998*.

- (4) The application does not call into question any decision in the excluded area of immigration and asylum law.¹⁰ It has been suggested that this condition should not be given a wide interpretation.¹¹

⁵ I.e. mandatory, prohibitory or quashing orders, declarations, injunctions, damages and restitution, interest and costs.

⁶ Under s 18(6) of the TCEA.

⁷ Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327.

⁸ More specifically, any decision of the First Tier Tribunal on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with s 5(1) *Criminal Injuries Compensation Act 1995*. See, for example, *Hutton v First Tier Tribunal (Criminal Injuries Compensation)* [2012] EWCA Civ 806.

⁹ More specifically, any decision of the First Tier Tribunal made under the Tribunal Procedure Rules or s 9 of the TCEA 2007 where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within paragraphs (b), (c) or (f) of s 11(5) of the TCEA 2007.

¹⁰ Defined as the Immigration Acts, the British Nationality Act 1981, any instrument having effect under those enactments or any other provision of law which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship.

6. As enacted, s 31A of the SCA 1981 provided:
 - (1) Mandatory transfer, if all 4 conditions are met and it is just and convenient to transfer the application.
 - (2) Discretionary transfer, if all but condition 3 was met.
7. Those arrangements were supplemented by s 53 of the *Borders, Citizenship and Immigration Act 2009* (“the BCIA 2009”), which made it mandatory to transfer fresh claim judicial reviews. More specifically, it provided that where conditions 1-3 were met and a new condition 5 was met (*i.e.* the application calls into question a decision of the Home Secretary not to accept an asylum or human rights claim as a fresh claim), the High Court must transfer it to the Upper Tribunal.
8. The following points arise:
 - (1) There is a broad power to transfer judicial review claims to the Upper Tribunal. What impact has that had? Where will it lead?
 - (2) There is currently a prohibition on the transfer of immigration claims, apart from fresh claim judicial reviews. Why is that? How is that likely to change?

Transfers – current practice

Generally

9. Outside the field of immigration and asylum, most judicial review claims will meet criteria (1), (2) and (4) of s 31A of the SCA 1981.

¹¹ *R (T) v Croydon London Borough Council*, December 5, 2011, unrep. (Nicol J.), cited in the White Book 2012, 9A-102.3.

10. The Senior President of Tribunals Annual Report 2012 indicates that this power has so far been used sparingly.
11. Walker J (President of the Administrative Appeals Chamber (“AAC”) of the Upper Tribunal) noted that a number of cases that had been transferred from the High Court to the AAC. These included:
 - (1) A judicial review challenge to a refusal to discharge a patient from detention under s 2 of the Mental Health Act 1983 on the application of his nearest relative. The High Court transferred the claim so that it could be determined by the judges of the AAC’s Mental Health Group.
 - (2) A judicial review claim to enforce a decision of the First Tier Tribunal (Special Educational Needs and Disability) which had named a school in a pupil’s statement of special educational needs.
12. Warren J (President of the Tax and Chancery Chamber) noted that a small number of tax judicial reviews had been transferred from the High Court, but that no substantive applications had yet been heard.
13. Blake J (President of the Immigration and Asylum Chamber) noted that a small number of age assessment claims had been transferred from the High Court, a point to which we return below.
14. Why has uptake of this power been so limited? Partly, we suspect, through caution, partly through lack of awareness and partly through uncertainty as to whether determination of a claim by the Upper Tribunal will be more “just and convenient”¹² than determination by the High Court. We return below to consider when it will be just and convenient to transfer a case.
15. One area in which the discretionary power of transfer is now being exercised consistently is in age assessment judicial reviews, to which we turn next.

¹² Part of the test under s 31A of the SCA 1981.

Age assessment cases

16. The problem of determining age has come to prominence with the recent increase in unaccompanied young people coming to this country, some of them to claim asylum, who lack definitive evidence of age.¹³ Some come from countries in which there is no coherent system of recording dates of birth.¹⁴
17. On 26 November 2009, the Supreme Court held that a local authority's determination of whether a person is a child for the purposes of s 20 of the *Children Act 1989* is amenable to challenge on the grounds of correctness, not just rationality and procedural fairness.¹⁵ The reasoning of the majority was that the wording of the Act, which defined "child" in objective terms, meant that a refusal to provide services based upon an incorrect determination of age was unlawful. Although not part of the *ratio*, the case has widely been understood as an application of the doctrine of precedent fact.¹⁶ The task of the Court is inquisitorial, there being no burden of proof, and the standard of proof is the balance of probabilities.¹⁷
18. The result has been the judicialisation of age assessment and an increase in the number of challenges. Keith J described it as "a new growth industry in the Administrative Court".¹⁸
19. Less than 3 months after the Supreme Court's decision, Collins J expressed his disquiet with the consequences during a post-judgment discussion:

"Frankly, this court is not the right forum to decide on that, and ideally it ought to be, as you indicate, a Lower Tier Tribunal which can bring in lay members or independent, for example doctors and so on, because they deal with age problems in other contexts, but we cannot do it. If you can think of

¹³ *R (A) v London Borough of Croydon* [2009] 1 WLR 2557, paragraph 3, *per* Lady Hale.

¹⁴ Such as Afghanistan, where a large proportion of such young people come from. See, for example: *R (N) v London Borough of Croydon* [2011] EWHC 862 (Admin).

¹⁵ *R (A) v London Borough of Croydon* [2009] 1 WLR 2557.

¹⁶ For example, *R (CJ) v Cardiff City Council* [2012] 2 All ER 836, paragraph 2, *per* Pitchford LJ.

¹⁷ *R (CJ) v Cardiff City Council* [2012] 2 All ER 836.

¹⁸ *R (Y) v London Borough of Hillingdon* [2011] EWHC 1477 (Admin), paragraph 1.

some way in which we can send a judicial review point or a factual issue from this court to some Tribunal, I would welcome it, because we are trying to think of some way. The difficulty is that once you are in this court and it is a question of judicial review, I do not think there is any power to send the issue to what I entirely agree with you would be the most obviously appropriate Tribunal.”¹⁹

20. On 29 November 2010, a year after *A v Croydon*, the *First-tier Tribunal and Upper Tribunal (Chambers) Order 2010* came into force.²⁰ This allocated to the Immigration and Asylum Chamber of the Upper Tribunal the function of determining an application for judicial review which “is made by a person who claims to be a minor from outside the United Kingdom challenging a defendant's assessment of that person's age” and has come before the Upper Tribunal.²¹
21. This prompted the Court of Appeal to suggest that age assessment cases should ordinarily be transferred to the Upper Tribunal.²² Its reasons for concluding that the transfer of such cases was “just and convenient”²³ were that:

- (1) “The Administrative Court does not habitually decide questions of fact on contested evidence and is not generally equipped to do so. Oral evidence is not normally a feature of judicial review proceedings or statutory appeals”.
- (2) “Transfer to the Upper Tribunal is appropriate because the judges there have experience of assessing the ages of children from abroad in the context of disputed asylum claims”.²⁴

¹⁹ *R (T) v Secretary of State for the Home Department* [2010] EWHC 435 (Admin).

²⁰ It was made under s 7 of the TCEA 2007.

²¹ Article 11(c)(ii).

²² *R (Z) v London Borough of Croydon* [2011] PTSR 748, paragraph 31, *per* Sir Anthony May P.

²³ The test under s 31A of the SCA 1981. The Court of Appeal did not refer to this test, but impliedly applied it.

²⁴ *Ibid.*

22. The majority of age assessment cases are now transferred to the Upper Tribunal²⁵. We have detected no significant difference of approach between judges of the Upper Tribunal and High Court judges. Contrary to the expectation of the Court of Appeal,²⁶ it appears that the experience of Upper Tribunal judges in this field has not led to a material difference in approach to the determination of claims, perhaps in part because of admonishments against judges relying on their perceptions of physical appearance and demeanour of foreign youngsters on the witness stand.²⁷ In *R (AE) v Croydon London Borough Council* [2012] EWCA Civ 547 the Court of Appeal clarified that in the absence of any documentary evidence of age or any reliable medical or dental evidence, the starting point for the judge should be the credibility of the claimant's evidence. In that case, there was no reason to disbelieve his claim that he saw his birth certificate before departure. The Court accepted that a judge might take impression and demeanour into account but considered there to be force in the point that the judge only sees the claimant for only a few hours. By contrast, in this case the various social workers and a teacher had seen the claimant over much longer periods. Aikens LJ said this [54]:

“The weight to be attached to their impression of his age, which they must have judged by examining his behaviour over a long period, must be greater than that to be given from seeing a witness for only a comparatively short time. Moreover, in my view it does not follow that because the deputy judge concluded that AE's demeanour was that of a person older than he claimed to be, she had to reject his otherwise credible evidence about his birth certificate; at least, if it were to be rejected it must be for a good reason. None was given.”

23. As to procedure, if the claim has been started in the High Court, it will normally be appropriate for the High Court to determine permission before transferring the case to

²⁵ In the period April to September 2012 the Upper Tribunal received 7 new age assessment claims, disposed of 22 and had 16 outstanding live cases.

²⁶ In *R (Z) v London Borough of Croydon* [2011] PTSR 748.

²⁷ As to which, see *R (U) v London Borough of Croydon* [2011] EWHC 3312 (Admin), paragraphs 9-10 per HHJ Pearl, and *R (CJ) v Cardiff City Council* [2011] EWHC 23 (Admin), paragraph 119, per Ouseley J.

the Upper Tribunal for directions to be given.²⁸ Age assessment hearings typically last three days, with cross-examination of the claimant, social workers and others involved in the claimant's care.

24. In February 2012, Blake J (President of the Immigration and Asylum Chamber) stated that:

“We have adopted the practice of listing early for directions and requiring the parties to disclose relevant immigration decisions. Early indications suggest that the Upper Tribunal may require the local authority seeking to maintain its assessment to engage with the Home Office to reach a consensus view. Taken together these factors offer the opportunity for speedier and more effective decision making of all disputes relating to a putative child's identity.”²⁹

25. In practice, there have been examples of the Upper Tribunal being less able than the High Court to determine age assessment claims quickly.³⁰ This is likely to be particularly so, where the contrast is made with the Administrative Courts sitting in the regions, where claims can generally be considered and heard more quickly than in London.
26. It has recently been held that the Home Secretary's determination of age for immigration and asylum purposes is also amenable to challenge on the grounds of correctness.³¹ It would seem logical for such cases to be transferred in the same way as challenges to the correctness of a local authority's assessment of age, not least because the Home Secretary's decision will usually be founded on the local authority's assessment. However, the prohibition on the transfer of immigration and asylum claims (other than fresh claims) currently prevents the transfer of such cases to the Upper Tribunal.

²⁸ *R (Z) v London Borough of Croydon* [2011] PTSR 748, paragraph 31, *per* Sir Anthony May P.

²⁹ Senior President of Tribunals Annual Report 2012.

³⁰ For example, *R (TS) v London Borough of Croydon* [2012] EWHC 2389 (Admin) was retained by the High Court because the claim was urgent and the Upper Tribunal could not list it as quickly as the High Court.

³¹ *AAM v Secretary of State for the Home Department* [2012] EWHC 2567 (QB), paragraphs 117-130, *per* Lang J.

Fresh claims

27. Pursuant to the Lord Chief Justice's direction the Upper Tribunal has been regularly considering judicial review applications, since 17 November 2011. It has been said that this development was prompted or at least prioritised because of the significant increase in the caseload of the Administrative Court, which has produced delays and an evident desire for the court to focus its limited resources.
28. One means of doing this has been to transfer an especially high-volume area - asylum fresh claim judicial reviews (of which there have been around 1000 annually in the Administrative Court). This has relieved pressure on the Administrative Court.
29. How is it working in the Upper Tribunal? The Upper Tribunal's task has been made simpler because the legal test on when a claim constitutes a fresh claim, has after an active period, settled. In see *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 the Court of Appeal described the test under rule 353 as undemanding. If the objective analysis of the materials leads to the conclusion that the outcome might well be different from the first determination then it would not be open to the Secretary of State to conclude otherwise. Buxton LJ observed that the Secretary of State must ask herself the right question and said [11]:

“The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision.”

30. That this is the correct approach has been clarified in *R (TK) v SSHD* [2010] EWCA Civ 1550.
31. This is a well-known test and one that an Upper Tribunal Judge arguably can bring greater expertise to than a High Court Judge.
32. The Upper Tribunal has demonstrated its willingness to consider fresh claims on an urgent basis, where removal directions are imminent. For example, in *X v SSHD* (27 February 2012) the claimant challenged the decision of the Secretary of State dated 6 February 2012 refusing his further submissions dated 1 February 2012 as a fresh claim. On 13 February 2012 removal directions were set for 28 February 2012 and the claimant lodged his application on 14 February 2012 together with form T483. At a hearing on 27 February 2012 the Upper Tribunal heard detailed country evidence on Sri Lanka before refusing permission.
33. For the period April to September 2012 it received 380 applications and disposed of 289.³² Waiting times for judicial review applications appear to be considerably less than those for a substantive hearing before the Upper Tribunal, where there has been a grant of permission against the decision of the First-tier Tribunal.
34. The Tribunal Procedure (Upper Tribunal) Rules 2008, SI 2008/2698 ('the UT Rules') govern the procedure of the Upper Tribunal. Part 4 of the UT Rules are concerned with 'Judicial review proceedings in the Upper Tribunal'. Rule 28 requires an applicant for JR to 'make a written application to the Upper Tribunal' for permission.
35. Rule 40(1) of the UT Rules entitles the Upper Tribunal to 'give a decision orally'. However, subject to an irrelevant exception, Rule 40(2) states that the Upper Tribunal 'must provide to each party as soon as reasonably practicable after making a [final]

³² For this same period 11% were granted permission, and 3% were granted permission after renewal. There have been no substantive hearings. It might be useful to compare this with the statistics available in a similar period in 2011 for the Administrative Court but that is unavailable at the time of writing. For the period April – September 2011 the Manchester Administrative Court received 142 immigration applications, of which 53 were fresh claims. In 10 %, permission was granted. The % for those granted permission after renewal is unavailable at time of writing.

decision', (a) 'a decision notice stating the Tribunal's decision', and (b) notification of the right to appeal.

36. Rule 44(1) requires a 'person seeking permission to appeal' to 'make a written application to the Upper Tribunal for permission to appeal'. Save in certain specified cases, Rule 44(4) provides that any such application 'must be sent or delivered to the Upper Tribunal so that it is received within 1 month after ... the Upper Tribunal sent to the person making the application ... written reasons for the decision'.

37. In *R (NB) v SSHD* [2012] EWCA Civ 1050, the Court of Appeal considered two questions:

(1) Should an applicant who has been refused permission by the Upper Tribunal to apply for judicial review, seek permission to appeal from the Upper Tribunal or from the Court of Appeal immediately after the Upper Tribunal has refused his application?

(2) On an application to the Court of Appeal for permission to appeal, can the Court grant permission to seek judicial review (as provided for in CPR 52.15 for cases coming from the Administrative Court), or must it first grant permission to appeal, and then entertain and allow the appeal, before granting permission to seek judicial review?

38. The Court gave the following guidance in relation to these questions.

(1) First, it is necessary to seek the permission of the Upper Tribunal to appeal to the Court of Appeal before an application for permission to appeal can be made to the Court of Appeal – see section 13(5) of the 2007 Act.

(2) Secondly, it is not possible to seek permission from the Upper Tribunal to appeal the refusal until the Tribunal has given its written reasons for refusing permission to apply for JR – see Rule 44(4) cited in para 17 above.

- (3) Thirdly, such written reasons will, at least often, be provided some time after the refusal of the Upper Tribunal to grant permission to seek JR has been made and communicated – see Rule 40(1) and (2) of the UT Rules. This may leave the applicant in no-man’s land for some time, namely at least from the date his application to seek JR is orally rejected by the Upper Tribunal under Rule 40(1), until he receives the written reasons for that rejection. Even then, the applicant would still have to apply in writing to the Upper Tribunal for permission to appeal to the Court of Appeal, and, only once that application was rejected could he apply to the Court of Appeal for permission to appeal. The position is quite different in the Administrative Court, where it is open to an applicant to apply for permission to appeal orally or in writing as soon as his application to seek JR is refused, and indeed such an applicant can apply for permission to appeal direct to the Court of Appeal – see CPR 52.3(2).

Where the Administrative Court refuses permission to apply for JR, and the applicant applies to the Court of Appeal for permission to appeal against that refusal, the Court of Appeal does not have to go through the cumbersome process of granting permission to appeal, hearing and allowing the appeal, and then sending the application back to the Administrative Court to reconsider whether to grant JR. CPR 52.13(3) entitles the Court of Appeal, even at the permission to appeal stage, to grant permission to seek JR and remit the JR application to the Administrative Court for determination on the merits. However that provision only applies to appeals from the High Court. No such procedure appears to exist in relation to applications for permission to appeal against the refusal of the Upper Tribunal to permit an applicant to seek JR.

- (4) The Court of Appeal can grant a stay to an applicant for JR, who has been refused permission to apply for JR by the Upper Tribunal, during the period between that refusal and the refusal (or, at least in theory, the grant) by the Upper Tribunal of permission to appeal to the Court of Appeal. The Court acknowledged that this was sensible from the applicant's point of

- (5) The Court therefore urged for a change in the UT Rules so that, at least in the types of case where a stay pending appeal may be sought from the Court of Appeal, an applicant can apply for permission to appeal to the Upper Tribunal as soon as his application is refused.
- (6) The Court also considered it would also be desirable if CPR 52.15(3) was amended so as to apply to appeals from the Upper Tribunal as well as to appeals from the Administrative Court. That would enable the Court of Appeal, on an application for permission to appeal against a refusal by the Upper Tribunal to permit the applicant to seek JR, not merely to grant permission to appeal (and, where appropriate, a stay), but to grant permission to the applicant to seek JR.

Transfers – the future

Generally

39. Apart from age assessments, the transfer power has been little used. We suggest that the following factors may be relevant to the future determinations as to whether it is just and convenient to transfer a case to the Upper Tribunal:

- (1) *The factual matrix.* Claims which slot into the competence of one of the Upper Tribunal’s chambers are more likely to be suitable for transfer. Robert Carnwath has written that: “The likelihood is that ...transfers will be confined, at least in the early stages, to categories which have a direct link with subjects already within the scope of the Upper Tribunal's appellate jurisdiction”.³³ The Upper Tribunal has four chambers. The Administrative Appeals Chamber has expertise³⁴ in *inter alia* social entitlements, health, education, social care and general regulatory matters.

³³ Tribunal justice – a new start: PL 2009, Jan, 48-69.

³⁴ Arising from its jurisdiction to hear appeals from the First-tier Tribunal in these fields.

The Tax and Chancery Chamber has experience *inter alia* with Financial Services Authority and Charity Commission matters, banking and tax. In addition, there is the Lands Chamber and the Immigration and Asylum Chamber.

- (2) *The nature and complexity of the point of law.* Cases in which there is no significant point of law or the point turns on an understanding of the legislative framework with which a chamber of the Upper Tribunal is familiar are more likely to be suitable for transfer. Mixed cases might benefit from transfer to the Upper Tribunal composed of a High Court judge³⁵, together with a specialist judge with expertise in the particular field. However, it seems to us less likely to be just and convenient to transfer cases which turn on points of law outside of the Upper Tribunal's expertise, raise points of wider importance or concern fundamental rights. As to the latter, Robert Carnwath has written: "I see us developing a practical partnership in which we can relieve the Administrative Court of some of its burden in relation to specialist tribunals, and thus help it to concentrate on its central role as guardian of constitutional rights".
- (3) *Urgency.* Whether it is just and convenient to transfer a claim may be affected by its urgency and the relative capacity of the High Court and the Upper Tribunal, together with capacity and availability in the regions. Currently the Upper Tribunal does not hear judicial review applications outside of London.

Immigration and asylum

40. The Government has repeatedly attempted to enact legislation to allow the transfer of immigration and asylum judicial review claims to the Upper Tribunal, so as to reduce the burden on the High Court, where such cases account for around three quarters of applications for permission to apply for judicial review.

³⁵ High Court judges may sit in the Upper Tribunal: s 5 and 6 of the TCEA 2007.

41. This was first debated during the passage of the TCEA 2007, when the proposal was defeated on the ground that immigration and asylum claims were too sensitive to be transferred out of the High Court.³⁶ In Grand Committee, Baroness Butler-Sloss stated: “I support my noble and learned friend Lord Lloyd of Berwick in relation to the requirement to have someone of the level of a High Court judge to hear a judicial review in the tribunal. It would be invidious for there not to be a judge of that rank dealing with it. I support my noble and learned friend very strongly”. As a result, immigration and asylum cases were excluded from the transfer provisions: see the fourth condition under 31A of the SCA 1981, above.
42. The Labour government then sought to leave over this question to delegated legislation, but this too went in the face of opposition in the House of Lords.
43. A second attempt to allow the transfer of immigration and asylum claims was made through the Borders, Citizenship and Immigration Bill. However, this was cut down so that the provision for the transfer of judicial review claims under BCIA 2009 was limited to fresh claim cases. This resulted from Liberal Democrat and Conservative opposition in the House of Lords, objections from the Home Affairs Select Committee, and lobbying by the Immigration Law Practitioners Association (“ILPA”) and the Joint Council on the Welfare of Immigrants (“JCWI”). Concerns included that cases involving the risk of serious human rights violations such as deportation to torture or death would not be decided by judges of sufficient seniority, that the constitutional role of the High Court would be neutered, that the perceived saving of time and resources were illusory, and that the workload of the Court of Appeal would increase.³⁷ ILPA relied on the Home Office’s concealment of its secret policy on detention which came to light in the *Abdi* case³⁸, as an example of why a high level of scrutiny was required and to argue that it was inappropriate to experiment with an untested tribunal.³⁹

³⁶ *Hansard* Lords, Grand Committee 13 December 2006 : Columns GC68-70.

³⁷ Summarised in Ministry of Justice memorandum, 22 June 2012:
http://www.parliament.uk/documents/joint-committees/human-rights/Lord_McNally_supplementary_memorandum.pdf and JCWI briefing:
<http://www.icwi.org.uk/sites/default/files/judicial%20review.pdf>

³⁸ *R (Abdi & Ors) v Secretary of State for the Home Department* [2008] EWHC 3166.

³⁹ <http://www.ilpa.org.uk/data/resources/12929/09.02.275.pdf>

44. A third attempt is now underway, in the form of Amendment 135 to the Crime and Courts Bill, proposed on 12 June 2012. The proposed amendment would:

(1) Remove the restriction on the power of the High Court to transfer immigration and nationality claims for judicial review to the Upper Tribunal.

(2) Allow the Lord Chief Justice, with the agreement of the Lord Chancellor, to direct that some or all immigration and nationality claims of specified classes must be transferred.

45. Moving Amendment 135 on 2 July 2012, the Minister of State (Lord McNally) said:

“The ability to transfer such cases would play an important role in improving access to justice. Immigration and asylum judicial review cases currently form a high proportion-around 70%-of the caseload in the administrative court. The total number of these cases has doubled in the past five years, with around 8,800 being received in 2011. Many of these cases are relatively straightforward. This volume of cases is unsustainable for the administrative court. It keeps High Court judges from other complex civil and criminal cases that they should be hearing. It has created a backlog and has added to waiting times for all public law cases heard by the administrative court.

I recently met the president of the Queen's Bench Division and the president of the Upper Tribunal immigration and asylum chamber to discuss the progress that has been made in the Upper Tribunal since it was created in 2010. I am persuaded that it now represents the most appropriate venue for the majority of judicial reviews of this type. As the avenue for appeals against a decision of the First-tier Tribunal, the Upper Tribunal deals with thousands of appeals each year. Since acquiring this jurisdiction it has received nearly 200 fresh claim judicial reviews, which have been dealt with more quickly. Fresh claim cases are on average dealt with in seven weeks, compared to an average of 11 weeks for the administrative court. This has not been at the expense of quality. The judges who sit in the Upper Tribunal have a high level of expertise,

particularly in relation to in-country conditions and human rights implications, and are regularly joined by judges of the administrative court.

The Upper Tribunal's expertise in the field of asylum and country guidance cases has been recognised by the higher courts in the UK and the European Court of Human Rights. It is able to make well informed decisions that will deliver justice in these types of judicial review cases, in the same way as the High Court has done in the past.”⁴⁰

46. The proposed amendment was supported by Lord Woolf, who said:

“Time has moved on since some of the matters to which he referred arose, and the experience so far of the quality of the tribunals, particularly the Upper Tribunal, has been particularly good.

The other important matter is the resource of High Court judges. The demands for the services of High Court judges are extensive. At present, there is the grave danger that judicial review will not be able to achieve one of its most necessary characteristics, which is to deal expeditiously with the urgent applications that come before it. This is critical because sometimes the very fact of the application for judicial review can and does delay matters of great importance-I hope am not overstepping the mark in saying matters, often, of national importance. The information that is available as to the pressure on High Court judges makes clear that they are overstrained. That is one side of the picture.

The other side of the picture is that the Upper Tribunal has huge expertise, which except in a very small number of cases is not available to High Court judges. Therefore, it is not apparent that they have the ability to deal with these cases as expeditiously and effectively as the tribunal. The danger in not accepting this amendment is that the desire for excellence could be the enemy of the good, and I urge the Committee to be sympathetic to it. It is my belief

⁴⁰ Hansard Lords, Grand Committee, 2 July 2012: Column 494.

that justice can and should be ensured, as it always is in this country when these matters are dealt with by the tribunal as proposed here. I know that those who are responsible for arranging the proper dispatch of business in the different parts of the High Court attach the greatest importance to this amendment. They see it as a lifeline.”

47. The counter-argument was put Lord Avebury, who observed that to many this must feel like Groundhog Day. There was no track record in relation to the determination of fresh claim judicial reviews in the Upper Tribunal and only a handful of reported age assessment cases, which turned on a narrow compass. Unless a High Court judge happened to be sitting in the Upper Tribunal, judicial review claims would be decided by judges with zero experience.

Conclusion

48. The Upper Tribunal has begun the process of dealing with the judicial review applications they are probably most suitable to address: fresh claims and age assessments. The extent to which that judicial review function will expand depends on a number of factors, which at present are difficult to assess: political decision-making, the perception of the Upper Tribunal’s ability to efficiently and effectively deal with age assessments and fresh claims, the capacity concerns of the Administrative Court including those Courts in the regions and comparative costs to the public purse.
49. What is clear is that the momentum lies in favour of the expansion of Tribunal justice including judicial review within Tribunals and it is most likely that the judicial review function of the Upper Tribunal (Immigration and Asylum Chamber) will mirror that momentum.

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